LEGAL NOTES VOL 3/2024

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[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!**

redistribution remedy to marriages terminated by death, instead of divorce — Such differentiation without any legitimate government purpose — Breach of s 9(1) of Constitution — High Court declaration of invalidity confirmed — Constitution, s 9(1); Divorce Act 70 of 1979, s 7(3).

This matter concerned the constitutionality of s 7(3) of the Divorce Act 70 of 1979. That section provided that a 'court granting a decree of divorce in respect of a marriage out of community of property *(a) entered into before the commencement of the Matrimonial Property Act, 1984, in terms of an antenuptial contract by which community of property, community of profit and loss and accrual sharing in any form are excluded . . .*' may make an equitable order that assets of the one spouse be transferred to the other (a redistribution remedy). The above was introduced by the Matrimonial Property Act, 1984. That statute, in terms of s 2, made all marriages entered after its commencement date, of 1 November 1984, in terms of an ANC to be subject to the accrual system, unless it was expressly excluded by the ANC contract, while in terms of s 21(2) providing spouses married in terms of an ANC prior to the commencement date, the opportunity, during a two-year window period, to make the accrual system applicable to their marriage too.

Presently, in case CCT 364/21, *EB (Born S) v ER (Born B) NO and Others*, the CC was asked to confirm an order of the High Court declaring s 7(3) of the Divorce Act unconstitutional to the extent that it *did not make available the redistribution remedy* where marriages were terminated *by death*, *rather than divorce*.* And, in case CCT 158/22, *KG v Minister of Home Affairs and Others*, the CC was asked to confirm an order of the High Court declaring s 7(3)*(a)* inconsistent with the Constitution to the extent that its provisions limited the operation of s 7(3) to marriages out of community of property *entered into before the commencement of the MPA*.† The CC addressed each case separately under the heading of the issue they dealt with, namely the 'divorce/death issue', and the 'before/after issue'. In each case the question was whether s 7(3) violated s 9 of the Constitution. In order to answer it, the CC followed the s 9 analysis adopted in *Harksen* (see test set out in [23]).

Case CCT 364/21 — the divorce/death issue

The CC held that, in respect of spouses in marriages out of community of property entered into prior to 1 November 1984 in terms of an ANC, ie 'old ANC marriages', s 7(3) of the Divorce Act treated those whose marriages terminated by divorce differently from those whose marriages terminated by

death, because the former class had the benefit of the redistribution remedy whereas the latter class did not. (See [46].) Such differentiation, the CC held, served no legitimate government purpose (see [53]). In explanation, the CC held that the underlying justification for the introduction of the redistribution remedy, namely to ameliorate the hardship which might be suffered by spouses in old ANC marriages, who, for whatever reason, did not adopt the accrual regime during the window period and who would be left without recognition for their contributions to the increase in the estate of the other spouse, applied equally to marital dissolution by divorce and death. (See [48] and [49].) The CC held further that that there could exist no legitimate government purpose in excluding dissolution by death; in this regard the CC rejected a number of justifications that were offered for rejecting a redistribution order that operated upon death (See [43] and [49] – [52].) Accordingly, the CC concluded that the provision in question violated s 9(1) of the Constitution (see [53]). ‡ The CC held further that the limitation of the equality right in s 9(1) of the Constitution was not justifiable in terms of s 36 of the Constitution. The only factors put up as a possible justification for the differentiation were those already rejected as legitimate government purposes, and they also had to fail as grounds of justification under s 36. (See [60].)

The CC accordingly confirmed the High Court's order of unconstitutionality. It declared s 7(3) of the Divorce Act 70 of 1979 inconsistent with the Constitution and invalid, which declaration it suspended for a period of 24 months to allow Parliament to take steps to cure the constitutional defects. It ordered that in the interim a reading-in be applied to the impacted legislation in the manner set out in [149(4)].

Case CCT 158/22 — the before/after issue

The CC found that s 7(3) differentiated, based on date of marriage, between, on the one hand, spouses in marriages entered into after the commencement of the MPA in terms of an ANC, ie 'new ANC marriages', and, on the other hand, spouses in old ANC marriages, amongst others. (See [102] – [103].) The purpose of such differentiation, the CC held, was to make the redistribution remedy available to those spouses who had got married out of community of property under a marital regime where accrual *was not the default regime*. The lawmaker's thinking was that, if the accrual regime was applicable by default, but the spouses chose to exclude it, the

redistribution remedy should not be available. (See [104].) The CC held that a government purpose of respecting and enforcing spousal choice could not be said to be illegitimate (see [105], [107], [109] and [113]), and the differentiation here accordingly did not breach s 9(1) of the Constitution (see [113]). The CC, however, held that s 7(3), in differentiating between spouses in old and new ANC marriages, indirectly discriminated against spouses on the grounds of gender (see [128]). In explanation, the CC stated that, while the differentiation was not directly a differentiation based on gender, its practical effect in the case of new ANC marriages was to prejudice women and benefit men disproportionately (see [127]). In this respect, the CC accepted expert evidence led by the applicant that, because women in South Africa tended

to be poorer than men, when marriages failed, it was more often women than men who would be prejudiced by the absence of a redistribution remedy. (See [115] – [116].)

The CC went on to hold that the indirect discrimination was unfair (see [137]). In this regard, the CC took into account that hardship for women in new ANC marriages on divorce could be very great; that women had in the past suffered from patterns of disadvantage; and that a woman's fundamental human dignity was impaired when no recognition was given to the contribution she had made to the increase in her husband's estate. (See [130].) The CC held further that the valuation of choice did not in this case render discrimination on the basis of gender fair (see [131]). The CC held further that such indirect discrimination was unjustifiable under s 36 of the Constitution (see [143]).

The CC accordingly again confirmed the High Court's order of unconstitutionality. It declared para *(a)* of s 7(3) of the Divorce Act inconsistent with the Constitution and invalid, which declaration it ordered to be suspended to enable Parliament to cure the constitutional defects. The CC ordered that in the interim a reading-in should be applied to the impacted legislation in the manner set out in [150(4)] and [150(6)].

EX PARTE MINISTER OF HOME AFFAIRS AND ANOTHER 2024 (2) SA 58 (CC)

Constitutional practice — Courts — Powers — Declaration of statutory invalidity — Suspension of — After effluxion of suspension period, court has no power to revive suspension.

Costs — Against public official — Order that Minister and Director-General of government department pay costs personally — Culpability for poorly conducted litigation.

Costs — Attorney's fees — Disallowance — Poor conduct of litigation — Deprivation of full fees.

Costs — Counsel's fees — Disallowance — Poor conduct of litigation — Deprivation of full fees.

Immigration — Illegal foreigner — Arrest, detention and appearance in court — Duties of immigration officer and court — Rights of illegal foreigner — Duty of immigration officer considering arrest and detention of illegal foreigner to consider whether interests of justice favour release — Right of detained illegal foreigner to be brought before court within 48 hours of arrest — Right of illegal foreigner to make representations before court — Court's duty to consider whether interests of justice weigh for illegal foreigner's release — Powers of court and rights of illegal foreigner in respect of further periods of detention — Immigration Act 13 of 2002, ss 34(1)*(b)* and *(d)*.

Legal practitioner — Fees — Disallowance — Poor conduct of litigation — Deprivation of full fees.

Applicants were the Minister of Home Affairs and the Director-General of the Department of Home Affairs, and the intervening party was Lawyers for Human Rights (LHR), a civil rights organisation. In 2016, at LHR's instance, the High Court (HC) had declared ss 34(1)*(b)* and *(d)* of the Immigration Act 13 of 2002 unconstitutional.

Section 34(1) provides that:

'Without the need for a warrant, an immigration officer may arrest an illegal foreigner . . . and shall, irrespective of whether such foreigner is arrested, deport him . . . or cause him . . . to be deported and may, pending his . . . deportation, detain him . . . in a manner and at a place determined by the Director-General, provided that the foreigner . . .

(b) may at any time request any officer attending to him . . . that his . . . detention . . . be confirmed by warrant of a court, which, if not issued within 48 hours of such request, shall cause the immediate release of such foreigner;

. . .

(d) may not be held in detention for longer than 30 calendar days without a warrant of a court which on good and reasonable grounds may extend

such detention for an adequate period not exceeding 90 calendar days . . . .' (See [8].)

In 2017 the CC confirmed the declaration but suspended it for 24 months to allow Parliament to remedy the section's defects. It ordered, in para 4 of its judgment, that—

'(p)ending legislation to be enacted within 24 months or upon the expiry of this period, any illegal foreigner detained under section 34(1) of the Immigration Act shall be brought before a court in person within 48 hours from the time of arrest or not later than the first court day after the expiry of the 48 hours, if the 48 hours expired outside ordinary court days'.

Parliament failed to enact the corrective legislation before the 24-month suspension expired.

In 2022 the Minister, applying ex parte and urgently to the HC, obtained an order that the CC's 2017 order remained operative, pending finalisation of an application to the CC for similar relief.

Here, in 2023, the Minister and the Director-General approached the CC ex parte for urgent direct access for 'revival' of the 2017 order for a further two years, in order to allow the Minister, Director-General and Parliament to effect the legislative amendments (see [13]).

Held, that extension of a suspension period, as a just and equitable remedy under s 172(1) of the Constitution, engaged the court's jurisdiction (see [29]).

The issue was what a just and equitable order would be (see [30]).

There were three considerations: (1) the constitutional defects; (2) the harm resulting from the failure to pass remedial legislation; and (3) the remedy (see [30]).

As to (1), ss 34(1)*(b)*'s defect was its failure to provide for automatic appearance in court within 48 hours of arrest; and ss 34(1)*(d)*'s was its non-provision of a right of

appearance at the hearing to determine whether detention should be extended (see [9], [31]).

In respect of (2), the ‘wide-ranging’ harms are at [32]–[34].

Regarding (3), remedy, ss 34(1)*(b)* and *(d)* had lapsed but para 4 of the Constitutional Court’s order continued. Using the power provided by s 172 of the Constitution, the court would amplify para 4 by adding a modified version of the subsections (see [40]).

The further issue was costs. There were two questions: (1) whether the Minister and Director-General’s former legal representatives, the State Attorney and an advocate instructed by the State Attorney, should be denied their fees; and (2) whether the Minister and Director-General should be ordered to pay LHR’s costs from their own pockets (see [55]).

Question (1) implicated the conduct of the 2022 High Court and present Constitutional Court proceedings.

In the HC the application was brought ex parte, the papers were not served on LHR, and it was not joined. (LHR was dominus litis in the 2017 CC and prior HC proceedings.)

No mention was made that the deadline for the enactment of remedial legislation had expired; and the HC’s attention was not brought to four judgments of the CC that hold that, after a suspension period has expired, the CC has no power to extend it. A fortiori the HC.

In the CC the application was brought ex parte and LHR was not cited. The papers were served on LHR, but LHR’s application to intervene was 'vigorously' opposed (see [56]–[63], [97]).

Held, that an order denying the former representatives *all* of their fees was warranted (see [110]).

Ad question (2) (whether a personal costs order should issue against the Minister and Director-General), considerations were the absence of good reason on the Minister and Director-General's part for failing to approach the CC for extension of its 2017 order; and the absence of any apology on their part (see [65], [67]).

Held, that the Minister should be liable in his personal capacity for 10% of LHR's costs; and the Director-General should be liable personally for 25% of LHR's costs (see [112], [114]).

Ordered, in summary, that 12 months were to be afforded to Parliament to enact remedial legislation; and that, pending enactment, para 4 of the 2017 Constitutional Court judgment and the following were to apply:

- An immigration officer considering arrest and detention of an illegal foreigner must consider whether the interests of justice permit his release;
- a person detained in terms of s 34(1) shall be brought before court within 48 hours of his arrest;
- the court before which the person is brought must consider whether the interests of justice permit his release;
- if the interests of justice do not permit release, the court may authorise further detention (to a maximum of 30 calendar days);
- before expiry of the detention period, the person must be brought before court and the court must consider whether the interests of justice permit release;
- if the interests of justice do not permit release, the court may authorise further detention (to a maximum of 90 days); and
- a person brought before court had in each instance to be given an opportunity to make representations.

If remedial legislation was not enacted within 12 months, the above regime would apply until such legislation was enacted.

The Minister and Director-General were to pay LHR's costs. Of those, the Minister was to pay 10% in his personal capacity and the Director-General 25% in his personal capacity. The Minister and Director-General's former legal representatives' fees were disallowed (see [118]).

INDEPENDENT CANDIDATE ASSOCIATION SA NPC v PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS 2024 (2) SA 104 (CC)

Election law — Election — Parliamentary election — Candidates — Independent candidates — Limitation on number of seats independent candidates may contest in provincial and national elections — Not infringing rule of law or any fundamental constitutional rights in ch 2 of Constitution — Constitution, ss 1*(c)*, 3(2)*(a)*, 9(1), 19(2), 19(3) and 46(1)*(d)*; Electoral Act 1 of 2023, sch 1A item 1.

Schedule 1A item 1 of the Electoral Act 73 of 1998, as amended by the Electoral Amendment Act 1 of 2023, * provides, inter alia, for independent candidates to

compete in elections for the National Assembly and provincial legislatures. It provides for a 200/200 split of seats in the National Assembly: 200 to be filled by independent candidates and candidates from regional lists of political parties (regional seats), and 200 seats to be filled by candidates from national lists of political parties (compensatory seats).

The purpose of the (national) compensatory seats was to restore overall proportionality as between the represented political parties due to potential distortion created by the regional system. The position after the passing of the Electoral Amendment Act was that 200 regional seats could be filled by independent candidates and candidates from political parties, and the 200 compensatory seats would be filled by the candidates from the lists of political parties only; independent candidates were excluded from contesting for the compensatory seats. (See [9], [32] – [33].)

The applicant, the Independent Candidate Association South Africa NPC (the ICA), a registered non-profit company representing and promoting the interests of independent candidates in the electoral system, applied for direct access to the Constitutional Court for certain declaratory relief regarding the constitutionality of the 200/200 split. The ICA contended that the 200/200 split meant that the quota of votes a political party must obtain to be allocated compensatory seats was much lower than the quota of votes of the independent candidate; the compensatory quota required only half the number of voters to support a political party than was required by an independent candidate (see [99]). This, the ICA claimed, infringed the following constitutional rights and values —

- the right to equality (s 9(1)), in that it arbitrarily differentiated between independent candidates and political parties (see [100]);
- the right to free and fair elections (s 19(2)) and to vote and stand for public office (s 19(3)), in that it undermined the fairness of the outcome

of the election because a vote for an independent candidate did not have equal weight, and that independent candidates do not stand an equal chance of being elected (see [128] – [129], [137]);

- was inconsistent with the entitlement to equal rights, privileges and benefits of citizenship (s 3(2)), in that a vote for an independent candidate carried less weight than a vote for a political party;

• the rule of law (s 1*(c)*), in that it was irrational, arbitrary in the sense of not reasonably capable of attaining the desired outcome. The dispute was not whether it was irrational for Parliament to distinguish between regional and compensatory seats in the National Assembly, it concerned the number of compensatory seats that ought to be reserved for political parties (see [50], [61], [67], [96]);

• s 46(1)*(d)*, which required Parliament to design an electoral system that resulted, 'in general, in proportional representation', in that the split would not result, in general, in proportional representation (see [63], [96]).

While the ICA accepted that compensatory seats should only be reserved for political parties, they rejected the reservation of 200 seats on the basis that independent candidates need double the votes that political parties need to win a seat, since a vote for a political party counted double. In its place, the ICA proposed a 350/50 split between regional and compensatory seats, ie a reduction in the compensatory seats from 200 to 50, which it submitted would result in an approximation of the actual voter support required for regional and compensatory seats, respectively, while preserving proportional representation for political parties; and also posing minimal risk of a so-called overhang (which occurs where the election formula requires political parties to be allocated more seats than are actually available in the legislature). (See [34], [40], [62].)

The primary remedy sought by the ICA was a combination of a striking-down and reading-in, which will result in the word 'half' in item 1*(a)* of the impugned schedule being changed with immediate effect to '350' and, similarly, the word 'half' in item 1*(b)* of the impugned schedule being changed to '50'. (See [2].)

At issue was whether —

• direct access should be granted;

• the 200/200 split was rationally connected to a legitimate governmental purpose (the rationality enquiry);

• the 200/200 split infringed fundamental rights in the Constitution;

• and if so, whether the limitation was justifiable under s 36 of the Constitution, and if unjustifiable, the appropriate remedy. (See [42].)

Held

Time was of the essence in that it was imperative that the issues raised in this application be determined as a matter of urgency to allow the Electoral Commission sufficient time to prepare for the 2024 elections. The circumstances of this case were

exceptional, and the issues raised were purely legal in nature. It was therefore in the interests of justice that direct access be granted. (See [45] – [48].)

The rationality of the 200/200 split hinged on whether it resulted in proportional representation in general and avoided the risk of overhang. If the purpose sought to be achieved was within the authority of the functionary, and if the functionary's decision was rationally connected to that purpose, a court could not interfere with the decision simply because it disagreed with it. Even if the 350/50 split proposed by the applicant might arguably be fairer and achieve proportionality, an assessment as to whether the 200/200 split achieved proportional representation in general was one that should be

conducted by Parliament, which enjoyed wide latitude to consider the way to conduct the electoral system. Sections 46(1) and 105(1) of the Constitution expressly left the choice of electoral system in Parliament's hands. The ICA acknowledged that there was a legitimate governmental purpose served by the 200/200 split — the split ensured proportionality in results. Accordingly, at least on the requirement of achieving proportionality, the 200/200 split chosen by Parliament passed constitutional muster. As to the risk of overhang, it would not always be an insurmountable obstacle. On the applicant's pleaded case, Parliament's second stated objective of the 200/200 split, which was to avoid the risk of overhang, was achieved. Consequently, the 200/200 split passed the rationality test, and it followed that the s 1*(c)* challenge was without merit. For the same reasons, the s 46(1)*(d)* challenge would also fail. (See [59], [68], [69], [87], [93], [97] – [98].)

The ICA's argument that the 200/200 split arbitrarily differentiated between independent candidates and political parties, was also without merit. Parliament had articulated and proven that there was a rational basis for the split, which was to facilitate proportional representation and to avoid the risk of overhang. The proposition that a vote for an independent candidate carried less weight, when compared to a vote for a political party, was also without merit. Independent candidates and political parties competed for the same quota in regional elections and the votes carried exactly the same weight. There was no differentiation in respect of regional seats. The fact that a law affected different categories of people differently did not prove a violation of the right to equality as provided in s 9 of the Constitution. The person alleging the violation should provide evidence to support the alleged violation. The ICA failed to

discharge the onus of proving that the model articulated by Parliament infringed on the equal-protection provisions in ss 3(2)*(a)* and 9(1). The ICA did not prove that *(a)* the split was arbitrary; and *(b)* a vote for an independent candidate carries less weight. (See [113], [116] – [117], [126].)

And because the LCA failed to establish that a vote for an independent candidate carried less weight than a vote for a political party, the argument that the 200/200 split infringed s 19 rights was also without merit, based as it was on the incorrect assumption that voters will not split their vote. The LCA was required to show that the measures adopted by Parliament constituted a limitation of the political rights alleged, but had failed to discharge this onus. Therefore, the impugned schedule did not infringe any of the fundamental rights in the Constitution. And, since the applicant had failed to prove a limitation of any right, that was the end of the enquiry. The s 19 challenge would thus also be dismissed. (See [155].)

Application dismissed.

ONE MOVEMENT SA NPC v PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS 2024 (2) SA 148 (CC)

Constitutional law — Human rights — Limitation — By statute — Whether reasonable and justifiable — Regulation versus limitation — Constitution, s 36(1).

Constitutional law — Human rights — Right to stand for public office — Infringement — Test — Applicable principles discussed — Court ruling that 15% signature threshold in s 31B(3) of Electoral Act (as inserted by Electoral Amendment Act 1 of 2023) constituting unreasonable and unjustifiable infringement of right to stand for public office — Court setting threshold, pending rectification of provision by Parliament, at 1000 signatures for both bodies — In case of National Assembly, however, 1000-signature threshold to be met in respect of each region candidate intended to contest — Constitution, s 19(3)*(b)*; Electoral Act 73 of 1998, s 31B(3).

Election law — Election — Parliamentary election — Candidates — Independent candidates — Nomination requirements — Signature requirement — Court ruling that 15% signature threshold in s 31B(3) of Electoral Act 73 of 1998 (inserted by Electoral Amendment Act 1 of 2023) unconstitutional for both National Assembly and provincial legislature elections — Court setting threshold, pending rectification of provision by Parliament, at 1000 signatures for each body — In case of National Assembly, however, 1000-signature threshold to be met in respect of each region candidate intended to contest.

Parliament — Proportional representation — Recalculation of seats on forfeiture or vacancy — Challenge to amended recalculation method dismissed — Items 7, 12 and 23 of sch 1A of Electoral Act 73 of 1998 as amended by Electoral Amendment Act 1 of 2023.

Section 19(1) of the Constitution protects the right to 'make political choices'; s 19(3)*(b),* the right 'to stand for public office'; and s 18, the right 'to freedom of association'. Section 36(1) stipulates that these rights (like other fundamental rights) may be limited '*only* in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. The issue in the present case was whether the newly introduced 'signature threshold' in s 31B(3) of the Electoral Act 73 of 1998 (EA) * violated the abovementioned fundamental rights beyond saving by s 36(1).
Members of the applicant, OSA, a not-for-profit company, wanted to contest the upcoming 2024 national and provincial elections as independent candidates. To assist them, OSA sought direct access to the Constitutional Court for an order that would lower the threshold set in s 31B(3).

Section 31B(3) was inserted into the EA (by the Electoral Amendment Act 1 of 2023 (EAA)) in response to the Constitutional Court's judgment in *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* 2020 (6) SA 257 (CC) (2020 (8) BCLR 950; [2020] ZACC 11), which declared the EA unconstitutional to the extent that it prevented people from running for public office independently of a political party. Section 31B(3) was an attempt by Parliament to rectify this defect by requiring independent candidates to obtain voters' signatures equal to 15% of the votes that would have been required in the previous elections for a seat in the region(s) sought to be contested. According to the respondents, † Parliament set the threshold where it did to discourage frivolous candidates, and to ensure that prospective independent candidates had a reasonable chance of success, which were both legitimate government purposes.
OSA, having pointed out that compliance with s 31B(3) would require independent candidates to collect anywhere from 10 000 to 14 000 signatures, contended that the threshold was unreasonable and arbitrary, served no legitimate government purpose,

and unconstitutionally limited the abovementioned three fundamental rights. OSA contended that the appropriate solution would be to replace the 15% requirement with the 1000-signature requirement set for the registration of political parties. For their part, the respondents argued that independent candidates could, by taking reasonable steps, meet the 15% threshold. OSA argued that compliance would, in fact, require prospective independent candidates to expend huge amounts of time, resources and energy.

Besides the constitutionality of s 31B(3), the court also had to decide on the constitutionality of those provisions in sch 1A of the EA that set out how seats had to be recalculated when an independent candidate died or resigned from the National Assembly or a provincial legislature (the recalculation issue).

The Constitutional Court unanimously granted direct access, but was split on the constitutionality s 31B(3) of the EA and the recalculation issue.

Majority judgment on the constitutionality of the 15% requirement (per Kollapen J, with Maya DCJ, Mhlantla J, Theron J and Rogers J concurring)

The court first had to determine whether the 15% requirement in s 31B(3) *limited* the above-mentioned fundamental rights and, if it did, then whether the limitation was *reasonable and justifiable* as intended in s 36(1) of the Constitution. The first stage required the court to first establish the boundaries of the right and then to determine whether the provision crossed them, either intentionally (by seeking to restrict the protected activity) or unintentionally (by being overbroad or through having deterrent effects). (See [230], [233] – [235], [282].)

According to precedent, rights were limited if the provision in question went beyond regulation and created a legal barrier either through explicit exclusion or through a deterrent that negatively impacted the right (an outright denial of the right was thus not required). The judgment in *New National Party*‡ — which established that a statute regulating a fundamental right would limit it only if it prevented people from exercising the right,

even if they took reasonable steps do so — applied *only* if the statute took *positive steps* to give effect to the right. The 15% requirement, however rationally linked to the legitimate government purpose of preventing frivolous participation in elections, not only limited independent candidates' right to stand for public office, but also *crossed*

its boundaries by creating a threshold requirement for persons seeking to stand for public office. Since the 15% requirement *intentionally* limited *all three* the impacted fundamental rights, the *New National Party* reasonable-steps requirement fell away, releasing OSA from the burden of having to show that its members could not, by taking reasonable steps, comply with it. (See [241], [251], [256], [258] – [260], [263], [265], [273] – [274], [283] – [285], [291] – [296].)

As to the second stage of the constitutionality test — justification analysis under s 36(1) of the Constitution — that *New National Party* did not signal a departure from s 36(1), which in any event sets an unequivocal standard that cannot be departed from in respect of a cluster of rights such as voting rights. If an enactment went beyond its limits, the duty to justify the limitation of the right was triggered, with no burden on the rights-bearer to show that the right could not be achieved by taking reasonable steps. Here, it was clear that the final threshold of between 10 000 and 14 000 signatures constituted not only an unjustified limitation of the right to contest elections, but also an unfair and arbitrary one. Since the respondents were unable to show that the limitation was reasonable and justifiable in an open and democratic society, OSA's rights challenge had to be upheld. (See [297] – [299], [322] – [323], [333], [342].)

As to the appropriate remedy, that, while the court would not generally intervene in a policy decision, practical concerns warranted an interim determination before the next general election (between May and August 2024). Since there was insufficient time for Parliament to address the matter, the court would go beyond adjudicating the requirement's constitutionality by making an interim determination until Parliament was able to set a constitutionally compliant signature requirement. In the interim, the only plausible figure was 1000 signatures, the sole extant signature requirement. Therefore, a 1000-signature requirement for contestation by independent candidates would be read in. This reading-in would apply only for the 24 months to afford Parliament an opportunity to properly consider the signature requirement and remedy the defect. (See [349] – [351].)

Dissenting judgment on the constitutionality of the 15% requirement (per Zondo CJ, with Mathopo J, Schippers AJ and Van Zyl AJ concurring)

The test for determining whether a statutory provision infringed the right to vote or stand for public office was whether it would prevent a voter from voting or an independent candidate standing for public office, *despite the taking of reasonable steps* by them to realise the right. The test had two legs, namely whether the

prevention existed, and if so, whether it would occur, despite the taking of reasonable steps by the voter or candidate. It was not enough merely to satisfy the first leg. (See [160] – [163].)

New National Party — which, like the present case, dealt with the regulation of a right — held that a statutory provision that facilitated the enjoyment or exercise of a right was not a limitation, which entailed a total denial or prohibition. By contrast, the 15% requirement obliged independent candidates to do something they had to do anyway, namely to canvass for votes. It had no adverse consequences for them or their right to stand for public office. Hence the provision containing it — s 31B(3) of the EA — did not limit any right or adversely affect anyone. As such, it passed constitutional muster, and the majority judgment erred in concluding otherwise. (See [171] – [175], [177], [181].)

Majority judgment on the recalculation issue (per Zondo CJ, with Maya DCJ, Kollapen J, Mhlantla J, Mathopo J, Schippers AJ and Van Zyl AJ concurring)

The recalculation method provided for in items 7, 12 and 23 of sch 1A of the Electoral Act 73 of 1998 (as amended by the Electoral Amendment Act 1 of 2023) was constitutional and valid. Accordingly, OSA's challenge fell to be dismissed. (See [206], [211].)

BODY CORPORATE, MARSH ROSE v STEINMULLER AND OTHERS 2024 (2) SA 270 (SCA)

Sectional title — Body corporate — Clearance certificate — Body corporate's power to withhold certificate required for transfer of unit until 'all moneys due' to it by owner seeking to transfer unit are paid — Buyer of property at sale in execution satisfying condition of sale agreement with sheriff that he pay all levies owed — Body corporate refusing to issue certificate until 'all moneys due' to it paid — Sectional Titles Act 95 of 1986, s 15B(3)*(a)*(i)*(aa)*.

In this matter a third party borrowed a sum of money from a bank and defaulted on the loan. The bank obtained judgment for the amount and a warrant for execution against the third party's unit in a sectional title scheme. At the sale in execution, the sheriff sold the unit to Mr Steinmuller, the first respondent. A condition of the sale agreement between the sheriff and Steinmuller was that Steinmuller pay the sheriff 'all levies due to the Body Corporate'.

The body corporate provided Steinmuller with an amount comprising 'all moneys due to the body corporate' for him to pay it, before it would issue a s 15B(3) certificate,

which was a prerequisite for transfer of the unit (see s 15B(3)*(a)*(i)*(aa)* of the Sectional Titles Act 95 of 1986 and [1] and [4]).

Section 15B provides:

'(3) The registrar shall not register a transfer of a unit or of an undivided share therein, unless there is produced to him —

(a) a conveyancer's certificate confirming that as at date of registration —

(i) *(aa)* if a body corporate is deemed to be established in terms of section 2(1) of the Sectional Titles Schemes Management Act, that body corporate has certified that all moneys due to the body corporate by the transferor in respect of the said unit have been paid, or that provision has been made to the satisfaction of the body corporate for the payment thereof; . . . .'

Steinmuller would only pay the levies owed, and demanded from the body corporate the documents evidencing the levy amounts. The body corporate refused. Steinmuller applied to the High Court for it to order the body corporate to issue the certificate, against tender of security for payment of the levies. The High Court granted the order. The body corporate appealed to the full court, which dismissed the appeal. The Supreme Court of Appeal granted special leave to appeal. The SCA —

Held, in terms of the sale agreement between the sheriff and Steinmuller, Steinmuller's payment of the levy would give him a contractual right against the sheriff to transfer of the property. The body corporate was not a party to the contract, and its statutory right to withhold the certificate until 'all moneys due' to it were paid, was unaffected (see [25], [28]).

Appeal upheld; order of the full court set aside; and the full court's order replaced with an order that the body corporate's application to the full court was upheld; and the High Court's order (that the body corporate issue the certificate) set aside and replaced with an order dismissing Steinmuller's application (see [38]).

COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE v FREE STATE DEVELOPMENT CORPORATION 2024 (2) SA 282 (SCA)

Revenue — Assessment to tax — Appeal — Statement of grounds of objection — Amendment of — Appeal against tax court's granting of taxpayer's application to amend statement of grounds of objection — Whether Tax Court's order appealable — Whether amended ground of appeal foreshadowed in original statement — Tax Court Rule 10(3).

This case concerned an appeal to the Supreme Court of Appeal against a Tax Court order granting the taxpayer permission to withdraw its statement of grounds of appeal against additional assessments issued by the Commissioner (the original statement), and to file an amended statement of grounds of appeal (the amended statement).

The Commissioner had raised the additional assessments after finding that the taxpayer had erroneously claimed that supplies were zero-rated and had therefore understated output value-added tax (VAT) for the disputed tax periods. The taxpayer raised the objection in its original statement that the payment received was not linked to a supply, but relied upon an incorrect legal opinion to claim that it was zero-rated. In the amended statement, based on a second legal opinion, the taxpayer claimed that the transactions were not subject to VAT because the transactions did not involve a supply.

The application was opposed by the Commissioner on the basis that the proposed amendment sought to introduce grounds of appeal which constituted amended grounds of objection against a part of the assessments not previously objected to. In this regard, the Commissioner submitted that the amended ground of appeal was in breach of Tax Court Rule 10(3), which provides that a taxpayer may not appeal 'on a ground that constitutes an amended objection against a part or amount of the disputed assessment not objected to under rule 7'. The taxpayer argued that the issue traversed in the amended grounds was covered by the substance of the objection, and it therefore did not contravene TCR 10(3). (See [20], [32], [37] – [38].)

The main issue before the SCA was whether, as Sars contended, the amended statement was premised on a new ground of objection not originally raised, in breach of TCR 10(3); or whether, as the Tax Court had held, the ground in the amended statement had been foreshadowed in the original objection (See [12].)

A preliminary issue, on which the court requested the parties to deliver supplementary submissions, was whether the Tax Court's order was appealable. Sars submitted it was, because the order was wrong; the taxpayer, that it was not, because the order was not definitive of the rights of the parties and did not dispose of any of the relief claimed in the main proceedings, and so did not meet the requirements for appealability. (See [5], [7], [9], [32].)

Held

As to appealability, that in the present matter the appeal of the Tax Court's order concerned the power of that court to allow the amendment in circumstances where, in Sars' view, it had no such power; and questions of competence were always treated as having a final effect, as a lack of competence would vitiate the decision. (See [9] – [11].)

As to the main issue, the basis of the objection and the claim for zero-rating was the nature of the transactions and the fact that the payments were not linked to an actual supply of goods or services. The amended grounds were thus clearly foreshadowed in the objection. The nature of the taxpayer's objection to the whole of Sars' assessment had always been the legality of imposing a VAT liability on the transactions under consideration. On a proper interpretation of TCR 10(3) (read together with TCR 32(3)), as a matter of law the taxpayer was not precluded from raising a new ground of appeal in its amended statement, in particular when the grounds were, in substance, the same as those stated in the initial objection under rule 7(1). The Tax Court therefore had the power to grant the amendment because the grounds were foreshadowed in the objection. (See [40] – [41].)

As to whether the Tax Court exercised its discretion to decide whether to grant the amendment correctly, this discretion must be exercised judicially, with due regard to certain basic principles, including considerations of prejudice to the other party; that the amendment was made in good faith; and that the granting of the amendment would ensure that justice is done in deciding the real issues between the parties. If an issue had been foreshadowed in the objection but was not expressly stated, there would be no real prejudice to the other party and the amendment should be granted. The taxpayer demonstrated that there would be no prejudice to Sars. The amendment was sought in good faith shortly after the second legal opinion was received, but more importantly, the granting of the amendment would allow the true legal issues between the parties to be ventilated. Accordingly, the appeal would fail. (See [42] – [49].)

NATIONAL BRANDS LTD v CAPE COOKIES CC AND ANOTHER 2024 (2) SA 296 (SCA)

Intellectual property — Trademark — Registrability — Distinctiveness — SALTICRAX and SNACKCRAX — Owner of SALTICRAX mark opposing registration of SNACKCRAX mark in respect of similar goods (savoury biscuits) — Section 10(17) of TMA applying not only to goods that are different to those for which mark was

registered, but also to similar goods — If registration were allowed, use of SNACKCRAX would reasonably probably, or be likely to, take unfair advantage of distinctive character or repute of SALTICRAX — Opposition to registration of SNACKCRAX trademark well founded — Trade Marks Act 194 of 1993, s 10(17).

National Brands Ltd, the owner of the registered trademark SALTICRAX, opposed an application by Cape Cookies CC to register the trademark SNACKCRAX. Its opposition was founded on s 10(17) of the Trade Marks Act 194 of 1993, which 'precludes registration of a mark which is identical or similar to a trade mark which is already registered and which is well-known in the Republic, if the use of the mark sought to be registered would be likely to take unfair advantage of, or be detrimental to, the distinctive character or the repute of the registered trade mark, notwithstanding the absence of deception or confusion . . .'.

The High Court dismissed the opposition, ordered that the relevant trademark application must proceed to registration, and directed the Registrar of Trade Marks to register it. The present case concerned National Brands' appeal to the Supreme Court if Appeal (the SCA).

Cape Cookies submitted that s 10(17) applied only to goods that were different to those for which the mark had been registered, and since both SALTICRAX and SNACKCRAX would cover savoury biscuits, National Brands was not entitled to rely on s 10(17) to resist registration. For this proposition it relied on case law to the effect that the purpose of the section was to prevent the use of a well-known mark in the Republic on goods other than those for which the mark is registered. Cape Cookies argued the suffix or word 'crax' was non-distinctive, being an ordinary word commonly used as a variation or abbreviation of the word 'crackers' (see [18]).

The SCA, since it was not provided with, nor could find, any authority which dealt with s 10(17), found guidance in cases dealing with infringement proceedings under s 34(1)*(c)*, while acknowledging that the provisions were different since the latter related to infringement whereas s 10(17) related to the registration stage, and the onus in respect of each differed (see [8]). The court then proceeded to consider whether the requirements in order to proceed under s 34(1)*(c)* had been met, more particularly those in dispute: whether the mark was identical or similar to a registered trademark; and whether use of the defendant's mark would be likely to take unfair advantage of, or be detrimental to, the distinctive character or the repute of the registered trademark (see [9], [12]).

Held

There were a number of strong indicators against supporting the case law relied on by Cape Cookies. Firstly, the language of our anti-dilution provisions did not in terms exclude similar goods and services. Secondly, the provision was adopted with the stated purpose of aligning our Act with provisions of the European Community and the United Kingdom White Paper. The United Kingdom opted to limit its anti-dilution provisions to non-similar goods and services. Our legislature, cognisant of both options, chose not to limit the application of our anti-dilution provisions to non-similar goods and services. Thirdly, this court on a number of occasions considered whether the provisions of s 34(1)*(c)* applied to alleged infringements without limiting the enquiry to non-similar goods, and have supported the general acceptance of the notion that the provision applied to 'any goods'. For these reasons, s 10(17) was not limited to matters involving different goods or services to those covered by the registered trademark. Similar goods and services fell squarely within its ambit. The submission of Cape Cookies to the contrary effect must be rejected. (See [19] – [22].)

In comparing the two marks, the long-accepted approach as to how to compare word marks must be applied. It was an evaluation for similarity which must be undertaken; s 10(17) explicitly excluded deception or confusion as an element of the enquiry (see [24] – [25]). In assessing similarity, regard must be had to any dominant feature of the marks. Clearly, the dominant feature in the present matter was the use by both parties of the suffix 'crax', which had not been registered as a standalone mark. The question was whether the different prefixes achieved sufficient prominence to render SNACKCRAX dissimilar to SALTICRAX. Considered as wholes, bearing in mind their dominant and distinctive features, SNACKCRAX had to be considered to be similar to SALTICRAX. The prefix 'snack' did nor serve to sufficiently distinguish SNACKCRAX from SALTICRAX, either visually or aurally. The conceptual similarities were clear. The test of an easily recognisable similarity between the two marks was met. The mark SNACKCRAX must therefore be held to be similar to SALTICRAX for the purposes of s 10(17). (See [28], [33], [35].)

As to whether the mark sought to be registered would be likely to take unfair advantage of, or be detrimental to, the distinctive character or the repute of the registered trademark, concrete evidence of actual advantage or detriment was not required under s 10(17), only a likelihood needed to be shown. A well-founded basis for why it would be likely that an unfair advantage would be gained if registration took place would

suffice. If registration were to be allowed, use of SNACKCRAX would reasonably probably, or be likely to, take unfair advantage of the distinctive character or repute of SALTICRAX. In the result, a case was made out that s 10(17) stood in the way of registration of the mark applied for. The High Court erred in dismissing the opposition to the registration application; the appeal would be upheld. (See [38], [45].)

NEMANGWELA v ROAD ACCIDENT FUND 2024 (2) SA 316 (SCA)

Motor vehicle accident — Compensation — Claim against Road Accident Fund — Definition of 'motor vehicle' — Test to be applied — Purpose of use — Use on road — Forklift used in private goods-receiving area of store not used by general public — Forklift not used on road, and therefore not 'motor vehicle' as defined — Road Accident Fund Act 56 of 1996, s 1 sv 'motor vehicle'.

A 'motor vehicle', as defined in s 1 of the Road Accident Fund Act 56 of 1996 (the RAF Act), 'means any vehicle designed or adapted for propulsion or haulage *on a road*'.

The High Court dismissed of Ms Nemangwela's action for compensation against the Road Accident Fund, arising from injuries she sustained when knocked down by a forklift in the goods-receiving area of her workplace, a Spar store. The High Court had found, inter alia, that the forklift could not be classified as a motor vehicle for the purpose of the RAF Act.

At issue in the present case — her appeal against the High Court's decision to the Supreme Court of Appeal — was whether the forklift in question was 'designed for, or adapted for, propulsion or haulage on a road', and was therefore a motor vehicle as defined in s 1 of the RAF Act (see [11]).

Held

The forklift under consideration was designed primarily for loading/offloading goods from the receiving area into the Spar store. The evidence was that it did not travel on the public road; it transported goods in and out of the store, particularly at the receiving area of the premises. The receiving area was only used to receive and load goods, and not used by the general public. It was a private area; not a road. The forklift therefore did not qualify to be classified as a motor vehicle for purposes of the RAF Act. In the result, the appeal would be dismissed. (See [8], [16], [18], [21].)

BOTHA AND OTHERS v ESKOM HOLDINGS SOC LTD 2024 (2) SA 322 (FB)

State — Actions by and against — Actions against — Notice — Whether Eskom an 'organ of state' and so requiring plaintiffs to give it notice of their intention to proceed

against it — Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002, ss 1(1) and 3.

Plaintiffs were private parties and defendant (Eskom) an organ of state. Consequent on fires on plaintiffs' farms allegedly caused by Eskom, plaintiffs instituted claims against Eskom for damages.

Eskom raised a special plea that plaintiffs had failed to give it notice of their intention to institute proceedings as required by s 3 of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002. Section 3 provides in essence that only if a claimant gives an organ of state notice of its intention to institute proceedings against it, may it do so. (See [1] – [2].)

Plaintiffs replicated to the effect that Eskom was not an organ of state that the Act shielded, with the consequence that it had been unnecessary for them to give notice (see [2] – [3]).

The issue was whether Eskom fell within the Act's definition of an organ of state (s 1(1)), and so received the Act's protection (see [5]).

The Free State High Court found that, properly interpreted, the Act's definition of organ of state did *not* embrace Eskom, and accordingly there had been no need to give it notice (see [25] – [26]).

Special plea dismissed (see [26]).

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MINISTER OF JUSTICE AND CORRECTIONAL SERVICES AND OTHERS v NTULI 2024 (1) SACR 227 (SCA)

Prisoner — Rights — Use of laptop computer in cell — Blanket policy forbidding inmates from using computers in cells for study purposes — In breach of right to further education — Policy declared unconstitutional and invalid — Constitution, ss 29(1)*(b)*.

The appellants appealed against an order of the High Court which found that the Public Procedures Directorate Formal Education (the policy), made by the Acting Commissioner of Correctional Services in 2007, was an unjustified limitation of the respondent's constitutional right to further education in terms of s 29(1)*(b)* of the Constitution, and constituted unfair discrimination in terms of the Equality Act. * The High Court declared that the respondent was entitled to use his personal computer in his cell, but without a modem, and subject to certain conditions.

The respondent was serving a sentence of 20 years' imprisonment. He had acquired a personal computer and was enrolled for a course in computer studies, with a focus on data-processing. Use of his personal computer was permitted, but not in his cell, where he spent 17 hours per day. The policy provided that —

'only registered students who have a need for a computer as supportive of his/her studies . . . are allowed to have a personal computer within the correctional facility. . . . A room within the correctional centre or at the school must be made available specifically for the placement of the personal computers of students. . . . No computer shall be allowed in any cell (communal and/or single)'.

The respondent expanded on his initial grounds of challenge to the policy in the Supreme Court of Appeal (the SCA), contending that it also violated various other constitutional rights.

The SCA set aside the part of the order declaring that the policy constituted unfair discrimination on the basis that the judge had not been designated as a presiding officer of the Equality Court, and therefore could not entertain that claim. (See [12]–[14].)

Held, further, that, under the Constitution, prisoners had the rights given to all persons entrenched in the Bill of Rights, subject to a regime of punishment that met the criteria of limitation set out in s 36 of the Constitution. Hence a prisoner did not have a residuum of rights, but enjoyed the rights the Constitution extended to all persons, and those specifically given to every sentenced prisoner unless those rights were limited by a law of general application. It was therefore for the state to justify a measure that compromised a prisoner’s constitutional rights. The measure had to be a law of general application that was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. (See [16].)

Held, further, that the prohibition in the policy inhibited the pursuit by the respondent of his studies. Although he had passed his initial course without the use of his personal computer in his cell, the right of a prisoner to pursue further education was not determined by what might suffice to pass his chosen course of study. Rather, the right was to pursue the course he had chosen. That entailed using time that was otherwise uncommitted, whilst confined to his cell, to study, and to do so in a way that was effective, which in his case was with the use of a personal computer. It followed that the outright prohibition of the policy was an infringement of the respondent’s right in s 29(1)*(b)* of the Constitution. (See [22]–[23] and [25].)

Held, further, that, although the maintenance of security in prisons was a matter of great importance, the question arose as to how much additional risk came about because of the access that certain prisoners would enjoy to personal computers in their cells. That question was not answered in the papers. Other than some factual basis to suppose that some significant additional risk arose, there was nothing but speculation to weigh in the balance against the blanket prohibition. (See [30]–[32].)
Held, as to the remedy, that the blanket prohibition could not stand, but the appellants should be afforded an opportunity to bring the policy into conformity with the Constitution. Twelve months would be a reasonable time within which to accomplish this task. It would therefore be just and equitable to suspend the order of invalidity for that period of time, to allow the appellants to revise their policy. The suspension should not, however, deprive the respondent in the interim of the right he had vindicated in the present proceedings, and other prisoners who were pursuing their studies should also enjoy such right in the interim. (See [35]–[36].) The court made an appropriate order in this regard, together with certain provisions to protect security.

S v TUTA 2024 (1) SACR 242 (CC)

Appeal — Generally — Contradiction between extempore judgment and signed judgment — Contradiction relating to proper test for putative self-defence — Extempore judgment to be used in circumstances in determining appeal — Test used, however, manifestly incorrect — Majority of court holding that conviction and sentence had to be set aside.

The applicant applied for leave to appeal against his conviction in the High Court for murder and attempted murder, and sentence of life imprisonment and 15 years' imprisonment, respectively. The High Court dismissed his application for leave to appeal, as did the Supreme Court of Appeal. He contended, inter alia, that the trial court had erred in the test it had applied in determining whether he had acted in putative self-defence. Unfortunately, there was a discrepancy in the formulation of the test between the extempore judgment, which stated that '(a) defence excluding unlawfulness, where the test is objective, and secondly, putative self-defence which relates to the accused state of mind and where the test is objective', and the signed judgment, which stated that, 'his defence amounts to putative self-defence. The test is

subjective, in other words, what the accused had in mind, objectively considered.' (See [55] – [56].)

Held, per Unterhalter AJ (Madlanga J, Majiedt J, Mathopo J, Mhlantla J, Theron J and Tshiqi J concurring) for the majority, that the extempore judgment, as it was transcribed, contained a clear error of law in stating that putative self-defence related to the accused's state of mind, and the test being objective. That was not so. (See [58].)

Held, further, that the question in the circumstances was not simply what the trial court meant by the ambiguous text, but rather, if the ambiguity was not resolved because it reflected a patent error, the ambiguity had to be acknowledged. If material, the ambiguity had to redound to the benefit of the accused. That was so because the presumption of innocence required that the court could not permit an accused to suffer a conviction which had resulted from a legal error. It followed that the extempore judgment had to be taken to state the legal test relied upon by the trial court to assess the case of putative private defence. A comparison of the two texts indicated an editorial correction that did not change the contents of the extempore judgment, save in one important respect, in that the trial judge cast the test for putative private defence as objective in the extempore judgment, whereas in the signed judgment the trial judge framed the test as subjective (See [63] – [65].)

Held, further, that the trial judge had made an error of law going to the heart of the applicant's defence. The conviction and sentence could not survive that error. (See [80].) In the result, leave to appeal was granted and the conviction and sentence set aside. (See [2] and [80].)

In a minority judgment, Kollapen J (Mlambo AJ concurring) held that neither the extempore judgment nor the revised judgment provided evidence of an error of law being committed by the trial judge in how the test for putative private defence was formulated. There was also no constitutional matter, or

arguable point of law of general public importance, that required determination in order to deal with the appeal. Leave to appeal accordingly ought to have been refused. (See [161].)

GROVES NO v MINISTER OF POLICE AND ANOTHER 2024 (1) SACR 286 (CC)

Arrest — With warrant — Execution of warrant — Whether arresting officer had discretion to arrest suspect — Arresting officer having no such discretion — Criminal Procedure Act 51 of 1977, ss 43(2) and 44.

The applicant was the widow of the plaintiff in a civil claim in a regional court for damages for unlawful arrest and detention, and malicious prosecution. On his death she was substituted for him in the present proceedings (an application for leave to appeal against the dismissal of his claim for damages and the subsequent dismissals of his appeals to the High Court and the Supreme Court of Appeal). There was only one issue that engaged the court's jurisdiction, namely whether a police officer had a discretion, when executing a warrant, not to arrest a suspect, and if there was such a discretion, what it entailed.

Held

Section 43(2) of the Criminal Procedure Act 51 of 1977 (the CPA) placed a positive duty on an arresting officer to arrest the person identified in the warrant, with the use of the word '*shall*'. * The *'shall'* related to the execution of the warrant and did not expressly or by implication create room for a discretion. Section 44 of the CPA, on the other hand, determined that a warrant of arrest issued '*may* be executed by a peace officer, and the peace officer executing such warrant shall do so in accordance with the terms thereof'. Taking into account the ordinary grammatical meaning and rules of construction, the word *'may'* related to who had the power to execute the warrant (a peace officer), and did not confer a discretion when executing the warrant. There was accordingly no disjuncture between ss 43(2) and 44. (See [56].) Application for leave to appeal was granted, but the appeal was dismissed, save for an alteration to the liability for costs.

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS v WESTERN BREEZE TRADING 434 (PTY) LTD AND ANOTHER 2024 (1) SACR 303 (KZD)

Prevention of crime — Forfeiture order — Application for in terms of s 48 of Prevention of Organised Crime Act 121 of 1998 — Proper procedure for obtaining order — Legislature providing for motion proceedings under s 48(1) of Act.

Prevention of crime — Forfeiture order in terms of Prevention of Organised Crime Act 121 of 1998 — When granted — Claim of lack of knowledge of source of funds by beneficiary dismissed where explanation highly improbable.

The applicant applied for an order declaring two immovable properties forfeited to the state. The first property was bought solely from the proceeds of a business (uMvuyo CC). The second property had been acquired by the first respondent in 2014, but was developed from funds provided by uMvuyo. A forensic investigation showed that contracts were awarded for the provision of refuse collection (and other municipal services) by a municipality. Certain officials and councillors had conspired to flout the tender legislation and procurement policies, and awarded the contracts to four-companies, one of which was El Shaddai Holdings Group CC (El Shaddai), which was represented by one Mr Ponnan. A total sum of R52 million was paid by the municipality to El Shaddai. Of that money an amount of R48 million was paid in turn to uMvuyo. The latter made payment of R6 million to a firm of attorneys, and a sum of R600 000 was paid by El Shaddai to the same firm for the purchase of the first property. The purchaser was the wife of the second respondent, who represented uMvuyo. In respect of the second property, uMvuyo paid a total of R16 million to various suppliers, including architects, project managers and interior decorators.
The applicant contended that the properties were the proceeds of unlawful activities, namely fraud, corruption, racketeering and money-laundering, and fell to be forfeited to the state.

The second respondent was also a director of two other businesses (Thunderstruck and Travel Meister), and he represented those businesses as well. Thunderstruck supplied frozen-food products to the retail industry and entered into an agreement with uMvuyo to supply frozen potato chips to it for an amount of R6 million. Travel Meister operated a cold-storage warehouse for the storage of perishable goods. uMvuyo paid it an amount of R10 million over a period of one year. The first respondent hired out plant equipment and supplied services to uMvuyo, which owed it an amount of R17 million. The delivery address of the frozen potato chips as represented on the Thunderstruck invoice was the residential flat of Mr Ponnan and his mother, and four of the invoices were for the delivery on the same day of 24 tons for each invoice for frozen potato chips to the flat. The information contained in the invoices issued by the first respondent to uMvuyo was the bare minimum, vague and did not provide details of any one of the four items of plant owned by the first respondent. The respondents contended that they did not know, nor had reasonable grounds to suspect, that the

funds from which uMvuyo had made the payments constituted the proceeds of crime. (See [9] – [10].)

Counsel for the respondents raised a point in limine that the motion proceedings were not suited for the present case because the applicant was seeking final relief, while motion proceedings were not designed to determine the probabilities where disputes of fact arose on the affidavits.

As to the point in limine, the court held that it was apparent, from the provisions of s 48(1) of the Prevention of Organised Crime Act 121 of 1998, that it was the intention of the legislature to utilise motion proceedings where the NDPP sought an order for forfeiture of property to the state. The use of such proceedings did not preclude any person from opposing the granting of an order to appear and adducing evidence at the hearing. (See [20].)

As to the merits, that, even if one were to accept uMvuyo's explanation that it could not make payment to the first respondent because it did not have a bank account at that time, the respondents' claim of lack of knowledge of the source of its funds would be more plausible if payment had been made into the bank account of either one of the other two companies which the second respondent claimed to have represented in his dealings with Mr Ponnan, namely Thunderstruck and Travel Meister. The explanation also raised the question as to how the first respondent was able to pay its creditors and receive payments from its debtors over the period when it had no bank account. It was also highly unlikely that the tons of frozen potato chips allegedly delivered would have fitted into a normal residential flat. It also defied belief that the three companies represented by the second respondent, two of which he represented as their sole director, provided goods and services to uMvuyo for over a year without any written contract, or any form of security, to protect their interest in the event of its default. These factors, inter alia, cumulatively led the court to the inescapable conclusion that the respondents were fully aware that the payments received from uMvuyo came from an unlawful activity, and that they had tried to launder the money by paying it to third parties. (See [23] – [28].)

As far as the second property was concerned, the respondents enjoyed protection in terms of s 25(1) of the Constitution from arbitrary deprivation. That right did not, however, extend to the money which was provided by uMvuyo. In the circumstances, some form of proportionality assessment was necessary to determine what right or interest should be forfeited to the state. The most practical and equitable method

would be to order an equivalent of the total amount expended by uMvuyo towards the development of the property to be forfeited to the state, on the basis that the

respondents had no legal right of entitlement to that money. (See [33].)
The order of forfeiture was in other respects granted as prayed for by the applicant.
MTOLO v MINISTER OF POLICE 2024 (1) SACR 317 (KZP)

Damages — Measure of — For unlawful arrest and detention — Plaintiff arrested and detained for two years and eight months — Police lacking any evidence that he committed offence and officials lying to prevent bail being granted — Plaintiff arrested at his workplace in front of colleagues — Police liable for whole period of detention — Damages of R3 million awarded.
The plaintiff instituted an action for damages for unlawful arrest and detention, as well as impairment of his dignity, good name and reputation, and loss of earnings, arising from malicious prosecution. He had been arrested on 12 September 2011 on counts of housebreaking with intent to steal and theft of saddles and theft of a motor vehicle. He remained in detention from the date of his arrest, having been refused bail. On 24 June 2013 the housebreaking charge was withdrawn against him. He remained in custody on the theft-of-motor-vehicle charge until it, too, was withdrawn on 9 June 2014. The court (presided over by an acting judge whose appointment had come to an end) found that the South African Police Service (the SAPS) witnesses had acted with malice. This was based upon the untruths uttered by them, the absence of evidence implicating the plaintiff in any of the charges that he faced, and their failure to investigate the motor vehicle case because they knew he was not involved in that matter. The court found that their implication of the plaintiff in the housebreaking matter was a stratagem designed to place an impediment to his release on bail in the motor vehicle theft matter. (See [6].) In the resumption of the hearing before a different judge, in order to determine the quantum of damages,
Held, that the facts of the case were troubling: first, for the length of the deprivation of liberty of two years and eight months; and secondly, that the malice found to exist was intensely upsetting and caused doubts to continue about the rectitude of the SAPS. It must have been a shocking and unnerving experience for the plaintiff, that he was failed by those who ought to have helped him. In considering an award for contumelia

and deprivation of freedom due to malicious arrest and detention, the plaintiff's detention after his arrest was a consequence of an order of court, and not, on the face of it, at the instance of the SAPS. However, the SAPS arrested him without evidence and then lied at the plaintiff's bail application, that he had been caught red-handed in a stolen motor vehicle. Consequently, the magistrate declined to admit the plaintiff to bail. That provided the plaintiff with a basis for holding the defendant delictually liable for the full period of detention that the plaintiff was forced to endure. An amount of R3 million was a fair and reasonable award in the circumstances. (See [21] and [28] – [29].)

As to an award for impairment of dignity, good name and reputation due to malicious prosecution, the arrest of the plaintiff had taken place in front of his work colleagues and must have been humiliating for him. He was thereafter required to make 37 court appearances before the charges against him crumbled. An award of R300 000 would be appropriate under this head, and for loss of earnings an amount of R67 200. (See [30].)

S v DZINGARAI AND OTHERS 2024 (1) SACR 327 (FB)

Legal practitioners — Duties of — Duty to client — Legal representative informing court that could not advance meaningful arguments on behalf of appellants — No duty on legal representative to concede merits of client's case as incident of duty to court, provided court not deceived regarding facts and/or law.

In an appeal against convictions for robbery with aggravating circumstances, when the legal representative of the appellants was asked to advance her submissions, the court was informed that, as an officer of the court, she could not advance any meaningful argument on behalf of the appellants.

Held

Advocates owed an overriding and paramount duty to the administration of justice. One aspect of this was the cab-rank rule, which promoted access to justice by ensuring that legal representation was available to all who needed it, including odious clients and unpopular causes. It ensured that no advocate could be criticised for representing a client whom the public considered to be particularly reprehensible. However, an advocate's duty to fearlessly represent his client, whether in the light of public hostility or hostility from the bench, was just as important to the administration of justice as

integrity. There was thus no duty on an advocate (or legal representative), in discharging his duty to the court, to concede the merits of his client's case, or to concede that no meaningful argument could be advanced on behalf of his client. It might well be that an advocate could not do so simply because the facts and/or the law was heavily stacked against him. But even in such a case was there no duty on the advocate, as an incident of his duty to the court, to make any concessions, provided that the court was not deceived or misled with regard to the facts and/or the law. (See [21] and [23] – [24].) The appeal was ultimately dismissed. (See [28] – [29].)

All South African Law Reports March 2024

Nedbank Limited and another v Survé and others [2024] 1 All SA 615 (SCA)

Civil Procedure – Equality Court order – Interim interdict – Appealability – Ordinarily, an interlocutory interdict that operates pending the outcome of further proceedings is not appealable – Where a decision does not dispose of all the issues in the case, section 17(1)(c) of the Superior Courts Act 10 of 2013 provides that leave to appeal may be granted if that would lead to a just and prompt resolution of the real issues between the parties

Civil Procedure – Interim relief – Requirements – Equality Court proceedings – Necessity for factual allegations to support a prima facie case.

In November 2021, the appellants ("Nedbank") issued termination letters notifying the respondents that their bank accounts would be closed. The first respondent, Dr Survé, and the remaining respondents (entities within the Sekunjalo Group, of which Dr Survé was the founder) instituted proceedings in the Equality Court. Their complaint against the banks was that the decision to close the accounts constituted conduct amounting to unfair discrimination on the ground of race. An interim interdict was sought in terms of section 21(5) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the "Equality Act"). The granting of that application was the subject matter of the present appeal.

Nedbank's decision to review its banker-customer relationship with the respondents was prompted by the Mpati Commission of Inquiry (the "Commission") which was appointed to investigate, report and make findings and recommendations on

allegations of impropriety concerning the Public Investment Corporation (the “PIC”). One aspect of the Commission’s scope of inquiry was the relationship between the PIC and certain companies within the Sekunjalo Group, and certain transactions between them. The inquiry and the Commission’s report generated significant adverse media attention for Dr Survé and the Sekunjalo Group. Concerned about the possible reputational risk its continued relationship with the respondents would generate, Nedbank embarked on a process of reviewing that relationship.

Two main issues arose for consideration in the appeal. The first was whether the order of the Equality Court was appealable, and the second was whether the respondents had established a *prima facie* case of racial discrimination. Nedbank contended that they did not, that the Equality Court erred in concluding otherwise, and that the order was appealable

The respondents’ submission was that, even if the order was appealable (which they disputed), it was correctly granted.

Held – All the contracts governing the banking relationship permitted Nedbank to terminate the contracts on reasonable notice.

The question of appealability arose because the Equality Court’s order was expressly stated to be an interim interdict under section 21(5) of the Equality Act. As a matter of general principle, an appealable decision is one which is final in effect and not susceptible to reconsideration by the court that granted it, is definitive of the rights of the parties, and has the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings. Thus, ordinarily, an interlocutory interdict that operates pending the outcome of further proceedings is not appealable. However, the above requirements for appealability are not a closed list. Where a decision does not dispose of all the issues in the case, section 17(1)(c) of the Superior Courts Act 10 of 2013 provides that leave to appeal may be granted if that would lead to a just and prompt resolution of the real issues between the parties. Although the interdict granted by the Equality Court was interim, and ordinarily not appealable, this was one of those exceptional cases in which considerations of justice rendered it appealable.

The well-established approach to interim relief requires the court to consider the facts set out by the applicant, together with any facts set out by the respondent which the

applicant cannot dispute, and to assess whether the applicant should, on those facts, obtain final relief in due course. In the context of Equality Court proceedings, mere allegation or speculation as to an infringement of the Equality Act will not suffice. In order to succeed the respondents had to make factual allegations to support a *prima facie* case that Nedbank had discriminated unfairly against them on the basis of race when it closed the respondents' accounts. Based on the facts, the respondents had not made out a case for the granting of an interim interdict. No *prima facie* case had been established that they had been targeted on the basis of race.

The appeal was upheld with costs.

Pasiya and others v Lithemba Mining (Pty) Ltd and others [2024] 1 All SA 626 (SCA)

Civil Procedure – Declaratory relief – Test – An applicant who seeks declaratory relief must satisfy the court that he is a person interested in an existing, future or contingent right or obligation and if the court is satisfied on that point, it must decide whether the case is a proper one for the exercise of the discretion conferred on it.

Corporate and Commercial – Company law – Company resolutions – Increase of authorised share capital – Conclusion of loan agreement – Validity of resolutions – Loan agreement and board and shareholder authorisations approving its conclusion and repayment were in compliance with the Companies Act 61 of 1973.

The appellants had approached the High Court for an order declaring unlawful, and setting aside, a loan agreement concluded between the first respondent ("LM") and the eleventh respondent ("LI") in 2009; declaring unlawful and setting aside the purported changes to the LM shareholding which occurred in January 2010 pursuant to the loan agreement between LM and LI; and directing that any dividends to be paid by LM to its shareholders be paid in accordance with the shareholding prior to the alleged unlawful changes. The dismissal of the application resulted in the present appeal.

The respondents opposed the relief sought. They contended that the appellants had failed to make out a case for declaratory relief. In support of that contention the respondents stated that the loan agreement between LI and LM was lawfully concluded, and had been authorised and approved by the board of directors and the shareholders' meeting of LM in April 2009. The loan was procured to meet certain

cash call obligations. The respondents denied further that the loan agreement resulted in unlawful dilution of the appellants' shareholding in LM.

Two main issues arose on appeal. The first was whether the court had erred in dismissing the appellants' application for declaratory relief and consequential relief, and the second was whether the court had misdirected itself by failing to dismiss the application with costs on a punitive scale.

Held – The first question was whether the High Court had erred in its application of the test for declaratory relief. In terms of section 21(1)(c) of the Superior Courts Act 10 of 2013, a High Court may, in its discretion, and at the instance of any interested person, enquire into and determine any existing, future, or contingent right obligation, notwithstanding that such person cannot claim any relief consequential upon the determination. An applicant who seeks declaratory relief must satisfy the court that he is a person interested in an existing, future or contingent right or obligation and if the court is satisfied on that point, it must decide whether the case is a proper one for the exercise of the discretion conferred on it. The applicants' contention that the court below had wrongly applied the test for declaratory relief was not supportable. It could not be found that the High Court had misdirected itself on the facts or the law in the exercise of its discretion, or that it had exercised its discretion injudiciously.

To the extent that the High Court erred in not dealing with the merits of the appellants' claim, the present Court undertook the relevant consideration. The relief sought by the appellants in the notice of motion was unsustainable. The undisputed facts showed that the loan agreement was lawfully authorised, concluded and repaid; the changes to the shareholding were lawfully and properly authorised and effected; and dividends were declared and paid in accordance with the changed shareholding. The loan agreement and the board and shareholder authorisations approving its conclusion and repayment complied with the 1973 Companies Act.

The appeal was thus dismissed.

South African Municipal Workers' Union National Medical Scheme (SAMWUMED) v City of Ekurhuleni and others[2024] 1 All SA 647 (SCA)

This is the appeal from the Gauteng Local Division, Johannesburg, against the finding of CSP Oosthuizen-Senekal AJ (sitting as a court of first instance) in the case of South African Municipal Workers Union National Medical Scheme (SAMWUMed) v City of Ekurhuleni and others reported at [2022] 4 All SA 878 (GJ) – Ed.

Corporate and Commercial – Contractual relationship – Unlawful interference – Where a cause of action is found on the delict of the unlawful and intentional interference by a third party in a party's contractual relationship, the delict must comport with the general principles of Aquilian liability – An unlawful interference with contractual relations is ultimately based upon the duty not to cause harm and to respect rights – Fault is satisfied by proof of intent which may consist of dolus eventualis.

The appellant ("SAMWUMED"), a self-administered medical scheme, had for a number of years been accredited by the South African Local Government Bargaining Council ("SALGBC") as a medical scheme which qualified for employer contributions. SALGBC was required to do such accreditation annually in terms of a collective agreement. Prior to January 2020, SAMWUMED had marketed its scheme through its own consultants, as the collective agreement permitted it to do, to employees who were members of accredited medical schemes or wished to become members. In 2020 however, the City of Ekurhuleni ("COE") informed SAMWUMED that a broker had been appointed to SAMWUMED to provide services to COE and its employees. The initial broker appointed was subsequently replaced with another ("Moso"). SAMWUMED objected to having to market its scheme or render any other service through Moso and sought relief in the High Court. The court dismissed the application, finding *inter alia* that SAMWUMED was not a party to the collective agreement, and therefore enjoyed no rights under the agreement. SAMWU appealed to the present court.

Although SAMWUMED was not reflected as a signatory to the collective agreement, it contended that it was a party to the agreement because the collective agreement was a contract for the benefit of a third party.

Held – A collective agreement, in terms of the Labour Relations Act 66 of 1995, is not an agreement concluded with an accredited medical scheme. Section 23 of the said Act sets out the legal effect of a collective agreement. Such agreement binds the

parties as defined in the Act, and the statutory scheme makes no provision for a collective agreement to bind parties who fall outside of the definition. Accredited medical schemes derived their rights and obligations from their agreement with SALGBC, arising from their accreditation by SALGBC. SAMWUMED's principal cause of action was to enforce what it conceived to be its rights under the collective agreement and COE's breach of that agreement. That cause of action could not prevail because SAMWUMED enjoyed no rights under the collective agreement.

However, SAMWUMED's application framed an alternative cause of action, averring that COE's conduct constituted unlawful and intentional interference with the rights of SAMWUMED and its employees to lawfully participate in the market comprised of the COE's employees. Where a cause of action is found on the delict of the unlawful and intentional interference by a third party in a party's contractual relationship, the delict must comport with the general principles of Aquilian liability. The unlawfulness requirement is not confined to the inducement of a breach of contract. An unlawful interference with contractual relations is ultimately based upon the duty not to cause harm and to respect rights. Fault is satisfied by proof of intent which may consist of *dolus eventualis* (and perhaps even negligence). The degree of fault may also be relevant to the enquiry as to unlawfulness. The conduct of COE clearly interfered with the contract between SAMWUMED and SALGBC, by restricting the means by which SAMWUMED could carry out its duties to service its members and exercise its right to market its scheme in the relevant period.

The appeal was upheld and the order of the High Court was substituted with orders permitting SAMWUMED to render its services as an accredited medical scheme.

Bhekuzulu and others v President of the Republic of South Africa and others and a related matter [2024] 1 All SA 662 (GP)

Civil Procedure – Exceptio res judicata – Irrebuttable presumption that a final judgment on a claim submitted to a competent court is correct – For a plea of res judicata to succeed, the requirements of the same cause of action and the same thing to be claimed should not be understood in a literal sense as immutable rules.

Traditional Leadership – Appointment of king – Whether incumbent king had correctly been appointed in terms of Zulu custom already decided in previous litigation – Whether the President had correctly recognised the king in terms of the Traditional and Khoi-San Leadership Act 3 of 2019 – Failure to follow peremptory procedure provided for in section 8 of the Act rendering President's decision susceptible to review.

The applicants brought two review applications requiring the court to determine whether the incumbent king ("King Misizulu") had correctly been appointed in terms of Zulu custom; and whether the President had correctly recognised the king in terms of the Traditional and Khoi-San Leadership Act 3 of 2019 (the "Leadership Act"). In respect of the first question, a previous court had already pronounced in related litigation that King Misizulu was the rightful heir to the throne. The present Court therefore had to decide whether the issue was *res iudicata*. The second review application raised the question of whether the recognition of the King by the President had been lawfully made in terms of the Leadership Act.

Held – *Exceptio res judicata* is based on the irrebuttable presumption that a final judgment on a claim submitted to a competent court is correct. The presumption is founded on public policy which requires that litigation should not be endless, and on a requirement of good faith which does not permit the same thing being demanded more than once. For a plea of *res judicata* to succeed, the requirements of the same cause of action and the same thing to be claimed should not be understood in a literal sense as immutable rules. The "same cause of action" issue also gives rise to the ancillary principle of issue estoppel, which is where, as in the present matter, although the causes of action may differ in nature, the issues which have to be decided in both causes of action, are the same. In such a case, a party is estopped from asking a court to decide that issue for a second time. On that basis, the plea was upheld.

On the recognition question, the Court highlighted two important distinctions between the procedures contemplated in section 8 and section 59. The first was that section 59 resorts under Chapter 5 of the Leadership Act dealing with general provisions while section 8 resorts under Chapter 2 of the Leadership Act dealing specifically with leadership and governance of traditional communities. Even more specific was the fact that section 8 deals with the recognition of a king. The principles of interpretation required that regard be had to the language used, the context in which

it was used and the purpose for which it was used. The consideration of those three interrelated aspects should be done as a unitary exercise without applying it in a mechanical fashion.

The President had not lawfully recognised the king, as the President had not followed the peremptory procedure provided for in section 8 of the Leadership Act 3 of 2019. The Act clearly contemplated that an investigative committee was the statutory body created to perform the required evaluative function. The President therefore erred in law in himself performing such evaluative function. The recognition of King Misizulu by the President was reviewed and set aside.

City of Cape Town and others v Sterea Digital CC and another [2024] 1 All SA 680 (WCC)

Constitutional and Administrative Law – Judicial review – Distinction between appeal and review – On review, court limits enquiry to the regularity of the impugned decision rather than its correctness.

Constitutional and Administrative Law – Judicial review – Right to fair administrative action – Allegation of bias – Test for bias – A reasonable suspicion of bias is tested against the perception of a reasonable, objective and informed person.

The first respondent ("Sterea") owned immovable property which had to be rezoned from "Single Residential" to "Local Business" to allow the second respondent ("SNH") to use the property for office purposes. A rezoning application to the first appellant, the City of Cape Town,

The City's Northern District Plan ("NDP") was a medium-term plan developed under a 10-year planning framework that was intended to guide spatial development processes in the relevant area. It had to be considered under section 99 of the City of Cape Town Municipal By-Law of 2015 when an application for rezoning was considered. On receipt of the rezoning application, the second and third appellants had to consider it against the NDP. The third appellant (the "MPT") refused the application on the grounds that the proposed land use was not considered desirable as contemplated in section 99(1) as read with section 99(3) of the By-Law, and a deviation from the NDP was not justified in the particular circumstances. The second appellant dismissed an appeal against the refusal of the application. Sterea and SNH successfully applied for review, and the present appeal resulted.

The issues on appeal were whether the court *a quo* had erred in finding that, as contended by the respondents both decision-makers failed to take into account relevant considerations; slavishly followed the NDP without applying their minds to whether it should be departed from in the specific circumstances put forward by the respondents; the respondents' perception of bias on the part of certain officials was reasonable; and the proceedings before the second and third appellants were procedurally unfair.

Held – The court *a quo* erred in not fully respecting the decision-makers' discretion to refuse to rezone the property. Instead of limiting the enquiry to the regularity of the two decisions, the court focused on their correctness. That was not permissible on review and constituted a misdirection.

A further error in the court's reasoning concerned the finding that the respondents had established bias on the part of the second appellant. It is established in case law referred to by the court, that whether an administrator was biased is a question of fact. On the other hand, a reasonable suspicion of bias is tested against the perception of a reasonable, objective and informed person.

There was nothing persuasive to refute the second appellant's version that he took the NDP into account as but one of the guiding factors, and independently applied his mind to the particular application before him. The Court considered the respondents' contentions to have contravened the caution in case law, against wanton, gratuitous allegations of bias – actual or perceived – against public officials.

Finally, the Court found that Sterea and SNH had failed to prove that both decision-makers failed to take into account relevant considerations; slavishly followed the NDP without applying their minds; and that the proceedings before the second and third appellants were procedurally unfair.

Du Plessis and another v Kriel NO and others [2024] 1 All SA 702 (LCC)

Property – Occupiers of farm – Relocation within farm – Extension of Security of Tenure Act 62 of 1997, section 8(4) – Applicability of protections to occupiers – Section 8 is invoked where an occupier's right of residence is terminated whether or not that termination is intended to lead to an eviction either at the time it is terminated or at any time thereafter – Where there was no evidence to show whether the parties

were long-term occupiers, it could not be concluded that they enjoyed the protections of section 8(4).

The appellants were a married couple, both over 70 years old. As retirees, they depended for their survival on a State pension. They lived in a three-bedroomed house on a farm which had been purchased by a trust in which the respondents were the trustees. The trust took transfer of the farm in 2014. In 2020, it commenced proceedings to relocate the appellants to a smaller house on the farm. The appellants were occupiers as defined in the Extension of Security of Tenure Act 62 of 1997 ("ESTA"). It was not disputed that on transfer of the property, the appellants would have obtained the protections conferred by section 24 of the Act, which protects occupiers' rights and keeps their consent to occupy in place when properties are transferred. The appellants occupied their home in terms of a lease agreement. They had fallen into arrears with the rental due under that agreement.

In seeking to relocate the appellants, the trust explained that the house occupied by them was more suited to the needs of the farm manager, and that the appellants could easily be accommodated in the smaller house which would be made available to them. The magistrate deciding the trust's application granted an eviction order.

Held – Appellants contended that they were protected by section 8(4) of ESTA and the wider provisions of section 8. Section 8 creates a series of conditions that must be met before an occupier's right of residence may be terminated. The only issue properly before the present court on appeal was the trust's failure to adhere to the protections in section 8(4) of ESTA as that was the only issue concerning section 8 that was pleaded in the answering affidavit and raised in the notice of appeal. The related question was whether, legally, section 8, and thus sub-section 8(4), was applicable to relocations. The rights that are affected by any relocation are rights of residence protected by section 8 of ESTA. Thus, properly interpreted, section 8 is invoked where an occupier's right of residence is terminated whether or not that termination is intended to lead to an eviction either at the time it is terminated or at any time thereafter. Interpreting the section the Court found an intention by the Legislature to confer a broad protection through section 8 to any termination of a right of residence whether in respect of the "land" as a whole or otherwise. It was also significant that the protection of section 8(4) is not invoked only when an occupier resides for 10 years on a registered land unit, but also if an occupier has resided on any other land belonging

to the owner for 10 years. That also signified that section 8(4) protection is not restricted to termination of the right of residence on land for eviction purposes. It was concluded that section 8 applies not only to terminations of rights of residence on land but to termination of rights of residence of a house on land even where the right to reside on the land is not being terminated. It thus applies in context of relocation applications. Consequently, if the appellants were long-term occupiers as contemplated by section 8(4), then their rights of residence had to be terminated in accordance with that section. There was no evidence to show whether the appellants were long-term occupiers, and the court was unable to conclude that they enjoyed the protections of section 8(4).

The appeal was dismissed.

Goldstar Finance (Pty) Ltd and others v Capitec Bank (Pty) Ltd and another [2024] 1 All SA 727 (WCC)

Civil Procedure – Interim interdictory relief – Requirements – Applicant having to establish a prima facie right; a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted; a balance of convenience in favour of granting of the interim interdict; and the absence of any other adequate ordinary remedy – Requirements not to be considered separately or in isolation but in conjunction with one another to determine whether the court should exercise its discretion in favour of the grant of the interim relief sought.

Corporate and Commercial – Contractual dispute – Termination of facilities by bank – Law applicable to termination of a contract of indefinite duration – Parties are entitled to terminate an indefinite contractual relationship on reasonable notice, not reasonable grounds, and no reasons need be given.

The applicants were credit providers, providing micro-lending services in the form of unsecured loans to customers. They sought interim interdictory relief preventing the first respondent (“Capitec”) from terminating certain services provided to them until the second respondent (“Amplifin”) found a replacement bank for the provision of the services, alternatively pending the outcome of an action to be instituted for final interdictory relief.

Amplifin used Capitec services to extract payments which were due from the bank accounts of the applicants' customers, so that such amounts could be then transferred to the applicants' bank accounts.

Held – Capitec was not the only entity which could provide the required services to the applicants and Amplifin. The practicality of switching to another option was relevant to the issue of whether the applicants would suffer irreparable harm if interim relief was refused. The requirements for the interim relief sought were a *prima facie* right; a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted; a balance of convenience in favour of granting of the interim interdict; and the absence of any other adequate ordinary remedy. Those requirements should not be considered separately or in isolation but in conjunction with one another to determine whether the court should exercise its discretion in favour of the grant of the interim relief sought.

The first point to be addressed on the merits was the applicants' contention that Capitec could not terminate the facilities for as long as the agreement between itself and Amplifin remained in place and that it was common cause that the agreement was in place until 15 October 2024, whereafter twelve months' written notice of termination had to be given by either party. The alternative argument was that the facilities could not be cancelled without good reason. It was also submitted that Capitec's termination of services would negatively affect the applicants' constitutional right to trade. Those contentions were rejected by the court. There was no support for the linking of the applicants' facilities to the agreement between Capitec and Amplifin, which underpinned the applicants' submissions. Furthermore, the jurisprudence pertaining to the termination of a contract of indefinite duration applied to the applicants' facility agreements. In terms thereof, parties are entitled to terminate an indefinite contractual relationship on reasonable notice, not reasonable grounds. No reasons need to be given because if reasonable notice is given the question of whether there is good cause for the closure of bank accounts of indefinite duration does not arise. Thus, as the law stands, good cause for termination of these contracts is not required.

The applicants had accordingly failed to establish a *prima facie* right to the relief sought, and the application fell to be dismissed on that basis alone. The court nonetheless also considered whether the applicant had a reasonable apprehension of

irreparable harm and whether the balance of convenience favoured the granting of the interim relief sought, finding against the applicants in both instances.

The applicants' application for interim relief was dismissed with costs.

Goodfind Properties (Pty) Ltd v Kennedy and others [2024] 1 All SA 751 (WCC)

Civil Procedure – Locus standi – Right to sue – Whether a company which passes a resolution permitting another entity to initiate and defend legal proceedings, can then institute proceedings in its own name – A party can divest itself of the right to sue, and once done, loses such right and lacks locus standi to bring legal proceedings.

The applicant ("Goodfind") sought the eviction of the first to third respondents from certain property by virtue of their alleged unlawful occupation.

The main basis on which the first to third respondents opposed the application was that of Goodfind's *locus standi*. The lease agreement in terms of which the respondents occupied the property had been concluded with the entity ("Communicare") from which Goodfind took transfer in 2019. The particulars of claim alleged that Communicare was the owner and person in charge of the property, that the property was transferred from Communicare to Goodfind, thereby ceding all the former's rights in terms of the lease agreement to Goodfind, and that Goodfind had passed a resolution permitting Communicare to initiate and defend legal proceedings and to manage Goodfind's immovable properties. The respondents therefore contend that, as far back as May 2019, Goodfind divested itself of the right to litigate on its own behalf, and consequently had no standing to institute proceedings in its own name, and that same should have been instituted by Communicare. Goodfind responded with the allegation that it was permitted, by a delegation of authority by Communicare, to bring the present application.

Held – A party can divest itself of the right to sue. In the present matter, there was no evidence before the court that Goodfind was reinvested with authority as alleged by it. There did not appear to be a resolution taken by Goodfind to revest the power to litigate in itself. Such delegation as was permitted extended only to litigating collections matters. Goodfind had not demonstrated *locus standi* to bring the application, which therefore fell to be dismissed on that ground alone. Nevertheless, it was necessary to also deal with the further grounds of objection raised on behalf of the respondents.

The first respondent contended for a tacit term in the lease agreement, to the effect that increases in her rent would not exceed the social grant she received. The suggestion of such a term was far-fetched and would render Communicare's (and Goodfind's) business impractical, if not impossible. Similar considerations applied to the respondents' submission that the lease had to be interpreted against the backdrop of constitutional imperatives, to mean that the rent could not be increased beyond what they could afford. To give the lease such a construction would entirely ignore the rights of Goodfind, and Communicare, to conduct their business, which, while providing housing to low and medium income earners, could not be conducted at a loss.

Despite the above, the eviction application could not be granted as the personal circumstances of the respondents were unknown. The application was accordingly dismissed.

JK v ESK [2024] 1 All SA 775 (WCC)

Family Law and Persons – Divorce – Rule 43 proceedings – Factors relevant to an order for interim maintenance – Legal principles applicable to Rule 43 applications – Rule 43 allows for interim arrangements to be imposed on the parties in matrimonial disputes, and pendente lite until the divorce court can make a properly informed decision and after hearing viva voce evidence – The applicant spouse is entitled to reasonable maintenance pendente lite dependent on the standard of living of the parties, actual and reasonable requirements and the capacity of the respondent to meet such requirements.

The parties herein were married to each other on 1 December 2012, out of community of property and with the inclusion of the accrual system. They had two minor children, resided shared time equally between the parties, who were no longer cohabiting.

After the birth of the children, the parties decided that the applicant, who had previously been a specialist medical representative, would be a full-time mother to the children. She had, since then, been financially dependent on the respondent.

In the present rule 43 application, the applicant sought maintenance *pendente lite* in respect of spousal maintenance in the amount of R37 500 per month, monthly maintenance in the amount of R15 000 for each child, and an initial contribution towards costs in the amount of R1 309 390. The application did not concern the

enforcement of a maintenance order but was concerned with whether maintenance should be ordered and if so, the *quantum* thereof.

Held – The legal principles applicable to such applications were as follows. Orders for maintenance that are issued pursuant to rule 43 are intended to be interim and temporary and cannot be determined with the degree of precision. The purpose of rule 43 is to provide a speedy and inexpensive remedy, primarily for the benefit of women and children. It allows for interim arrangements to be imposed on the parties in matrimonial disputes, and *pendente lite* until the divorce court can make a properly informed decision and after hearing *viva voce* evidence. The applicant spouse is entitled to reasonable maintenance *pendente lite* dependent on the standard of living of the parties, actual and reasonable requirements and the capacity of the respondent to meet such requirements.

Apart from the established principles governing rule 43 applications, the court had to be guided by the gender-based realities in claims for maintenance while divorce proceedings are pending, and the vital constitutional principle of the best interests of the child as required by section 28(2) of the Constitution.

The Court set out the factors relevant to an order for interim maintenance before turning to consider the respondent's invocation of the doctrine of unclean hands, based on the applicant's conduct towards him. He referred to disparaging comments posted about him by the applicant on social media, and its potential to harm his reputation and business. However, there was not authority supporting the applicability of the doctrine of unclean hands in rule 43 proceedings, and the doctrine found no application on the evidence. While the applicant's conduct was unfortunate, the court was not satisfied that such conduct should have any bearing on a maintenance claim pursuant to rule 43. The respondent's disputing of the reasonableness of the applicants claimed expenses was also rejected.

An order in the applicant's favour was granted.

Lombardy Development (Pty) Limited and others v City of Tshwane Metropolitan Municipality and another [2024] 1 All SA 798 (GP)

Civil Procedure – Court order – Compliance with – Duty of Organ of State – A failure by an Organ of State to adhere to and take all steps necessary to give effect to a court order constitutes a breach of section 165(4) and section 165(5) of the Constitution –

There is a particularly high duty on Organs of State to comply with court orders, both because of the duties imposed by section 165(4) of the Constitution and because the State must lead by example.

Civil Procedure – Mootness – Where parties remained in dispute as to whether there had been compliance with orders and whether further steps were required to give effect thereto, a live issue existed – Court a quo erring in finding that the relief sought was moot.

Local government – Levying of rates on property owners – Re-categorisation of property – Review – Non-compliance with review orders in contravention of obligation on Organ of State.

The appellants were property owners in a development called Lombardy Estate within the jurisdiction of the first respondent (the "City"). The first appellant was the developer, and at relevant times, the owner of many of the properties affected by the present appeal. The remaining appellants were property owners in Lombardy Estate. The City was the first respondent and the second respondent was the City's municipal manager.

In 2013, the City took a decision to recategorized the appellants' properties as "vacant" pursuant to a 2012 Special Valuation Roll (the "2012 SVR") and a 2013 General Valuation Roll (the "2013 GVR"). In consequence, the City invoiced the appellants for significantly increased rates. On application by the appellants, the Court reviewed and set aside the re-categorisation decisions, and made ancillary orders against the City. Contending that the City had done nothing to implement the review orders, the appellants attempted to enforce those orders in contempt of court and compliance proceedings but their application was dismissed. That led to the present appeal.

Although the appellants' grounds of appeal were extensively pleaded, there were two fundamental questions which underpinned the appeal. The first was whether the court *a quo* erred in finding that the relief sought in the founding affidavit was moot, and the second was whether the court *a quo* had erred in concluding that the appellants had sought to make out their case in reply and impermissibly introduced new matter in reply.

Held – Although the appellants had abandoned the first two prayers in their notice of motion, they did not abandon the alternative relief in prayer 3, which remained live. The parties remained in dispute as to whether the City had complied with the review orders and whether further steps were required to give effect thereto. The court *a quo* erred in finding that the relief sought in prayer 3 was moot. On the issue of a new case and new matter in reply, the appellants could not have dealt with the matter objected to in their founding affidavit as the events dealt with had not yet taken place, and it could not be said that a wholly new cause of action was introduced.

It then had to be decided whether the City had failed to comply with its constitutional obligation to adhere to and take all necessary steps to give effect to the review orders. A failure by an Organ of State to adhere to and take all steps necessary to give effect to a court order constitutes a breach of constitutional obligations, specifically section 165(4) and section 165(5) of the Constitution. There is a particularly high duty on Organs of State to comply with court orders, both because of the duties imposed by section 165(4) of the Constitution and because the State must lead by example and observe the law scrupulously.

In order to determine whether there had been non-compliance, the court had to interpret the review orders. Where there is a *bona fide* dispute about compliance with a court order pursuant to which a State party is obliged to rectify a rate-payers' account, the State party must engage meaningfully with the rate-payer so as to ensure compliance as part of its duty to adhere to and take steps necessary to comply with that order. The appellants had at the very least cast serious doubt on whether the City had complied with the review orders and there was, at best for the City, a *bona fide* dispute on that issue.

The appeal was upheld and the Court granted declaratory relief and relief akin to an order for a statement and debatement of account.

Petroleum Oil and Gas Corporation of South Africa (SOC) Ltd v Commissioner for the South African Revenue Service and another [2024] 1 All SA 824 (WCC)

Trade (Customs and Excise) – Fuel levy goods – Whether a licensee of a customs and excise manufacturing warehouse was entitled to a refund or set-off in respect of transactions concluded during a specific audit period – Requirements to substantiate

a set-off found to have been substantially complied with and claimant established prevailing practice allowing set-offs in respect of fuel levy goods removed or exported to African countries from unlicensed facilities, provided that fuel levy goods were duty paid stock.

Manufactured fuel levy goods, as defined in the Customs and Excise Act 91 of 1964, attracted payment of an excise duty, a fuel levy and a Road Accident Fund levy. Also relevant are Rules adopted under the Act (the “Rules”), relating to customs and excise warehouses in which excisable or fuel levy goods are manufactured or stored and the Rules relating to the manufacture, payment of duty and controlled movement of fuel levy goods. The applicant (“PetroSA”) was the licensee of a customs and excise manufacturing warehouse. The excise duty and the levies were payable to the first respondent (“SARS”) when the fuel goods left the warehouse. They were then deemed to have been entered into the country for home consumption, even though they might be destined for exportation to neighbouring or other African countries. Exports to neighbouring countries (“BLNS countries”) were referred to as “removals”. Once they leave the warehouse and the duty and levies were paid, the fuel goods become “duty paid stock”. However, in terms of section 75(1)(d) read with Schedule 6 of the Act, a licensee was entitled to a refund of the excise duty and fuel levies in respect of removed or exported goods provided that the statutory requirements were met. In terms of section 77, such a refund could be set-off in the licensee’s monthly excise account.

The present matter concerned whether PetroSA was entitled to a refund in respect of certain transactions concluded during a specific audit period. Duties and levies were paid on the fuel goods and set-off was effected by PetroSA. The question was whether PetroSA was entitled to the set-off (effectively a refund of the duty and levies paid). It appealed against two determinations by the respondent (SARS), that it was not entitled to the set-off.

Held – As PetroSA contended, the appeal was limited to what was determined by SARS. The nature of the determinations accordingly limited the scope of the appeal.

Turning to each of the impugned determinations, the Court confirmed that the requirements to substantiate a set-off were contained in the Rules, more particularly in rule 19A4.04(b)(ii)(ff). That rule required duly completed copies of certain forms to

accompany the monthly account in support of set-off of the duty against the amount due and payable on that account, or an application for a refund of duty by the licensed distributor. The Court was satisfied that there was material compliance with the requirements in the rules and the purpose of the requirements was achieved.

PetroSA also contended that further determinations were made in a procedurally unfair manner and contrary to the Promotion of Administrative Justice Act 3 of 2000 as it was never given an opportunity to deal with them and that some of the alleged shortcomings by PetroSA were formulated in an impermissibly vague manner. The Court found the alleged shortcomings not to be material.

Further, PetroSA was found to have discharged the onus of proving that, during the audit period, there was a practice generally prevailing to the effect that set-offs (refunds) were allowed in the circumstances applicable in the present case. The appeal was upheld and the determinations by SARS were set aside on the basis there was no liability in terms of section 44(11A) of the Act as during the audit period set-offs (refunds) were allowed in terms of the practice in respect of fuel levy goods removed or exported to African countries from unlicensed facilities, provided that fuel levy goods were duty paid stock.

P[...] P[...] M[...] and others v Minister of Home Affairs and another (Children's Institute as *amicus curiae*) [2024] 1 All SA 847 (GP)

Constitutional and Administrative Law – Immigration – Blocking of identity numbers – Failure by Department of Home Affairs to follow just administrative procedures – The impugned practice, in the absence of fair administrative process and implemented before any final decision was taken, constituted unjust and irregular administrative action.

To address the problem of fraudulently obtained identity documents being used in South Africa, the Department of Home Affairs ("DHA") resorted to a practice, referred to as ID blocking, which involved blocking any suspiciously processed identity number before or while investigating whether a person registered in the national population register was a South African citizen or permanent resident. Because the ID blocking underpinning this litigation occurred before any investigation was concluded and a

final decision was reached regarding a person's status as citizen or permanent resident, it prejudiced *bona fide* citizens and permanent residents just as much as it prevented illegal immigrants who fraudulently obtained identity numbers to reap the benefits associated with being a citizen.

The present application was for review of the above practice of the DHA in placing a marker against the identity number ("ID") of a person registered in the national population register as a South African citizen or permanent resident, which automatically resulted in the marked ID being blocked, without advising the affected party thereof. The blocking of IDs prevented individuals from actions involving use of their ID, such as obtaining passports to travel, voting, accessing healthcare or education, and opening bank accounts.

The respondents contended that placing markers and blocking suspicious IDs was legally correct and critical in safeguarding the national population register. They claimed that if the placing of markers against IDs was declared unconstitutional and invalid, the DHA would have no alternative remedy for dealing with identity theft, fraud, and duplicate IDs, creating an immense security risk for the country.

Held – The impugned conduct of the DHA amounted to administrative action and the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") therefore applied. The primary issues to be determined included the constitutional validity of the practice of placing markers against and blocking IDs, and the granting of a just and equitable remedy. The necessity to fashion a just and equitable remedy followed the respondents' concession that no fair administrative process was followed before blocking IDs.

Since the legislative framework was embedded in the Constitution, any decision to seize, revoke, or cancel any birth certificate, identity document, or permanent resident status had to adhere to the principles of administrative justice enshrined in section 33 of the Constitution and PAJA. While the placing of a marker against an ID to establish if it needed to be investigated could not be faulted, the problem related to the subsequent blocking of the ID without following just administrative procedures. In the absence of a challenge to the constitutional validity of section 19 of the Identification Act, the practice of blocking IDs could not be declared constitutionally invalid without regard to the facts and context of each individual matter. Before any

decision could be made, the DHA had to investigate the matter. The principles of administrative justice required that an affected person be informed of the investigation, be provided an opportunity to put their case forward, be informed of any decision and the reasons for that decision, and be provided with an internal appeal or review mechanism to challenge any adverse decision.

The impugned practice, in the absence of fair administrative process and implemented before any final decision was taken relating to the affected individual's status as a South African citizen or permanent resident, in the absence of any empowering legislation having been promulgated, constituted unjust and irregular administrative action.

Zero Azania (Pty) Ltd v Caterpillar Financial Services SA (Pty) Ltd and a related matter [2024] 1 All SA 883 (GJ)

Civil Procedure – Appeal – Interim execution order pending appeal – Section 18(1) and (3) of the Superior Courts Act 10 of 2013 – Requirements for interim execution – Requirements are that there are exceptional circumstances justifying such execution; that the applicant for interim execution will suffer irreparable harm if interim execution is not permitted; and that the respondent will suffer no irreparable harm if it is.

The respondent ("Caterpillar") terminated its instalment sale agreement with the appellants ("Azania"), based on alleged breach, and obtained an order from the court below for the return of the vehicles. Azania sought leave to appeal against that order. Its application for leave to appeal was refused, but its attempt to challenge the order for the return of the vehicles caused Caterpillar to successfully bring an application under section 18 of the Superior Courts Act 10 of 2013.

Azania appealed against the interim execution order.

Held – It had to be determined how Azania's failure to honour its contractual obligations weighed on the question of whether Caterpillar had established irreparable harm. As the party who sought execution pending appeal, Caterpillar was required to prove, on a balance of probabilities, that it would suffer irreparable harm. The balance of probabilities is an objective test and is dependent on the value to be given to the facts insofar as it relates to relative probabilities.

Section 18(1) and (3) of the Act permit the execution of a final order granted at first instance pending any appeal against it, provided that three jurisdictional requirements have been met. Those requirements are that there are exceptional circumstances justifying such execution; that the applicant for interim execution will suffer irreparable harm if interim execution is not permitted; and that the respondent will suffer no irreparable harm if it is. The party who seeks execution pending appeal must prove that it will suffer irreparable harm on a balance of probabilities. In this case that was Caterpillar. The requirements for an order under section 18 are exceptional circumstances, and for the applicant to show on a balance of probabilities that it will suffer irreparable harm if the court does not order so and that the other party will not suffer irreparable harm. There appears to be no reason, in principle, why prospects of success should not be taken into account both to determine exceptionality and as a factor to be considered in exercising the discretion to enforce a court order pending an application to the Supreme Court of Appeal for leave to appeal.

At the heart of the appeal was the issue of irreparable harm to either party. The entire process of fact finding requires that due consideration be had to the test to be applied which is one of a balance of probabilities. The court had to select a conclusion which seemed to be more natural or plausible a conclusion from amongst several conceivable ones having evaluated the probabilities deduced from all of the affidavits without particularly favouring either party's version. There could only be two conclusions – either Caterpillar would suffer irreparable harm or it would not if interim execution was not ordered. The facts showed that Azania was using the vehicles without having paid Caterpillar since October 2021, that there was no proof that the vehicles were covered by any insurance and no proof that they were being maintained. Caterpillar was thus found to have discharged the onus resting on it to show irreparable harm. The appeal was dismissed.

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