LEGAL NOTES VOL 4/2024

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South African Law Reports (April 2024)

BARNARD AND ANOTHER NNO v NATIONAL CONSUMER TRIBUNAL AND ANOTHER 2024 (2) SA 329 (SCA)

Credit agreement — Consumer credit agreement — National Consumer Tribunal — Appeals from — Right of 'participant in a hearing' before Tribunal to appeal Tribunal's decision to High Court — Meaning of 'participant' — National Credit Act 34 of 2005, s 148(2)*(b)*.

In this matter first and second appellants were the liquidators of the CMR Group (Pty) Ltd. First respondent was the National Consumer Tribunal and second respondent the National Credit Regulator.

CMR loaned money to consumers. The Regulator investigated the loan agreements and applied to the Tribunal for a declarator that the agreements contravened the National Credit Act 34 of 2005. CMR filed an answering affidavit. Pursuant to a voluntary winding-up, the Gauteng High Court granted an order placing CMR in voluntary liquidation and appointing first applicant and second applicant as its provisional liquidators. The Regulator later became aware of the liquidation order. The Tribunal sent CMR and the liquidators a notice of set-down and first applicant

[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!**

confirmed that she would appear. At the hearing before the Tribunal, there was no appearance by first applicant, second applicant or CMR.

The Tribunal proceeded with the matter and granted orders adverse to CMR, whereupon first and second applicants appealed to the Gauteng High Court against some of them. The appeal was in terms of s 148(2)*(b)* of the Act. The court held that it had no jurisdiction to hear the appeal because appellants had not been 'participants' in the hearing before the Tribunal, and dismissed the appeal. It refused leave to appeal. Applicants then applied (erroneously) to the Supreme Court of Appeal for special leave to appeal (see [12]).

The SCA, in the interests of justice, dealt with the application as an application for leave to appeal in terms of s 16(1)*(a)* of the Superior Courts Act 10 of 2013 (see [13]), and —

Held per Mbatha JA for the majority:

A 'participant in a hearing' had to physically participate in his own capacity or through his legal representative (see [21]).

• The Tribunal's consideration of CMR's answering affidavit did not constitute participation (see [24]).

• The proper course would have been for applicants to apply to the Tribunal for it to rescind its order as intended in s 165 of the Act:

> 'The Tribunal . . . may vary or rescind its decision or order —
>
> *(a)* erroneously sought or granted in the absence of a party affected by it . . . .'

The SCA accordingly struck the application for leave to appeal from the roll (see [41]).

Mabindla-Boqwana JA and Siwendu AJA, dissenting, would have upheld the appeal. In their view the liquidators, as parties interested in the relief sought by the Regulator, ought to have been joined in the proceedings before the Tribunal, and the consequence of the failure to do so was to render the proceedings fatally flawed (see [43], [47], [50], [52], [55], [59] – [61]).

They would have granted the application for leave to appeal, upheld the appeal, and set aside the High Court's order, replacing it with one upholding the liquidators' appeal against the Tribunal's order, setting aside the Tribunal's order, and staying the proceedings before the Tribunal for three months pending joinder of the liquidators (see [63]).

BECKER AND OTHERS v FINANCIAL SERVICES CONDUCT AUTHORITY AND OTHERS 2024 (2) SA 348 (SCA)

Financial institution — Financial Services Conduct Authority — Powers — Debarment — Issues that Authority required to invite submissions on and consider before making order of debarment — Financial Sector Regulation Act 9 of 2017, ss 154 and 167.

First and second appellants were directors of third appellant company. First respondent was the Financial Services Conduct Authority, which was created and given powers by the Financial Sector Regulation Act 9 of 2017.

The Authority had investigated the company's affairs and come to the conclusion that it had contravened certain financial sector laws. It then gave notice to the appellants of its prima facie view that the company, through the agency of first and second appellants, had contravened these laws, that on the strength of s 167 of the Act it intended to penalise the company, and, under s 154, debar the first and second appellants for a period of 15 years. It also gave the appellants an opportunity to make submissions on the proposed sanctions.

This, first and second appellants did, and also applied to the Gauteng Division for a declarator that ss 154 and 167 were unconstitutional. The Gauteng Division dismissed the application, but gave leave to appeal to the Supreme Court of Appeal.

Before the SCA, the appellants argued that the sections infringed the constitutional right to procedural fairness (s 33(1) of the Constitution). They argued that, while the sections in question required the Authority to invite submissions before it decided whether to sanction a party, there was no requirement that the Authority must invite submissions before making the prior finding that there had been a contravention of a financial sector law. Consequently s 154 and s 167, which was predicated on s 154, were invalid (see [10]).

Held, on a proper interpretation of s 154, that the submissions that it required the Authority to invite and consider, before it made a debarment order, should include whether there had been contravention of a financial sector law. Read this way, the Authority could make no decision that there had been a contravention and to debar until after it had considered the submissions. The same, mutatis mutandis, went for s 167 (see [20] – [21] and [23]).

Held, moreover, that the Authority's decision as to whether there was a contravention was administrative action under the Promotion of Administrative Justice Act 3 of 2000, which would require procedural fairness before the making of the decision (see [24]). In sum, there was no infringement of the constitutional right (see [24]).
Appeal dismissed (see [27]).

ZUMA v DOWNER AND ANOTHER 2024 (2) SA 356 (SCA)

Appeal — Execution — Application to execute pending appeal — Order setting aside, as abuse of process, private prosecution brought by criminal accused (ex-RSA President) against lead prosecutor in case against him and journalist covering proceedings — Suspension of order would prolong and perpetuate abuse — Suspension of order would compromise public confidence in courts and administration of justice — Appeal against order immediately executing order declined.

The appellant was former President Jacob Zuma. He faced multiple charges of corruption, fraud, racketeering and money laundering. Since making his first appearance in court in June 2005, he had launched numerous legal challenges in respect of his prosecution, resulting in the continued delay of the commencement of his criminal trial. Importantly for present purposes, in September 2022 Mr Zuma instituted a private prosecution in the Pietermaritzburg High Court against, firstly, the first respondent, Mr Downer, who had at all relevant times served as the lead prosecutor for the National Prosecuting Authority in Mr Zuma's case, and, secondly, against the second respondent, Ms Maughan, who was a senior legal journalist, who had been reporting on Mr Zuma's criminal-charges legal challenges for well on 20 years. This prompted the respondents to approach the Pietermaritzburg High Court where they obtained an order setting aside the private prosecution as an abuse of process (main order). Mr Zuma subsequently instituted appeal proceedings. Both respondents then, consequent to an application in terms of s 18(1) read with s 18(3) of the Superior Courts Act 10 of 2013, obtained an order ('execution order') in the High Court, that, pending the outcome of Mr Zuma's appeal proceedings, the setting-aside of the private prosecution was to remain in force. (The effect of the execution order was that the private prosecution was put on hold pending Mr Zuma's appeal attempts.) The present matter concerned Mr Zuma's appeal to the Supreme Court of Appeal,

against the execution order, under s 18(4)(ii) of the Superior Courts Act, in which he argued that, in effect, the main order should not be put into effect until the appeal process had been exhausted (ie such that he should be able to proceed with his private prosecution in the interim).

Held, that the private prosecutions constituted a clear case of abuse of process which a court had the duty to prevent: In respect of Mr Downer, the private prosecution was instituted for an ulterior purpose, in that it formed part of a so-called 'Stalingrad strategy' aimed at obstructing, delaying and preventing his criminal trial, and was aimed at having Mr Downer removed as prosecutor in Mr Zuma's trial. And in respect of both Mr Downer and Ms Maughan, the contemplated private prosecutions were without foundation in both fact and law. (See [11], [26] – [28] and [30].)

Held, that, to order the suspension of the main order pending an appeal, would be to prolong and perpetuate the abuse. To allow the respondents to appear as accused persons in an abusive private prosecution would compromise public confidence in the courts and the administration of justice (see [18] and [30]). By having to appear in the criminal dock, the respondents' personal liberty and human dignity would be eroded. In respect of Ms Maughan, this indignity would be compounded by the personal insults and threats she would have to endure from Mr Zuma's supporters on social media. The social-media abuse constituted a steady erosion of Ms Maughan's liberty and dignity, and was also likely to discourage other journalists from reporting on powerful individuals for fear of reprisals. (See [14] and [24].)

Held, further, that, if the execution order were upheld, a potential obstacle to the commencement of Mr Zuma's trial would be removed, facilitating the expeditious commencement and management of his criminal trial (see [32]). Further, Mr Zuma would suffer no harm, because the respondents would remain under threat of prosecution until such time as Mr Zuma had exhausted his appeal process (see [21]).

Held, accordingly, that the appeal had to fail (see [36]). Further, in the light of the baseless allegations that Mr Zuma had made against High Court judges in reckless disregard of the truth, he ought to be penalised with a punitive costs order (see [36]).

ESTATE HAFIZ AND OTHERS v HAFIZ AND OTHERS 2024 (2) SA 374 (SCA)

Trust — Trust deed — Validity — Ambiguity in clause relating to succession of trustees — Interpretation of trust deed — Whether settlor envisaged appointment of trustee during his lifetime.

Trust — Trust deed — Amendment — Validity — Original trust deed amended by subsequent agreements appointing further trustees — Effect of trust deed's variation clause.

Clause 4.1 of the Goolam Murtuza Hafiz Trust (the Hafiz Trust) related to the perpetual succession of trustees and provided that '(o)n the death of the settlor, the office of Trustee shall descend to the First Trustee and thereafter to the eldest male issue of the First Trustee, if any'.

The 1994 trust deed of the Hafiz Trust stated that it was an agreement entered into between Goolam Hafiz, as settlor and founder, and Ahmed Hafiz, the eldest of Goolam Hafiz's sons, as First Trustee. Letters of authority was issued on 21 September 1994, appointing Ahmed Hafiz as First Trustee. The 1994 trust deed was, apart from clause 4, silent about the appointment of other trustees. A 2004 deed of amendment and resolution approved the assumption of additional trustees, and led to the Master appointing Akhmed Wahab and Sayed Mohamed as additional trustees. A 2011 deed of amendment sought the appointment of Goolam Hafiz's other two sons as further trustees, but in July 2012, in response to objections, the Master — taking the view that clause 4.1 meant that the First Trustee would only be appointed upon the death of the settlor — withdrew all letters of authority issued after 21 September 1994 and ruled that, pending the amendment of the deed, the Hafiz Trust was to be administered by Ahmed Hafiz and Goolam Hafiz.

Ahmed Hafiz and Akhmed Wahab indicated that they would challenge the Master's decision to withdraw the letters of authority. However, in the meantime, an agreement of trust was concluded between Goolam Hafiz and four others (the 2011 deed of trust) which purported to amend the 1994 trust deed and introduce further trustees. In December 2011 the Master issued letters of authority appointing them as trustees.

The present case, in the Supreme Court of Appeal, was an appeal against the full bench of the High Court's reversal of an earlier order obtained by Goolam Hafiz, that the Hafiz Trust was not a valid trust. The High Court had also dismissed a counter-application by Ahmed Hafiz and Akhmed Wahab in which they sought a declaration that the Hafiz Trust was validly founded and that it be administered in terms of the 2004 deed of amendment. Instead, the High Court declared that the 1994 deed of trust was amended by the 2011 deed of trust and the latter deed established a valid trust;

and that the parties to the 2011 agreement, together with Ahmed Hafiz and Akhmed Wahab, were the trustees of the Hafiz Trust.

The full court declared that the Hafiz Trust was validly created; that it was to be administered in accordance with the 1994 deed as amended by the

2004 deed of amendment; and that Ahmed Hafiz, Akhmed Wahab and Sayed Mohamed were the trustees of the Hafiz Trust. In addition, it varied clause 4.1 of the 1994 deed of trust to read that the First Trustee was Ahmed Hafiz and, upon his death, the office of trustee would descend to his eldest male issue.

The main issue before the SCA was whether the Hafiz Trust was validly created, more particularly whether Goolam Hafiz intended to create a trust in his lifetime. Other issues were whether the 1994 trust deed was amended, and if so, by what instrument — more particularly whether the 1994 trust deed was amended by the 2004 deed of amendment as sought in the counter-application — and the identity of the trustees of the Hafiz Trust. (See [17], [24], [31].)

Held

As to the main issue, that clause 4 provided for the continued existence of the office of trusteeship after the death of the settlor. Read in the context of the deed of trust as a whole, it did not mean that the first trustee would only be appointed once the settlor had died. Nothing in the 1994 deed conferred upon the settlor any responsibilities or duties as trustee. The settlor was not appointed as trustee, and there was no evidence that he, at any stage, regarded himself as a trustee of the Hafiz Trust. The evidence was to the contrary, and overwhelmingly established that a trust was in fact constituted by the deed of trust and that ownership and control of the trust property passed into the hands of the nominated first trustee during the lifetime of the settlor. The full court therefore correctly found that the trust was validly established. (See [26] – [28].)

As to the full court's variation of clause 4.1: It had not been open to the full court to vary clause 4.1 mero motu, without an application for variation before it. The full court's order of variation would not stand. (See [30].)

As to the amendment of the 1994 trust deed: Variation could only be effected by the named trustees acting in their capacity as trustees. Accordingly, the agreement to vary the original deed by the deed of amendment of 2004 could not and did not validly vary the original deed of trust. Therefore, the 1994 trust deed remained extant and had to

be administered in accordance with the terms of the 1994 trust deed. (See [34] and [40].)

As to the full court's declarations as to who the trustees were: The full court erred since there was an insufficient factual basis in the evidence to support the order. Ahmed Hafiz's position was different — he was nominated as a trustee by the settlor. The Master's subsequent concerns relating to the appointment of trustees did not relate to his appointment as trustee. In the result, he would be declared the trustee for the time being of the Hafiz Trust. (See [38] and [40].)

AVIS SOUTHERN AFRICA (PTY) LTD AND OTHERS v PORTEOUS AND ANOTHER 2024 (2) SA 386 (GJ)

Practice — Applications and motions — Urgent application — Urgency — What amounts to — Commercial urgency — Commercial interests as worthy of protection to justify reliance on rule 6(12) as matters concerning threat to liberty, life or some other basic essential of everyday life — Whether commercial interests justified urgent hearing would always depend on facts of each case, due regard being had to fact that litigant with commercial interests at stake enjoyed same constitutional right of access to court, enshrined in s 34 of Constitution, as any other category of litigant.

Competition — Restraint of trade agreement — Transmissibility of benefits of restraint of trade on transfer of business — Determining whether restraint agreement survived transfer of business was fact-specific enquiry that involved ascertaining if benefit created by restraint constituted component of goodwill transferred to purchaser.

The present matter concerned the circumstances in which a restraint of trade will survive a transfer of business. The first applicant was Avis Southern Africa (Pty) Ltd (Avis), a car rental company. The second applicant, Zenith Car Rental (Pty) Ltd, and the third applicant, Zeda Car Rental (Pty) Ltd, were Avis subsidiaries. In the present urgent application before the Johannesburg High Court, the applicants sought an interim interdict to restrain the first respondent and the second respondent (Ms Porteous) from acting in breach of restraint of trade covenants. As against the first respondent, ultimately, the court found that the applicants had failed to show urgency, and hence struck the case against him from the roll; this headnote will therefore focus on the applicants' case against Ms Porteous. The latter, in 1999, took up employment

with the third applicant, with which she entered, in 2003, the restraint of trade that forms the basis of the applicants' relief. Ms Porteous' employment was later transferred to Barloworld, after the latter acquired Avis South Africa, and she entered into a contract of employment with them in 2008 to assume the position of Manager: International Sales for Avis Rent a Car. After Barloworld unbundled the Avis car rental and leasing business, Ms Porteous' employment was transferred to the second applicant, where Ms Porteous remained until her resignation, which took effect on 31 May 2023. The applicants launched an application to seek an order interdicting Ms Porteous from competing against them in breach of the restraint of trade for 12 months, consequent to learning of the findings of a forensic study investigation that Ms Porteous, in transmitting work-related documents to her personal email address, had potentially breached her confidentiality obligations.

The applicants rested their case entirely on the restraint entered into by Ms Porteous with the third applicant in 2003. They did not contend that it was replaced by a subsequent document that recorded a fresh covenant in restraint of trade. They argued that it was incorporated into Ms Porteous' contract of employment with Barloworld, and continued to apply when she was employed by the second applicant. The key question then, the court held, was whether the benefits associated with the restraint were transmitted from the third applicant to Barloworld and subsequently to the second applicant pursuant to the transfer of Ms Porteous' employment (see [37]).

As to urgency

Held, that commercial interests were equally worthy of protection to justify reliance on rule 6(12), as were matters that concerned a threat to liberty, life or some other basic essential of everyday life (see [18]). Whether commercial interests justified an urgent hearing would always depend on the facts of each case, due regard being had to the fact that a litigant with commercial interests at stake enjoyed the same constitutional right of access to court, enshrined in s 34 of the Constitution, as any other category of litigant. (See [19] – [21].)

Held, on the facts, that the applicants were entitled to enrol the matter against Ms Porteous as a matter of urgency: Their delay in seeking the present relief after receiving the results of the forensic investigation was not inordinate, and the applicants would not obtain substantial redress at a hearing held in due course. (See [23] – [24].)

As to the merits

Held, that, when a restraint agreement was entered into for the *benefit of a business*, as opposed to an owner, the benefit so created was incidental to the business and formed part of its goodwill (see [46]).

Held, further, that the determination of whether a restraint agreement survived the transfer of a business was a fact-specific enquiry that involved, at the very least, ascertaining if the benefit created by the restraint constituted a component of the goodwill transferred to the purchaser.

Held, further, that the benefits created by a restraint were characterised in law as one or more contractual rights enforceable against an employee and, when those benefits were transferred as part of the goodwill under a sale of business agreement, the transfer took place by way of a cession and had to meet the common-law requirements for a valid cession (see [49]).

Held, that, on the facts of the present case, the restraint of trade entered into by Ms Porteous in favour of the third applicant in 2003 was entered into for the benefit of the business itself, as distinct from the personal benefit of the owner; and was thus incidental to the business as part of its goodwill (see [56] – [57]). However, the applicants' papers failed to show that the transfer of Ms Porteous' employment to Barloworld was part of a sale of business from the third applicant to Barloworld that included as part of the merx a cession of the goodwill of the third applicant's business, and that this included the benefits created by the restraint. (See [58].)

Held, accordingly, that Barloworld did not become entitled to enforce the restraint obligations against Ms Porteous, not having received a cession of the contractual rights from the third applicant (see [65]). If the restraint did not survive the transfer of Ms Porteous' employment to Barloworld, the transfer of her employment to the second applicant could not have vested the second applicant with stronger rights to enforce the restraint, by virtue of the application of the principle *nemo plus iuris transferre potest quam ipse habet* (see [66]).

Held, accordingly, that the rights to enforce the restraint remained vested in the third applicant. As the restraint was only valid for 12 months from date of termination of her employment on 10 December 2008, the contractual rights to restrain the second respondent from acting in breach of her restraint lapsed on 9 December 2009. (See [84] – [85].)

Held, in any case, that the applicants had failed prove their claim of the existence of a protectable interest based on confidential information (see [98]). Accordingly, application dismissed.

ESSENCE LADING CC v INFINITI INSURANCE LTD AND ANOTHER 2024 (2) SA 407 (GJ)

Practice — Pleadings — Amendment — Wrong defendant — Correction of citation where plaintiff cited wrong defendant — When competent to use rule 28 procedure — If plaintiff cited wrong defendant, plaintiff should in principle withdraw action, starting afresh against correct defendant — Availability of rule 28 limited to situations where no incurable injustice would result — This generally only so where, despite error, correct party entered appearance to defend; or service of process on existing party could be deemed to be service on party to be introduced — Distinction between misnomers and substitutions of limited value in applications for amendments — Prejudice remained primary test — Uniform Rule 28.

The plaintiff, Essence Lading CC (Essence), applied in terms of Uniform Rule 28 for leave to effect an amendment, by changing the name of the second defendant from Mediterranean Shipping Company (Pty) Ltd (Mediterranean) to MSC Logistics (Pty) Ltd (MSC).

This, after Mediterranean had raised an exception to the particulars of claim on the basis that they did not disclose a cause of action against it; and Essence, acknowledging that it had incorrectly cited Mediterranean as second defendant, had given notice of its intention to amend the summons by deleting Mediterranean's name as second defendant and replacing it with MSC's. This notice was only served on Mediterranean's attorney of record, not also on MSC (see [22]).

MSC was not mentioned in the citation, did not enter an appearance to defend, was not before the court and was not represented in the action (see [69], [73]). The court, however, accepted that summons was served on MSC as claimed (see [14], [15], [19]).

Mediterranean objected to the proposed amendment on a number of grounds, repeated in opposition to Essence's application for leave to amend (see [20] – [24]).

Held

The correction of a mistake in the citation of a defendant — whether this mistake be described as a misnomer, or the correction thereof a substitution — was essentially a

question of how the mistake could be corrected in a manner compliant with the constitutional imperative of a fair and just process. (See [26].)

It was evident that a practice was in existence in our courts whereby a party in legal proceedings could be substituted with a new party, provided that the process by which the substitution was effected did not result in incurable injustice. The most important consideration remained prejudice, and, in this regard, the main consideration was whether the party who was to be introduced to the action was given proper notice of the proceedings against him. (See [37].)

Rule 28 may only be used to effect a substitution when no prejudice or injustice would result from such procedure. This would generally only be the case where, through some form of agency, the party to be introduced was already represented in the action, and service of the process on the agent was deemed to be service on the party to be introduced; or the correct defendant, despite the mistake in the citation, entered an appearance to defend or intervened in the action. (See [53].)

Subject to these exceptions, the appropriate process to substitute a defendant — one which would prevent an incurable injustice — was for plaintiff to bring an application for joinder or substitution on proper notice to the proposed new party. In these applications reasons should be given why it would be more appropriate for the new party to be introduced, instead of the action being withdrawn. Once the new defendant was properly joined or substituted and became a party to the action, it would then be open to the plaintiff to appropriately amend the summons, either based on the order granted by the court, or in terms of rule 28. (See [58], [59].)

The distinction between misnomers and substitutions had limited value in applications for amendment. A finding that the amendment of the defendant's citation was just the correction of a misnomer, was entirely unhelpful in determining whether the correction of the citation would be procedurally fair or just. Any correction of a wrong defendant, regardless of how the mistake was described, would entail that a new party be brought before court. That being the case, the focus must be on ensuring that the process followed was fair and just, as required by the Constitution. The distinction should be limited to the effect it has on the question of prejudice, which is the primary test. (See [69], [70].)

Th present case did not present an opportunity to make use of rule 28 to correct the mistake in the citation fairly. Where MSC was not represented in this court, a notice of intention to amend could obviously not be served on Mediterranean's attorneys. Such

a procedure is simply inappropriate and will lead to gross injustice. The appropriate procedure — compatible with the constitutional requirement of a fair hearing, and justice being done, and which would prevent an incurable injustice — would be for the plaintiff to either apply, on proper notice to MSC (by way of service by sheriff of the notice of motion), for the joinder or substitution of MSC, together with prayers for ancillary relief which may include leave to effect the appropriate amendment, or to do so in future. In the premises, the amendment sought could not be granted. (See [73], [77], [82].)

FFS FINANCE SOUTH AFRICA RF (PTY) LTD t/a FORD CREDIT v LAMOLA AND A SIMILAR MATTER 2024 (2) SA 427 (GP)

Consumer protection — Consumer agreement — Unfair, unreasonable or unjust terms — Punitive costs clauses in pro forma contracts — Against public policy and likely unlawful — Courts to intervene where required — Court in casu declining to invalidate costs clause in instalment sale agreement because issue was not argued — Making order for payment of party and party costs.

FFS Finance South Africa, trading as Ford Credit, and BMW Financial Services South Africa (the credit providers) sought default judgments against two consumers who had fallen into arrears with their motor-vehicle repayments. The consumers had signed pro forma instalment sale agreements that contained boilerplate punitive costs clauses allowing the credit providers to recover their costs on an attorney and client scale. The defendants failed to defend the claims and the Pretoria High Court granted default judgments against them.

In dealing with the issue of punitive costs, the Pretoria court (per Marumoa- gae AJ) remarked that, while courts should in general respect and enforce commercial agreements, they should not rubber-stamp punitive costs clauses in instalment sale agreements that were in conflict with the aims of the Consumer Protection Act 68 of 2008 or the National Credit Act 34 of 2005, or contrary to public policy and constitutional rights and principles. Consumers generally signed these agreements from a position of unequal bargaining power and without being aware of their contents, which had public-policy implications since public policy precluded the enforcement of contractual terms where it would be unjust or unreasonable. Punitive costs clauses

were, in the light of the above considerations, against public policy and likely unlawful, presenting a clear case for judicial intervention.

In the present case, however, the court could not make such an order due to the absence of argument on the matter or an application to declare the clauses in question unlawful. The court directed the defendants to pay party and party costs only. (See [19], [29] – [46], [52] – [54].)

GRACEFUL BLESSINGS (PTY) LTD v ZANDER BURGER PROPERTIES (PTY) LTD 2024 (2) SA 441 (FB)

Spoliation — Mandament van spolie — Challenge to title to despoiled property — Permitted if applicant relies on substantive right to possession, thereby going further than merely seeking restoration — Applicant, while not 'going further' in this sense, having opened itself up to canvassing of its right to possession by inviting respondent to deal with merits.

Contract — Legality — Contracts contrary to public policy — Lease providing that lessor may take 'any action' for ejectment of lessee.

The appellant (Graceful Blessings) was the owner of commercial property in Bloemfontein that was rented by the respondent (ZBP) in terms of a written lease agreement (the lease). In November 2021 Graceful Blessings cancelled the lease, which ZBP maintained was improperly done. Then, in May 2022, Graceful Blessings changed the property's locks to deny ZBP further access. In response, ZBP brought spoliation proceedings in the Bloemfontein High Court (the court a quo) for the restoration of its possession. The court a quo found that the provision of the lease relied on by Graceful Blessings, clause 18, did not, despite its wording, entitle it to repossess without recourse to law, and granted the spoliation application. Clause 18 provided that, in the event of breach by the lessee, the lessor could 'cancel the lease and . . . obtain repossession . . . and for that purpose to take *whatever action may be necessary* for the immediate ejectment of the Lessee'.

Graceful Blessings obtained leave to appeal to a full bench of the Bloemfontein High Court. It argued that the court a quo should have refused ZBP's spoliation application based on Graceful Blessings' contractual right to repossession under clause 18.

The governing legal position was that an offending respondent in spoliation proceedings was barred from contesting the spoliated applicant's title to the property because a claim for spoliatory relief arises solely from the unprocedural deprivation of

possession. This was, however, subject to the qualification that, if the applicant 'went further' by claiming a substantive right to possession, then the respondent could show that the applicant lacked the right to possession it relied on (see [28]).

Held

While there might be situations in which policy considerations would allow conduct that would ordinarily constitute spoliation, this would be restricted to cases in which the applicant 'went further' in the sense described above. In the present matter ZBP did not 'go further' by seeking relief over and above the restoration of the despoiled property. But, by inviting Graceful Blessings to deal with the merits, it ran the risk that its substantive right to remain in occupation would be canvassed. (See [11], [41], [56], [58].)

As to whether there was a need to develop the common-law principles applicable to spoliation applications so as to cater for developments in modern commercial transactions, that it would be manifestly unfair if commercial entities were allowed to enter into agreements in respect of commercial property that provided for the termination of possession by means other than court process, especially in the context of a failure to pay rent. But there was precedent to the effect that, provided that the principle of *pacta sunt servanda* was counterbalanced with the constitutional principles of dignity and equality, contractual provisions regulating extracurial process might be justified. In the present case, however, the provision in clause 18 that Graceful Blessings was allowed to take 'any action' for the ejectment of ZBP, did not pass constitutional muster. If it had, however, been formulated differently, there might have been a basis for interference with the court a quo's order granting the spoliation application, particularly since it was clear that ZBP had breached the conditions of the lease. (See [61] – [64].) Appeal dismissed.

JJVR v TAXING MASTER HIGH COURT OF SOUTH AFRICA (WESTERN CAPE DIVISION) AND OTHERS 2024 (2) SA 457 (WCC)

Costs — Taxation — Who may appear — Only legal practitioners with right of appearance — Costs consultant may not appear before Taxing Master, whether alone, or accompanied by legal practitioner.

The issue in this matter was whether a costs consultant, whether alone or accompanied by a legal practitioner, may appear before a Taxing Master of the

superior courts to attend to the taxation of litigants' bills of costs. The traditional position was articulated in the Appellate Division case of *Bills of Costs (Pty) Ltd and Another v The Registrar, Cape, NO and Another* 1979 (3) SA 923 (A). It held:

'(T)axation has been, and still is, regarded as an integral part of the judicial process and . . . the rights and obligations of the parties to a suit are not finally determined until the costs ordered by the Court have been taxed. Accordingly the only persons who can appear before a Taxing Master in a Supreme Court are persons who are permitted to practise in such Court.'

The question was whether such position still held under the Legal Practice Act 28 of 2014, in terms of which only advocates, and attorneys with right of appearance, may appear in the superior courts. What gave rise to this case was a taxation that took place before the first respondent, the Taxing Master of the Western Cape High Court (the Taxing Master), in respect of a bill of costs prepared by the second respondent, Ms AJVR, consequent to her having been awarded a series of costs orders in divorce proceeding against her husband, the applicant, Mr JJVR. The latter's attorneys appointed one Ms Erasmus, a costs consultant, to attend to the taxation. On the first day of the taxation, and on its resumption after the first postponement, Ms Erasmus argued the applicant's case in opposition before the Taxing Master. On each occasion, she was accompanied by a legal practitioner, on the first by an attorney, and the second by a junior counsel, Ms Meyer. Their input, however, was negligible (Ms Erasmus herself described the advocate as being on a 'watching brief'); Ms Erasmus ran the case. On the return day after a second postponement, the Taxing Master informed Ms Erasmus that she would no longer allow her to address her on any issues relating to the taxation, and would only permit Ms Meyer, as a duly admitted legal practitioner, to do so. The Taxing Master later clarified her stance in a communication to the applicant, informing him that it was, and always had been, the law that only a legal practitioner with right of appearance could present a matter for taxation; whilst she had in the past allowed costs consultants to address her, after engagement with management it had been decided that this could not continue.

In the present review application, the applicant argued that the decision of the Taxing Master — ruling that persons who do not have right of appearance in terms of the Legal Practice Act 28 of 2014 (as well as its predecessor) may not appear and represent parties in a taxation, and may similarly not be called as experts therein — was nonsensical and irrational, and stood to be reviewed and set aside in terms s

6(2)*(e)* and/or s 6(2)*(f)*(ii) of the Promotion of Administrative Justice Act, Act 3 of 2000 (PAJA). Counsel for the applicant further asked the court to craft a suitable, just and equitable remedy under s 172(1)*(b)* of the Constitution, that would sanction the permissibility of costs consultants arguing a taxation with an advocate or attorney briefed by the client in attendance.

Three parties sought, and were granted, leave to intervene as amici. The third intervening party, the Legal Practice Council (LPC), submitted that an appearance at a taxation before a Taxing Master may only be undertaken by a duly admitted legal practitioner, and that a costs consultant should also not even be allowed to appear before the Taxing Master with a legal practitioner in tow. The first and second intervening parties — legal practitioners with experience in costs consultancy — sought to alert the court that Ms Erasmus had previously fraudulently practised as an advocate under a stolen identity in Gauteng, and that, after exposure of such fact in the investigative TV programme *Carte Blanche*, had in fact been interdicted by the Pretoria High Court from holding herself out as a legal practitioner. The intervening parties described Mr JJVR as being a 'stalking horse' for Ms Erasmus, and that this case was all about Ms Erasmus establishing Ms Erasmus' right to practise as a costs consultant forever and a day, in circumstances where her reputation and integrity were dubious, to say the least.

Held, that none of the parties had produced any court authority in which *Bills of Costs* has been overruled. In terms of the principle of stare decisis, the court was still bound to follow *Bills of Costs*. Furthermore, having regard to an analysis of the LPA, * the change in statutory regime which that legislation introduced had not changed the position which the court in *Bills of Costs* held was in accordance with the relevant statutes of the day. (See [64].)

Held, further, that there was a trenchant reason why a person such as Ms Erasmus should not be permitted to appear before a Taxing Master. She had been interdicted from holding herself out as a legal practitioner in circumstances where her uncontested conduct demonstrates dishonesty, deceit and fraud. To permit such a person to participate in a process in which the integrity associated with a legal practitioner was not subject to statutory control of the LPC, or any other form of statutory body, would be anathema to the interests of the legal system and the broader society in general. (See [66].)

Held, accordingly, that the Taxing Master correctly refused Ms Erasmus, as a person not duly admitted to practise as a legal practitioner, the right of appearance before her (see [67]).

Held, further, that the decision in *Bills of Costs*, considered in the light of the LPA, also precluded a costs consultant who was not a duly admitted legal practitioner from representing a party at a taxation in the company of such a practitioner (see [79]): A scenario in which it was allowed would raise many questions: What purpose was achieved by permitting the costs consultant to run the taxation qua lawyer with a legal representative merely in attendance? And what role would the legal practitioner play? And could they be held liable for sanction by the LPC for, for example, the dishonesty of the costs consultant? (See [75].)

Held, further, that granting the relief sought by Ms Erasmus under s 172(1)*(b)* would be a breach of the Code of Conduct of Legal Practitioners: item 12.1 thereof did not permit an attorney paying a costs consultant who was not an admitted legal practitioner a fee for her appearance at the taxation, and seeking to recover that fee from the client (see [82] and [85]).

Held, further, that the ruling of the Taxing Master did not in any case constitute administrative action: the decision in question did not amount to the exercise of public power as envisaged in PAJA; there was no question of the Taxing Master exercising any form of discretion on an issue which was purely a question of law — either Ms Erasmus was permitted under the LPA, considered in the light of *Bills of Costs*, to appear, or not. (See [91].)

Held, in conclusion, that the applicant had failed to make out a case for the relief sought in the notice of motion and that the application fell to be dismissed. Further, in light of the serious allegations made against Ms Erasmus, the matter would be referred to the local Director of Public Prosecutions for consideration of the appropriate steps, if any, to be taken against Ms Erasmus, whether locally, in Gauteng or elsewhere. (See [98].)

LESTER CONNOCK COMMEMORATION FUND v BROUGH CAPITAL (PTY) LTD AND ANOTHER 2024 (2) SA 486 (GJ)

Financial institution — Financial services provider — Duty to investor — Duty to exercise reasonable skill and care — Duty to protect investor from economic loss through business email compromise — Discussion.

The present matter concerned the duties of a financial services provider to protect investors against economic loss through business email compromise. In 2003 the Rotary Club of Rosebank and the first defendant — presently named Brough Capital (Pty) Ltd (Brough), but at that time called Imara Asset Management South Africa (Pty) Ltd (Imara), and trading as an authorised financial services provider in terms of s 1 of the Financial Advisory and Intermediary Services Act 37 of 2002 — entered into an agreement in terms of which Brough undertook to administer specified investment funds of the Rosebank Rotary Club. In terms of such 'investment management mandate', the second defendant, Mr Christiaan Botha — presently the sole director of Brough, and also a duly registered financial services provider — was specifically authorised, as 'investment manager', to receive funds from the Rosebank Rotary Club and invest them on its behalf. The established practice was that, when the Rosebank Rotary Club wished to transact on its investments, one Mr Franklin, an official of the Rotary Club, would communicate the necessary instructions, via email, directly to the second defendant. The second defendant would then act on such instructions, which at relevant times involved engaging with Momentum, which the defendants had contracted to administer clients' funds in a segregated share portfolio.

What gave rise to the present action — a claim by the plaintiff, Lester Connock Commemoration Fund, * against the defendants in respect of economic losses sustained by the Rosebank Rotary Club due to theft of some of its funds — was the following. One Sharon Botha of Brough, after recently being asked by the second defendant, her husband, to assist him with administration, sent an email to Mr Franklin to introduce herself. Shortly thereafter, she received a series of emails, emanating from Mr Franklin's email address and seemingly written by him, containing a number of instructions to withdraw funds. The author indicated too that the bank account into which the funds had to be paid had changed as per the details provided, and attached bank letters seemingly confirming this. Mrs Botha relayed such instructions to Mr

Botha, who acted on them, contacting Momentum to pay the funds — the subtotal of all the withdrawals amounting to R3,1 million — into the indicated bank account. That was done. However, the reality was that the indicated bank account did not belong to the Rosebank Rotary Club, but to an unknown third party, and the email instructions and bank letters were fraudulent, emanating from an unknown person who had somehow hacked into the email account of Mr Franklin to impersonate him.

The plaintiff's case was that the defendants had breached the agreement by not verifying the authenticity of the instructions, and that they should be held liable to pay the plaintiff for the economic loss the Rosebank Rotary Club had incurred. The defendants, for their part, resisted the claim by relying on a clause in the agreement indemnifying the defendants against any claim for loss suffered, except that arising from fraud or gross negligence on their part, neither of which were present in the present case. The plaintiff argued that Brough's employees in the form of Sharon and Christiaan Botha had indeed been grossly negligent. The defendants argued further that the duty to authenticate the Rosebank Rotary Club's banking account lay with Momentum, and claimed that there was a tacit term to such effect in the agreement between the Rosebank Rotary Club and the defendants.

The court held that the contract between the Rosebank Rotary Club and Brough imposed a duty of care on the defendants in dealing with the club's investments (see [102]), and that it was an implied term thereof that the defendants would exercise the skill, adequate knowledge and diligence expected of a financial services provider (see [105]).

The court held that, under the General Code of Conduct for Financial Services Providers and Representatives, the defendants as financial services providers were obliged at all times to 'have and effectively employ the resources, procedures and appropriate technological systems that could reasonably be expected to eliminate as far as possible, the risk that clients . . . will suffer financial loss through theft, fraud, other dishonest acts, poor administration, negligence, professional misconduct or culpable omissions' (see [115]].

The court held that Mr and Mrs Botha failed to exercise the necessary skill, care and diligence to ensure that the money held by Momentum was paid into the correct account. It was as a result of this lack of diligence that the plaintiff suffered loss.

The court held further that the defendants' failure to authenticate the instructions also amounted to gross negligence, having regard to the following facts that ought to have

alerted them to be vigilant: that the bank account letters attached to the fraudulent emails incorrectly described the account holder as 'The Rotary Club', as opposed to 'The Rotary Club of Rosebank'; and that it was unusual for the Rosebank Rotary Club to suddenly make a number of withdrawal requests for such huge sums at short intervals. (See [113] – [114] and [130].) The court further rejected the defendants' claim that it was a term of the agreement that it would be Momentum's responsibility to check the authenticity of the Rosebank Rotary Club's bank account (see [120]). The court accordingly held that the indemnity clause did not exonerate the defendants from liability.

The court concluded that the defendants were liable to the plaintiff in the sum of R3 100 000 plus interest. (See [130] and [131].)

NAT INDUSTRIES (PTY) LTD (IN LIQUIDATION) AND OTHERS v GRINDROD BANK LTD 2024 (2) SA 506 (KZD)

Common law — Development — On exception — No general rule that issues relating to development of common law cannot be decided on exception.

Common law — Development — Pure economic loss — Case for development to be properly pleaded.

Company — Winding-up — Unlawful alienations and preferences — Undue preference and collusive dealings before sequestration — Repayment of fraudulently obtained funds — Fraud not reported — No cause of action disclosed — Exception upheld — Insolvency Act 24 of 1936, s 30(1) and s 31.

Delict — Specific forms — Pure economic loss — Whether recoverable — Failure by victim of fraud to report it to authorities — No legal duty on victim to ensure that third parties do not suffer losses in consequence of fraud committed on it — Imposing such duty in absence of allegation that, had fraud been reported, no further fraud would have occurred, going too far — Suggested development of common law not appropriate on exception.

Insolvency — Unlawful alienations and preferences — Collusive dealings before sequestration — Jurisdictional facts to be alleged and proved to obtain voidance on basis of collusion — (1) Collusion between debtor and creditor; (2) disposition of property belonging to creditor; (3) with effect of prejudicing one creditor over another — Liquidator to allege and prove factual basis on which collusion premised — Pleading conclusion of collusion insufficient — Insolvency Act 24 of 1936, s 30(1).

Insolvency — Unlawful alienations and preferences — Undue preference — Jurisdictional facts to be alleged and proved to obtain voidance of disposition — (1) Insolvent to have made disposition of its own property — (2) Disposition to have been made when insolvent's liabilities exceeded its assets, but before its liquidation — (3) Disposition to have been made with intention of preferring one creditor above another at time when debtor was already contemplating sequestration — (4) Liquidation must postdate disposition — Repayment of fraudulently obtained funds not constituting voidable 'disposition' for purposes of Insolvency Act — Insolvency Act 24 of 1936, s 30(1).

Sections 30 (undue preference to creditors) and 31 (collusive dealings before sequestration) of the Insolvency Act 24 of 1939 create a remedy for liquidators to recover assets that were removed from an estate before insolvency by having a person declared a debtor of the insolvent estate, and then having the 'disposition' in question set aside. The Act defines 'disposition' to mean 'any transfer or abandonment of rights to property'.

The jurisdictional facts the liquidators must allege and prove to obtain a setting-aside under s 30(1) are: (1) that the insolvent made a disposition of *its* property, not property it stole; (2) that the disposition happened when the liabilities of the insolvent exceeded its assets, but before its liquidation; (3) that the disposition was made with the intention of preferring one creditor above another — if there is no direct evidence of intention, it may be inferred if the liquidator can show that the insolvent was at least contemplating liquidation at the time the disposition was made; and (4) that the liquidation postdated the disposition. The repayment of money fraudulently obtained by the insolvent does not constitute a voidable 'disposition' for purposes of the Insolvency Act and cannot be recovered under s 30(1). (See [26] – [31].)

The jurisdictional facts the liquidators must allege and prove to obtain a setting-aside under s 31 are: (1) collusion between the debtor and the creditor; (2) a disposition of property belonging to the creditor; (3) in a manner that has the effect of prejudicing one creditor over another. The factual basis on which the collusion is premised must be pleaded, and pleading a conclusion of collusion is insufficient and would render the claim excipiable. (See [33].)

In September 2017 Nat Industries (Nat) and Grindrod concluded a factoring contract under which Nat sold its book debts to Grindrod. At this point Nat was already

insolvent. The debts sold to Grindrod were claims held by Nat against a third party, Southey, for services rendered to Southey under a temporary employment services contract (the services contract). Pursuant to the factoring contract, Grindrod paid Nat R8,2 million in two instalments, R4 million on 5 October 2017 and the balance on 12 October 2017.

Grindrod then discovered that it had been defrauded by Nat: Southey had terminated the services contract on which the factoring contract was based more than a year earlier. After being confronted by Grindrod at a meeting held on 25 October 2017, Nat repaid the defrauded amount, together with interest and finance charges of R381 334,31, over a period of 11 months from November 2017. Grindrod never reported the fraud to the authorities.

Nat had in 2013 similarly defrauded another finance company, which in 2017 ceded its rights to Finance Factors (FF), with which Nat then concluded a further fraudulent factoring contract.

Meanwhile, Nat was being wound up. Concursus creditorum commenced on 5 February 2020. Joint liquidators were appointed, and Nat was finally wound up.

The joint liquidators and FF, which had been defrauded of over R130 million, instituted an action against Grindrod in which they pleaded four claims.

In claim 1 — which was based on s 30 and s 31 — the joint liquidators pleaded that, since Nat was already insolvent when it repaid Grindrod, the amount repaid constituted an undue preference under s 30 and a collusive deal under s 31. The joint liquidators sought the setting-aside of the repayments.

In claim 2 — which was based on the principle that a party should not benefit from its own fraud — the liquidators pleaded that, since Grindrod knew by late October 2017 that Nat had defrauded it, it had benefited from and compounded the fraud when it secured repayment from Nat. The joint liquidators sought the restitution of the R8,2 million.

In claim 3 FF alleged that Grindrod's failure to report the fraud constituted a breach of the duty of care it owed FF, resulting in foreseeable losses for FF. Under this heading, FF sought R103 million in delict from Grindrod.

In claim 4 the liquidators similarly alleged that Grindrod's failure to report the fraud breached the duty of care that it owed to Nat to ensure that the latter did not suffer continued losses after the fraud was discovered. The liquidators sought R100 million from Grindrod under this heading.

Grindrod raised exceptions to each of these claims. Against claim 1 it argued that, since the money was stolen from Grindrod, Nat could not 'dispose' of it as intended in ss 30 and 31; against claim 2 it argued that it was scuttled by plaintiffs' failure to allege fraud on Grindrod's part; and against claims 3 and 4 it argued that the plaintiffs failed to plead facts from which a duty of care, wrongfulness or causation could be inferred.

Held

As to claim 1: Since Nat had no entitlement in law to the R8,2 million it stole, it did not make a 'disposition' when it repaid the money to Grindrod. While the R381 334,31 in interest and charges might have been a 'disposition', the liquidators did not allege the required intent to prefer one creditor over another. So, the jurisdictional requirements of s 30(1) were not established. Given that the liquidators also failed to plead the jurisdictional fact of collusion required by s 31, the exception to claim 1 would be upheld. (See [29] – [33].)

As to claim 2: Grindrod's awareness (i) of the fraudulent nature of the invoices Nat presented to it; and (ii) of the fraud Nat was perpetrating on other parties, did not establish fraud by Grindrod. In the absence of an allegation that Grindrod agreed for reward not to prosecute, no guilt was established by its decision to keep silent. The exception to claim 2 would also be upheld. (See [34].)

As to claims 3 and 4: The conduct the liquidators and FF relied on in their claims for pure economic loss was Grindrod's failure to report Nat's fraud to the authorities. But the liquidators' pleadings were silent on the reason why Grindrod should be saddled with a legal duty to ensure that third parties did not suffer losses. And developing the common law to impose liability on a victim of a fraud because it failed to report it and others then fell victim to the same fraud, without any allegation that reporting would have prevented the additional fraud, went a step too far. Since the liquidators, moreover, did not plead anything that would enable a trial court to decide on the development of the common law, claims 3 and 4 lacked the averments necessary to sustain a claim for pure economic loss. (See [36] – [39].)

In the result, all the exceptions fell to be upheld. The plaintiffs were granted leave to amend their particulars of claim within 10 days of the date of this judgment. (See [42].)

THUBAKGALE AND OTHERS v EKURHULENI METROPOLITAN MUNICIPALITY AND OTHERS 2024 (2) SA 525 (GP)

Constitutional law — Constitutional damages — Award — Appropriateness — Breach of socioeconomic rights — Municipality in contempt of court order directing it to provide housing to residents of informal settlement, leading to breach of socioeconomic rights — Award of constitutional damages constituting 'appropriate relief' under s 38 of Constitution in circumstances of case — Constitution, s 38.

This was an application in the High Court, Pretoria, for an order declaring the Ekurhuleni Metropolitan Municipality to be in contempt of a court order directing it to provide the applicants, residents of the Winnie Mandela informal settlement in Ekurhuleni, with housing; as well as seeking constitutional damages against it consequent to such breach. The background was as follows: The applicants had been granted housing subsidies under the Integrated Residential Development Programme contained in the National Housing Code, 2009. They were however never given possession of the stands in the settlement that were developed in terms of the subsidy, and furthermore the agreement reached pursuant to negotiations between the applicants and the Ekurhuleni Metropolitan Municipality, to the effect that the applicants would be relocated to a new development in Tembisa, failed to materialise. That prompted the applicants to approach the High Court, Pretoria. There they obtained an order dated 15 December 2017 — 'the court order' that was the subject of the present contempt proceedings — inter alia, directing the municipality to provide the applicants the promised housing in Tembisa or in another agreed-upon location before 31 December 2018. Various litigation followed. The municipality appealed to the Supreme Court of Appeal, where they were able to have the court order modified by extending the deadline for the provision of housing to 30 June 2019. Just before the passing of the modified deadline, the municipality approached the High Court seeking another extension, to 1 July 2020, which the applicants answered with a counterclaim for constitutional damages. Both were refused. That refusal the applicants appealed to the CC, with opposition provided by the municipality. The CC declined the relief sought. As yet, the municipality has failed to comply at all with the court order of December 2017. Such failure prompted the present application. There were two key issues to be addressed: (1) Whether the municipality had discharged the

onus to demonstrate that its admitted non-compliance with the court order was not wilful and mala fide, and therefore not in contempt of the court order; and (2) whether constitutional damages could be awarded as an effective remedy for violation of socio-economic rights if the municipality was found to be in contempt.

As to (1): The court * expressed agreement with the applicants that the municipality had not, at the time of hearing the present application, shown what it had done to obey the court order. Nothing had been placed before the court to show that the municipality would ever comply with the court order. Instead, the municipality had in its latest report (filed 10 days before the date of the hearing) indicated that it might (not will) be able to provide housing by 30 June 2023. (See [16].) The municipality, the court held, had displayed itself to be a recalcitrant party throughout the proceedings because every undertaking it had made had not been fulfilled, and it had conducted itself in a manner that disregarded and violated the applicants' constitutional rights to housing. Despite four budget cycles having passed since the applicants were granted housing subsidies, the budget cycles coming and passing for the municipality to consider plans which give effect to the court order, the municipality still failed to comply with the court order. (See [16].) The court concluded that the municipality had wilfully and mala fides breached the court order, and was accordingly in contempt of court (see [17]).

As to (2), the court held that, where there had been a breach of a socioeconomic right, a court may grant constitutional damages as a form of 'appropriate relief' under s 38 of the Constitution in order to remediate the constitutional violation. (See [19] and [22].) The court held further that, on the facts of this case, the granting of constitutional damages would constitute 'appropriate relief' for the breach by the municipality. In reaching this conclusion, the court had regard to, inter alia, the following: that the municipality's infringement of the applicants' constitutional rights was systemic, repetitive and egregious; and that the award would have a deterrent effect on the commission of constitutional abuses by the municipality. (See [25].)

The court concluded that the applicants were entitled to the relief sought in the notice of motion (see [26] and order of court).

VANTAGE MEZZANINE FUND II PARTNERSHIP AND ANOTHER v HOPESON AND OTHERS 2024 (2) SA 550 (GJ)

Company — Directors and officers — Directors — Declaration of delinquency — Application — Locus standi — Creditor — May apply for remedy in terms of extended standing granted to persons 'acting in the public interest, with leave of the court' — Companies Act 71 of 2008, ss 157(1)*(d)*, 162(2) and 162(5).

Company — Directors and officers — Directors — Declaration of delinquency — Application — Locus standi — Extended standing under s 157 of Companies Act to apply for remedies — Application by persons 'acting in the public interest, with leave of the court' — No requirement that leave be sought prior to application — Companies Act 71 of 2008, s 157(1)*(d)*.

The present matter concerned the entitlement of a creditor of a company to seek an order declaring its directors to be delinquent. The plaintiffs were creditors of Somnipoint (Pty) Ltd (in liquidation). The plaintiffs sued the defendants — directors of Somnipoint and companies related to it — for, amongst others, an order in terms of s 162(5) of the Companies Act 71 of 2008 declaring them to be delinquent directors. * However, the list of stakeholders set out in s 162(2) to whom the right to seek such delinquency relief was granted *did not include* a creditor of a company. Relying on this fact, the third defendant raised an exception disputing the plaintiffs' standing. In the present application, the plaintiffs sought leave of the court to amend their papers, in a manner they believed would meet the exception. They sought the same relief, but now relied on s 157(1) for standing. Section 157 was headed 'Extended standing to apply for remedies', and in ss (1) provided that '(w)hen, in terms of this Act, an application can be made to, or a matter can be brought before, a court, the Companies Tribunal, the Panel or the Commission, the right to make the application or bring the matter may be exercised by' the persons listed in paras *(a)* – *(d)*. The plaintiffs claimed the relief in terms of para *(d)*, ie as persons 'acting in the public interest, with leave of the court'. The third defendant opposed the amendment, arguing that granting it would render the plaintiffs' pleadings excipiable. This was so, for inter alia, the following reasons:

(i) Leave had to be granted *prior* to the s 157(1)*(d)* application being brought. The third defendant argued that such a stance was supported by a purposive statutory

interpretation: A class action in South African law required a prior application for a court to certify it, in order that it could be properly managed. A remedy under s 157 was akin to a class action, grounded as it was in the public interest, and should accordingly too be managed. Prior leave was therefore required.

(ii) Creditors do not have standing under s 157(1)*(d)* to bring an action under s 162. The third defendant made various points in support of such a stance. It argued, for one, that a proper interpretation supported it: The exclusion of creditors from s 162(2) must have been a deliberate choice on the part of the legislature; this, having regard inter alia to the fact that creditors were granted standing in terms of the predecessor to s 162, that is, s 423 of the 1973 Companies Act. The third defendant argued further that a creditor could not be said to be 'genuine' in its claim to act 'in the public interest', explaining that the danger of giving a creditor standing was that it could use the threat of a delinquency declaration to squeeze the proverbial few extra bob out of the directors. Finally, the third defendant argued, relying on English-law authority, that, based on traditional company law, company directors owed no duty to creditors.

(iii) The plaintiffs' cause of action was own-interest, not public-interest litigation.

Held, that there was no reason for a requirement that an application in terms of s 157(1)*(d)* could not be brought without prior leave of a court: The determination of whether an applicant in terms of s 157(1)*(d)* was acting in the public interest was a single enquiry of fact, and not the multiple enquiry required of an applicant in a class action. Accordingly, the need for the court to engage in prior management was not compelling. (See [23].)

Held, that the statutory comparison between s 423 of the old Act and s 162 of the new Act did not exclude a creditor from seeking a remedy under s 162: The respective sections did not serve the same purpose: whereas s 423 sought to make the miscreant director restore assets or moneys to the company, s 162 did not. (See [26].)

Held, further, that, it did not automatically follow that, because a creditor was also suing the directors at the same time for damages, as well as seeking a delinquency declaration, they had to be acting cynically and opportunistically. That would depend on the facts of each case. In this case the plaintiffs had advanced arguments for why they were acting in the public interest. These could be tested if challenged but they were not a basis for so extreme a finding that a creditor could never be a genuine applicant to vindicate the public interest and hence as a ground of exception the amendment should be denied. (See [31].)

Held, further, that the plaintiffs' reading of English law was mistaken: a company's interests should be treated as equivalent to the shareholders' interests only while the company was financially stable; *not* when it was in liquidation, when losses resulting from risk-taking were borne wholly or mainly by third parties (the so-called 'economic approach'). Such an approach was consonant with the purposes of the new Companies Act, amongst which included the provision to investors and third parties of greater remedies in relation to companies; and the encouragement of high standards of corporate governance. Any reading of s 157(1)*(d)* read with s 162 which sought to categorically deny a creditor standing seemed contrary to the spirit of the Act. Whilst it could not be said that a creditor always had a right to claim s 162 relief under s 157(1)*(d)* as a category of person, it could not be denied this right without the further enquiry as to whether it acted in the public interest, and that was an enquiry dependent on the facts in each case. (See [33] – [36].)

Held, that the question whether the plaintiffs were acting in their own interest, or for that of the public, was a factual question that should not be decided on exception, but could form part of a special plea. (See [38] – [39].)

Held, in conclusion, that the plaintiffs should be granted leave to amend their particulars of claim in accordance with their Uniform Rule 28 notice of intention to amend. (See [41].)

WESCOAL MINING (PTY) LTD AND ANOTHER v MKHOMBO NO AND OTHERS 2024 (2) SA 563 (GJ)

Company — Business rescue — Business rescue proceedings — Participation — Rights of 'creditor' to participate in business rescue proceedings — 'Creditor' — Meaning of — 'Creditor' to whom rights granted to participate in business rescue proceedings, including to vote at meeting called under s 152 on adoption of proposed business rescue plan, meaning company's existing creditors at commencement of business rescue process — References to 'creditor' not including someone to whom company incurred obligations during business rescue process — Companies Act 71 of 2008, ss 145(1), 145(2)*(a)* and 152.

Words and phrases — 'Creditor' — Meaning of in ch 6 of Companies Act 71 of 2008 — 'Creditor' to whom rights granted to participate in business rescue proceedings, including to vote at meeting called under s 152 on adoption of proposed business rescue plan, meaning company's existing creditors at commencement of business

rescue process — References to 'creditor' not including someone to whom company incurred obligations during business rescue process.

In terms of s 145(1) and (2)*(a)* of the Companies Act 71 of 2008, a *'creditor'* was afforded various rights of participation in business rescue proceedings, including, amongst others, to vote at a meeting called under s 152 on the adoption of a proposed business rescue plan for a company in business rescue. The question in this matter was whether such rights were limited to the company's existing creditors at the commencement of the business rescue process, or whether they extended to someone to whom the company incurred obligations *during the business rescue process* (see [18]).

The applicants in this matter, Wescoal Mining (Pty) Ltd and Salungano Group Ltd, were creditors of the second-respondent coal-mine operator, Arnot Opco (Pty) Ltd, which was in business rescue under the stewardship of the first respondent, Mr Mkhombo. In this urgent application, they sought an order confirming that a business rescue plan for Arnot placed before a meeting called under s 152 of the Act by Mr Mkhombo on 28 July 2023 for voting on, was duly approved and adopted, and that such plan was accordingly valid, binding and enforceable. At the meeting that plan *did not* receive the support of at least 75% of the creditors' voting interests that were voted, the threshold demanded by s 152(2)*(a)* of the Act for its adoption. Nevertheless, in this application the applicants contended that the votes against the plan by one of the creditors present at the meeting, namely the fourth respondent, Mashwayi Projects (Pty) Ltd, *should not have been counted*: This was because it had only become a creditor of Arnot *after business rescue had commenced*. On a proper interpretation of the Companies Act, the applicants argued, *'post-commencement creditors' were not 'creditors'* with 'voting interests' in the approval or rejection of a business rescue plan. And if Mashwayi's votes were not counted, the required 75% threshold would have been met (this was common cause).

Held, that, evaluated as a whole in conformity with the rules of interpretation, the business rescue provisions of the Companies Act assigned voting interests under s 152 of the Act *only to creditors who were creditors of the entity under business rescue at the time the business rescue process commenced* (see [20). The Act placed post-commencement creditors in a different category to the type of 'creditor' to which the business rescue provisions addressed themselves, and where it extended protection

to their interests, it did so in a different way (see [27]). This was so, having regard to the following:

• 'Creditors' were classed along with unions, employees and shareholders as 'affected persons' in terms of s 128 of the Act, and were accordingly viewed as persons 'affected' by the commencement of the business rescue process itself. It was the purpose of the Act to encourage such persons to engage with each other to achieve, insofar as this was possible, the rescue or rehabilitation of the business. (See [21].)

• If just any creditor could vote an interest at a s 152 meeting — even a creditor who, like Mashwayi, appeared to have come onto the scene on the eve of the meeting itself — there would be little to stop speculators or asset strippers preying on business rescue proceedings, blocking the adoption of appropriate business rescue plans, and forcing liquidations where they could be avoided. *This would be inconsistent with the overall purpose of business rescue, to preserve the social value of a business as a going concern and to avoid the destruction of that value that would come about if the company was liquidated.* (See [22].)

• Section 150(2)*(a)*(ii) of the Act required that a business rescue plan contain a 'complete list of the creditors of the company *when the business rescue proceedings began*'. The express exclusion of post-commencement creditors only made sense if those creditors have no voteable interest in the plan. (See [23].)

• Where the Act could have made clear that post-commencement creditors may vote an interest, it failed to do so. In s 135 dealing with post-commencement finance, creditors that advance finance to a company in business rescue were accorded a preferent claim against the company; yet no provision was made for a post-commencement financier to vote an interest at a s 152 meeting. The implication being, post-commencement finance creditors were rewarded with enhanced security, not a say in whether the business rescue plan should be adopted. (See [24].)

• Under s 152, the business rescue plan of a company bound all 'creditors' of the company. The business rescue plan could permissibly provide for the compromise of some creditors' claims. With this in mind, it would make no sense to afford a post-commencement financier a preferent claim against the company under s 135 of the Act, if that claim could be suspended or extinguished under the business rescue plan. (See [25].)

• Section 135 of the Act did not describe post-commencement financiers as 'creditors' at all, but rather as 'lenders'. (See [26].)

Held, accordingly, that Mashwayi's votes should not have been counted, meaning that the plan reached the statutory threshold. The applicants were entitled to the relief they sought. (See [34], [39] and [40].)

ZERO AZANIA (PTY) LTD v CATERPILLAR FINANCIAL SERVICES SA (PTY) LTD AND A SIMILAR APPEAL 2024 (2) SA 574 (GJ)

Appeal — Execution — Application to execute pending appeal — Whether requirements for interim execution met — Meaning of 'irreparable harm' — Alleged presumption of irreparable harm in favour of owner seeking possession of property pending appeal — Evaluation of prospects of success to establish exceptional circumstances — Court's residual discretion after finding that requirements for interim execution met — Majority holding that applicant showed irreparable harm on balance of probabilities without need for reliance on, or evaluation of, presumption of irreparable harm in favour of property owner — Minority finding that no such harm shown on facts — Appeal dismissed — Superior Courts Act 10 of 2013, s 18(1) and (3).

The parties to the present two appeals against the granting of an application for interim execution were a machinery supplier (Caterpillar) and two construction companies (Azania). Azania had purchased machinery from Caterpillar, paid a portion of the purchase price, and then stopped paying the instalments. After cancelling the agreements, Caterpillar sought and obtained an order from the Johannesburg High Court (per Senyatsi J) for the return of the machines by Azania. Azania sought leave to appeal, which prompted Caterpillar to institute an application for interim execution pending appeal under s 18 of the Superior Courts Act 10 of 2013 (the Act). The court below granted the application on 4 October 2023, which led to the present full-court appeal.

In support of its argument for interim execution, Caterpillar relied, inter alia, on a supposed legal presumption of irreparable harm that supposedly kicked in when an owner sought interim relief to obtain possession of its property. It was common cause that Azania had not paid anything on the machinery since October 2021 and that it was still using the machinery. Azania provided no evidence that it had either insured the machinery or of properly maintaining it.

The Johannesburg court, ruling that the jurisdictional requirements of s 18 were met, granted Caterpillar's application, precipitating the instant full-bench appeal by Azania. The issue before the full bench was whether Caterpillar had met the three jurisdictional requirements of s 18(1) and (3), namely the existence of exceptional circumstances justifying execution; that the applicant (in the present case Caterpillar) would suffer irreparable harm if interim execution was not permitted; and that the respondent (in the present case Azania) would suffer no irreparable harm if it was. Caterpillar argued in respect of the second requirement that the irreparable harm it would suffer resided in the wear-and-tear depreciation the machinery would undergo while Azania exhausted its appeals.

The court rendered a split decision, with the minority (per Wilson J) first denying the existence of the presumption relied on by Caterpillar and then reasoning that the decision a quo was wrong because Caterpillar failed to show that it would suffer irreparable harm if interim execution were refused.

Even though Azania's poor prospects on appeal supplied an exceptional circumstance as intended in s 18(1), the wear-and-tear depreciation of the machinery relied on by Caterpillar was a normal cost of doing business, that did not amount to the kind of irreparable harm envisaged by s 18(1). The rules that forbade execution pending appeal were necessary for the protection of poor and vulnerable people, who would often be unable to fully develop their case at first instance and whose claims required filtration through appellate processes before they were fully recognised. (See [16] – [17], [20], [27] – [30].)

The majority (per Opperman J) disagreed with Wilson J's approach to the second requirement, pointing out that Caterpillar did not rely exclusively on a presumption of irreparable harm in its favour and that Wilson J erred in considering such harm in isolation from the other facts of the case, in particular that the machinery was Caterpillar's only security and that there was no evidence on its maintenance or insurance. Since the court had to assume from Azania's silence that the machinery was not being adequately maintained, irreparable harm beyond normal wear and tear was established on a balance of probabilities. In fact, everything pointed to an unscrupulous exploitation of the benefit of possession by Azania, with little or no regard for Caterpillar's rights. Opperman J, relying on the fact that Azania was using the machinery and on the inadequacy of its evidence in respect of insurance and

maintenance, concluded that Caterpillar had proved irreparable harm on a balance of probabilities and that it had no need to resort to presumptions. (See [50] – [62].)

Opperman J pointed out that it could be argued that courts retained a discretion to refuse execution once the three requirements in s 18(1) and (3) were met, in which case the prospects of success would again come into play, presumably to the detriment of parties with extremely poor prospects, like Azania. (Opperman J agreed with Wilson J that the prospects of success should be considered in the determination of exceptionality.) (See [13], [41], [63] – [64].)

In concluding, Opperman J warned against a strict interpretation of s 18(1) and (3) that would prevent Caterpillar from establishing irreparable harm, despite the weak prospects of Azania's appeals and the absence of irreparable harm on its part. It would not only blunt the effectiveness of Senyatsi J's order, but also undermine public confidence in the courts, which had to be seen to enforce their own orders once it became apparent that they were unlikely to be interfered with on appeal. In the light of the above, Opperman J on behalf of the majority dismissed the appeal with costs. (See [65] – [68].)

RAYMENT AND OTHERS v MINISTER OF HOME AFFAIRS AND OTHERS 2024 (2) SA 591 (CC)

Immigration — Visas — Visitor's visas — Spousal visas — Foreign spouse's visa valid only while spousal relationship exists with South African spouse — Visa invalidated if relationship ends — Exception where foreign spouse is parent of child who is South African citizen or permanent resident and foreign spouse is fulfilling his parental responsibilities — Visa valid pending application for new visa — Immigration Act 13 of 2002, s 11(6)*(b)*; Immigration Regulations, 2014, reg 9(9)*(a)*.

Immigration — Visas — Visitor's visas — Holder may not apply to change status attaching to visa while in South Africa — Exception where holder is parent of child who is South African citizen or permanent resident — Immigration Act 13 of 2002, s 10(6)*(b)*; Immigration Regulations, 2014, reg 9(9)*(a)*.

Immigration — Visas — Relative's visas — Holders of may not work — Exception where visa-holder is parent of child who is South African citizen or permanent resident and visa-holder is fulfilling his parental responsibilities — Immigration Act 13 of 2002, s 18(2).

In each instance in this case, a South African citizen had formed a spousal relationship with a foreign national and the couple had had children together. The children were South African citizens. All of the parties presently lived in South Africa, with the foreign parents holding spousal visitor's visas. The foreign parents worked here, and fulfilled their parental responsibilities. However, each spousal relationship had now ended, with the consequence that the foreign parents' visitor's visas had ceased to be valid. A condition of validity of such a visa was an extant spousal relationship. The effect was that the foreign parents would be required to leave the country.

Aggrieved, they brought a constitutional challenge in the High Court to the legislative and regulatory provisions bringing about this state of affairs. Those were ss 10(6)*(b)*, 11(6) and 18(2) of the Immigration Act 13 of 2002, and reg 9(9)*(a)* of the Immigration Regulations, 2014. Those provisions provide (in summary) as follows.

Section 10(6)*(b)*:

'An application for a change of status attached to a visitor's . . . visa shall not be made by the visa holder while in the Republic, except in exceptional circumstances as prescribed [in reg 9(9)*(a)* of the Immigration Regulations].'

Regulation 9(9)*(a)* sets out the list of 'exceptional circumstances'.

Section 11(6):

'Notwithstanding the provisions of this section, a visitor's visa may be issued to a foreigner who is the spouse of a citizen or permanent resident and who does not qualify for any of the visas contemplated in sections 13 to 22: Provided that —

(a) such visa shall only be valid while the good faith spousal relationship exists;

(b) on application, the holder of such visa may be authorised to perform any of the activities provided for in the visas contemplated in sections 13 to 22; and

(c) the holder of such visa shall apply for permanent residence contemplated in section 26*(b)* within three months from the date upon which he or she qualifies to be issued with that visa.'

And s 18(2):

'The holder of a relative's visa may not conduct work.'

The High Court upheld the challenge, and declared the provisions unconstitutional (see [21]).

Here, the application was to the Constitutional Court for confirmation of the High Court's order (see [23]).

This it did, declaring ss 10(6)*(b)*, 11(6) and 18(2), as well as reg 9(9)*(a)*, unconstitutional and invalid by reason of their unjustifiable limitation of the foreign parent and child's rights to dignity and family life, and the child's citizenship rights under s 28(1)*(b)* and s 28(2) (see [93], [95] – [96], [109] and [133]).

The court suspended its declaration for two years to enable Parliament and the Minister of Home Affairs to correct the defects, and in the interim, ordered certain readings-in (see [133]). Those were as follows:

To reg 9(9)*(a)* (which detailed the 'exceptional circumstances' envisaged by s 10(6)*(b)*, in which an application to change the status of a visitor's visa may be made while in South Africa) —

'(iv) is the parent of a citizen or permanent resident child'.

To s 11(6) —

'(a) such visa shall only be valid while the good faith spousal relationship exists, save that in the case of a foreigner whose good faith spousal relationship has terminated and who:

(i) is a parent of a child who is a citizen or permanent resident; and

(ii) is at the time fulfilling, or demonstrates an intention to fulfil, his or her parental responsibilities to that child,

such visa shall be deemed to be valid, pending the outcome of an application by the foreigner for a new visa which must be made within three months of the end of the good faith spousal relationship. Provided further that, if such application is made after the expiry of three months, good cause is shown why it was made after that period.' (See [38].)

To s 18(2):

'The holder of a relative's visa may not conduct work, provided that if —

(a) the South African citizen or permanent resident is a child;

(b) the foreigner is a parent of the child; and

(c) the foreigner is currently fulfilling or demonstrates an intention to fulfil his or her responsibilities to that child,

then the foreigner shall be allowed to work in the Republic for the full duration of the visa.' (See [44].)

The court added that, were the sections and regulation not corrected within the period of suspension, the readings-in would become final. With respect to the applicants, their

visas would remain valid until their applications for a new status were determined. (See [133].)

MUNYAI AND ANOTHER v DIRECTOR-GENERAL, HOME AFFAIRS AND ANOTHER 2024 (2) SA 635 (GP)

Births and deaths — Birth — Registration — Non-South African father and South African mother who are unmarried — Departmental circular requiring paternity test as prerequisite for registration as father — Legal authority of circular — Births and Deaths Registration Act 51 of 1992.

This case concerned a child born of a South African mother and a non-South African father who were unmarried and whose wish for their child was that they be registered as having their father's surname.

However, a prerequisite for registration of a father in these circumstances (non-South African, not married to the child's mother) was that he present a positive paternity test to the registering authority, the Department of Home Affairs. This was required by a departmental circular.

The father duly had the test done and conveyed it to the Department, but it disappeared in the process of transmission between the testing facility and the Department. Flowing from this, the mother and father approached the High Court for an order that the Department register the birth of the child, register the father, and record the child as having his surname.

Held, that whether a departmental circular was legally binding was to be determined with reference to the legislation concerned and whether it envisaged the circular (see [14]). Here, the pertinent Act, the Births and Deaths Registration Act 51 of 1992, did not envisage circulars pertaining to registration of births, and accordingly a paternity test was not a requirement for registration of the father as the child's parent. Moreover, an affidavit attesting to the father's paternity was entirely sufficient as proof thereof (see [14], [16]).

The court accordingly ordered respondents to register the birth of the child (see [17]).

STAY AT SOUTH POINT PROPERTIES (PTY) LTD v MQULWANA AND OTHERS 2024 (2) SA 640 (SCA)

Land — Unlawful occupation — Eviction — Statutory eviction — Student residence — Precondition for application of PIE Act, that dwelling occupiers sought to be evicted from be their home — Eviction sought of students from student residence — Whether residence was students' home — Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

Appellant was the owner of a residence for students at the Cape Peninsula University of Technology. Respondents were students at the University in 2020. Appellant would lease the residence to the University and it would allocate accommodation to students. Here the University had allocated accommodation to the respondents until the end of 2020, but at the end of that year they refused to leave.

This caused appellant, relying on the rei vindicatio, to apply to the High Court for the eviction of the respondents. Respondents contended that the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) applied; that appellant had failed to rely on the Act; and that the application was accordingly defective.

Appellant contended that the residence was not a home, so that on eviction the students, who had come from homes to study and would return to them, would not be homeless, and that, consequently, PIE did not apply.

The High Court dismissed the application and granted leave to appellant to appeal to the Supreme Court of Appeal.

The SCA referenced its own authority that PIE applied only to evictions of individuals from their homes, and it delineated the issue as whether the student accommodation that the University provided was a 'home' (see [10] – [11]).

Held, that it was not (see [17]). Indicators suggesting this were —

- students came from a home to study (with the corollary that the accommodation was not a home) (see [12]);
- the University's provision of accommodation was for a short period (the academic year) and for a limited purpose (to enable their studying at the University) (see [13]); and

• equity required that those who had had the benefit of the accommodation (respondents) should yield to those who had not (the new year's intake of students) (see [16]).

The High Court's refusal to order eviction was, accordingly, an error (see [18]). Appeal upheld, the order of the High Court set aside, and replaced with an order declaring that the Act did not apply to the unlawful occupation by the respondents of the accommodation, and appellant was entitled to evict them (see [20]).

South African Criminal Law Reports (April 2024)

S v MTHANTI 2024 (1) SACR 335 (SCA)

Rape — Sentence — Life imprisonment — Minimum sentence in terms of Criminal Law Amendment Act 105 of 1997 — 'Grievous bodily harm' in item *(c)* of part I of sch 2 to Act — Meaning of — To be understood within context of its use in Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

The appellant had been convicted in the High Court of two counts of rape, three counts of robbery with aggravating circumstances, and assault with intent to do grievous bodily harm. He was sentenced to two terms of life imprisonment for the counts of rape and to various terms of imprisonment relating to the other offences. He had enticed his victims to Pietermaritzburg for possible employment, but instead had assaulted, robbed and raped two of them. The third victim fortunately managed to escape. He appealed unsuccessfully against the sentences to the full court. On appeal to the present court, he contended that the sentence of life imprisonment on the first count of rape was not justified, in that he had not caused grievous bodily harm to the complainant. He contended further that the sentence on the second count was also unjustified, as he had been sentenced on the basis that he had already been convicted of a prior rape offence, but at that stage had not yet been convicted of that offence.

Held, as to the severity of the bodily harm inflicted on the complainant, that there was no definition of grievous bodily harm in the Criminal Law Amendment Act 105 of 1997 (the CLAA), courts had held that, while the injury should not be trivial or insignificant, it need not necessarily be life-threatening, dangerous or disabling. The meaning of the term ought also to be understood within the context of its use in the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 and the rampant

levels of sexual offences in the country. The purpose of item *(c)* of part 1 of sch 2 of the CLAA, which prescribed a minimum sentence of life imprisonment for rape offences involving the infliction of grievous bodily harm, was to ensure that appropriate punishment was imposed for violent conduct that was designed to induce submission to sexual intercourse, given that rape, on its own, was a violent and degrading act. In the present case it was common cause that the appellant had stabbed the complainant with a knife to subdue her so that he could rape her. The wound she sustained was a 0,5-centimetres-wide laceration which required suturing. In the circumstances, the finding that the rape involved the infliction of grievous bodily harm could not be faulted, thereby implicating s 51(1), read with part 1 of sch 2, and the trial court had not misdirected itself in imposing the minimum sentence of life imprisonment. (See [12] – [14].)

Held, however, that the court a quo had erred with regard to the sentence of life imprisonment for the second count of rape, because it was a second conviction of rape committed by the appellant. This was incorrect, as the appellant had at that stage not yet been convicted of the first count. That misdirection justified interference. In the circumstances, a sentence of 15 years' imprisonment was considered appropriate. (See [15] and [18].)

SAVOI AND OTHERS v NATIONAL PROSECUTING AUTHORITY AND ANOTHER 2024 (1) SACR 343 (CC)

Evidence — Admissibility — Privilege — Documents protected by legal professional privilege — Mechanism for considering contested documents in camera — Superior Courts Act 10 of 2013, s 32.

The three applicants were pursuing an application for a permanent stay of prosecution before the Pietermaritzburg High Court. They were charged with bribery, racketeering, money-laundering, fraud and corruption in relation to an alleged criminal enterprise involving the supply of water- purification plants and oxygen self-generating units to the provincial health departments in KwaZulu-Natal and the Northern Cape. There were separate High Court prosecutions against them in both the KwaZulu-Natal and the Northern Cape divisions. The basis of the application was that 69 documents/categories of documents (the contested documents) were seized from

them by the state, allegedly in violation of legal professional privilege. The applicants contended that the extent of this violation was such that prosecuting them would tarnish the administration of justice. In order to prevent further encroachment on their right, they brought an interlocutory application in the Pietermaritzburg High Court in terms of s 32 of the Superior Courts Act 10 of 2013 (the SCA Act), requesting that it employ a mechanism to consider the contested documents in camera (in private). The respondents, the National Prosecuting Authority and the South African Police Service, opposed the application and disputed that the contested documents were in fact privileged. The court dismissed the application. They then applied to the present court for leave to appeal against this dismissal.

The contested documents were identified in an annexure to the founding affidavit before the Pietermaritzburg High Court, but the court did not have sight of the documents. The majority judgment in the High Court held that, to establish a 'special case' in terms of s 32 of the SCA Act, the applicants were required to prove their claim of legal professional privilege, which they failed to do. It further held that the descriptions of the documents in the annexure were insufficient to support a claim of privilege.

Held

The narrow question in the matter was the appropriate procedure for the court determining the application to consider the contested documents. That did not require an assessment of whether the documents were in fact privileged, or whether a violation of legal professional privilege was sufficient to ground an application for a permanent stay of prosecution. Those were questions for the court that determined the said application. As to the appropriate procedure, both the open-justice principle and legal professional privilege were important elements of the judicial system in an open and democratic society, and an appropriate balance had to be struck between the two.

An in-camera consideration of the documents, alleged to be privileged, struck that balance. (See [18] – [20].) The court accordingly crafted an order that catered for the process of considering the documents in camera with confidentiality safeguards. (See [28].)

S v BN AND OTHERS 2024 (1) SACR 353 (ECGq)

Human trafficking — Defences — Customary practices — Conflict between legal systems — Effect of on knowledge of unlawfulness.

At the commencement of its judgment in a criminal trial in the High Court, the court remarked that the present case brought into focus a tension between the line of development of a globally integrated legal system and localised customary uses and practice that constituted customary legal systems. It was a tension which was well recognised within our law and in the development of our constitutional democracy. At the heart of the case, however, was a young woman who had at 13 years of age found herself ostensibly married to a 61-year-old man and coerced into sexual intercourse. The three accused were charged with two contraventions of the Prevention and Combating of Trafficking in Persons Act 7 of 2013. The first accused, the man who ostensibly married the complainant, was also charged with two counts of rape. The second accused was the complainant's uncle, and the third accused was a woman who assisted at the Sunday- school classes the complainant attended. (See [1] and [3].)

The state alleged that between April and October 2016 the accused acted in concert to conclude a forced marriage for the purpose of exploitation between the complainant and the first accused, and that the forced marriage (the first count) was concluded in contravention of s 4(2)*(b)* of the Act. It was furthermore alleged that during November 2016 and April 2017 the accused caused the complainant to be transported between a town in KwaZulu-Natal and a town and city in the Eastern Cape on various occasions in contravention of s 4(1) of the Act (the second count). The first and third accused alleged that they had no knowledge of the unlawfulness of their conduct in respect of the marriage. This absence arose from two factors, namely the belief that they were acting in accordance with cultural practices, and their specific lack of knowledge of the prescripts of the Trafficking Act. (See [5] – [6] and [98].)

The court held that it had to determine whether there was a reasonable possibility that the accused did not know and appreciate that their conduct was unlawful. It was not sufficient to claim a lack of knowledge. The alleged lack of knowledge must in the circumstances, and having regard to the accused, be reasonably sustainable. (See [98] – [99].)

The court held further that the first accused's evidence indicated an acceptance that a customary marriage was premised upon agreement and that a forced marriage was unacceptable from a customary-practice perspective. The fact that he, throughout his testimony, asserted the process of achieving agreement in relation to the marriage, permitted of only one reasonable conclusion, namely that he knew and understood that to conclude a forced marriage was unlawful. The averred lack of knowledge of unlawfulness in relation to the second count was therefore not reasonably possibly true on his own version. The same conclusion applied to the third accused in respect to count 2. Her case was that she was initially not in favour of the first accused's declared intentions because the complainant was young, even though this to her was no impediment. However, once it was conveyed to her that the complainant had agreed, she accepted it because she could not do anything about it, and, in that respect, she went on to describe it ultimately as a beautiful thing. (See [106] – [107].) As to the transportation or transfer for the purpose of exploitation, the avowed purpose of the travel arrangement was that the complainant should be with her husband. The assessment of what the accused reasonably knew or ought to have known was, however, inextricably bound up with their knowledge of unlawfulness in relation to the marriage as a whole. It was the first and third accused's case that they did not know the complainant's age and, in accordance with their custom, did not enquire about her age. They claimed no knowledge of the provisions of the Recognition of Customary Marriages Act 120 of 1998 (the RCMA). In terms of that Act the prospective spouses had to be both above the age of 18 years, both had to consent to the marriage, and the marriage had to be negotiated and entered into in accordance with customary law as set out in s 3(1)*(a)* and *(b)* of the Act. In the event that a prospective spouse was a minor, the consent of both parents, or legal guardian, had to be obtained. There could be no doubt on the evidence that the marriage concluded between the first accused and the complainant was not a legally cognisable marriage in accordance with the RCMA. However, it was not the validity of the marriage itself that was at stake; the central question was whether the purported adherence to cultural practices could negative an inference of knowledge of unlawfulness. The first accused had been told at the outset that the complainant was a child and that she was still too young for marriage, yet he took no steps to satisfy himself that her age was not in fact an impediment to marriage. Added to this was his instruction to another witness to present the complainant as her sister if asked. This clearly reflected an awareness of the

unlawfulness of his marriage to the complainant. The shield of cultural practice or Mpondo custom by the first and second accused to clothe the marriage in some form of legitimacy was not sustainable. No particular cultural practices had been followed, even if it were accepted that in broad terms a process akin to or recognisable as a customary-marriage process was followed. (See [108] – [109] and [111].]

Customary law and practice had to comply with the Constitution and with the provisions of the Bill of Rights. It was to that purpose that the RCMA was enacted and had been on the statute books since 1998. It could hardly be suggested that the annotation and development of customary law to accord with constitutional values and principles were a novel or recent undertaking. The Constitution required that the interests of the child were treated as paramount in all matters that affected the child, and the Children's Act 38 of 2005 gave expression to that principle. The protection accorded to children due to their vulnerability was also a feature of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. There had thus been a transformative process under way for three decades and, to the extent that the accused claimed that they were unaware of, and therefore had no knowledge of, the unlawfulness of concluding a marriage of the child, particularly one as young as the complainant, it was not a claim that could readily be countenanced. (See [117] – [119] and [121].)

The court had no hesitation in accepting the complainant's evidence in respect of the repeated forced sexual intercourse to which she was subjected. Further, that she was, on the evidence, a child with a mental disability and not able to consent to such, and that the state had proved beyond a reasonable doubt that accused 1 was guilty on the two counts of rape. (See [125].)

The court held that s 4(2)*(b)* did not strike at the person or persons who facilitated or participated in the conclusion of the forced marriage. If that were intended the section would no doubt have been worded differently. The alternative count of contravention of s 10(1)*(a)* was framed in terms sufficiently broad to strike at the role performed by both the second and third accused in relation to the conclusion of the marriage, in that it applied to 'any person who . . . *(a)* attempts to commit or performs any act aimed at participating in the commission of' the forced marriage. (See [136] – [137].]

The first accused was accordingly found guilty on all of the counts, and the second and third accused were found guilty on the second count, as well as a contravention of s 10(1)*(a)* of the Act. (See [132] – [133], [138] and [142].)

S v RUITERS 2024 (1) SACR 391 (WCC)

Sentence — Imprisonment — Declaration as dangerous criminal in terms of s 286A of Criminal Procedure Act 51 of 1977 — Generally — Court pointing out disconnect between provisions of s 286A and those of Criminal Law Amendment Act 105 of 1997 — However, no obligation to declare person dangerous criminal, and minimum-sentencing legislation could be applied.

The accused was convicted in the High Court on his plea of guilty to murder, violating a corpse and attempting to defeat the ends of justice. The court noted that the manner in which he had described the premeditated, senseless and cold-blooded killing and dismemberment of the body of the deceased gave a chilling account of an evil and callous person; someone who had no regard for the sanctity of life of any person, to such an extent that the court had great difficulty finding words to describe his evil conduct. (See [9].) He had been assessed after his arrest in terms of the provisions of s 79(2) of the Criminal Procedure Act 51 of 1977 (the CPA), the psychiatrist noting that he was not mentally ill, but had definite psychopathic traits. He had recommended that the court consider declaring him a danger to the physical and mental wellbeing of others, as envisaged by s 286A of the CPA, if convicted. After conviction, the court received a further report in terms of s 286A(2) and (3) of the Act. The examining panel found that the accused indeed represented a danger to the physical and mental wellbeing of other persons, and that he should be declared a dangerous criminal. It found that he showed no genuine remorse for the offence, was deceitful and had a pervasive pattern of violating the rights of others. He also had an antisocial personality disorder, which offered a poor prognosis for rehabilitation. The court noted that, before it could make a declaration declaring a person a dangerous criminal in terms of the CPA, the Act required that the court had to make two definitive findings, namely, that the person represented a danger to other persons and that the community had to be protected against such person.

Held, that the accused had no history of violent behaviour or any previous convictions, but did represent a danger to society, particularly regarding the violent and brutal manner in which he had killed and dismembered the deceased, and his unnatural interest and desire to harm people. That fact was underlined by his conduct in stalking females as indicated on the notes made on his cellphone prior to the murder. The

accused was accordingly a person referred to in s 286A(1). However, there was no obligation on the court to declare the accused a dangerous criminal. (See [17] – [18].)
Held, further, that there was a disconnect between the provisions of the Criminal Law Amendment Act 105 of 1997 (the CLAA) and the provisions of s 286A. If a court made a declaration that a person was a dangerous criminal, it might lead to the court imposing a lesser sentence than life imprisonment. A case, however, could hardly be made out that, once a person was viewed to be a dangerous criminal, that could constitute a fact for a court to conclude that there were substantial and compelling circumstances. In fact, it ought to be a consideration that militated against a finding that there were substantial and compelling circumstances. This was a factor which the legislature had overlooked when the provisions of the CLAA were introduced. (See [20] – [21].)
Held, further, that there could be no doubt that in the present case there were no substantial and compelling circumstances warranting deviation from the prescribed sentence. (See [31].)
The court accordingly imposed a sentence of life imprisonment in respect of the count of murder, 15 years' imprisonment in respect of violating a corpse, and five years' imprisonment in respect of the count of attempting to defeat the ends of justice. All the sentences were to run concurrently. (See [34].)

S v BROWN AND OTHERS 2024 (1) SACR 403 (ECMk)

Evidence — Trial-within-trial — Finding of court — Determination to be made as to whether evidence admissible in terms of s 35(5) of Constitution — Failure to make determination before defence case begins vitiates trial.

The appellants were convicted in a magistrates' court of contravention of the Marine Living Resources Act 18 of 1998 (the Act) relating to abalone, as well as racketeering and money-laundering in contravention of the provisions of the Prevention of Organised Crime Act 121 of 1998 (POCA), together with other counts, the present judgment dealing only with the abalone and racketeering counts. At the trial the state's case rested largely on the search warrants, the evidence that was obtained as a result of searches conducted, some with warrants and others without warrants, and the s 204 witnesses who were involved in the racketeering activities. The validity of the

search warrants, and the evidence obtained as a result thereof, was strongly contested at trial and was at the heart of the present appeal against their convictions.

A trial-within-a-trial was held to determine the validity of the search warrants and the admissibility of the evidence obtained as a result thereof. After having heard evidence of the police officials on the searches in respect of the racketeering activities, the trial court ruled and found certain exhibits to be invalid. It further ruled that the state would be allowed to lead evidence so that I could make a determination in terms of s 35(5) * of the Constitution at the end of the state's case. The court ultimately found to be valid certain of the searches, the video recordings of abalone-processing and the search warrants of the first and second appellants. No ruling was made on the search with a warrant of the third appellant and on the search without a warrant of the second appellant's car. The trial court further made no determination in terms of s 35(5). (See [11] – [16].)

Held

When the state's case was closed, the appellants had no idea what evidence was admissible or not admissible. In the circumstances, the trial court had committed an irregularity by not making the determination in terms of s 35(5) at the end of the trial-within-a-trial, or at the end of the state's case. (See [29].)

Even though the evidence may have been obtained unconstitutionally, it would not necessarily render the trial unfair. But before such evidence was admitted, the trial court was required to ascertain whether the admission of such evidence would not render the trial unfair, or otherwise be detrimental to the administration. The trial court did not, however, apply its mind to s 35(5). This was an irregularity sufficient to render the trial unfair. (See [39] – [40].) In the result, the appeal was upheld, and the convictions of the appellants and the sentences on the counts involved were set aside and replaced with a finding of not guilty. (See [43].)

S v MKHWEBANE 2024 (1) SACR 415 (ML)

Intoxication — Committing unlawful act under influence of intoxicating substance — Contravention of s 1(1) of Criminal Law Amendment Act 1 of 1988 — Sentence — Accused acquitted of murder of grandmother after plea of guilty to alternative count of contravention of s 1(1) — Under influence of powdered Kat and alcohol — Showed remorse and was not danger to society — Sentenced to five years'

imprisonment under s 276(1)*(i)* of Criminal Procedure Act 51 of 1977 and further eight years' imprisonment wholly suspended.

The accused pleaded not guilty to a charge of murder, but guilty to the alternative count of a contravention of s 1(1) of the Criminal Law Amendment Act 1 of 1998 (the Act). He admitted that he had killed his grandmother by stabbing her multiple times. (See [4.10] – [4.12].) He stated that he was under the influence of Kat in a powdered form, and alcohol. The powdered form was apparently a more potent form than the leafy forms and had the effect of cocaine, as well as that of Tik. He stated that he had blacked out and was not aware of what he was doing. His statements were corroborated by the unanimous reports of two psychiatrists. The court was satisfied that the accused's lack of criminal capacity had been established beyond reasonable doubt. He was therefore acquitted on the main count and found guilty as charged on the alternative count of a contravention of s 1(1) of the Act. (See [10].)

As to sentence, the court was convinced that the accused was genuinely remorseful. The question was whether he was a suitable candidate for rehabilitation and/or a danger to society. The court held that the evidence established that he was not a danger to society or had a propensity to commit violent crimes. It appeared that he was loved in his community. His plea statement and the evidence pointed to the fact that he was a candidate for rehabilitation. There was further no call for retribution from the deceased's family. On the contrary, they asked for mercy for him. Although deserving of punishment, the court held that the circumstances did not warrant the removal of the accused from society for a long time. It accordingly sentenced him to five years' imprisonment in terms of s 276(1)*(i)* of the Criminal Procedure Act 51 of 1977, and a further eight years' imprisonment which was wholly suspended for five years. (See [46] – [48].)

S v BJANYANE 2024 (1) SACR 428 (GJ)

Appeal — By Director of Public Prosecutions in terms of ss 315 and 316 of Criminal Procedure Act 51 of 1977 — After acquittal of respondent in criminal trial — Nothing in text or context of ss 315 and 316 to suggest that appeal by state could lie to full court from acquittal in High Court — Matter struck from roll.

After the acquittal of the respondent in the criminal trial in the High Court, the state applied for leave to appeal in terms of s 316 read with s 315 of the Criminal Procedure Act 51 of 1977 (the CPA). The application was founded on a wide variety of points which the state framed as questions of law for the court to reserve and be referred to the Supreme Court of Appeal. The application was opposed on the basis that what the state deemed to be questions of law were questions of fact. The court, feeling bound by precedent, reserved certain questions of law which it referred to the full court. The respondent raised a point in limine, that the court did not have jurisdiction to hear the appeal, and that s 316 was only applicable to an accused and not to the state; and that the only section under which the state could appeal was s 319 of the CPA. The state contended that s 319 did not apply, as that section only dealt with matters that were still pending before the trial court, and that this was not so in the present matter. The court held that it was clear from the plain wording of s 315 * that the legislature intended for appeals originating in the High Court as a court of first instance to be heard by the Supreme Court of Appeal. The plain text of s 316(1)*(a)*† made it clear that the section only had reference to an accused who could apply for leave to appeal against a conviction in the High Court. There was nothing in the text or the context of ss 315 and 316 to suggest that an appeal by the state could lie to a full court. If those sections were to be interpreted as giving the state such option, it would be in direct conflict with s 319 of the CPA and would therefore be insensible and unbusinesslike. It therefore followed that the court did not have jurisdiction to hear the appeal, and that the point in limine had to succeed. (See [16] – [27].) The appeal was struck off the roll.

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS v MLAMULELI 2024 (1) SACR 435 (FB)

Prevention of crime — Restraint order — Rescission of — Final order made in absence of respondent whose legal representative was in court whilst order made in chambers without their knowledge — Order rescinded in terms of common law — Whether court having jurisdiction to do so — Court having authority under common law to rescind on grounds existing at time of order — Prevention of Organised Crime Act 121 of 1998, ss 26(1) and 26(10).

The High Court had granted a restraint order over certain assets of the respondent. On the return day, the respondent's attorneys were in court awaiting the calling of the

matter, unaware that the matter was at the same time being heard in chambers, where the court made a final order against the respondent. The respondent then applied for rescission of the judgment based on the common law. The court granted the rescission order. The appellant appealed against the order, contending that a restraint order under the provisions of s 26(1) of the Prevention of Organised Crime Act 121 of 1998 (POCA) could not be rescinded.

Held, that the High Court had no inherent jurisdiction to rescind an order issued in terms of s 26(1) of POCA, but it could do so if one or other of the recognised common-law grounds existed at the time when the restraint order was granted, absent which it could only be done in terms of and on the grounds of s 26(10). * Had it not been for s 26(10), the High Court would not have been entitled and would not have had the jurisdiction to rescind the restraint order based on grounds that came into existence after the order had been granted. (See [23].)

Held, further, that the court a quo therefore did not err by setting aside the final order on common-law grounds, based on circumstances that prevailed at the date when the final order was made. There was therefore no basis upon which the court could interfere with the discretion exercised by the court a quo in granting rescission. (See [32].) The appeal accordingly had to be dismissed.

ALL SA LAW REPORTS APRIL 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)

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 recategorise 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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