**LEGAL NOTES VOL 5/2024**

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## South African Law Reports May 2024

### DEMOCRATIC ALLIANCE AND ANOTHER v PUBLIC PROTECTOR AND OTHERS 2024 (3) SA 1 (CC)

**Appeal** — Execution — Execution of judgment pending appeal — Judgment declaring decision by President to suspend Public Protector to be constitutionally invalid — Such decision by President amounting to 'conduct' as contemplated in s 167(5) and must, in accordance with applicable rules, be referred to Constitutional Court for confirmation — Constitution, s 167(5), s 172(2)*(a)* and *(d)*; Superior Courts Act 10 of 2013, s 18(1). **Public Protector** — Suspension — Apprehension of bias — Conflict of interest — President suspending Public Protector while under investigation by her office — President not exposing himself to any situation involving risk of conflict between his official responsibilities and private interests — Constitution, ss 96(2)*(b)*.

**Relevant constitutional provisions and principles**

- s 167(5), which provides that '(t)he Constitutional Court makes the final decision whether . . . *conduct of the President is constitutional*, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force';

[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!**

- s 172(2)*(a)*, which provides that 'the Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court'.
- the principle that, while the Supreme Court of Appeal or a High Court (or a court of similar status) may make an order concerning the constitutionality of an Act of Parliament, a provincial Act or conduct of the President, an order of unconstitutionality has no force unless it is confirmed by the Constitutional Court (CC);
- s 172(2)*(d)*, which provides that 'any person or organ of state with a sufficient interest may appeal, or apply, directly to the CC to confirm or vary an order of constitutional invalidity by a court in terms of this subsection';
- s 96(2)*(b)*, which provides that ministers and deputy ministers may not 'act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests'; and
- s 194(3*)(a)*, which empowers the President to suspend the Public Protector (PP) from office.

**Background**

The National Assembly established a Section 194 Committee in April 2021 to consider a motion for the removal of the PP from office. They, however, suspended their investigation pending the outcome of a CC case which involved the PP. After judgment in that case, the Speaker of the National Assembly, on 10 March 2022, wrote a letter to the President, advising him that they, the Section 194 Committee, resolved to continue with their consideration of the motion for the removal of the PP from office. (See [7].)

On 17 March 2022 the President wrote a letter to the PP informing her of the letter he received from the Speaker and inviting her to provide reasons why he should not exercise his powers in terms of s 194(3)*(a)* of the Constitution to suspend her pending the finalisation of the enquiry of the Section 194 Committee. The PP, through her attorneys, on 18 March 2022, wrote to the Speaker, demanding a retraction of the 10 March letter sent by the Speaker to the President, which the Speaker refused to do. And on 22 March 2022 the PP wrote a letter to the President, informing him that there were multiple instances of conflict of interest, which she stated precluded him from

personally suspending her. In response, the President, through the State Attorney, informed the PP that he would act personally and did not consider himself to be disqualified from doing so. (See [8] – [10].)

On 1 April 2022 the PP filed a High Court review application, in two parts. In part A she sought urgent interdictory relief against the Section 194 Committee, the Speaker and the President; in part B she sought orders declaring the conduct of the Speaker in writing the letter to the President, the conduct of the President in writing the letter initiating the suspension process, and the conduct of the Section 194 Committee in proceeding with the s 194 enquiry, irrational, unconstitutional and invalid. On 26 May 2022 the PP's attorneys addressed a letter to the President, setting out her representations as to why she should not be suspended. (See [11] – [13].)

While this application was pending, the President, who was already the subject of a number of PP investigations, became the subject of a new investigation. On 1 June 2022 criminal charges were laid against him in relation to allegations of criminal misconduct involving foreign currency allegedly stolen at his Phala Phala farm. By 3 June 2022 the Office of the PP had received a complaint from a political party against the President, requesting an investigation; on 7 June 2022 she wrote a letter to the President, instructing him to answer a number of questions in relation to an investigation she was conducting as a result of the complaint; and on 8 June 2022 the PP publicly announced her intention to launch an investigation into the Phala Phala incident. (The President submitted his reply to these questions on 22 July 2022.) (See [14] – [15].)

On 9 June 2022 the President suspended the PP, and the Deputy PP took over the functions of PP. This was one day before the High Court judgment was delivered, dismissing part A of the PP's review application. As a result of the President's decision to suspend her, the Public Protector filed a notice to amend part B of the original application, seeking instead an order declaring the decision to suspend her irrational, unconstitutional and invalid. (See [16], [21] – [22].)

A full court considered part B and delivered its judgment on 9 September 2022. It dismissed the relief the PP had sought against the Section 194 Committee and the Speaker but held that an objectively reasonable apprehension of bias prevented the President from exercising his powers under s 194(3)*(a)* of the Constitution to suspend her. This bias also meant that the President acted contrary to s 96(2)*(b)*, by exposing himself to a situation involving the risk of a conflict between his official responsibilities

and private interests. The full court therefore declared the President's decision to suspend the PP invalid, and set aside the suspension effective from the date of its order. (See [29], [36] – [38].)

The PP next approached the High Court, under s 18 of the Superior Courts Act 10 of 2013, to render the judgment of the full court operational and executable pending any application for leave to appeal or appeal delivered in respect thereof. The PP argued that the part B order was not made in terms of s 172(2)*(a)* of the Constitution and was thus not subject to confirmation by the CC. According to her, the order was executable in the interim, provided a successful application was made in terms of s 18(1) and (3) of the Superior Courts Act. The High Court (the same full bench which dealt with the part B application) held that the decision to suspend the PP amounted to 'conduct of the President' under ss 172(2)*(a)* and 167(5), and that the order of the High Court had to be confirmed by the Constitutional Court before it had any effect. Accordingly, the court concluded that s 18 did not apply. (See [40] – [45].)

**Present case**

In the main it concerned three applications: two by the Democratic Alliance (DA) and the President, in which they appealed, alternatively applied for leave to appeal, directly to the CC under s 172*(d),* against the full court's order in respect of the part B application; the third was an urgent application for leave to appeal brought by the PP against the full court's dismissal of her s 18 application. (See [1] – [4], [86].)

**Issues**

(1) Whether the part B order was subject to confirmation by the CC in terms of s 172(2)*(d)* of the Constitution. This depended on whether the President's exercise of the power afforded to him in s 194(3*)(a)* of the Constitution, to suspend the PP from office, constituted 'conduct' as envisaged in ss 167(5) and 172(2)*(a)*. If it were such conduct, then the declaratory order of the full court, that the PP's suspension was unconstitutional, would be subject to confirmation by the CC, and the DA and the President may appeal to the CC as of right in terms of s 172(2)*(d)* of the Constitution. (See [58], [88], [106].)

(2) Whether, in suspending the PP, the President acted in breach of s 96(2)*(b)* of the Constitution, in that the decision was biased, alternatively the PP's apprehension that the President would not bring an open mind in deciding whether to suspend her was reasonable.

**Main submissions**

As to (1), the PP argued that the relevant part of the High Court's order did not relate to the conduct of the President as contemplated in s 172(2)*(a)* of the Constitution, and thus required no confirmation by this court. That being so, there was no valid s 172(2)*(d)* application before the court, and the grounds of direct appeal advanced by the DA and the President were not reached.

As to (2), the PP submitted that the President was disqualified by s 96(2)*(b)* of the Constitution from suspending her due to conflicts of interest allegedly arising from various complaints involving serious and impeachable conduct against him, which had been or were still being investigated (see [113]).

The DA argued that her suspension was a necessary precaution in the light of credible allegations of misconduct and incompetence against her and the ongoing process to remove her; and that in the current circumstances it was necessary to protect the integrity of the Office of the PP and the effectiveness of the s 194 process while an investigation was under way. The DA also submitted that a claim of personal bias rested on the assumption that a certain decision would benefit the decision-maker. The President mostly aligned himself with the DA's arguments. (See [46] – [55], [96].)

As to the PP's application for leave to appeal against the s 18(1) order of the full court, the DA contended that s 18 did not apply to orders that were the subject of confirmation under s 172(2) of the Constitution.

**Held**

(1) This court had, in a number of cases which also dealt with decisions that were set aside for constitutional invalidity and were subject to confirmation by this court within the ambit of ss 167(5) and 172(2)*(a)*, determined that a decision of the President constituted conduct which required confirmation. The PP was unable to distinguish these analogous cases. The phrase 'any conduct of the President' should be given wide meaning and interpretation. The purpose of the provisions was to ensure that this court should control declarations of constitutional invalidity made against the highest organs of state. The decision to suspend the PP was therefore subject to confirmation as enumerated in ss 167(5) and 172(2)*(a).* (See [110], [112].)

(2) The essential elements of a conflict between official responsibilities and private interests were risk of a conflict between them and conduct exposing them to that risk. The risk, to be real, must be of such a nature that it would reasonably be apprehended by a reasonable person. The only basis on which the High Court found that the

President could be biased was that he had suspended the PP shortly after she initiated an investigation into allegations about his conduct at Phala Phala. (See [117] – [121].) Whether the President's decision to suspend the PP was biased depended on whether he stood to gain a benefit from the decision. The mere fact that the PP was investigating him could not create a reasonable apprehension of bias or expose him to a risk of conflict between his official responsibilities and private interests. The evidence did not show that the President acted in a manner which exposed him to a situation involving the risk of a conflict between his official responsibilities and private interests. (See [121], [124].)

The President did not suspend the PP to prejudice her; the suspension was only a precautionary one and did no harm to her, as she remained on full pay and had time to properly attend to her defence in the s 194 enquiry. The full court inexplicably isolated the events of 7 – 9 June 2022, overlooking critical evidence that amply showed that the suspension was long in the making, and that the President became aware that the full court's judgment in part A would be delivered on 10 June 2022 only after he had already issued the suspension letter. (See [124], [132].)

In all the circumstances, there was therefore no exposure on the President's part to the risk envisaged in s 96(2)*(b)*. Having reached this conclusion, it was unnecessary to decide the question of bias. At the level of fact (that is, whether there was a reasonable apprehension of bias), the conclusion would plainly be the same as that reached in discussing the facts under s 96(2)*(b).* Accordingly, the DA and the President's appeals would succeed. (See [140] – [141].)

**KGA LIFE LTD v MULTISURE CORPORATION (PTY) LTD AND OTHERS 2024 (3) SA 51 (SCA)**

**Insurance** — Funeral group scheme — Termination of contract between intermediary and insurer — Effect of 2017 Insurance Act on contract between insurer and intermediary concluded before its promulgation — Contract not complying with provisions of 2017 Act unenforceable by reason of supervening illegality — Insurance Act 18 of 2017.

In January 2015 KGA Life Ltd (KGA), a registered 'licensed insurer' in terms of the Long-Term Insurance Act 52 of 1998, and Multisure Corporation (Pty) Ltd (Multisure), an independent intermediary, entered into two agreements in terms of which KGA agreed to underwrite Multisure's funeral cover group scheme.

The majority of the clients were social grant beneficiaries, and the agreements contemplated deductions for funeral cover to be made by the South African Social Security Agency (SASSA) and paid directly to the intermediary (Multisure). During the subsistence of the aforesaid agreements, SASSA decided that it would make payments directly to the insurer (KGA) under the group scheme, and appointed Q Link Holdings (Pty) Ltd to administer the deductions from the social benefits administered by SASSA.

In July 2021 Multisure cancelled the agreements with KGA and entered into a new intermediary agreement with African Unity Life Ltd (AUL) as the underwriter. Multisure wanted Q Link to change the deduction codes to allow payment of the premiums of Multisure's clients to African Unity Life, instead of KGA. When KGA would not cooperate — by notifying Q Link of the cancellation of the agreement and transferring its underwriting of the existing funeral cover policies to AUL — Multisure approached the High Court, where is was granted declaratory relief to the effect that the intermediary agreement between Multisure and KGA had been cancelled and that the group scheme established in terms of the agreement had been terminated. The High Court also directed Q Link to change the deduction codes to ensure payment of premiums to AUL.

The present case concerned KGA's appeal to the Supreme Court of Appeal against the High Court's order. The SCA identified the decisive issue as the effect that the Insurance Act of 2017 had on the attempt by Multisure to cancel the agreement, more particularly whether there was a contract in existence to cancel, having regard to its provisions. (See [16].)

**Held**

The 2017 Act brought about substantive changes to the definition of a group scheme and a policyholder. It replaced the system of registration of insurers with a licensing system, and recognised the need for transitional provisions which allowed time for the conversion of registration to licensing. Given the provisions of the 2017 Act, each member of the group scheme had to individually cancel the policy with the insurer KGA, as the group scheme under Multisure no longer existed. There was no allegation that either Multisure or KGA was unaware of the fact that steps had to be taken to undo the group scheme and replace it with contractual relationships between the parties which would be lawful under the 2017 Act. It was indeed unlawful for them to

proceed as they did once KGA ceased to be a registered insurer and became a licensed insurer. (See [16], [26] – [18], [34].)

The central, if not the sole, purpose of the agreements was the conduct of an unlawful group funeral insurance scheme which was prohibited under the 2017 Act. The general rule applied, that things done contrary to statutory prohibition were invalid, and thus also contracts for the performance of those things are invalid. In the result, there was no contract to be cancelled at the time Multisure purported to do so, and Multisure had no power or right to appoint AUL as a substitute for KGA as the underwriter of what had become its defunct group funeral insurance scheme. Multisure equally had no right or power to ask Q Link to make deductions from the SASSA entitlements of its former members and to pay those moneys over to AUL. KGA's appeal would accordingly succeed. (See [38], [46] – [47], [54], [55].)

**LINDSEY AND OTHERS v CONTEH 2024 (3) SA 68 (SCA)**

**Practice** — Judgments and orders — Foreign judgment — Enforcement — US (California) judgment for delivery of shares — Judgment placing monetary value on shares — Writ of possession issued — Sheriff unable to obtain possession — By operation of law, judgment then becoming enforceable as if it were money judgment — Writ of execution issued — Judgment creditors suing in South African court for provisional sentence on judgment and writs — Whether judgment and writs were liquid documents.

In this matter one Conteh, without the permission of corporation A, caused corporation B to transfer shares to corporation C. Corporation C was owned by Conteh.

Appellants brought a derivative action on behalf of corporation A and in a California court obtained an order (order 1) directing Conteh to turn over the shares to appellants. The order also placed a value (for security purposes) on the shares. A writ of possession was issued. Two further orders were later issued, order 2 clarifying order 1, and order 3 affirming order 1 and the writ.

The sheriff then proceeded to serve the writ, but Conteh failed to turn over the shares. This prompted the sheriff to serve a demand on Conteh, which Conteh evaded. Thereupon, by operation of California law, order 1 became enforceable in the same

manner as a money judgment for the value of the shares specified in the order. Appellants procured a writ of execution.

Meanwhile, Conteh had relocated to Johannesburg. There the appellants approached the High Court, contending orders 1 – 3 were a money judgment, so a liquid document, and so entitling them to provisional sentence for the amount in order 1. Conteh asserted that order 1 was a judgment for delivery of shares and thus not a liquid document.

The High Court reasoned that external evidence on California law was required to prove that the order for delivery of the shares was converted by law into a money debt. Accordingly, evidence being required, the documents were not liquid, and so not satisfying this requirement for provisional sentence.

The High Court gave leave to the appellants to appeal to the Supreme Court of Appeal. The issue was the proper characterisation of order 1, specifically whether it was a money judgment (see [26]).

**Held**

*(a)* Order 1 required Conteh to deliver the shares to appellants and also put a value to them. It did not order Conteh to pay moneys to appellants (see [30]).

*(b)* Order 1, unlike a money judgment, was not immediately enforceable (further steps were required before it could be enforced) (see [31]).

*(c)* California law permitted order 1's enforcement 'in the same manner' as a money judgment, but did not render order 1 a money judgment (see [32]).

*(d)* Appellants had sought the High Court's enforcement of what they characterised as a money judgment. They had not asked the High Court to execute the California enforcement mechanism (triggered by the failure to obtain possession of the shares) (see [34]).

Accordingly, order 1 was not a money judgment (a liquid document), with the result that the precondition for grant of provisional sentence, that it be on a liquid document, was absent (see [21], [35]).

Appeal dismissed (see [37]).

**ABSA BANK LTD v PRINSLOO FAMILIE TRUST AND OTHERS 2024 (3) SA 80 (GJ)**

**Estoppel** — Res judicata — Functus officio principle — Will apply only where common cause or beyond dispute that judgment bringing res judicata doctrine into operation —

In event of dispute, court duty-bound to determine that dispute and cannot avoid doing so on basis that it is functus officio.

**Practice** — Judgments and orders — Default judgment — Abandonment — Effect — Court functus officio, but may then decide that res judicata should not operate — Party asserting that contemplated action barred by operation of res judicata to file special plea to that effect — Considerations of equity decisive in court's decision to relax operation of res judicata.

**Practice** — Judgments and orders — Default judgment — Rescission — Right to seek rescission under rule 42(1)*(a)* of Uniform Rules of Court or common law available only to absent party, not party that originally sought and obtained judgment.

In March 2020 Absa Bank Ltd (Absa) instituted action for almost R19 million against the five defendants, jointly and severally. In November 2022 the court entered default judgment in that sum against the third defendant, Prinsloo, who had failed to deliver heads of argument. When Prinsloo applied for leave to appeal against the default judgment, Absa, convinced that its particulars lacked merit, proposed conditionally to abandon it. * The proposal was accepted, and Absa abandoned the default judgment against Prinsloo on 13 February 2023. The remaining defendants and Prinsloo then argued that, since the default judgment had — despite its abandonment — finally disposed of the suit between them and Absa, the entire action had become res judicata.

In March 2023 Absa applied to the present court to rescind the default judgment against Prinsloo under rule 42(1)*(a)* of the Uniform Rules of Court, alternatively the common law, on the ground that its particulars of claim had been excipiable. Absa's rescission application was opposed by way of counter-application by Prinsloo and the other defendants. They sought the dismissal of Absa's rescission application on the above-stated ground that the court was functus officio and the entire action res judicata.

The court summarised the issues before it as follows (see [25]):

- Whether Absa's abandonment of the default judgment meant that it had forfeited the right to rescind it either under rule 42(1)*(a)* or the common law.
- Whether the default judgment rendered the court functus officio.
- Whether the default judgment was res judicata between Absa and Prinsloo and between Absa and the remaining defendants, thereby finally disposing of the entire *lis*.

- Whether Absa had legal competence to institute proceedings for the rescission of the default judgment, either under rule 42(1)*(a)* or the common law.

**Held**

Abandoning a default judgment did not irretrievably deprive the abandoner of the right to request its rescission under rule 42(1)*(a)* or the common law. Nor would abandonment necessarily (or even ordinarily) result in a successful defence of res judicata, for the doctrine could be relaxed where a substantial injustice would result from its application. While finality, in the sense of functus officio, applied once judgment was entered, it was always open to a party to argue that res judicata should, in the prevailing circumstances, be relaxed. If the court agreed, finality would not have been reached and the court would not be considered functus officio. Where the applicability of res judicata was disputed, the court was duty-bound to determine said dispute, and could not avoid doing so by claiming that it was functus officio. (See [32], [39], [41] – [49].)

In the present case the doctrine of res judicata had to be relaxed since it would be pertinently unjust to deprive Absa — which had not by its abandonment intended to gift Prinsloo millions of rands and which had no alternative remedy (see below) — of redress against her. And the remaining defendants were equally barred from raising res judicata to resist Absa's claims. Since they were, in any event, not even parties to the default judgment, they fell short of one of the essential elements (*idem actor*) to sustain the defence. Absa was, moreover, perfectly entitled to proceed against them as debtors in solidum, which entitlement would have endured, even if a situation of res judicata had obtained between Absa and Prinsloo. (See [44] – [45], [50] – [54].)

While it had been improper for Absa to seek default judgment on defective particulars, and rule 42(1)*(a)* was *notionally* available to it to obtain rescission, the words 'in the absence of any party affected thereby' were of a limiting nature. They confined the remedy under rule 42(1)*(a)* to the absent party only, and excluded the party which had initially sought and obtained the judgment. Absa was not the absent party and could therefore not rely on the rule to secure the required rescission. And Absa's reliance on the common law was equally misplaced because the common-law remedy is confined to persons who in consequence of some or other default had been saddled with a judgment against them. It followed that Absa had no alternative remedy. (See [66] – [73].)

In the result, the present court was not functus officio and the default judgment could not be treated as a final judgment. Res judicata did not arise, whether as between Absa and Prinsloo or as between Absa and the remaining defendants. The action would consequently proceed in the ordinary course. (See [74], [76].)

**AHMR HOSPITALITY (PTY) LTD WINELANDS VENUE v DA SILVA 2024 (3) SA 100 (WCC)**

**Contract** — Enforcement — Public policy and fairness — Refusal to refund deposit paid pursuant to cancellation of agreement booking wedding venue as result of Covid-19 pandemic — Fairness and morality dictating that refusal to return deposit not bona fide.

This case concerned an appeal against a magistrates' court order, which granted summary judgment in favour of Ms Da Silva against AHMR Hospitality (Pty) Ltd (AHMR), for the return of the deposit of R50 000 she paid in terms of a venue-hire agreement between them that was cancelled because of the Covid-19 pandemic.

The agreement, entered into on 23 November 2019, was for AHMR to host Ms Da Silva's wedding at their Bakenhof Winelands Venue; the deposit was paid to reserve the date, 2 May 2020. As a result of the Covid-19 pandemic and the restrictions imposed on travel and social gatherings from March 2020 onwards, the parties agreed to postpone the event to 3 October 2020. However, on 15 May 2020 Ms Da Silva notified AHMR that because of 'the prospect of travel [not looking] promising', they wanted to cancel their booking. As a gesture of goodwill, she requested AHMR to provide her with a schedule of costs already incurred and to refund the balance of the deposit to her. AHMR did not provide the requested schedule or attend to the refund of the deposit.

In the subsequent action instituted by Ms Da Silva, AHMR pleaded a bare denial that it was liable to refund Ms Da Silva any amounts at all. In its affidavit opposing summary judgment, AHMR's main complaint was that the application was not based on a liquid document or liquidated amount of money, but it also put forward the defence that Ms Da Silva was still bound by the terms of the agreement in accordance with the *pacta sunt servanda* principle. AMHR went on to allege that Ms Da Silva had cancelled the agreement without ever giving it the opportunity to perform in accordance with the agreement. The magistrate held that this defence did not not raise a triable issue. AMHR's principal grounds of appeal (in its notice of appeal) were that the magistrate

had erred, inter alia, by failing to take into account clause 2.1 of the agreement, which provided for a deposit being non-refundable. (See [7] – [8], [11], [18].)

In the present case, the appeal court requested AHMR to make additional submissions regarding, inter alia, whether public policy or fairness was a consideration or factor to be taken into account in the court's adjudication of the matter. In its replying supplementary note, AHMR suggested that the court was not entitled to enquire as to whether the contract was unenforceable on the basis of impossibility of performance by the appellant and/or unfairness as a result of public policy, based on the lockdown restrictions. (See [16] – [17].)

**Held**

A defendant could not for the first time raise defences in its affidavit opposing summary judgment, where no such defences existed in its plea, or make out a case or defence in its heads of argument when no such case was pleaded in its papers. The magistrate was confronted with a bald denial by the appellant in its plea; furthermore, its opposing affidavit did not contain the issues that were consistent with the grounds of appeal relied upon in the appellant's notice of appeal. There was no misdirection on the part of the magistrates' court; it made an evaluation based on the papers and evidence before it. On this basis alone, the appeal would fail. (See [14], [16].) The Constitutional Court has cautioned that the principle of *pacta sunt servanda* should be honoured and that the power of courts to enforce unfair agreements should be exercised sparingly, and only in the clearest of cases. This was one of those cases. It seemed as if AHMR opportunistically held on to Ms Da Silva's money when, given the prevailing conditions at the time, it was not entitled to. Their actions were not only *contra bonos mores*, but performance of the contract was impossible due to the prevalent conditions — and it would have been immoral for the appellant to have held the respondent ransom and to dictate when they could get married, as a means or entitlement for them to retain the deposit. Ms Da Siva was willing to pay for administrative expenses that the appellant incurred. This was reasonable conduct. Instead, AHMR relied upon clause 2.1 which provided for a deposit being non-refundable, in circumstances which public policy dictated would not have been bona fide. The operation of *pacta sunt servanda* would have been applicable, had the restrictions of the Covid-19 pandemic and the attendant lockdown restrictions not been in place. Fairness and morality dictated that the retention of the deposit was not bona fide. There was no misdirection

in the magistrate's finding in this regard. The appeal would therefore fail. (See [22] – [23].)

**CC v GC 2024 (3) SA 109 (WCC)**

**Magistrates' court** — Civil proceedings — Divorce — Jurisdiction of reginal court in divorce matters and 'any question arising therefrom' — Whether counterclaim in divorce action constituted question 'arising' from divorce action — Question in counterclaim was whether damages were payable in amount claimed, which was not question arising from divorce proceedings — Magistrates' Courts Act 32 of 1944, s 29(1B).

Section 29(1B) of the Magistrates' Courts Act 32 of 1944 provides for regional courts to 'have jurisdiction to hear and determine suits relating to the nullity of a marriage or a civil union and relating to divorce between parties and to decide upon any question arising therefrom'.

The parties were married out of community, without application of the accrual system. In their divorce action in the regional court, CC raised a special plea to GC's second counterclaim of approximately R1,7 million, that it exceeded the monetary jurisdiction of the regional magistrates' court, and so should be dismissed.

The present case concerned CC's appeal to the High Court, the magistrates' court having dismissed her special plea. At issue was whether the counterclaim was a question arising from the divorce action, as contemplated in s 29(1B).

The counterclaim was based on an agreement that GC alleged he entered into with CC in 2011, that she would be entrusted with the administration of his financial affairs and would attend to the administration thereof. In administering his affairs, she was required to collect rentals due to him, pay bond instalments, pay property levies and pay municipal rates and taxes. The allegations were that she breached their contract when she held on to moneys instead of transferring them to him. (See [12] – [13].)

It was submitted on behalf of CC that the counterclaim was entirely unrelated to the divorce; it was a claim that could just have as easily existed between the defendant and some third party appointed to administer his financial affairs, who then subsequently ran off with the money. GC's submissions as to why the claim was sufficiently connected to the divorce were that, *(a)* since success in the counterclaim would affect the plaintiff's patrimonial position, it was relevant to the division of

patrimonial benefits under s 7(5)*(d)* of the Divorce Act 70 of 1979; *(b)* that under the agreement CC was to use the difference between rental moneys received and expenses paid to 'contribute to the parties' household expenses, so it was relevant to maintenance; and that the reasons for the irretrievable breakdown of their marriage included her breach of the agreement. (See [20] – [21], [30].)

**Held**

In enacting the amendment to the Magistrates' Courts Act, the legislature did not simply provide that the Regional Magistrates' Court would hear divorce actions. It employed language to extend the scope of jurisdiction to include 'questions arising' from a divorce. The phrase 'any question arising therefrom' forged a link or connection between the subject (divorces) and the questions associated with it. To fall within the ambit of the regional magistrates' court's jurisdiction, therefore, the issue raised would have to arise *from a divorce*. (See [18].)

At points in the counterclaim, the respondent's claim against the appellant was pleaded as a claim in contract; at other points, the counterclaim read as a claim in delict because the defendant alleged that the plaintiff stole or misappropriated the defendant's funds. However, whether the claim was one in contract or delict did not matter for the purposes of the appeal because the question was whether the counterclaim was sufficiently connected to the divorce to qualify as 'a question arising therefrom'. (See [13] – [14].)

None of GC's arguments availed him: the court was not to be engaged in an exercise of determining the division of assets between the parties; the counterclaim was not relevant to any decision that the court would have to make on maintenance; whether or not the parties had an agreement for how they would pay for their household expenses, the fact of the matter was that they were married out of community of property, with the accrual system excluded and without any community of profit and loss; and while the relevant question in the divorce was whether there was a breakdown of the relationship, the question that arose in the counterclaim was a different one, ie whether CC was liable to pay damages to GC in an amount of R1,7 million — a question that did not arise *from* the divorce proceedings. (See [22] – [27], [30].)

More needed to have been done by GC in his own pleadings, for the determination of the counterclaim to qualify as a question arising from the divorce. He did not set out a basis for the link and therefore, on his own pleadings, the necessary jurisdiction of the

regional magistrates' court was not established. The special plea ought, therefore, to have been upheld, and accordingly the appeal would be upheld. (See [32], [33].)

**KNOOP NO AND ANOTHER v PILLAY AND OTHERS 2024 (3) SA 116 (GJ)**

**Company** — Business rescue — Effect on contracts — Cancellation by business rescue practitioner of obligations on basis that it was 'just and reasonable in . . . circumstances' — Considerations in exercising such discretion — Pacta sunt servanda not to be elevated over purpose of business rescue and its impact on various stakeholders — Companies Act 71 of 2008, s 136(2)*(b)*.

Under s 136(2)*(b)* of the Companies Act 71 of 2008 business rescue practitioners may 'apply urgently to a court to . . . cancel, on any terms that are *just and reasonable in the circumstances*, any obligation of the company contemplated in paragraph *(a)*'. Section 136(2)*(a)* allows business rescue practitioners to suspend, during business rescue proceedings, 'any obligation' of the company that 'arises under an agreement to which the company was a party at the commencement of the business rescue proceedings' and 'would otherwise become due during those proceedings'.

The first applicant, a business rescue practitioner (BRP) sought to evict the first to fourth respondents (Mr Pillay and others) from three properties owned by the second applicant — the company in business rescue that the BRP acted for — in order to market and sell the properties as part of the business rescue.

At issue was whether the BRP met the 'just and reasonable circumstances' test laid down in s 136(2)*(b)*, more specifically in view of the effect that such cancellation would have on the principle of *pacta sunt servanda.*

**Held**

While the effect of cancellation on the sanctity of contract was a consideration to keep in mind in interpreting the discretion in terms of the section, it was not the only one. The purpose of business rescue and its impact on the various stakeholders was also a consideration. The BRP provided a proper explanation for why the respondents should be evicted — to be able to sell the property and thus realise the optimal price. This objective was more likely to be achieved in the absence of a tenant who enjoyed the benefit of lease that made no commercial sense for any owner of the properties to have entered into. The relief sought would therefore be granted. (See [23] – [24], [26], [28].)

**MALEBANA v JORDAAN NO AND ANOTHER 2024 (3) SA 124 (GP)**

**Marriage** — Divorce — Proprietary rights — Marriage in community of property — Adjustment in terms of s 15(9)*(b)* of Matrimonial Property Act — Can be granted by court after decree of divorce, during process of division of joint estate — No adjustment for losses suffered post-divorce.

**Marriage** — Divorce — Proprietary rights — Marriage in community of property — Division of joint estate — Sale of former common home at auction — Liquidator to give vacant possession to purchaser — May demand eviction of spouse still living there to give vacant possession to spouse who bought his share in property at auction.

Section 15(9)*(b)* of the Matrimonial Property Act 88 of 1984 provides that if a spouse married in community of property fails to obtain the other spouse's consent to a transaction listed in ss (2) or (3) of s 15 when he or she knows, or ought reasonably to know, that it will be refused, and the joint estate suffers a loss as a result of that transaction, then 'an adjustment shall be effected in favour of the other spouse *upon the division of the joint estate*'.

Properly interpreted, s 15(9)*(b)* allows the contemplated adjustment order to be made *after* the granting of the decree of divorce, ie during the process of division of the joint estate. It could not have been the intention of the legislature to limit the availability of the remedy to the period before the divorce decree is issued. The distinction is important because in most cases the loss to the joint estate becomes apparent only *after* the decree of divorce. No adjustment can, however, be made for losses suffered post-divorce. (See [10] – [17].)

A liquidator charged with the division of the joint estate of divorcing spouses who had been married in community of property must, when selling the common home at auction, give vacant possession to the purchaser. The liquidator may therefore evict a spouse who refuses to relinquish possession to the other spouse where the latter had purchased the former's share in the erstwhile matrimonial home. *Van Onselen NO v Kgengwenyane* 1997 (2) SA 423 (B) is clear and good authority on this point. (See [27] – [32].)

**MM v OM 2024 (3) SA 133 (GP)**

**Marriage** — Divorce — Proprietary rights — Pension benefits — Non-member spouse's share — Benefits received by member spouse who ceased to be member

after institution but before finalisation of divorce, and received benefits only after finalisation — Pension interest of member spouse vesting in parties' joint estate on date of institution of divorce — Day of divorce relevant to amount of pension interest each party entitled to — Member spouse in casu ordered to pay 50% of such benefits to non-member spouse as per settlement agreement — Irrelevant that he had ceased to be member by time decree of divorce issued — Divorce Act 70 of 1979, s 7(7)*(a)* and 7(8).

The parties, whose marriage in community of property ended in divorce, came to court with a stated case which asked, among other things, whether a spouse who had ceased to be a member of a pension scheme after the institution of divorce proceedings and who received the pension benefits after the order, could be directed to pay his or her former spouse a portion of those benefits.

The facts were that the plaintiff had instituted the divorce via a summons issued on 30 March 2017; that the defendant had retired on 31 March 2017, thereby terminating his membership of his pension fund; that the divorce order was made on 21 July 2017; and that the plaintiff received his pension payout of R1,7 million in October 2017. The settlement concluded by the parties, signed on the date of divorce and incorporated into the divorce order, provided that each party was entitled to 50% of the other party's pension-fund interest *calculated as at the date of divorce*.

The defendant argued that, since he was, due to his retirement, not a member of any pension fund on the date of the divorce, the plaintiff was not entitled to 50% of the R1,7 million he had received in October 2017.

The plaintiff argued that, since the parties were married in community of property, their pension interests were part of the assets of their joint estate for purposes of determining their patrimonial benefits, and that she was, by virtue of the divorce order, entitled to 50% of the R1,7 million.

The applicable statute, s 7(7)*(a)* of the Divorce Act 70 of 1979 (the Act), provided that '(i)n the determination of the patrimonial benefits to which the parties to any divorce action may be entitled, the pension interest of a party shall . . . be deemed to be part of his assets'.

**Held**

The simple answer to the question in the stated case was, yes, the defendant had to pay the plaintiff 50% of the R1,7 million. Section 7(7)*(a)* of the Act

had *automatically* vested the defendant's pension interest in the parties' joint estate on the institution of the divorce proceedings on 30 March 2017. The fact that the defendant's pension-fund membership ended on 31 March 2017 was immaterial because at that stage the parties were already 'parties to [a] divorce action' as intended in s 7(7)*(a)*, which under s 2 of the Act was deemed to have been instituted on the date of issuance of the summons, ie 30 March 2017. The date of the order was relevant only to determine how much of the pension interest each party was entitled to. It was also immaterial that the defendant's pension interest was paid to him only in October 2017. He was, by virtue of the terms of the settlement, obliged to pay the plaintiff 50% of his pension benefits, calculated as at the date of divorce. There was accordingly no merit in his contention in the stated case. (See [7.3] – [7.7], [7.11], [7.13], [9.5] – [9.6].)

**MOLOSE NO AND OTHERS v NONXUBA AND A SIMILAR MATTER 2024 (3) SA 145 (ECEL)**

**Company** — Directors and officers — Director — Liability for debts of company — Applicable provision, CA s 19(3), applying to company's ordinary business debts — Theft of funds from corporate attorneys' trust account — Theft amounting to breach of contract (mandate) by corporation — Recoverable from director under s 19(3) — Quaere: Whether such constituting 'debt' sufficient for provisional sequestration of director — Companies Act 71 of 2008, s 19(3).

The respondents in each of these two applications for provisional sequestration were attorneys and directors of a company of attorneys, Nonxuba Inc. Nonxuba had been mandated to recover damages from a provincial health department on behalf of minor children who had suffered severe bodily harm due to medical negligence at hospitals administered by the health department. The applicants, the parents of some of the children, claimed from the respondents awards totalling almost R50 million that Nonxuba had recovered from the health department on behalf of the children. The health department had paid the sums in question into Nonxuba's trust account. The relevant court orders had directed Nonxuba to register a trust for each of the beneficiaries. The proceeds of the awards, less the fees and disbursements due to the firm, were to be paid over to the trusts. According to the applicants, this never happened. Instead, they say, Nonxuba stole the funds. The accusation of theft was

not, however, supported by direct evidence (see [12], [24]). The applicants relied instead on an alleged deficit in Nonxuba's trust account. The respondents denied having stolen any funds or that funds were stolen at all.

No proceedings other than the present provisional sequestration applications were instituted to recover any of the amounts allegedly stolen. The applicants relied on the factual insolvency of Nonxuba, and consequently of the respondents themselves. On the applicants' version, Nonxuba's debt arose from the theft of the trust funds, rendering the respondents jointly liable to them under s 19(3) of the Companies Act 71 of 2008, which states that 'the directors and past directors [of a personal liability company like Nonxuba] are jointly and severally liable, together with the company, for any debts and liabilities of the company as are or were *contracted* during their respective periods of office'.

The respondents argued that s 19(3) was not applicable because the applicants' claim was based on delict, not on the contractual debt envisaged by s 19(3). In addition, s 19(3) did not authorise a creditor to obtain the sequestration of directors without first acting against the corporation or the directors to recover the debt from them personally. It did not convert directors into debtors for the purposes of s 9 and s 10 of the Insolvency Act 24 of 1936. Since the applicants accordingly failed to establish the basis for the relief which they sought against the respondents, the applications had to fail as well.

**Held**

Section 19(3) was worded similarly to its predecessor, s 53*(b)* of the Companies Act 61 of 1973 which, according to precedent, applied to the company's ordinary business debts. This meant that s 19(3) would similarly provide for the personal liability of directors for ordinary commercial contractual debts, or liability incurred by the company during the term of office of the director in question. The respondents' argument, that the applicants' claim was not covered by s 19(3) because it was delictual, was wrong because the mandate granted to Nonxuba established a contractual relationship under which damages recovered by Nonxuba would accrue to the beneficiaries. Theft of the awards would amount to a breach of the contract, giving rise to a contractual claim against Nonxuba. Accordingly, the claims as presented were indeed covered by s 19(3). (See [18] – [20].)

While the respondents' argument regarding the non-applicability of s 9 and s 10 of the Insolvency Act was persuasive, it was not necessary to decide on it because the

applicants' failure to prove theft meant that they did not establish a debt due to them that would support the provisional sequestration of the respondents. (See [22] – [25].) In closing, the court criticised the applicants' decision to pursue the respondents instead of Nonxuba, the alleged perpetrator of the theft, which was not in liquidation and had a significant credit balance in its trust account. This could be detrimental to the children, whose best interests were the overriding consideration. (See [30].)

**NEDBANK LTD v MASHABA AND OTHER SIMILAR MATTERS 2024 (3) SA 155 (GJ)**

**Practice** — Judgments and orders — Default judgment — Granting of by registrar — Matters falling under NCA — Registrar may grant default judgment in terms of its powers under rule 31(5) where proceedings falling within ambit of debt enforcement procedures prescribed in NCA — National Credit Act 34 of 2005, s 130(3); Uniform Rules of Court, rule 31(5).

**Credit agreement** — Consumer credit agreement — Debt enforcement — Debt proceedings in court — Default judgment — Granting of by registrar — Whether competent — Meaning of 'court' — Registrar may grant default judgment in terms of its powers under rule 31(5) where proceedings falling within ambit of debt enforcement procedures prescribed in NCA — National Credit Act 34 of 2005, s 130(3); Uniform Rules of Court, rule 31(5).

**Credit agreement** — Consumer credit agreement — Debt enforcement — Debt proceedings in court — Default judgment — Granting of by registrar — Correct procedure.

The applicant, Nedbank Ltd, brought a number of default judgment applications to the Johannesburg High Court, in each of which it sought to enforce, as credit provider, an instalment agreement — for the financing of motor vehicles, and subject to the National Credit Act 34 of 2005 — entered into with the respondent, as consumer. After those matters were called up on the unopposed motion court roll, the presiding judge adjourned proceedings to allow the applicant to prepare written submissions to address an issue that had given rise to conflicting decisions in the Johannesburg division of the High Court and other divisions, namely, whether the registrar may grant default judgment in terms of its powers under rule 31(5) *where the proceedings fell within the ambit of the debt enforcement procedures prescribed in the NCA*. This

question arose in light of s 130 of the NCA. That section, headed 'Debt Procedures in a Court', in ss (1) and (2) addressed the circumstances in which a credit provider could approach the court to enforce a credit agreement. Importantly, ss (3) provided that '(d)espite any provision of law or contract to the contrary, in any proceedings commenced in a court in respect of a credit agreement to which this Act applies, the court may determine the matter only if *the court* is satisfied that [certain requirements set out in paras *(a)* – *(c)* had been met]'. Some judgments had interpreted 'the court' as being limited to 'open court', such that the registrar could not fulfil the role of 'the court' and so grant default judgment in respect of NCA matters. Other judgments had decided otherwise. After hearing extensive submissions from the applicant, as well as the Banking Association of South Africa, which later been admitted as amicus curiae, given the importance of the issue to the banking industry, the court —

*Held*, that the kind of oversight required by s 130 was *not* the kind of 'judicial supervision' courts had in the past held was necessary when an order was sought in relation to the execution against a debtor's property, ie supervision by a judge in open court. Oversight under s 130 could be adequately performed by the registrar using its prescribed powers in terms of rule 31(5)*(b)*. And the purposes of the NCA would not be undermined by the registrar fulfilling the role of court as required by s 130. (See [48], [51] and [56].)

*Held*, further, as to the correct procedure in respect of applications for default judgment in respect of NCA matters, attorneys were first to approach the registrar for default judgment — not because the court did not have jurisdiction or competence to hear applications for default judgment, but because of the described division of labour between open court and the registrar. Should the applicant for default judgment seek to approach open court directly, without first placing the matter before the registrar in terms of rule 31(5), it had to have good reason to do so, supported where necessary by the appropriate facts. (See [62].)

*Held*, further, that the registrar too had to fulfil its part of the mandate. The registrar could not, routinely, require the matter to be heard in open court simply because it was an NCA matter. Nor could it do so because it may be overburdened. The registrar was permitted to consider NCA actions where they fell within the ambit of rule 31(5), and to perform the oversight function required by s 130 of the NCA, including to appropriately exercise the powers that it has in terms of rule 31(5)*(b)*(i) – (vi), and it

should do so. Should the registrar require a matter to be heard in open court in terms of rule 31(5)*(b)*(iv), it should give sufficient reasons. (See [63].)

*Held*, in conclusion, that the matters be removed from the roll and so enable the applicant to approach the registrar in terms of rule 31(5)*(a)* (see [64]).

**STANDARD BANK OF SOUTH AFRICA LTD v FRIEDMAN 2024 (3) SA 171 (WCC)**

**Contract** — Breach — Remedies — Cancellation — Effect — Party may cancel and simultaneously elect to exercise right under contract, such as to invoke acceleration clause.

**Contract** — Terms — Acceleration clause — Reliance on pari passu with cancellation — Acceleration and cancellation communicated in same letter — Court rejecting argument that applicant could not invoke acceleration clause because it simultaneously elected to cancel contract containing it — Nothing preventing parties to contract from exercising rights simultaneously with cancellation.

**Contract** — Enforcement — Excessive formality — Formality should promote associated benefits of certainty, predictability and clarity.

Friedman, a director and the CEO of Urban, a private company, had guaranteed debt Urban owed Standard Bank under a loan-facility agreement (LFA). The guaranteed obligations included all present and future indebtedness by Urban to Standard Bank, up to R110 million. Friedman undertook to pay Standard Bank whenever Urban failed to pay any amount or to perform any obligation as borrower under the LFA. Default on the LFA was defined as a default on the guarantee.

Significantly, the LFA contained an acceleration clause that provided that, upon default by Urban, Standard Bank could accelerate its obligations (ie require Urban to repay the entire outstanding amount).

On 17 April 2023 Standard Bank, citing continuing defaults by Urban, informed it by letter that it (i) cancelled the LFA; and (ii) 'declared that the full amount of the loan . . . together with interest [was] immediately due and payable'. At this point Urban owed Standard Bank over R370 million.

On 19 June 2023 Standard Bank Ltd applied for a monetary judgment against Friedman for R110 million plus interest and costs. Friedman's sole defence was that, by 'electing' to cancel, Standard Bank had forfeited the right to rely on the acceleration clause — the agreement containing it now being defunct. The moment Standard Bank

cancelled, it was too late for reliance on any acceleration clause. Standard Bank should have executed the acceleration clause first, then cancelled. But its election to do otherwise doomed its claim under the guarantee. Therefore, Friedman did not owe Standard Bank anything.

**Held**

While parties to a contract cannot invoke contractual rights after the cancellation of the contract, there was nothing to preclude them from exercising their rights simultaneously with cancellation. Here Standard Bank sought to invoke its right to acceleration *not after* cancellation, but at the same time as cancellation. It was entitled to do so under the acceleration clause, which itself incorporated the right of cancellation. Moreover, Friedman's interpretation that acceleration and cancellation could not take place simultaneously placed form over substance, to no purpose. (See [43] – [45].)

While there might be cases where tensions arose between the benefits associated with formality — legal certainty and predictability — and the countervailing principles of fairness, dignity and equality, the formality insisted on by Friedman did not promote the aforementioned benefits. (See [46].)

Accordingy, Standard Bank acted within its rights under the contract when it executed the acceleration and cancellation in the same letter. (See [48].)

The court accordingly ordered Friedman to pay Standard Bank the R110 million he owed under the guarantee, together with interest and costs. (See [51].)

**TEGETA EXPLORATION AND RESOURCES (PTY) LTD AND OTHERS v KNOOP AND OTHERS 2024 (3) SA 181 (GP)**

**Company** — Business rescue — Business rescue practitioner — Removal — Removal application — Legal representation of director at — Board's appointment of legal representative cannot be vetoed by business rescue practitioner — Companies Act 71 of 2008, s 139(3).

The first to the fourth applicants were companies linked to the notorious Gupta family. Following on the findings of the Zondo Commission, * the companies' access to banking services was blocked, resulting in their placement in voluntary business rescue. The first to fourth respondents were appointed as business rescue practitioners. Subsequently the applicants (which included, apart from the companies,

their directors) sought the removal of the practitioners under s 139(2) of the Companies Act 71 of 2008.

During the removal application, which was opposed by the practitioners, the applicants' authority to appoint a firm of attorneys (the attorneys) to represent them was contested by the practitioners, and became the subject of the present interlocutory application. The applicants argued that, since said appointment was a governance matter, it did not require approval of the practitioners, who dealt with management, not governance. The practitioners in turn argued that they had exclusive authority to represent the companies in the removal application and that they never authorised the attorneys to act on the companies' behalf, with the result that they were not duly appointed.

**Held**

Despite the applicants' attempts to distinguish them, the concepts of governance and management were interconnected and overlapping. Directors and practitioners needed each other to run the company. However, the power of the directors relating to governance (as opposed to management) functions, including the appointment and removal of directors and practitioners, was *not* subject to practitioners' authority. Section 139(3) of the Companies Act provided the board with 'the unfettered power to appoint a substitute practitioner', and consequently the directors were not required to seek the approval of the practitioners to appoint attorneys to represent them in the removal application. (See [64], [67] – [69].)

The court accordingly ruled that the authority of the attorneys was established and that they could represent the second, fifth and sixth applicants in the removal application (there were issues with their authorisation to represent the other applicants). (See [70] – [77].)

**TIKBOX LEAGUE (PTY) LTD AND OTHERS v DU TOIT AND OTHERS 2024 (3) SA 198 (GP)**

**Contract** — Legality — Contracts contrary to public policy — Specific instances — Hosting of unregulated boxing contests between members of general public — Contra bonos mores and unlawful — Unlawfulness not negated by consent of participants.

The first applicant, Tikbox League (Pty) Ltd, engaged in the business of hosting and promoting 'for fun' boxing matches between feuding 'TikTok' * stars before spectators. A dispute between the two directors of Tikbox, the second applicant and the first

respondent (the latter of which claimed that he had since resigned) over entitlement to the proceeds of ticket-sales for the first hosted event, gave rise to the present application. In it, the applicants sought, inter alia, an order declaring the first respondent to be a delinquent director and directing the third and fifth respondents to effect payment of the ticket sales to Tikbox. The court ruled that, before it could turn to the relief sought, it had to determine the lawfulness of Tikbox's business and the contracts it had entered with various stakeholders, including the competitors themselves, the sponsors and the online ticket sales platforms.

The court described the contract in question as an agreement between parties to host and promote a boxing event(s) where members of the general public that had social-media feuds were engaged in a contest whereby they intentionally applied bodily force on each other in an effort to settle them, in a spectacle for the public, with a common purpose, to gain profit and/or fame. (See [13].)

The court stressed that assault was a crime. The question was, the court added, whether the unlawfulness of the pursuit engaged in in this case was negated by the fact of the participants' consent (see [16]). In this regard, the court stressed, only '*lawful consent*' would constitute a defence in law to a crime actually committed. (See [17] – [18].) The court noted that 'lawful consent' could be granted within the arena of sports carrying with them risks (see [20]), which, quoting Burrel, were not prohibited by legislation and in which 'the intention of the participants [was] not to inflict serious injury and where the rules [were] designed to prevent such injury'. The court stressed though — contrary to the present one — in such cases, referring to boxing by way of example, the sport was tightly regulated by legislation aimed at legalising the sport so that *lawful consent* could be granted by participants. (See [21] – [22].)

No person, the court stressed, could simply consent to pure assault. There had to be some or other justification for applying intended bodily force to another. (See [24].) In this regard the court rejected the obiter dictum in *Austin* to the effect that '(a) friendly contest in boxing, not calculated to produce injury to either party, would not be illegal'. Given the inherent and imminent risk and nature of the sport of boxing, one could not imagine an instance where any boxing contest could be regarded as a friendly contest not calculated to produce injury to either party. (See [25].)

The court held that the undisputed facts showed that the contest had not been legalised, nor could lawful consent be granted in the instance (see [27]). The court concluded that the act to engage random members of the public in a contest which

was inherently dangerous, to the extent that the participants may be seriously injured or even killed, was *contra bonos mores* and unlawful; and so were the contracts which the parties sought to enforce. (See [30].)

So, the court dismissed the application, as well as ordering the referral of the order to the Companies and Intellectual Property Commission, to consider whether the purpose of the company in question was lawful and, if not, to address the issue accordingly; as well as to the National Prosecuting Authority, to consider whether a crime had been committed by any of the persons or entities mentioned in the judgment. (See [31].)

**TUBESTONE (PTY) LTD v RECYCLING AND ECONOMIC DEVELOPMENT INITIATIVE OF SOUTH AFRICA NPC 2024 (3) SA 207 (WCC)**

**Administrative law** — Administrative action — Decision of functionary — Collateral challenge to validity of decision — Availability — Late collateral challenge — Whether court may decline to entertain collateral challenge due to delay — Not correct that lateness of no relevance in respect of so-called 'classical' collateral challenge — Distinction between 'classical' and 'extended' collateral challenges unhelpful — Key question not whether collateral challenge which was raised was 'classical' one or not, but whether, on facts, it was one which could and should be entertained — Determining factors discussed.

The present matter concerned the question of when a court may decline to entertain a collateral challenge because of delay. The appellant, Tubestone (Pty) Ltd, was a company that imported tyres. In terms of its obligations as a tyre 'producer' under the National Environmental Management: Waste Act (the Waste Act) and the Waste Tyre Regulations of 2008, it subscribed to a 'waste management plan' (WTM plan), containing measures for the recycling or disposal of waste tyres, that was administered by the respondent, Recycling and Economic Development Initiative of SA NPC (Redisa). Under such plan, the appellant had to pay a 'waste tyre management fee' to Redisa, based on the returns it rendered. The appellant rendered returns and paid the required levies from the time the plan was promulgated by the Minister of Water and Environmental Affairs in November 2012, until October 2016. But between 1 November 2016 and October 2017, whilst continuing to render returns, it failed to pay the levies, which remained outstanding. In August 2019 Redisa made formal demand for them; and subsequently, launching an application in September 2019, sought

judgment for them before a single judge of the court a quo, which found in its favour. This matter was the appeal, before a full bench of the Western Cape High Court, against such decision.

In the court a quo, in response to Redisa's application, the appellant raised several collateral challenges * to the enforcement of the WTM plan in which it disputed the lawfulness of the levies charged. It had argued, inter alia, that the levy charged for the relevant period was based on the initial 2012 tariff, in circumstances in which that tariff, in terms of the plan, was only supposed to have been an estimated fee that had to be reviewed and amended annually based on actual costs incurred. The court a quo, however, declined to entertain such challenges, on the grounds of the appellant's lengthy delay in raising them. Whether the court a quo was correct in this, was the focus of the present appeal. The appellant sought to rely on the judgment of the Constitutional Court, per Cameron J, in *Merafong*. Cameron J in that case distinguished between so-called 'classical' collateral challenges — those brought by citizens in response to coercive action by the state in terms of administrative action that was general in its application, ie directed at 'the world at large', and of whose existence the citizen might not have previously been aware — and those like the one it was faced with — challenges raised by state organs or corporate entites in respect of administrative decisions that were specifically directed at them. In respect of the former, Cameron J held, 'delay [played] no role'; in the latter, it may well be relevant. The appellant argued that, as its challenge was indeed a 'classical' one, its delay in raising it was consequently irrelevant and could not be held against it.

The court firstly held that the formalistic distinction between a so-called 'classical' collateral challenge by a private person and the 'extended' one by an organ of state or corporate entity served no use, and that it was time to jettison it. Reference had simply to be made to collateral challenges as a genus, rather than a separate species. (See [64].)

The court rejected appellant's contention that Cameron J, in stating that in a 'classical' collateral challenge 'delay plays no role', was laying down a rule or principle (see [65]). When considered in its proper context, what Cameron J was saying was that in the 'classical' collateral challenge delay commonly could not or did not play a role, because it was concerned with cases where a person had not previously been confronted with the coercive action concerned. (See [67].) However, the court held, there might well be instances where a court would decline to uphold a late classical

collateral challenge, for example, where the citizen was aware of the action or decision and that it may apply to him, but deliberately chose not to challenge it and to see if he could avoid it. (See [68].)

The court held that the question which required an answer was not whether the collateral challenge which was raised was a 'classical' one or not, but whether, on the facts, it was one which could and should be entertained. The determining factors were (1) whether the object of the challenge was one that was specific to the challenger (in that it was directed at him/her, or it, in particular, or to a class or group to which he/she/they belonged), or was one that was general and unspecific or indeterminate (in that it was of application to the world at large); and (2) whether it was known to the challenger (or should have been known by him/her/it, with the exercise of reasonable care). (See [69].) In the case of the former and a challenger who had actual knowledge (such as in the present matter), the further factor that had to be considered was whether the challenger had sufficient (or 'ample') opportunity to contest the administrative act or decision directly (by way of review or other legal remedy), but failed, or deliberately chose not, to do so. In such a case delay would obviously be an aspect which the court had to consider, in determining whether to entertain the challenge or to dismiss it. Unlike in review matters, the court would not have a 'discretion' to refuse to entertain the challenge without evaluating it, *simply* or *only* because it was brought late. It had to have regard for all the circumstances, which would include the delay which was attendant on the bringing of the challenge and the explanation which was given in this regard, and the effect that upholding the challenge may have on vested rights, as well as the requirements of certainty and finality of administrative acts and decisions. (See [70].)

The court held that in the present matter, delay was a material and important feature that had to be considered: The appellant knew about the Redisa plan well before it was promulgated in 2012 and subscribed to it; it was part of a group to whom the plan specifically applied; and, despite its already knowing in the first year after the plan's promulgation that the fee was not being reviewed and adjusted, it continued to make payment of the levied fee for four years, without raising any question as to its validity, only seeking to do so when the application by Redisa was launched in September 2019. (See [71].) In seeking to challenge the enforcement of the plan collaterally, the appellant made no attempt to provide any explanation as to why it made payment of the fee it considered to be unlawful, why it never sought to challenge it by way of

review or otherwise, and for the delay in doing anything until it raised its collateral challenge late in 2019. In the absence of such an explanation, it was difficult not to conclude that its belated raising of a collateral challenge was nothing more than an opportunistic attempt to avoid making payment, and that it stopped making payment of the levies in October 2016 because it took advantage of the fact that (1) the state had indicated in or about August 2016 that it was going to change the funding model for waste plans, and by doing so Redisa would no longer be entitled to recover the levies from subscribers; and (2) in or about October – November 2016 the Minister sought to take control of Redisa. (See [72].)

The court further held that delay was not one that the court a quo could overlook: the interests of the finality and certainty of administrative decisions were strongly against allowing this. Millions of rands were paid over in lieu of levies by tyre producers and importers from November 2012 to May 2017. (See [73].) Furthermore, the prospects of the appellant's succeeding on the merits of its challenge were extremely tenuous. (See [74] – [79].)

The court accordingly held that the appeal ought to be dismissed (see [80]).

**WILLIAMS v SHACKLETON CREDIT MANAGEMENT 2024 (3) SA 234 (WCC)**

**Practice** — Judgments and orders — Default judgment — Rescission — Failure of credit provider to properly deliver required notice in terms of s 129(1) and (7) of NCA — Judgment erroneously sought and granted — Court has no choice but to rescind — Uniform Rules of Court, rule 42(1)*(a)*; National Credit Act 34 of 2005, s 129(1) and (7).

**Credit agreement** — Consumer credit agreement — Debt enforcement — Preliminary procedures — Notice of default — Delivery — Failure of credit provider to properly deliver notice prior to commencement of proceedings — Default judgment granted despite such failure — Judgment erroneously sought and granted — Upon rescission application in terms of rule 42(1)*(a)*, court has no choice but to rescind — Uniform Rules of Court, rule 42(1)*(a)*; National Credit Act 34 of 2005, s 129(1) and (7).

In this matter, the applicant, Mr Williams, sought the rescission of a judgment obtained by default against him by the respondent, Shackleton Credit Management, on the basis of his non-compliance with a credit agreement entered into with Direct Axis. Such agreement was subject to the National Credit Act 34 of 2005. Accordingly,

Shackleton, to whom Direct Axis had ceded its rights under the agreement, had been obligated in terms of s 129(1) of the NCA to deliver a notice to Mr Williams, as consumer, before instituting proceedings, to inform him of his default and his rights under the NCA. Shackleton did send a registered notice to the domicilium address selected by the applicant in the agreement, of Philadelphia in the Western Cape, but the track-and-trace receipt indicated that it was still in transit in KwaZulu-Natal, where the respondent was based. So, the respondent could not provide adequate proof of delivery as envisioned in s 129(7), ie 'written confirmation . . . of proof of delivery to the relevant post office or postal agency'. The applicant submitted that, given such failure, the default judgment had been 'erroneously sought and granted', entitling it to rescission in terms of rule 42(1)*(a)*. The respondent argued that, while the notice was not delivered in accordance with s 129, it had since come to the attention of the applicant — ie when the applicant obtained a copy of the court file after discovery of the fact of the default judgment — and its improper delivery was not a reason to grant rescission under rule 42(1)*(a)*. The key issue then to be addressed by the court was the following: For the purposes of an application under rule 42(1)*(a)*, if a credit provider failed to properly deliver a notice in terms of s 129(1) and (7) of the National Credit Act 34 of 2005 (NCA), but default judgment was nonetheless granted, did the court hearing such application have to rescind, or did it retain a discretion to decline to do so?

The court considered the provisions of s 129 of the NCA. It noted that, under s 129(1)*(b)*(i), a credit provider '*may not commence any legal proceedings* to enforce the agreement before (i) first providing notice to the consumer, as contemplated in para *(a)* . . .' It noted further that, under s 130(4)*(b)*, if a credit provider commenced legal proceedings without complying with s 129, the court had to adjourn the matter before it, and make an appropriate order setting out the steps the credit provider had to complete before the matter could be resumed. (See [33] – [34].)

The court identified two approaches that underlined the conflicting judgments on the issue in question: a formal approach and a pragmatic approach. The formal approach was that the failure to establish proper delivery of the s 129 notice tainted the process [of debt enforcement under the NCA] and meant judgment was erroneously granted — end of enquiry. The pragmatic approach was that there was no point rescinding a judgment solely for improper delivery of a s 129 notice when the consumer had, in fact, received it. (See [57].)

The court expressed sympathy for the pragmatic approach, noting that rescission for the sake of rescission served nobody. As to the present case, it held, for the court to grant rescission would likely merely delay the inevitable (at great costs to the parties' pockets and the court's time), having regard to the fact that the applicant had as yet failed to identify any substantive defence, and his attempts at settlement had failed. (See [60].) Nevertheless, the court expressed itself to be constrained to grant it based on its understanding of rule 42(1)*(a)*: If there was an error that was evident from the papers that precluded the granting of default judgment, then the judgment was erroneously sought and erroneously granted. Rescission had to follow. The absence of a defence was irrelevant, and the court had no discretion to refuse rescission. (See [60].) In this case, it was apparent from the summons itself, and the application for default judgment, that the s 129 notice had not been delivered to the relevant post office as s 129(7) required. Section 130(4) prohibited the registrar from granting the default judgment. The default judgment was, therefore, erroneously sought and erroneously granted. (See [61].)

The court added that there may be room for the more pragmatic approach if the consumer did eventually obtain the s 129 notice [at least 20 days] before judgment, even if it had not been delivered as required by law. But where, the court asserted, as here, the credit provider did not establish delivery to the relevant post office, and the consumer only learnt of the s 129 notice after default judgment, rescission sought in terms of rule 42(1)*(a)* had to follow. (See [63] and [64].)

The court added that, even if it were wrong, and courts did have a discretion to refuse rescission, even though judgment was erroneously granted, it would have rescinded in this case (see reasons at [65]).

The court concluded by holding that, with some hesitation, little sympathy for the applicant, and with limited hope the rescission would achieve anything, it would grant the rescission (see [66]).

**AD HOC CENTRAL AUTHORITY, SOUTH AFRICA AND ANOTHER v KOCH NO AND ANOTHER 2024 (3) SA 249 (CC)**

**Children** — Abduction — International abduction — Application for return of unlawfully removed or retained child — Father, terminally ill mother and child coming to SA — Father returning to UK — Child remaining with mother in SA — Opposed request by father for return of child to UK — Factors militating for return — Hague Convention on the Civil Aspects of International Child Abduction, 1980, art 13*(b)*.

**Children** — Abduction — International abduction — Application for return of unlawfully removed or retained child — Defences — Harm or intolerability — Degree of risk and harm — Burden and standard of proof — Admissible evidence — Factual disputes — Discretion to order return — Hague Convention on the Civil Aspects of International Child Abduction, 1980, art 13*(b)*.

The parties in this case were a mother, father, child, maternal aunt and the Ad Hoc Central Authority, South Africa (CA). The father and mother were resident in the United Kingdom (UK), where the child was born. The mother fell ill and when the child was 2 years old, they and her father travelled to South Africa (SA) to seek treatment. They stayed with the mother's sister. While there, the father and mother's relationship deteriorated, and the father returned to the UK. The mother, whose illness was terminal, was of the opinion that the father should not raise the child after her death, and that her sister should do so. The father opposed this, and insisted that the child be returned to the UK. The mother refused. The father then approached the Central Authority for England and Wales



(CAEW) for its assistance in securing the child's return. His ground was that he had not consented to the child remaining indefinitely in SA. On the CAEW's direction, the CA asked the mother to agree to the child's return. She refused. The CA then applied to the High Court for an order that the child be returned. The defence raised was that there was a grave risk that the child's return would expose her to physical or psychological harm or otherwise place her in an intolerable situation (harm or intolerability).

Article 13*(b)* of the Hague Convention on the Civil Aspects of International Child Abduction, 1980, provides:

'Notwithstanding the provisions of the preceding Article, the judicial . . . authority of the requested State is not bound to order the return of the child if the person . . . which opposes its return establishes that —

. . .

*(e)* there is a grave risk that . . . her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.'

The High Court was unsatisfied that the defence had been established. It ordered the child's return. At this point she was 3 years old. The aunt obtained leave to appeal to the Supreme Court of Appeal, which upheld the appeal (the mother died before the High Court gave judgment). The child was by then 4 years old (see [12] – [13]).

In the present application, the CA and the father sought leave to appeal to the Constitutional Court, which it granted (see [39]). The issue was whether the art 13*(b)* defence to the child's return had been established (see [148] – [149], [158], [219]).

A **majority** of the Constitutional Court ruled that it had not been (see [219]). Considerations bearing on this conclusion were as follows.

- Risk was mitigated by social support available to the child in the UK (see [158], [178], [213], [219]).
- Delay could not be allowed to impede the Convention's purposes — to accept delay as a valid consideration going against an order of return would incentivise the drawing-out of litigation (see [216], [219]).
- Properly viewed, the harm described by the experts would be harm of a degree naturally flowing from an order of return — but not reaching the gravity referenced in art 13*(b)* (see [167] – [168], [173], [195]).
- Harm would likely flow from the father's absence (see [183]).

The Constitutional Court accordingly upheld the appeal and ordered that the child should be returned to the jurisdiction of the CAEW, and that, pending return, she should not be removed from the Western Cape (see [220]). The order also provided an election to the aunt (and failing its exercise, to the father) to accompany the child on the return journey; for interim contact of the child and father; that the father procure social services on the child's return; that proceedings as to parental rights be stayed pending the child's return; and reporting requirements on travel arrangements (see [220]).

The **dissenting** judgment considered issues left open in *Sonderup* (see 'Cases cited').

First, whether art 13*(b)* ought to be narrowly interpreted. The dissenting judges held that it should not because its plain words implicitly set a high threshold. To meet it, the risk needed to be grave, and the harm of a degree that was intolerable (see [61] – [62]).

Second, the issue of proof. The dissenting judges held that the party raising the defence bore the burden of proof, the standard being a balance of probabilities. Evidence need not be on affidavit (this in the interest of expedition), and the discretion to admit evidence need be exercised in this light, influenced by the circumstances, the evidence's nature and the issues.

Factual disputes ought not to be resolved by application of the *Plascon-Evans* rule, but by assessment of what the common facts were, what facts were unchallenged or corroborated, and the probabilities. (See [68], [75], [77], [80].)

Third, the discretion, even if art 13*(b)* was established, to order return. The dissenting judges held that, in the exercise of this discretion, the child's interests had to be weighed against the Convention's purposes (deterring abduction and unfair advantage in custody disputes by forum-shopping). (See [81] – [84].)

Regulation 24 of the International Child Abduction Regulations should be used to expedite matters ('the Court may . . . give any interim direction . . . it deems fit . . . to regulate any aspect of the process'). Practice directions and court rules ought also to be crafted to this end (see [8], [138], [140], [142]).

Here, evidentially, the art 13*(b)* defence was established, and the overriding discretion (to nonetheless order return) ought not to be exercised (see [91], [114], [131]).

The dissenting judges would therefore have upheld the appeal, set aside the Supreme Court of Appeal's order, and replaced it with an order dismissing the appeal from the High Court's judgment (see [145]).

## South African Criminal Law Reports (May 2024)

### MNCWABE v PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS 2024 (1) SACR 447 (CC)

**Prosecuting authority** — Director of Public Prosecutions — Appointment of — By State President — Requirements — Notification of appointment — Notification by National Director of Public Prosecutions in circumstances where he had no direct or implied authority to do so — Appointment by former State President of two DPPs shortly before leaving office therefore inchoate, and incoming State President entitled to appoint his own choice of candidates — National Prosecuting Authority Act 32 of 1998, s 13(1)*(a)*.

**Prosecuting authority** — Director of Public Prosecutions — Appointment of — By State President — Requirements — Notification of appointment — Public notification not required and personal notification sufficient — National Prosecuting Authority Act 32 of 1998, s 13(1)*(a)*.

In two matters the same issues arose. The cases resulted from the appointment by the former State President of the two applicants as provincial Directors of Public Prosecution (the DPPs), in the last days of his presidency. The appointments made were recorded by way of Presidential Minutes 10 and 20 of 2018, respectively. The appointments were conveyed to the two applicants by the then National Director of Public Prosecutions (the NDPP), one Mr Abrahams. Shortly after taking office, the current State President revoked the appointments and nominated two other persons as the DPPs, the fourth respondent in the first case and the sixth respondent in the second case. Aggrieved by these appointments, the applicants separately approached the High Court to review and set aside the decisions, and the matters were heard together in the High Court.

The central issue before the High Court was whether the current President was entitled to reverse the initial decision of the former President to appoint the applicants. That entailed the functus officio principle and required a determination of two main issues: first, whether s 13(1)*(a)* of the National Prosecuting Authority Act 32 of 1998 (the NPA Act) was complied with prior to the notification of the appointments. Secondly, whether a personal notification was sufficient, or whether there also had to be public notification. In dismissing the review applications, the court held that the functus officio principle did not apply, and that without public notification the decision to appoint was not final. Therefore, the former President, or his successor, still had the right to change his mind regarding the appointments.

The Supreme Court of Appeal dismissed the applicants' application for leave to appeal on similar grounds, and their applications for reconsideration to the President of that court met the same fate. Leave was sought from the Constitutional Court to appeal against the former decisions and application made for direct access to review and set aside the current President's decisions to fill the vacancies in the NPA implicated by the two cases.

In their application for direct access to the Constitutional Court, the applicants contended, inter alia, that it was sufficient that the applicants were notified personally, and such personal notification was validly attained when Mr Abrahams communicated

the appointments to them, which he had done, having received the Presidential Minutes from the Department of Justice. Consequently, the doctrine of functus officio applied. (See [22] and [25] – [26].)

The court held that the applications engaged its constitutional and extended jurisdiction. (See [36] – [41].)

*Held*, as to the functus officio argument, that the law was clear that communication of a decision to an affected party was central to the finality of that decision, but the question remained whether there was a requirement for public notification as well. (See [53].)

*Held*, as to whether there had to be public notification, that the importance of a public post in and of itself did not establish a public notification requirement. (See [56].)

*Held*, as to personal notification, that a DPP unquestionably occupied a very important position within the NPA which, in turn, fulfilled a very important role in South Africa's constitutional democracy. It was of no trifling significance that s 13(1) of the NPA Act vested the power of appointment in the President. Since the communication by Mr Abrahams itself was undisputed, the crucial issue as to whether Mr Abraham had the requisite authority to notify the applicants had to be examined. For the announcement to be valid Mr Abrahams needed either original power or conferred authority to notify applicants of their appointment as DPP. (See [64] and [67] – [68].)

*Held*, as to whether Mr Abrahams had the authority to notify the applicants, Mr Abrahams' affidavit was short on detail and merely stated that, as head of the NPA, and having the authority and performance of all his duties and functions conferred by the Constitution, the NPA Act or any other law, he immediately informed the candidates of their respective appointments. He did not cite a specific legislative provision, nor could he, as there was nothing in the Constitution or the NPA, to lend legitimacy to his claim. Even more revealing was his blanket invocation of 'any other law' as justification for his actions. (See [69] – [70].)

*Held*, further, that implied powers were the exception, not the rule. Mr Abrahams could make no claim to an express legislative provision, since the statutory power to appoint DPPs vested exclusively in the President, not the NDPP.

The decisive factor for the existence of an implied power was necessity. However, without an instruction to make the notification on the President's behalf, Mr Abrahams had no authority to finalise the appointments, nor could he assert implied authority. (See [72] and [74].)

*Held*, further, that there was nothing in Mr Abrahams' affidavit that suggested that he was authorised to communicate the decision and that he did not simply take it upon himself to do so because he believed it was his duty. If he had been authorised, then he would simply have said so, but he did not. His coming into possession of the Presidential Minutes did not and could not support any conclusion that, at the time he informed the applicants, he had the authority to do so. Since that was the case, there was no lawful communication of the decision, and it was thus open to revisiting. (See [11].)

In a dissenting judgment per Zondo CJ (Madlanga J and Makgoka AJ concurring), the minority noted that s 13 of the NPA Act did not expressly refer to a public pronouncement or any notice being given to the person appointed as DPP or provide for the need for acceptance of the appointment by the person appointed by the President. The proposition that Mr Abrams was not authorised to inform the applicants of their appointments was simply unsustainable in the light of the overwhelming evidence to the contrary. The procedure for dealing with Presidential Minutes authorised the NPA, and therefore Mr Abrahams, as head of the NPA, to inform the applicants of their appointments. He was, in fact, not only authorised but obliged to inform the individuals concerned of their appointments because informing them was part of the implementation of President Zuma's decisions. This could done be a public announcement, letters of appointment, verbally or by phone. Therefore, the appointments became effective in law when Mr Abrahams informed the applicants of such. They would have upheld the appeal. (See [172], [192], [238] and [241].)

In the result, leave to appeal was granted, but the appeal was dismissed. (See [130].)

**S v VAN DER WESTHUIZEN AND OTHERS 2024 (1) SACR 525 (FB)**

**Evidence** — Witnesses — Accomplice — Discharge from prosecution of witness in terms of s 204(2) of Criminal Procedure Act 51 of 1977 — Inquiry — Locus standi of accused.

The legal representative contended, in limine, at an inquiry into whether certain witnesses should be discharged from prosecution in terms of s 204(2) of the Criminal Procedure Act 51 of 1977, that the accused had no locus standi. He submitted that it would be unfair to the s 204 witnesses, should the accused also be granted the right to address the court on the issue of the discharge. He argued that an accused had the

advantage of being present during the entire trial and could therefore base his submissions on the totality of the evidence. Contrary thereto, a s 204 witness was not entitled to be present during the evidence of the other witnesses, and that caused s 204 witnesses to be disadvantaged, as compared to the position of an accused.

*Held*, that in a trial there were three participating parties, and there was no rational basis for the view that in the subsequent inquiry the defence's (the accused's) entitlement to participate in proceedings came to an end. The lis between an accused, the state and a s 204 witness persisted just as much as it did during the trial. Furthermore, the court had never come across a situation that, when such inquiry was held immediately after judgment on the merits or sentence, an accused and/or their legal representative was excused before the inquiry was proceeded with. To the contrary, an accused or their legal representative was always requested to also address the court on such question. (See [18].) The point in limine was dismissed, and the accused permitted to address the court at the inquiry. (See [19].)

**S v BL 2024 (1) SACR 537 (WCC)**

**Domestic violence** — Protection order — Domestic Violence Act 116 of 1998 — Breach of — What constitutes — Accused prohibited from making violent threats or swearing at applicant or related persons — Accused using 'p-word' in reference to radio while shouting at applicant's daughter — Word commonplace in society — Such use not constituting breach of order.

The accused was convicted of a breach of a final domestic-violence protection order, granted at the instance of his sister, which ordered that he not 'threaten with violence and/or swear at the applicant and/or related persons'. The accused lived in the same house as his sister. He became angry when the complainant, his sister's daughter, turned off the music he was playing, and he turned the music on again. When his niece turned it off again, he shouted at her, saying, 'Los my ma se pxxx se ding.' He was arrested by the police and convicted of a contravention of the order, and sentenced to a wholly suspended term of imprisonment.

On review, the court examined the use of the 'p-word' in the local vernacular and remarked that it was commonplace in our society. Further, the fact that the complainant was not referred to by the p-word, which the accused had only used to refer to in respect of the radio, did not amount to a contravention of the protection order. The conviction and sentence were set aside. (See [12] – [14].)

**S v TEU 2024 (1) SACR 543 (NCK)**

**Trial** — Presiding officer — Recusal of — Referral of case by High Court to trial court for hearing of further evidence after conviction and sentence set aside — Not irregular for same magistrate to hear matter and no grounds for recusal.

After the accused's conviction and sentence were set aside on appeal by the High Court, the court made an order that the matter be referred back to the regional court for the leading of further evidence. When the matter eventually came back to the regional court, counsel for the accused sought the recusal of the magistrate who had convicted and sentenced him, on grounds that the accused might not get a fair trial.

On review, the court held that it was unclear how the magistrate was expected to hear further evidence if he recused himself. A more prudent approach would be to comply with the order and furnish the evidence that the defence intended to provide. At the end of the entire trial the accused would still have remedies to explore, should that need arise. In that way, a piecemeal approach was prevented, and the matter could receive finality. (See [7].)

**WSL AND ANOTHER v MINISTER OF POLICE AND OTHERS 2024 (1) SACR 546 (GJ)**

**Arrest** — With warrant — Execution of warrant — Means used to effect arrest had to be rationally connected to objects of arrest and should not be arbitrary — In casu, persons arrested known not to be flight risk and had dutifully attended court on previous occasions before same charge withdrawn — Plaintiffs arrested early on Saturday morning and kept in cells in shocking condition until Monday morning, when released on bail without opposition by investigating officer or prosecutor — Arrests in violation of obligations in terms of Police Act and plaintiffs' rights under ss 10 and 12 of Constitution — Arrests unlawfully effected — South African Police Service Act 68 of 1995, s 13.

The plaintiffs instituted action against the defendants for unlawful arrest and detention. The charge against them was that they had abused and assaulted the second plaintiff's minor children. The arrest was effected on the basis of a warrant of arrest issued at the instance of a prosecutor and authorised by a magistrate. The plaintiffs had on a previous occasion been arrested two years earlier and appeared in court, but the matter was subsequently withdrawn. The circumstances of the arrest which

resulted in the present case were that the plaintiffs were still in bed with their one child, who was approximately 2 years old, when a large contingent of police arrived to arrest them. The second plaintiff had to plead to be allowed to change from her sleeping attire into suitable clothing and arrange for her mother to fetch the child before they were handcuffed, placed in unmarked police vehicles and taken to the police station. They were not presented with a warrant of arrest or informed of the reason for the arrests until these were disclosed to them at the police station. The first plaintiff was detained together with other arrested suspects in a small cell with no shower facility, despicable ablution facilities, and had to sleep on a cement floor with dirty blankets. The plaintiffs were taken to the magistrates' court the following available morning. A bail application was launched on their behalf by a lawyer, and they were immediately granted bail, without any opposition by either the prosecutor or the investigating officer. The charge against them was the original charge which had previously been withdrawn. The plaintiffs were acquitted at their trial.

*Held*, as regards the treatment of the plaintiffs by the police, that public power was not ultimate power, but was bestowed in terms of empowering legislation deriving from the Constitution. When the investigating officer exercised public power to effect the arrests of the plaintiffs — exercising his discretion as to the time, manner and place of the arrest — he was obliged to do so in compliance with the Constitution and the doctrine of legality. The means employed therefore had to be rationally connected to the objects of the arrests, and should not have been arbitrary. (See [22] and [25].)

*Held*, further, that, in the circumstances where both the arresting officer and the prosecutor confirmed that they did not regard either of the plaintiffs as a flight risk, and there was no urgency in effecting the arrests, the question had to be raised why they were arrested early on a Saturday morning, resulting in their having to spend the weekend in holding cells. The arresting officer and the prosecutor knew that both plaintiffs had been previously arrested and granted bail, and thereafter appeared in court on various occasions. The only reason advanced as to why the plaintiffs were arrested on a Saturday morning was that it was due to police 'workload'. In the circumstances, the investigating officer had failed to consider any less restrictive means to procure the attendance of the plaintiffs at court; failed to adhere to his obligations in terms of s 13 of the South African Police Service Act 68 of 1995; and failed to consider that the plaintiffs' rights under ss 10 and 12 of the Constitution were being breached. (See [33].)

*Held*, accordingly, that the arrests of the plaintiffs were unlawfully effected. The first defendant was ordered to pay damages to the first plaintiff in an amount of R150 000 and R200 000 to the second plaintiff. (See [44].)

**All South African Law Reports (May 2024)**

**Director of Public Prosecutions, KwaZulu-Natal, Pietermaritzburg v Ndlovu [2024] 2 All SA 315 (SCA)**

*Criminal Law and Procedure – Rape – Applicability of prescribed minimum sentence provisions – Correctness of judicial precedent stating that where the victim had been raped by more than one person, the prescribed minimum sentence for rape was not applicable where only one of the alleged perpetrators was before court – Section 51(1) of Criminal Law Amendment Act 105 of 1997 clearly stating that in respect of the offence of rape, a sentence of life imprisonment must ordinarily be imposed on a person convicted thereof – Contention that other rape incidents perpetrated by persons not before court had to be proved before section 51(1) could be invoked was clearly wrong.*

*Legal Theory – Legal doctrine – Stare decisis rule – While judgments of the Supreme Court of Appeal are binding, the court has the legal competence to overturn its own previous decisions if convinced that they are wrong.*

*Statute – Statutory interpretation – Interpretation is a unitary exercise, taking into account the text, context and the purpose of the instrument under consideration – Section 51(1) of the Criminal Law Amendment Act 105 of 1997 – Both section 51(1) and Part I of Schedule 2 clearly state that in respect of the offence of rape, a sentence of life imprisonment must ordinarily be imposed on a person convicted thereof – Incorrectness of precedent stating that section 51(1) is inapplicable where the rape victim was raped by two or more persons, if not all of the co-perpetrators are before the trial court and have not been convicted of rape.*

The respondent was convicted of contravening section 3 read with sections 1, 2, 50, 56(1), 56A and 57–61 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 and further read with sections 94, 256 and 261 of the Criminal Procedure Act 51 of 1977. That conviction related to the offence of rape. He was also convicted of kidnapping. The trial court sentenced him to imprisonment for life on the rape count in accordance with section 51(1) of the Criminal Law Amendment Act 105 of 1997, and three years' imprisonment on the kidnapping count. An appeal to the High Court was dismissed in respect of the conviction. However, the Court upheld the appeal against sentence on the count of rape. In concluding that the trial court had erred in sentencing the respondent to life imprisonment, the majority judgment relied on the decision of the present court in *Mahlase v S* [2013] ZASCA 191. The court in the latter case had held that where the victim had been raped by more than one person, the prescribed minimum sentence for rape was not applicable

where only one of the alleged perpetrators was before court. As similar circumstances applied in the appellant's case the High Court set aside the term of life imprisonment and substituted it with a sentence of 15 years' imprisonment. That led to the present appeal by the Director of Public Prosecutions.

**Held** – Precedent and the doctrine of *stare decisis* were fundamentally important. Judgments of the Supreme Court of Appeal are, in terms of the hierarchical structure of our courts, binding not only on the present court but also all other courts below it. The Court has consistently emphasised respect for precedent. However, it has the legal competence to overturn its own previous decisions. It can do so only if it is convinced that they are clearly wrong. Examining the *Mahlase* judgment, the Court found that the approach in that case read words into the section which were not there, in conflict with the principles of contextual interpretation. Fundamentally, the conclusion reached in *Mahlase* diminished the effectiveness of section 5(1) read with Part I of Schedule 2 and the overarching object of the Criminal Law Amendment Act.

The fate of the appeal hinged entirely on the wording of section 51(1) read with Part I of Schedule 2 at the relevant time. The principles of statutory interpretation were confirmed. Essentially, interpretation is a unitary exercise, taking into account the text, context and the purpose of the instrument under consideration.

Both section 51(1) and Part I of Schedule 2 clearly state that in respect of the offence of rape, a sentence of life imprisonment must ordinarily be imposed on a person convicted thereof. To the extent that *Mahlase* held that so-called "other rape incidents" had to be proved before section 51(1) could be invoked, that conclusion was clearly wrong.

The appeal was upheld, and the sentence of life imprisonment was reinstated.

**Murray and others NNO v Ntombela and others**
**[2024] 2 All SA 342 (SCA)**

Civil Procedure – Review application – Appeal against order compelling delivery of rule 53 record – Whether it is competent for a court to compel delivery of a rule 53 record before determining whether what is before it is a review as contemplated in rule 53 when that was placed in issue in limine by the opposing party – An applicant in review proceedings is as of right entitled to the record.

The appellants were joint liquidators of a close corporation (Phehla Umsebenzi) in liquidation. The first and second respondents, who were married to each other in community of property, allegedly purchased immovable property from Phehla Umsebenzi for a purchase price of R2 500 000. Despite numerous enquiries by the respondents, transfer was not effected into their names. When they discovered that Phehla Umsebenzi was in liquidation, the respondents approached the liquidators, who elected not to transfer the property into the respondents' names but, instead, to sell it on auction. The respondents applied to court for an order staying the sale (on auction) pending an application to review and set aside the liquidators' decision, which stay was granted. The respondents thereafter brought an application to review and set aside the liquidators' decision. They also sought an order directing the liquidators to sign all transfer papers necessary, to enable the Deeds Offices to transfer the property to them.

The liquidators served a notice under rule 6(5)(d)(iii) of the Uniform Rules of Court questioning the legal competence of the respondents' review application on the basis that the liquidators had neither exercised a public power nor performed a public function in terms of any empowering statutory provision, when making their decision. Secondly, the liquidators asserted that in terms of the prevailing legal position, specific performance could not be ordered against a liquidator in circumstances where that would have the effect of negating the fundamental purpose of a *concursus creditorum*. The respondents replied by lodging a rule 30/30A interlocutory application, seeking the setting aside of the liquidators' rule 6(5)(d)(iii) notice on the grounds that such notice constituted an irregular step. They also sought an order compelling the liquidators to file the record of the proceedings relating to the impugned decision in terms of rule 53(1)(b).

The High Court found in the respondents' favour, stating that the full record of the proceedings was fundamental to the full ventilation of the issues raised in the review proceedings as contemplated in rule 53. It referred to rule 53(4), which states that, upon the record being made available, an applicant may amend, add to or vary its notice of motion and supplement the founding affidavit. The Court therefore reasoned that it was not open to the liquidators to invoke rule 6(5)(d)(iii), as the review proceedings had not reached a stage where the applicants in the review application had been afforded the opportunity to exercise their procedural right to supplement their

founding affidavit in the review application in terms of rule 53. It concluded that the delivery of the rule 6(5)(d)(iii) notice by the appellants was premature.

On appeal, the liquidators submitted that any entitlement of the respondents to receive a record in terms of rule 53(1)(b) only arises once established, as a jurisdictional fact, that the proceedings sought to be reviewed and in respect of which the production of a record relates, are reviewable.

**Held** – The question was whether it is competent for a court to compel delivery of a rule 53 record before determining whether what is before it is a review as contemplated in rule 53 when that was placed in issue *in limine* by the opposing party. Rule 53 provides for a procedure that follows as a matter of course after the issuance and service of a review application except in limited circumstances where the court's jurisdiction to hear the review application has to be determined first. Case law establishes that review proceedings must, in the ordinary course, be brought under rule 53 unless they fall within the purview of the Promotion of Administrative Justice Act 3 of 2000. The primary purpose of the rule is to facilitate and regulate applications for review.

The liquidators' allegation that they did not have the record to produce was rejected on the probabilities. Further, their assertion that the relief sought by the respondents in their review proceedings was legally untenable could only be determined once the review application was ripe for hearing.

Once the jurisdiction of the court before which review proceedings are pending is beyond question, the reach of rule 53 of the Uniform Rules becomes unavoidable. The majority of the Court thus dismissed the appeal.

**ABSA Bank Ltd v Saunderson [2024] 2 All SA 364 (NCK)**

*Civil Procedure – Summary judgment application – Effect of amendment to Rule 32 of the Uniform Rules of Court – An application for summary judgment may now only be brought after a defendant's plea in an action had been filed as opposed to after notice of intention to defend was given – A more liberal approach regarding the allowing of additional evidence is required, as long as the evidence provided by the plaintiff serves only to support its contentions as to why the defences as pleaded by the defendant, did not raise issues for trial – Test remains whether the defendant had disclosed a bona fide defence.*

In its application for summary judgment against the defendant, the plaintiff sought payment plus interest in three claims. Opposing the application, the defendant contended that the supporting affidavit went “above and beyond” what was expected of an affidavit in support of an application for summary judgment. Specifically, it was argued that the plaintiff delved into the merits of the matter by discussing the validity of the defendant’s plea and by attaching documents to the supporting affidavit which were not attached to the plaintiff’s particulars of claim and that in doing so, the plaintiff created a “mini-trial” which defeated the purpose of summary judgment proceedings.

**Held** – Rule 32 of the Uniform Rules of Court was amended in 2019, with the most significant change being that an application for summary judgment may now only be brought after a defendant’s plea in an action had been filed as opposed to after notice of intention to defend was given according to what was required by the rule pre-amendment. Rule 32(2)(b) requires the plaintiff, in its affidavit, to verify the cause of action and the amount, if any, claimed, and identify any point of law relied upon and the facts upon which the claim was based, and explain briefly why the defence as pleaded did not raise any issue for trial. That suggested that post-amendment, a supporting affidavit in an application for summary judgment should contain something more and deal with something more than what was prescribed in terms of rule 32(2) pre-amendment. A court tasked with determining an application for summary judgment under the new regime faces a dilemma in that a plaintiff has to file a more comprehensive supporting affidavit indicating why the defences pleaded did not raise issues for trial and substantiating the contentions in that regard such as to allow the court to determine whether the defences raised in the plea were *bona fide* defences. On the other hand, the court might be put in a position where it is confronted with disputes of fact on the merits of the principle case between the parties which it was not expected to determine at the summary judgment stage. The solution is a more liberal approach regarding the allowance of additional evidence, as long as the evidence provided by the plaintiff serves only to support its contentions as to why the defences as pleaded by the defendant, did not raise issues for trial. In the event of such evidence being documentary in nature, same must be attached to the supporting affidavit so that the defendant would be in a position to answer thereto. Case law establishes that despite the amendment to rule 32, what is required from a defendant in the answering affidavit in summary judgment proceedings has remained essentially

the same and the test remains whether the defendant had disclosed a *bona fide* defence. It has also been stated that that although more may be expected of a defendant now than previously, it does not mean that the intention behind the amendment was to make the procedure more draconian than it used to be.

Examining the defences, based largely on the National Credit Act 34 of 2005, the Court found that no *bona fide* defence was raised. Summary judgment was granted in favour of the plaintiff.

**Democratic Alliance v African National Congress and others (Afriforum NPC as *amicus curiae)* [2024] 2 All SA 382 (GP)**

*Constitutional and Administrative Law – Political party's policy – Deployment of African National Congress cadres into public service – Challenge to lawfulness and constitutionality of policy based on allegation that it negatively impacted critical State institutions, blurring lines of accountability, and facilitating State capture – No unconstitutionality involved in political party's influencing policy direction of a government, including the appointment of senior personnel to public service, as long as the public service is protected against being misused for partisan purposes.*

The applicant ("DA"), a political party, applied to court to declare the ruling African National Congress' Cadre Deployment Policy inconsistent with the Constitution and therefore unlawful. The opposition to the policy was based on the DA's view that it negatively impacted critical State institutions, blurring lines of accountability, and facilitating State capture. The policy was said to have led to poor service delivery and breaches of human rights – and to inhibit the State's ability to function effectively and promote human rights.

The present judgment dealt with the first respondent's objections regarding standing, jurisdiction and material non-joinder. In respect of the main defences of the first respondent ("ANC"), the judgment confined itself to whether there was any valid constitutional attack; whether the ANC's or any other political party's influence on government's decisions regarding the appointment of senior staff, such as Directors General, Deputy Directors General, and Heads of Departments, was unconstitutional; and whether the principle of subsidiarity was applicable.

In challenging the DA's standing, the ANC contended that its policies involved the terms of the contract between members of the ANC on the one hand, and on the other,

the members and the voluntary association, and that, not being an ANC member, the DA had no standing to invalidate a contract between members of the ANC. The DA claimed to bring the proceedings in its own interest and in the interests of the public. The ANC also argued that the present Court's jurisdiction did not extend to making political statements about the content of political party policies.

**Held** – Despite having no legal standing to challenge a term of an agreement to which it was not a member, it was in the interests of justice that the DA be allowed the standing it claimed so that its claims could be interrogated.

Regarding jurisdiction, although the DA had not identified any clause of the policy which offended the Constitution, the question of whether any intelligible constitutional attack had been pleaded with the mandatory specificity was an aspect over which the court did have jurisdiction. In alleging that the cadre deployment policy allowed the usurping of the relevant Minister's power to appoint, the DA advanced no admissible evidence for its conclusions, thus requiring the court to speculate on the allegations made.

In response to the DA's constitutional challenge to the policy, the court found that there was no properly pleaded constitutional attack, with the result that the case based on unconstitutionality had to fail entirely. In so far as the DA had relied on constitutional provisions to challenge the ANC policy, it was bound by the principle of subsidiarity, which required its challenge to be brought in terms of the specific legislation enacted to give effect to the relevant constitutional principles.

The DA's contention that it was impermissible for any political party to influence appointments to public service was incorrect. There was nothing unconstitutional about a political party influencing the policy direction of a government, including the appointment of senior personnel to public service, as long as the public service was protected against being misused for partisan purposes.

The Court concluded that there was no case to be answered, and the application was dismissed.

**M Magigaba Inc Attorneys and another v Legal Aid South Africa and others [2024] 2 All SA 407 (LCC)**

*Legal Practice – Attorneys in land claim – Claim for payment – Legal Aid accreditation – Whether applicants were entitled to charge fees or incur disbursements for work performed prior to being accredited with Legal Aid and, if still not accredited, whether Legal Aid was entitled to withhold accreditation – Legal Aid's conduct, viewed against its mandate of procuring legal services to indigent communities to enable them to bring their claims for restitution of land rights, pointed to its obligation to pay applicant for work done.*

The applicants brought an urgent application against the first respondent ("Legal Aid") and its Chief Executive Officer (the "second respondent") for payment of amounts allegedly owing for legal fees and disbursements, including amounts due to Counsel. The application was brought because Legal Aid had refused to pay for the fees and disbursements claimed by the applicant since 1 January 2022 pursuant to its continued representation of a certain land claimant ("Kwalindile community") in ongoing court hearings that had commenced prior to Legal Aid taking over the management of legal assistance to litigants in land claims cases.

Legal Aid raised several preliminary points, including a challenge to the court's jurisdiction.

**Held** – The issues were whether the applicants were entitled to charge fees or incur disbursements for any work performed prior to being accredited with Legal Aid and, if it was still not accredited, whether Legal Aid was entitled to withhold accreditation. The resolution of those issues involved the question of whether accreditation was an administrative or regulatory process which, if satisfied, enabled the release of payment for work done and disbursements effected subject to Legal Aid's internal assessment or external taxation processes - or whether the applicants never had a mandate to represent the Kwalindile. A second question was whether the proper administration of justice and the interests of justice required the applicants to continue representing the Kwalindile, for which Legal Aid was liable for payment whether by reason of the invocation of *negotiorum gestor*, estoppel, or unjustified enrichment.

In terms of section 29(4) of the Restitution of Land Rights Act 22 of 1994, the Chief Land Claims Commissioner bears the responsibility to arrange legal representation in

respect of a party appearing before the Land Claims Court. The aim is to enable litigants, and perhaps more especially indigent communities, to engage competent legal representatives and experts in pursuing their claims. Legal Aid acts as the manager of funds which the Commissioner, exer related to the applicant's engagement to provide legal services for the Kwalindile, and its entitlement to payment therefor, arose from the exercise of a section 29(4) power, which confirmed the court's jurisdiction in the matter.

The correspondence between the parties showed that although the issue of the applicants' accreditation had been drawn to its attention, Legal Aid had never terminated its mandate, appointed another legal representative for the Kwalindile community, or informed the applicants that their invoices would not be paid. The Court pointed out that Legal Aid is a statutorily created institution which is obliged to fulfil its mandate of procuring legal services to indigent communities to enable them to bring their claims for restitution of land rights and not to abdicate that function. The concern that if it paid the applicant for work done it would be acting contrary to various legislation and regulations was illusory. Once accreditation occurred, there was compliance and any work performed then would become due and payable.

**Marothodi Metsi (Pty) Ltd v Uthukela District Municipality and others**
**[2024] 2 All SA 433 (KZP)**

*Constitutional and Administrative Law – Procurement by Organ of State – Irregularities in award of tender – Application for self-review – Evidence establishing multiple errors and irregularities in bid assessment, rendering award of tender to applicant neither fair, equitable, transparent, competitive nor cost-effective, as required by section 217(1) of the Constitution.*

In February 2020, the first respondent municipality advertised a tender. It awarded the tender to two entities, one of which was an entity called "the Marothodi Metsi and Sebata Group". When the municipality terminated the relevant contract, the applicant, who was not the Marothodi Metsi and Sebata Group but a company called "Marothodi Metsi (Pty) Ltd", brought an urgent application for specific performance of the contract. It subsequently brought an application for the rectification of the same contract. The municipality in turn, brought a counter-application in the form of a legality review, seeking to set aside the decision to award the tender to the Marothodi Metsi and

Sebata Group and the contract. Finally, the municipality launched an application for a money judgment and associated relief against the applicant.

The Court decided to begin with the review application as it sought, as one of its goals, to set aside the contract that the applicant wished to enforce in the urgent application and to rectify in the rectification application. If the review was upheld, that would put an end to both the urgent application and the rectification application as there would be no contract to enforce or to rectify.

The grounds of review were that there was no entity known as the Marothodi Metsi and Sebata Group; the Sebata Group had not submitted compulsory documentation that was required; no audited annual financial statements were furnished as required by the bid conditions; the winning bid was incorrectly assessed, and scored, by the first respondent's bid evaluation committee; and the terms of reference of the bid were impermissibly departed from by the municipality.

**Held** – The municipality, as an Organ of State, was confined to a legality review.

On the first ground of review, it was found that the bidder in the relevant bid document delivered by the applicant to the municipality was not Marothodi Metsi, as submitted by the applicant, but rather the Marothodi Metsi and Sebata Group as stated by the municipality. On the applicant's own version, there was no such entity. Secondly, the documents required of the Sebata Group were important. The tax clearance certificate in particular was material and served a lawful purpose. The failure to put up the compulsory documentation should have resulted in the bid being declared non-responsive. The same applied in respect of the failure to furnish audited annual financial statements. The applicant was in law required to produce financial statements and its failure to do so, again, rendered the bid non-responsive. The bid should have progressed no further. The municipality's submissions that the bid scoring had been irregular and that the terms of reference of the bid were impermissibly departed from, were borne out by the evidence. The bid committee had allocated points to the applicant in respect of requirements that it had not met. In actual fact, the bid should not have been allowed to progress to the next stage of assessment, as it could not have met the minimum score of 60 points. In addition, the scope of the tender was impermissibly expanded. In light of all of the above, the awarding of the tender to the

Marothodi Metsi and Sebata Group was neither fair, equitable, transparent, competitive nor cost-effective, as required by section 217(1) of the Constitution.

The contract was reviewed and set aside.

**Minister of Forestry, Fisheries and the Environment and another v Hacky Fishing (Pty) Ltd and others; *In re*: Hacky Fishing (Pty) Ltd v Minister of Forestry, Fisheries and the Environment and others [2024] 2 All SA 466 (WCC)**

*Constitutional and Administrative Law – Allocation of fishing rights by Minister – Application for review – Delay in making decision – Whether a delay in making such decision was unreasonable was a factual inquiry upon which a value judgment had to be made with due regard to all relevant circumstances.*

*Constitutional and Administrative Law – Self-review – Allocation of fishing rights by Minister – Relief sought by Minister was essential to correct mistake in scoring, and was in the interests of the fishing sector – Balance of convenience favoured granting of interdict against affected respondents to correct irregular fishing rights issued to them.*

In the first of two applications before the court, the applicant ("Hacky") sought urgent review of the alleged unreasonable delay by the Minister of Forestry, Fisheries, and the Environment in taking a final decision regarding Hacky's fishing right in Category B of the Hake Inshore Trawl as envisaged in section 18 of the Marine Living Resources Act 18 of 1998 (the MLRA"). In the second application, the Minister launched a counter-application seeking an order directing the relevant officials to refuse to issue fishing permits to the current category B right holders in the Hake Inshore Trawl fishing sector for the 2024 fishing season pending finalisation of a self-review application to be brought by the applicants. The self-review application was intended to review the scoring of all Category B right holders. The Minister acknowledged that the interdictory relief she sought would be disruptive to the industry, but contended that that had to be balanced against the consequences of continuing to allow the incorrect entities to fish and the need to bring stability to the sector so that the disruptions might finally end.

Hacky contended that the Minister's failure to make a final decision awarding a right to it by 14 December 2022 was irregular irrational and unlawful. It also relied on section 237 of the Constitution which required that all constitutional obligations, of which the

dispensing of just administrative action was one, must be performed diligently and without delay.

**Held** – The main question to be determined was whether the Minister had made out a case for an order postponing Hacky's application, and for an order interdicting and restraining any category B right holders who had already been issued with a fishing permit for the 2024 fishing seasons, from fishing in terms thereof pending the finalisation of an application to be brought by the Minister to review and set aside the scoring of all Category B rights holders not affected by the Hacky order. Second, the court had to determine whether to review the Minister's delay in granting Hacky a fishing right, and whether it should grant Hacky interdictory relief restraining the third to fifth respondents from making any application for fishing permits pending the finalisation of a provisional addendum by the Minister.

Section 18(1) of the Act authorised the Minister to issue commercial fishing rights for periods not exceeding 15 years and to determine the proportion of available fish resources (total allowable catch) which each successful right holder may catch annually. Whether a delay in making such decision was unreasonable was a factual inquiry upon which a value judgment had to be made with due regard to all the relevant circumstances. In this case, the delay was not undue. The Minister had also clearly set out urgency as envisaged in Rule 6(12)(b) of the Uniform Rules of Court.

The court found that the relief sought by the Minister was essential to correct a mistake in scoring, and was in the interests of the sector. However, in the counter-application, the relief sought by the Minister was too wide and would deprive lawfully awarded fishing rights holders. The top-scoring respondents would suffer irreparable harm if the interdict against them was granted. The balance of convenience favoured the granting of an interdict against the affected respondents to correct the irregular fishing rights issued to them. Relief was therefore ordered against only the low-scoring respondents.

**Raliphada v Makhado Municipality and others [2024] 2 All SA 490 (LP)**

*Constitutional and Administrative Law – Failure to appoint candidate as chief financial officer of municipality – Jurisdiction to adjudicate dispute – Legislation which ousts the jurisdiction of the High Court to hear a particular dispute must say so expressly – High Court having jurisdiction in matter involving municipal council's failure to implement recommendation of selection panel on the suitable candidate for the position of the CFO without rational explanation – In absence of sound or reasonable grounds for municipal council to bypass recommended candidate and appoint another candidate, such decision was reviewable.*

The first respondent ("the municipality") had advertised a permanent post for Chief Financial Officer ("CFO"). The selection panel was established by the municipal council in line with the applicable legal compliance guidelines. The applicant and the eighth respondents were some of the candidates who applied for the post and they were both shortlisted for interviews by the selection panel. At the interview stage of the process, the applicant was found to be suitable for appointment, with the highest score of 86%. He was followed by the eighth respondent who was also found to be suitable for appointment by a score of 69%. The next stage of the process was the competency test where the applicant and eighth respondents were both found to be competent for appointment to the position of CFO of the municipality. Unlike the applicant, the eighth respondent held an NQF8 qualification. However, the applicant had been acting in the CFO position for several years. Although the selection panel recommended the applicant for the position, the municipal council decided to appoint the eighth respondent. The applicant sought the review of that decision.

The respondents disputed the High Court's jurisdiction to entertain the application on the ground that the nature of the dispute fell within the scope of labour law, and therefore should have been referred to the labour forums. They further submitted that the employment of employees was not an administrative act which could be reviewed either under the principle of legality or rationality. The applicant, on the other hand, argued that the Labour Court did not have exclusive jurisdiction in the matter.

**Held** – Legislation which ousts the jurisdiction of the High Court to hear a particular dispute must say so expressly. Section 10 of the Employment Equity Act 55 of 1998 ousted the jurisdiction of the High Court in certain type of matters, but was not applicable in this matter. The dominant complaint by the applicant was that the municipal council had failed to implement the recommendation of the selection panel on the suitable candidate for the position of the CFO without rational explanation, thereby acting irrationally, unreasonably and in conflict with the law. That meant that the present Court did have jurisdiction.

On the merits, the selection panel having unequivocally indicated that the applicant was the most suitable candidate and the only one recommended, the only circumstances in which the eighth respondent could be considered was if the applicant

declined the appointment. That had never occurred. The importance attached to the eighth respondent holding an NQF8 qualification was misplaced. If that was intended to be a critical requirement, the council should have made that clear at an earlier stage. There were therefore no sound or reasonable grounds for the municipal council to bypass the applicant and appoint the eighth respondent. The review application accordingly succeeded.

**RH v NM [2024] 2 All SA 504 (WCC)**

*Family Law and Persons – Parent and child – Relocation with child – Section 28(2) of the Constitution provides that a child's best interests are of paramount importance in every matter concerning a child – Family Advocate's recommendation not followed where not shown to be in best interests of child – Express wishes of child could not be ignored.*

The parties had been involved in a relationship without ever having married. The relationship resulted in the birth of a child. The applicant now sought an order granting him leave to permanently relocate the child ("L"), who was now eight years old, to Australia where he now resided and that the primary care of L be transferred to him from the date of relocation. The respondent opposed the application and, in a counter application, sought leave to relocate L permanently with her to Aix-en-Provence, France. Each party set out a number of facts which they alleged warranted their respective moves to the country of their choice with L.

**Held** – Section 28(2) of the Constitution provides that a child's best interests are of paramount importance in every matter concerning a child.

The Court was satisfied from the evidence and, more importantly, the reports by the various experts, that the respondent had, in various respects and at various times, conducted herself in a manner that sought to frustrate the applicant's contact with L. However, that should not detract from the expressly stated wish of L, that he be allowed to be with his mother. The Court did not accept the Family Advocate's recommendation that L should first relocate to Australia with the applicant for a year or until he obtained Australian citizenship, after which he could relocate to France. Although the court will not lightly depart from the recommendations of a Family Advocate, and other experts, in this instance the option recommended would not be in L's best interests. On the other hand, a proposal made by the respondent did provide a means by which the concerns of the applicant, as well as L's desire to have both

parents in his life as much as possible, could be addressed. The proposal was that L should relocate to Australia for a year once he reached the age of 13, providing that he expressed a desire to do so, the applicant proved that he could provide all of L's needs, a relocation plan and maintenance agreement were signed, and therapeutic support offered to L to monitor his relocation and settlement. The Court considered the proposal to be fair and sensible, and, more importantly, in L's best interests. As the present Court would no longer have jurisdiction over the matter when the time arrived, any dispute between the parties as to the implementation and/or execution of the said proposal, would have to be addressed to a competent court in the relevant jurisdiction.

The applicant's application was dismissed, and the respondent was granted leave to remove L permanently from South Africa and to relocate him with her to France, subject to the above arrangement. The Court's order detailed the rights and obligations of the parties going forward.

**SB Guarantee Company (RF) (Pty) Ltd v Botes [2024] 2 All SA 529 (GP)**

*Civil Procedure – Summary judgment application – Court having jurisdiction and plaintiff as dominus litis in the proceedings, was entitled as a matter of choice, to institute proceedings in the present court – None of the defences raised constituted bona fide or triable defences – Declaration of immovable property as specially executable constituting only recourse for plaintiff in circumstances of case.*

In 2015, the plaintiff concluded a guarantee agreement with a bank in terms of which the plaintiff would from time to time guarantee the obligations of the bank's debtors under individual home loan agreements. In October 2016, the defendant and the bank concluded a home loan agreement in terms of which the bank agreed to advance the sum of R1 440 000 to the defendant. As security for the Home Loan, the bank required a guarantee of payment from the plaintiff in the event of default by the defendant and an indemnity in terms of which the defendant indemnified the plaintiff against any claim made by the bank in terms of the guarantee. When the defendant defaulted under the home loan agreement, the bank called on the plaintiff to make payment under the guarantee and to institute legal proceedings against the defendant for the recovery of the full amount due. That resulted in the plaintiff's application for summary judgment against the defendant. It sought payment of the amount claimed by the bank, interest, and an order declaring the defendant's immovable property executable.

**Held** – In his first plea the defendant contended that the action had to be instituted in the Magistrates Court following an express term contained in the mortgage bond; and that under the *contra proferentum* rule, the plaintiff was obliged to commence legal proceedings in the Magistrates Court because that would be favourable to the defendant. Other grounds on which the first defence relied included alleged non-compliance with the National Credit Act 34 of 2005. Section 21(1) of the Superior Courts Act 10 of 2013 confers jurisdiction over all persons residing or being in, and in relation to all causes arising within its area of jurisdiction. The present division did have jurisdiction to hear the present application, and the plaintiff as *dominus litis* in the proceedings, became entitled as a matter of choice, to institute the proceedings in the present court. Further, the objections based on the National Credit Act were found to be unsustainable. Various other defences raised were also lacking in merit and were rejected by the Court. Considering the principles governing summary judgment proceedings, the defences raised by the defendant did not constitute *bona fide* and triable defences.

It then had to be decided whether the property in question should be declared specially executable. The amount owed by the defendant was substantial and the immovable property was the only tangible security which the plaintiff held in that regard. The Court was not convinced, in the absence of any proof submitted by the defendant to the contrary, that there were less invasive avenues available to the plaintiff to recover its substantial debt or that the mechanisms contained in Uniform Rule 46(1)(a)(i) would suffice in the circumstances of the case. The defendant's submission that granting executability of immovable property would be unjust and disproportionate was accordingly rejected. The Court was not persuaded that an order declaring the defendant's immovable property specially executable in the circumstances would be a violation of his basic human rights, his property rights, his right to adequate housing or his right to dignity.

The application for summary judgment was accordingly granted.

**SS Salutions (Pty) Ltd t/a Seal Security v Western Cape Provincial Government and others [2024] 2 All SA 547 (WCC)**

*Constitutional and Administrative Law – Procurement by Organ of State – Award of tender – Application for review – State must follow a fair, equal, open, competitive, and cost-effective procurement system – Administrative action which materially and adversely affects any person's rights or legitimate expectations is procedurally unfair*

*– While court has power to review unlawful administrative action, reviewing courts should not be influenced by the mere suspicion of wrongdoing, and materiality is a critical requirement in assessing deviations from the prescripts of a tender.*

The first respondent and other parties representing other provincial departments (the "provincial respondents") published a tender invitation for the provision of security services to be provided at properties owned by the provincial respondents. The relevant protection services were to include provision of a control room, security vehicles, firearm management, armed response vehicles, security relocation and eviction services. The applicant, the tenth respondent ("RS") and the twenty second respondent ("TSS") submitted bids, and made a shortlist.

The applicant sought the review of the award of the contract to RS, alleging that the latter was treated differently from other bidders, resulting in unfairness. It was contended that RS was afforded an enhanced opportunity to undergo a risk assessment, that there were uncertainties regarding the ability of the incumbent to deliver the services, and that RS was provided with additional opportunities to demonstrate its capability and competence in respect of provision of the required services. Based on the averments that RS was favoured over the other bidders due to the strategy adopted by the provincial respondents, the applicant submitted that the tender awarded to RS should be re-evaluated and invalidated.

**Held** – Procuring bodies should only consider compliant and conforming tenders. Therefore, tenders must adhere to every tender component, following the specifications provided by the purchasing entity in the tender invitation. Failure to achieve those conditions would undermine the objective of soliciting information and documents from potential bidders.

The fact that RS was subjected to an additional risk evaluation in a separate province did not lead to unfairness to the applicant and TSS as alleged, and was simply intended to assess the usefulness of the bid made by RS.

The principle of legality demands that those who make public decisions must use the powers given to them and do their jobs in a legal manner that makes sense and is done in good faith. The provincial respondents therefore had to follow the rule that they could only do what the law permitted. In the context of procurement, the State must follow a fair, equal, open, competitive, and cost-effective system. Administrative

action which materially and adversely affects any person's rights or legitimate expectations is procedurally unfair.

When the provincial respondents acted by way of procurement, they were exercising public power and performing a public function. In that regard, they bore onerous duties and had to weigh up different public interests, such as the public good from getting a lower price. The court has the power to review unlawful administrative action. Significantly however, reviewing courts should not be influenced by the mere suspicion of wrongdoing or moral turpitude. Materiality is a critical requirement in assessing deviations from the prescripts of a tender. In the present case, there were no material grounds justifying setting aside the tender awarded to RS.

The applicants' grounds for review were not sustainable, and the application for review was dismissed.

**Van der Vyver Transport (Pty) Ltd v Minister of Labour and others**
**[2024] 2 All SA 581 (WCC)**

*Constitutional and Administrative Law – Judicial review – Time limit imposed by section 7(1) of Promotion of Administrative Justice Act 3 of 2000 – Any proceedings for judicial review must be instituted without unreasonable delay and no later than 180 days after any internal remedies have been concluded or after the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons therefor – Applications brought outside prescribed period must be accompanied by an application for an extension of time as contemplated in section 9(2) – Failure to bring an extension application is fatal to the review proceedings as a court would have no authority to enter into the substantive merits.*

In terms of section 83 of the Compensation for Occupational Injuries and Diseases Act 130 of 1994, an employer is assessed by the third respondent (the "D-G") according to a tariff of assessment calculated on the basis of such percentage of the annual earnings of its employees as the D-G, with due regard to the requirements of the compensation fund for the year of assessment, may deem necessary. The employer must then pay the Compensation Commissioner the relevant amount within 30 days of the date of the notice of assessment.

Dissatisfied with the tariff applied to it by the D-G, the appellant instituted a review application in terms of section 6(2)(g) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). Opposing the application, the respondents submitted that the

application had been brought outside the 180 days provided for in section 7(1) of PAJA and that it was not in the interests of justice to grant an extension in terms of section 9 of the Act. The respondents argued that as there was no condonation application, the appellant had failed to satisfy the court that it would be in the interests of justice to extend the 180-day period. The court *a quo* dismissed the application on the grounds that the appellant had unreasonably delayed in bringing the application, failed to provide a satisfactory explanation for the entire period for which it sought redress, and failed to exhaust an internal remedy.

**Held** – On appeal that in terms of section 7(1) of PAJA, any proceedings for judicial review must be instituted without unreasonable delay and no later than 180 days after any internal remedies have been concluded or after the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons therefor. When judicial review proceedings instituted in terms of PAJA are brought outside the statutory period of 180 days, the application must be accompanied by an application for an extension of time as contemplated in section 9(2). A failure to bring an extension application is fatal to the review proceedings as a court would have no authority to enter into the substantive merits.

Based on when the appellant was aware or could reasonably have been expected to be aware of the administrative action, it was clear that the application had been brought outside the 180-day statutorily prescribed period. It had not brought an application for extension of the period as per section 9. The appeal stood to be dismissed on that ground alone. However, in the event that the court was wrong and it could be argued that the appellant had brought an application for extension, the court considered whether it was shown that it would be in the interests of justice to grant such an extension. It was decided that the interests of justice would not be served by granting an extension of the 180-day period.

A court is precluded from reviewing any administrative action unless the aggrieved person has exhausted the internal remedies provided for in any other law. The appellant had not exhausted the internal remedies available to it. The appeal was therefore dismissed by the majority of the court.

In a dissenting judgment, it was held that the context and peculiar character of the delay in this case, the absence of prejudicial consequences to the respondents or third parties, the importance of the case and the apparent merit of the review, weighed holistically, demonstrated that the interests of justice required that condonation be granted. It was also stated that there were no internal remedies available to the appellant.

**Walker v City of Cape Town and others [2024] 2 All SA 612 (WCC)**

*Local Government – Town planning – Land use management scheme – Refusal of application for departure from scheme – City having duty to consider whether plans submitted for approval objectively complied with applicable zoning and building regulations – Errors and irrationality in deciding application rendering resultant decision reviewable.*

The applicant required certain departures from the first respondent's Development Management Scheme ("DMS") to regularise an existing outhouse on her property. The outhouse had been built prior to her becoming owner of the property. She also required the removal of certain restrictive conditions from the subject property's title deed. Those restrictions prescribed that there could be no more than a single dwelling on each lot without the written consent of the first respondent (the "City"). The applicant applied for the relaxation of those conditions so as to allow two dwellings and a domestic worker accommodation on the subject property. The City's Municipal Planning Tribunal ("MPT") granted departures from and removed certain restrictive title deed conditions in respect of the applicant's property. That decision was overturned in part by the second respondent (Appeal Authority) pursuant to an appeal by the third respondent. The applicant sought the review of the latter decision. She contended that the Appeal Authority's allegation of inadequate information was flawed in so far as it focused on past instead of future use of the property; that it committed a material error of law and fact by relying on what it believed to be the subjective intention of the applicant; and that its decision was irrational as it removed the title deed restriction which favoured the applicant, leaving her in a worse position than she would have been had the entire application been dismissed at the outset or had the full appeal been upheld.

**Held** – The dispute involved a set of archaic title deed conditions which had existed for a considerable period of time in parallel with, and sharp contradiction to, a set of progressive land use policies and a modern development management scheme which

were adopted by the City after extensive public consultation. An enormous and expensive effort was required of a property owner, whenever an application became necessary in order to bring the historic conditions in line with the letter and spirit of the DMS.

The applicant's challenge to the Appeal Authority's decision had merit. Case authority establishes that the City's duty was to consider whether plans objectively complied with the zoning and building regulations and that the subjective intention of the person who submitted the plans was irrelevant. The focus on the applicant's subjective intention in this case was wrong. Further, the applicant's application was dealt with on appeal based on the assumption that she had applied for three dwellings to be used as Airbnb units, when she had applied for two dwellings and domestic staff quarters. To the extent that there was a danger that the subject property was to be used in a different way from that indicated in the application, the solution was to tighten the protective condition. The Appeal Authority also wrongly claimed that the applicant had not furnished sufficient information, when in fact the information sought was not relevant. Furthermore, the removal of one of the title deed conditions was irrational. The decision to uphold the third respondent's appeal was reviewed and set aside in its entirety. The matter was remitted to the second respondent for reconsideration.

END-FOR NOW