LEGAL NOTES VOL 6/2024

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South African Law Reports (June 2024)

SASOL CHEVRON HOLDINGS LTD v COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE 2024 (3) SA 321 (CC)

Administrative law — Administrative action — Review — Application — Delay in bringing application — When applicant became aware of action and reasons therefor or might reasonably have been expected to have become aware thereof — Promotion of Administrative Justice Act 3 of 2000, s 7(1).

On 21 September 2018 Sasol Chevron Holdings Ltd filed a review application in the High Court under the Promotion of Administrative Justice Act 3 of 2000 (PAJA), seeking to set aside Sars' decision of 6 December 2017 that it was not entitled to a value-added tax refund as envisaged by s 11(1)*(a)*(ii)*(bb)* of the Value-Added Tax Act 89 of 1991, read with reg 6 of part 1 of the Export Regulations. (See [13].)

Sars raised a preliminary objection to the review application on the ground that Sasol Chevron had not complied with s 7(1) which allows for a 180-day period to institute review proceedings after becoming 'aware of the action and the reasons for it'. Sars' decision and the reasons therefor were communicated to Chevron by way of a letter dated 6 December 2017. Further correspondence was exchanged between the

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

parties, culminating in a letter dated 26 March 2018 from Sars to Sasol Chevron in which Sars reaffirmed its previous stance. (See [11] – [12].)

The High Court dismissed the objection and upheld the review, finding, inter alia, that the relevant correspondence from Sars was that of 26 March 2018, because this was when Sars first provided reasons for its ruling, and that the review application was therefore instituted 179 days after reasons were provided.

In Sars' appeal to the Supreme Court of Appeal, that court held that the decision sought to be reviewed and the reasons therefor were communicated to Sasol Chevron on 6 December 2017, which was the date from which the 180-day period began running; that consequently, the review application was instituted outside of the 180-day period prescribed in s 7(1) of PAJA; and that this was dispositive of the matter. (See [15].)

The present case concerned Sasol Chevron's application to the Constitutional Court for leave to appeal — which was granted in the interests of justice (see [16] – [17) — and its appeal. At issue was whether Sasol Chevron brought its review application within the period of 180 days, and more particularly when Chevron became 'aware of the action and the reasons for it', as contemplated in s 7(1).

Held

The reasons provided by Sars as to why Sasol Chevron was not entitled to a refund were set out in paras 1 – 3 of the Commissioner's letter of 6 December 2017. These reasons were sufficient for the purposes of PAJA. Sasol Chevron was placed in a position to formulate an objection; it did not need the further explanation that was furnished in the 26 March 2018 letter, which did not contain new reasons but was an elaboration of the reasons given on 6 December 2017. If this court were to hold that the 180 days in s 7(1) of PAJA only began to run when a reviewing party was satisfied with the reasons given to it, this would enable parties, especially well-resourced parties, to indefinitely extend the period in s 7(1) by simply requesting additional reasons. This was contrary to the purpose of s 7(1), which was to promote certainty regarding the lawful status of administrative decisions. The SCA's reasoning was unassailable, and the appeal would accordingly be dismissed. (See [20] – [24.)

SCALABRINI CENTRE OF CAPE TOWN AND ANOTHER v MINISTER OF HOME AFFAIRS AND OTHERS 2024 (3) SA 330 (CC)

Immigration — Refugee — Asylum seeker — Asylum-seeker visa — Failure to renew within one month of expiry — Failure deemed an abandonment of application for asylum — Constitutionality — Refugees Act 130 of 1998, ss 22(12) and (13).

Applicant trust approached the High Court and obtained the invalidation of ss 22(12) and (13) (the impugned sections) of the Refugees Act 130 of 1998, as well as its associated regulations, for their inconsistency with the Constitution as well as their irrationality.

The impugned sections provide, in essence, that an asylum seeker who fails to renew his asylum seeker visa within one month of its expiry, is deemed to have abandoned his application, may not reapply for asylum, and is to be dealt with as an illegal foreigner (see [24]). Here, applicant sought confirmation of the High Court's order from the Constitutional Court.

The Constitutional Court upheld the application, holding that the impunged sections infringed the principle of non-refoulement (s 2 of the Act), limited the rights to dignity, to just administrative action, and those of children, and threatened the right to life (see [28], [36], [40] – [41]). They also had illegitimate purposes and arbitrary effects (see [45] – [47]).

Declaration of invalidity confirmed (see [51]).

VODACOM (PTY) LTD v MAKATE AND ANOTHER 2024 (3) SA 347 (SCA)

Expert valuer — Determination by — Review — Test — Restatement.

Expert valuer — Determination by — Determination by CEO in capacity as deadlock breaker in respect of dispute between cellphone company and employee (Makate) as to appropriate compensation to be paid to latter for his 'please call me' (PCM) idea — Review of — Decision of CEO that Mr Makate was entitled to 5% of the revenue earned from the PCM product over five years from year product launched looking forward — CEO exercising judgment unreasonably, leading to patently inequitable result — Decision reviewed on equitable grounds.

The first respondent, Mr Makate, in 2000, whilst working for the appellant, Vodacom, came up with an idea that a cellphone user with no airtime could send a request to another user who had airtime to call them. Vodacom developed this in 2001 into its highly successful 'Please Call Me' (PCM) product. When Vodacom refused to remunerate Mr Makate for his idea, he approached the courts. The dispute reached the Constitutional Court, which in 2016 handed down an order ('the operative order') in Mr Makate's favour. It found inter alia that an agreement reached between Mr Makate and Mr Geissler — Vodacom's director of product development at the time, and whom Mr Makate approached with this idea — in terms of which Mr Makate would be paid a share of the revenue generated, should the product prove to be a success, was binding on Vodacom. The CC in its order directed Vodacom to 'commence negotiations in good faith with Mr Makate for determining a reasonable compensation payable to him in terms of the agreement'. It also ordered that, should the parties fail 'to agree on the reasonable compensation, the matter [had to be] submitted to Vodacom's [CEO] for determination of the amount'. The parties did enter negotiations, but they failed to reach agreement on the amount of compensation. They accordingly referred the matter to the CEO, whose role, the parties agreed, was that of 'deadlock breaker'. Vodacom in its submissions to the CEO contended that the operative order contemplated an employee-remuneration model based on international best practices. Mr Makate disagreed, insisting that the order demanded that his remuneration be calculated in terms of a revenue-share model, looking 'backwards' over 18 years, according to which he should receive compensation at 5 % of all revenue generated by the PCM product. The CEO ultimately arrived at a determination of R47 million as reasonable compensation for Mr Makate. The CEO considered a number of different models in arriving at his approach, which was to place himself in the position of the CEO in 2001, and then consider what compensation Vodacom would have paid Mr Makate under a contract concluded with him at that time. With this in mind, the CEO determined inter alia that Mr Makate was entitled to 5% of the revenue earned from the PCM product over five years from 2001 looking forward. The CEO imposed a five year cap, having regard to the duration of similar contracts entered into with third-party service providers at the time. Critical to the CEO's calculation was his assumption that only 30% of the return calls (in response to a 'please call me' message) yielded 'incremental revenue', that is, revenue that Vodacom would not have earned but for its use of PCM.

Mr Makate was however dissatisfied with the determination. So, he instituted proceedings in the High Court to review and set aside the CEO's determination. The court ruled in Mr Makate's favour. It found that the CEO had not exercised the judgment of a reasonable person, which resulted in an inequitable result for the affected parties. It endorsed Mr Makate's revenue sharing model for calculating suitable remuneration. And it rejected the approach of the CEO: He had relied on his own models on which he had not engaged the parties; committed fundamental errors in the calculation of revenue; and acted arbitrarily in applying a 30% adjustment for incremental revenue. The court remitted the determination to the CEO to make a fresh determination, based on a number of 'directives', including that Mr Makate was entitled to be paid 5% of the total voice revenue generated from the PCM product from March 2001 to March 2021; and that revenue include PCM revenue derived from prepaid, contract (both in-bundle and out bundle) and interconnect (MTR) fees.

Majority judgment: Before considering whether the High Court was correct in its finding, the court set out the standard of review in respect of the determination of the CEO. That was that, where a third person was nominated to fix a price or make a valuation, their determination may be rectified on reasonable grounds, should it be found that, (1) the valuer exercised their judgment unreasonably, irregularly or wrongly; (2) such as to lead to a patently inequitable result. (See [13] – [14].)

The court accepted that the High Court was correct in its finding on the first leg of the test, that is, that the CEO's determination was not reasonable: The CEO had made a number of irrefutable errors in calculating compensation — he had omitted MTR in relation to contract subscribers in determining revenue derived from PCM; he, once the parties had agreed that 27% of PCM resulted in a return call, had, without reference to the parties, and without providing any reasons in his determination for having done so, applied a further 70% deduction. (See [18] – [22].)

The focus of the court's attention was the second leg of the test, which it held the High Court had wrongly not considered (see [22]): whether the determination was patently inequitable. The court considered the proper interpretation of the 'operative order'. It held that the term 'compensation' referred to Mr Makate's claim for payment from Vodacom for his invention, within 'a special contract' between the parties, outside the context of a traditional employer – employee relationship. It followed that the parties envisaged that Mr Makate would be compensated for his invention based on the duration of the contract. (See [33].) The court rejected the approach of the CEO's

decision in capping remuneration to a five-year period starting from 2001. The justification offered, ie that other contracts Vodacom entered into with third-party service providers were generally for a maximum period of three years, was contradicted by the facts: contracts with service providers such as WASP and iBurst stretched to over 18 years. (See [27] and [29].) Further, in circumstances in which the PCM product had been generating revenue for Vodacom for over 20 years, it would have been eminently reasonable, sensible and 'business-like' for Vodacom to have extended Mr Makate's contract to a period beyond five years. (See [28] – [29].) The court, in conclusion, held that the CEO's determination was flawed and thus inequitable (see [29]).

As to an appropriate determination, the court held that, on a conspectus of the evidence presented, including expert evidence, it could find no objection by Vodacom to the revenue models presented by Mr Makate. And, there was no basis why the CEO had preferred his own model, which he had crafted with no reference or recourse to the parties. (See [34].) In conclusion, the court expressed itself in agreement with the High Court to the extent that it found that the CEO had acted contrary to his Constitutional Court mandate. However, the court asserted, the High Court ought not to have remitted the matter to the CEO for a fresh determination, but rather have set aside the determination, and substituted it with it own decision, all the necessary evidence having been before it to do so. In this regard, there was no evidence that Mr Makate's computation of remuneration was wrong, and ought to be accepted as correct. (See [36] – [37].) Accordingly, the court dismissed the appeal in part, and substituted the High Court's order with one reviewing and setting aside the High Court's order, and replacing the CEO's determination with one finding that the applicant was entitled to be paid 5 – 7,5% of the total revenue of the PCM product from March 2001 to date of judgment, together with interest thereon, and directing that the total revenue ought to be that as set out in models presented by Mr Makate.

Minority judgment: The minority disagreed with Mr Makate that only the model presented by himself, in terms of which he was entitled to a fixed percentage of the total revenue generated by the PCM product, was in line with the operative order. The agreement of the parties as encapsulated in the 'operative order' was no more than that Mr Makate would get a 'share' or 'part' of the revenue in an 'amount', which 'amount' the CEO had to determine. How he should do so, and what form the compensation should take, was left to the discretion of the CEO. (See [91] – [100].)

The CEO was entitled to determine the compensation payable to Mr Makate on the basis that he did: the appropriate model did result in an amount constituting a share or a part of the revenue generated by the PCM idea. (See [101].) Furthermore, it disagreed that the CEO's determination of 'incremental revenue' was without factual basis: the CEO drew on his experience and expertise to make the assumption that only 30% of the return calls yielded incremental revenue, and provided a detailed explanation for it. (See [150] – [153] and [172] – [173].) It could not be said, the minority concluded, that the CEO's determination of PCM incremental revenue was unreasonable or patently inequitable (see [174]). It however did find the CEO's determination as to the duration of the contract unreasonable and patently inequitable (see [192]), in circumstances in which the commercial viability of PCM was a proven fact, and in which it was accepted that Vodacom has used the PCM service for more than 20 years and continued to do so. A contract duration of 18 years, which Mr Makate had indicated he would accept, was both reasonable and fair. (See [196].) It followed that the High Court's order that Mr Makate be paid 5% of the total voice revenue generated by the PCM product for 20 years had to be set aside. The issue of the duration of the contract had to be remitted to the CEO to redo his determination in accordance with the models that he considered when making the determination, save that he must allow for an 18-year contract period. (See [197].)

FORESTRY SOUTH AFRICA v MINISTER OF HUMAN SETTLEMENTS, WATER AND SANITATION AND OTHERS 2024 (3) SA 400 (SCA)

Environmental law — Commercial forestry — Water use — Regulation — Stream reduction and planting of new species in commercial plantations established before commencement of 1998 Water Act — Meaning and effect of relevant provisions of Act — National Water Act 36 of 1998, s 2, s 32(1)*(a)*(ii), s 34, s 35 and s 36(1).

Water — Use of water — Existing lawful use — Stream flow reduction activity — Stream reduction and planting of new species in commercial plantation established before commencement of 1998 Water Act — Meaning and effect of relevant provisions of Act — National Water Act 36 of 1998, s 2, s 32(1)*(a)*(ii), s 34, s 35 and s 36(1).

Forestry South Africa (FSA), a non-profit organisation representing the interests of timber growers, applied in the Western Cape High Court for declaratory relief in the form of an interpretation of provisions of the National Water Act 36 of 1998 (the Act) that would bind its members as well as the respondents. The purpose of the Act is

described in its s 2 as 'to ensure that . . . water resources are protected, used, developed, conserved, managed and controlled'.

FSA argued that plantations that existed at the commencement of the Act had to be considered lawful water use, irrespective of whether it was authorised under pre-1998 legislation (the recognition issue). It also argued that the Act did not prevent its members from replacing one genus/species of tree with another (the species/genus exchange issue).

The respondents (various Statutory Authorities with powers under the Act) argued, in respect of the recognition issue, that a 'stream flow reduction activity' (flow activity) such as forestry must have been lawful under pre-1998 legislation to be lawful now. The Act, which introduced the concept of flow activity into South African law, defined it in s 36 to include 'the use of land for afforestation . . . for commercial purposes'. The Statutory Authorities submitted that if flow activity was not lawful in the two-year period prior to the commencement of the Act stipulated in s 32, it was not made so by the Act. In respect of the species issue, the Statutory Authorities argued that the verification process envisaged in s 35 empowered them to limit the species of trees used for commercial afforestation.

The High Court ruled against FSA on the recognition issue and against the Statutory Authorities on the species issue. Both sides appealed to the Supreme Court of Appeal, with the result that it was faced with two consolidated appeals.

On the recognition issue, FSA's view was that the concept of flow activity as used in s 32 was not subject to authorisation under pre-1998 legislation. The High Court ruled that flow activity had to be *lawful water use*, not merely existing water use.

Sections 32 – 35 fell into part 3 of the Act, which dealt with existing lawful water use. Section 36 fell into part 4 of the Act, which allowed the Minister to regulate activities that reduce stream flow by declaring them to be 'stream flow reduction activities'.

On appeal to the Supreme Court of Appeal —

Held for the majority per Unterhalter AJA

As to the recognition issue: Since the definition of flow activity did not import the requirements of authorised use, a water use could be recognised as flow activity without that activity being one authorised under pre-1998 law. The typology of s 32(1)*(a)* allowed water use to qualify as an existing lawful water use even if it was not authorised use. Importing the requirements for authorised use into flow activity would impermissibly muddle the three types of pre-commencement water use — authorised

use, flow activity, and controlled activity — so carefully distinguished by the Act. The recognition of flow activity as a distinct use right did not, however, mean that the Act legalised what had been unlawful commercial afforestation pre-1998. Nor did the Act's recognition of existing water use rights immunise those rights from the regulatory remit of the Act. It followed that the High Court should have granted the declarator sought by FSA. (See [36] – [40], [49] – [53].)

As to the species/genus exchange issue: Section 34(1)*(a)*, which was relevant to the species issue, made flow use 'subject to any existing conditions or obligations attaching to that use'. 'Existing' could — given the nature of flow activity as one that did not rest on authorisation under pre-1998 law — only mean 'existing as at the commencement of the Act'. Accordingly, the High Court should have granted the second declarator as well, albeit in modified form, since the old-order law could contain obligations or conditions that qualified the right to flow activity, thereby limiting the species of trees that could be planted. (See [59] – [63].)

The majority accordingly ruled substantially in favour of Forestry SA in both appeals. It replaced the order of the Western Cape High Court with one declaring that —

(i) an existing lawful water use in a stream flow reduction activity (as intended in s 32(1)*(a)*(ii)) in commercial afforestation under s 36 does not require authorisation under any law in force immediately before the date of commencement of the Act; and

(ii) s 34(1)*(a)* does not limit the planting of specific species or genera of trees, save insofar as the restriction attached to the rights to undertake these activities by reason of conditions or obligations arising from law of application at the commencement of the Act. (See [85].)

Held per Mothle JA dissenting

The majority erred in finding that the verification process in s 35 was not applicable to the species/genus exchange. Its too narrow interpretation of s 35 was inconsistent with the purpose of the Act as set out in s 2. The dissent would have ordered, inter alia, that genera, species and clones of trees used for commercial forestation may not be exchanged without authorisation in terms of the Act. (See [98] – [100].)

MANTIS INVESTMENTS HOLDINGS (PTY) LTD AND ANOTHER v DE JAGER NO AND ANOTHER 2024 (3) SA 431 (SCA)

Insolvency — Creditors — Proof of claims — Admission of claim by Master — Master's decision to admit claim constituting administrative action — Standing unless set aside on review — Litigant dissatisfied with Master's decision must apply to court for review under IA s 151, but only after following procedure in IA s 45(3) — If no steps taken to review Master's decision, then admitted claim becoming conclusive — Insolvency Act 24 of 1936, s 44, s 45(3) and s 151.

Section 44 of the Insolvency Act 24 of 1936, which regulates the proof of liquidated claims against an insolvent estate, obliges the Master to examine the proof-of-claims documents to determine whether they prima facie disclose the existence of an enforceable claim. If the Master then admits a claim, the decision stands as an administrative action, and the Master cannot subsequently alter it. But the decision may be disputed under s 45(3), and only thereafter taken on review under s 151. The procedure in s 45(3) is peremptory, and the Master's decision to admit the claim *may not be reviewed unless the procedure in s 45(3) had been followed*. If no steps are taken to review the Master's decision to admit a proved claim, the decision stands and *the claim becomes conclusive and enforceable* against the company in liquidation. (See [14] – [18].)

The Supreme Court of Appeal applied these principles to dismiss an appeal against a High Court order upholding the Master's unchallenged admission of claims against a company in liquidation. The SCA pointed out that the legal consequence of the Master's decision could not be avoided by requiring proof of pre-existing proved claims, thereby defeating the Act's comprehensive measures to protect creditors. (See [12], [21] – [22].)

MUNICIPAL GRATUITY FUND v PENSION FUNDS ADJUDICATOR AND ANOTHER 2024 (3) SA 439 (SCA)

Pension — Disputes — Pension Fund Adjudicator — Determination of dispute — Opportunity to comment — Pension fund not given opportunity to make representations to adjudicator — Audi alteram partem principle violated — Adjudicator's determination set aside — Pension Funds Act 24 of 1956, s 30F.

During his lifetime the deceased was an employee of the Ba-Phalaborwa Municipality and a member of the Municipal Gratuity Fund (the Fund). Prior to his death, on 12 January 2009, he had nominated Ms Mutsila, his wife, and their five children as the beneficiaries of his death benefits in the Fund. Upon his death a dispute arose concerning the allocation of the death benefits to his dependants. Ms Mutsila, the second respondent, was dissatisfied with the Fund also allocating death benefits to the deceased's life partner, Ms Masete, and two of her children who were still minors. The Fund accepted their factual dependency, although under the mistaken belief that the children were the deceased's children.

On 14 April 2014 Ms Mutsila filed a complaint with the Pension Funds Adjudicator (the Adjudicator), in which she cited a pending case between Ms Masete and the father of her two minor children relating to their custody (the custody application). On 15 May 2014 the Adjudicator informed the Fund in writing of the complaint. The Fund responded on 30 May 2014, suggesting that the evidence in the custody application might have a direct impact on the consideration of the complaint and the distribution of the death benefits; that consideration of the complaint should be held in abeyance until the conclusion of the custody application; and that the Fund be allowed an opportunity to respond 30 days after the conclusion of that application. Contrary to the Fund's suggestion, the Adjudicator considered the complaint and made a determination, inter alia, setting aside the Fund's allocation of the death benefits, and ordering the Fund to pay R300 000 to Ms Mutsila 'for the repayment of her housing loan with Absa Home Loan Division as resolved on 9 April 2014'. The Fund, however, made no such resolution; the Adjudicator had committed a factual misdirection in this regard. (See [7] – [8].)

The Fund subsequently approached the High Court to set aside the Adjudicator's determination but was unsuccessful, as was their subsequent full bench appeal. The present case concerned the Fund's appeal to the Supreme Court of Appeal (the SCA), with its leave (as was the case with the appeal to the full bench). The Adjudicator did not participate in the appeal (as was the case in the courts below) but the appeal was opposed by Ms Mutsila. The Fund's challenge was based on, *(a)* the Adjudicator not having jurisdiction to determine Ms Mutsila's complaint (the jurisdiction challenge); *(b)* the Fund not having been afforded an opportunity to be heard before

the Adjudicator decided the complaint (the *audi alteram partem* challenge); and *(c)* a defence of lis pendens insofar as the custody application had not been finalised (the pending action challenge).

The SCA rejected grounds *(a)* and *(c)* (see [15] – [20]), but upheld the *audi alteram partem* challenge, holding that, in the circumstances, the Fund was not allowed an opportunity to respond fully as provided for in s 30F (quoted at [21]) before its award was set aside (see [22]). It accordingly upheld the appeal against the orders of the High Court and the full court, also setting aside the Adjudicator's determination (see [35]).

As to remedy, it was held that the only equitable outcome was to accept that the Fund complied with its legislative mandate and in its discretion made a correct distribution, so that its determination would prevail (see [30]).

FINBOND MUTUAL BANK LTD v MAGAU AND OTHERS 2024 (3) SA 453 (LCC)

Land — Land reform — Land Claims Court — Jurisdiction — Power to adjudicate delictual claims.

Applicant was the owner of a farm and respondents occupiers in terms of the Extension of Security of Tenure Act 62 of 1997 (ESTA).

Applicant alleged that respondents were engaging in theft, trespassing, arson, illegal hunting and intimidation of its farm manager. It approached the Land Claims Court (LCC) for an eviction order, which the court granted.

Third respondent then counterclaimed, alleging that the eviction proceedings were irregular, causing impairment of her dignity and emotional shock, suffering and trauma. These injuries, she said, grounded a claim under the actio iniuriarum for compensation. (See [28], [59]).

The issues were, (1) whether the LCC has jurisdiction to adjudicate delictual claims; and (2) if so, whether the requisites for such a claim were satisfied (see [30]).

Held, as to (1), yes. This on the bases of s 22(2)*(a)* of the Restitution of Land Rights Act 22 of 1994 ('the [LCC] . . . shall have . . . all such powers in respect to matters falling within its jurisdiction as are possessed by a High Court having jurisdiction in civil proceedings'); s 22(2)*(c)* of the Act ('the LCC . . . shall have . . . the powers to decide any issue either in terms of this Act or in terms of any other law, which is not ordinarily within its jurisdiction if the court considers it to be in the interests of justice

to do so'; that third respondent was an occupier in terms of ESTA; and that the claim was brought in the Land Claims Court. (See [47] – [48].)

Held, on (2), no. This, firstly, on the ground that, procedurally, delictual claims fell within the category of actions; rule 44 of the LCC Rules provided that actions are to be brought by notice of action; and, contra rule 44, third respondent had brought the claim by counter-application (see [52]).

Secondly, s 14(3)*(c)* of ESTA provides that if an eviction is contra the Act, the court may order damages (including for suffering), and third respondent had not shown she was evicted contra the Act (see [61], [63] – [65]). Accordingly, the court lacked the power to award damages. This made it unnecessary to decide if the elements of the actio iniuriarum were established (see [67]).

Counterclaim dismissed (see [72]).

MAZIBUKO AND OTHERS v MINISTER OF HOME AFFAIRS AND ANOTHER 2024 (3) SA 469 (GP)

Constitutional law — Citizenship — Permanent residence — Rights, privileges and benefits — Rights, privileges and benefits associated with use of identity document — Practice of 'ID blocking' implemented by Department of Home Affairs — Placement of markers against 'suspicious' identity numbers of persons registered in national register as SA citizens or permanent residents, with effect that those ID numbers automatically 'blocked', before conclusion of investigation into, and any final decision on, status of ID holder as citizen or permanent resident — No law of general application authorising such practice — Lack of fair administrative process preceding ID marking and blocking — Practice amounting to unjust and irregular administrative action inconsistent with Constitution.

This matter concerned the practice (the 'impugned practice') of 'ID blocking', adopted by the Department of Home Affairs (DHA), and aimed at addressing the problem of non-South African citizens illegally present in the country obtaining, through fraudulent means, identity numbers and documents under the pretence that they were born as South African citizens or had permanent status. The practice involved placing markers against 'suspicious' identification (ID) numbers of persons registered in the national register as SA citizens or permanent residents, with the effect that those ID numbers were automatically 'blocked'. The marking and blocking would take place (at least until very recently), it was common cause, without any fair administrative process being followed: that is, prior to the conclusion of any investigation into, and final decision on, the status of the ID holders as citizens or permanent residents, and without any notice

given to them. The consequence for the affected person would be to be deprived of the benefits of being a citizen or permanent resident, such as being able to acquire services from any office of the DHA, or of SASSA, open a bank account, access healthcare or education systems, and vote. The child of a blocked ID holder would also be impacted, their status being tied to that of their parents.

The first applicant in the present matter, brought before the Gauteng Division of the High Court, Pretoria, was one Ms Mazibuko. She was born in Swaziland, but had obtained permanent residence in South Africa and a SA ID document. She was the subject of a prolonged investigation (since around 2012) into the lawfulness of her status, since it had been discovered that two ID documents were linked to her name, and her ID, until recently, had been blocked. In the present application, Ms Mazibuko sought an order interdicting the respondents, being the Minister of Home Affairs and the Director-General of the Department of Home Affairs, from taking any steps, inter alia, to revoke her status as a permanent resident. She sought an order declaring the decision of the DHA to place markers against, and block, her ID, to be unconstitutional, and to substitute such decision with one confirming her status as a lawful SA permanent resident.

Lawyers for Human Rights (LHR) and LegalWise SA (LegalWise) successfully intervened as second and third applicants, respectively. LHR and LegalWise, in addition to seeking relief specific to the needs of clients they represented, sought a declarator that the general conduct of the respondents, in placing markers against persons' ID numbers that had the effect of blocking them, was unconstitutional and invalid. LHR sought the unblocking of all IDs currently blocked. They sought also that the respondents promulgate regulations implementing a fair and just administrative process before blocking or marking ID numbers, that would, amongst others, include measures to provide affected persons with prior notice and grant them the opportunity to be heard. The Children's Institute was admitted as amicus, and sought to illustrate the significant impact that the DHA's practice of ID blocking had on children.

The respondents, shortly before the trial commenced, conceded that blocking IDs without a fair and just administrative process was inconsistent with the Constitution. They also effected the unblocking of some 1,8 million IDs, including that of Ms Mazibuko. They submitted they had recently put in place a procedurally fair process to precede the blocking of IDs. With this done, the respondents argued, the practice of placing markers against specified IDs, resulting in their blocking, which it was

admitted constituted a violation of individuals' constitutionally protected rights, would be justified and acceptable under s 36 of the Constitution. The respondents insisted that the general practice ought to remain in place, aimed as it was at protecting the broader public from ID fraud, curbing illegal immigration and ensuring the integrity and credibility of the national population register.

As to the general declarator sought by LHR and LegalWise, the court held that the blocking of a person's ID, with all the effects it had on a person's life, indeed infringed several constitutional rights. (See [66].) The key question, the court held, was whether the general practice of ID blocking was justifiable in terms of s 36 of the Constitution. And the point of dispute here was whether the practice was sanctioned by law of general application. (See [69].) It was, the court held. Section 19 of the Identification Act 68 of 1997, inter alia, provided (see [82]) the Director-General with the power to '*seize*' an ID that '[did] not reflect correctly the particulars of the person to whom it was issued', if such ID was not first handed over to them. The act of 'seizing', the court held, had to, of necessity, include the placing of a marker against the ID and the ensuing blocking thereof. (See [87].) The court accordingly declined the general declarator sought: in the absence of an attack against the constitutional validity of s 19 of the Identification Act, the practice of blocking IDs in itself could not be declared invalid without regard to the facts and context of each individual matter. (See [91].)

However, the court stressed, the current relevant legislative framework — which included the Identification Act, as well as the Births and Deaths Registration Act 51 of 1992 (and regulations in terms thereof), the Immigration Act 13 of 2002 (plus regulations) and the South African Citizenship Act 88 of 1995 (see [73]) — *did not authorise* the DHA to place a marker against an ID number, resulting in its blocking, *before* a final decision had been made, in terms of the applicable legislation, to deprive the affected person of their status as South African citizen, or permanent resident, or cancel their birth certificate. For the DHA to place a marker against an ID number in the investigation stage was not permitted in terms of any law of general application. For such reason, and also given the absence of any fair administrative action preceding the placing of markers, the court declared the impugned practice of the DHA to be unjust and irregular administrative action, inconsistent with the Constitution and therefore invalid. (See [92] – [96], [103], [120] and [125].)

In consideration of *what would constitute a just and equitable remedy*, the court declined to grant the order sought by LHR for the immediate unblocking of all

remaining blocked IDs, its being against the public interest to do so, in the light, inter alia, of evidence presented by the DHA of the security risk posed by such a course of action (see [104] – [105]). It would be fair and just, the court held, though, to suspend the declaration of invalidity for a period of 12 months from the date of the court's order, during which period the DHA, in respect of all remaining IDs still blocked, could either determine conclusively whether or not the ID correctly reflected the particulars of the persons to whom the ID number was assigned, or obtain a court order authorising the block to remain, pending investigation. (See [106] and [125].) As to Ms Mazibuko, the court granted the interdict sought by her. (The court declined, on the grounds of the principle of the separation of powers, to substitute the DHA's decision to block Ms Mazibuko's ID with a declarator of its own regarding her status.) (See [109], [111] – [115] and [125].) The court also granted an order interdicting the respondents from proceeding, absent a court order, with the practice of placing markers against any ID number that would result in its automatic blocking, and declared that any blockage would be invalid unless and until a final decision had been taken on the correctness of the information reflected in the national population register regarding any suspicious identity number, which decision needed to be authorised in terms of the applicable enabling legislation and after following a procedurally fair administrative process. (See [120] – [122] and [125].) * Finally, the court granted an order declaring that, in the absence of a court order or enabling legislation being promulgated, no block may be imposed on any minor child's ID number before a final decision was made in terms of the applicable-legislation to revoke the minor child's parents' citizenship or permanent resident status, and/or cancel the child's birth certificate and ID. (See [125].)

The court further deemed it appropriate to grant a punitive costs order against the respondents, given their prolonged and persistent failure to develop and implement a constitutionally compliant process, which failure necessitated the present application; their violation of fundamental human rights; and given the prejudice caused to children. (See [122] – [124].)

MERRIMAN COURT BODY CORPORATE AND OTHERS v GREEFF 2024 (3) SA 509 (WCC)

Sectional title — Common property — Exclusive use rights — Obtaining right of extension of unit onto exclusive use area forming part of common property — Formal requirements — Sectional Titles Act 95 of 1986, s 17; Sectional Titles Schemes

Management Act 8 of 2011, ss 5(1)*(a)*, 5(1)*(h)* and 6(2); Alienation of Land Act 68 of 1981, s 2.

In this appeal to a full bench, the Body Corporate of the Merriman Court sectional title scheme (the Body Corporate) appealed against declaratory and other relief ordered against it in favour of the respondent, Mr Greeff, the owner of a unit in the scheme. The court a quo declared that Mr Greeff had a right to implement 'plans for construction'; and a right to extend the building structure of his unit onto a portion of the common property over which he had an exclusive use right, namely a garden area; and also ordered that members of the body corporate be compelled to vote at a special meeting in favour of approval of respondent's 2019 plans.

Mr Greeff alleged, (i) that his plans were approved by the body corporate and that it had allowed him to build a garage at a 2007 annual general meeting (AGM); (ii) that at a 2013 ordinary meeting it 'unanimously approved' his wife's request to grant him permission to expand his section into the garden area; (iii) that at a 2017 informal meeting of the body corporate, it had formally accepted his plans for such extension; and (iv) that at a special general meeting in August 2019, his preliminary plans were accepted. Only Mr Greeff, his architect, and one Mr Scalabrino, on behalf of the Body Corporate, were present at the August 2019 meeting. The minutes of this meeting recorded several conditions, including that '(t)he owner of Section 1 [Mr Greeff] confirmed that the owner of Section 3 would be receiving approximately 16 square metres to use for her garden area'. The 2019 plans differed substantially from the 2017 plans. At a special general meeting in October 2019, a majority of members present objected to the plans for the extension of respondent's section and for the building of his garage; and when the draft plans were distributed, members of the Body Corporate had several difficulties with the plans (see [31] – [32]).

One of the grounds of appeal was that, while, at its 2013 ordinary meeting, the Body Corporate's approved the proposed extension, it was subject to respondent producing plans for approval (see [3]). It was also submitted that the decision at the meeting of August 2017 was irregular because no formal written resolution encapsulating the decision was circulated in advance to members, nor was there a formal notice to members of the intention to consider a decision to effectively alienate from the Body Corporate members a portion of the common area, without receiving any remuneration therefor (see [37]). And the Body Corporate further complained about a lack of proper

notice for the October 2019 meeting, including a lack of notice of a special resolution sought to be passed (see [60]).

Relevant statutory provisions

- Section 5(1)*(h)* of the Sectional Titles Schemes Management Act 8 of 2011 (the STSMA), which states that the Body Corporate 'must, on application by an owner and upon special resolution by the owners, approve the extension of boundaries or floor area of a section in terms of the Sectional Titles Act 95 of 1986' (the STA).
- Section 5(1)*(a)* of the STSMA, which requires the adoption of a unanimous resolution for the alienation of common property.
- Section 6(2) of the STSMA, which requires 30 days' notice prior to a meeting of the body corporate where a special resolution or unanimous resolution will be taken.
- Section 24(3) of the STA, which states that '(i)f an owner of a section proposes to extend the boundaries or floor area of his or her section, he or she shall if authorised in terms of section 5(1)*(h)* of the [STSMA], cause the land surveyor or architect concerned to submit a draft sectional plan of the extension to the Surveyor-General for approval'.
- Section 7 of the STA, which states that 'the owners and holders of a right of extension contemplated in section 25 may, if authorised in terms of section 5(1)*(a)* of the [STSMA] direct the body corporate on their behalf to alienate common property or any part thereof, or to let common property or any part thereof under a lease'.
- Section 7(2) of the STA and s 2 of the Alienation of Land Act 68 of 1981 (the ALA), both of which required a written recordal of a decision by all the members of the body corporate to alienate a portion of the common property.

Held

Mr Greeff did not prove that there was a prior approval of plans to erect a garage in 2007, only an in principle approval (see [27].) As for the April 2017 meeting, the minutes showed that that no special resolution as defined in the Act was passed to allow respondent to extend the unit in its entirety as he sought to do (see [30]). It was also clear from the minutes of the August 2019 special general meeting that no special resolution as defined in the Act was passed to allow respondent to extend the unit in its entirety as he sought to do, and when the draft plans were distributed, members of the Body Corporate had several difficulties with them (see [31] – [32]).

The garden area constituted a portion of the common property, and the decision to 'give away' a portion of immovable property owned by the Body Corporate was not

recorded as a pre-circulated written resolution to dispose of property belonging to all the members of the Body Corporate as common property. If the order of the court a quo were to be implemented, it would lead to Mr Greeff exercising rights of ownership over the exclusive use garden area which formed part of the common property belonging to the members of the Body Corporate — without paying any remuneration for those square metres of vacant land, and without a special express resolution having been taken to alienate that land to him. (See [27].)

Similarly, as to the proposed roof area on the proposed extension of respondent's property, which Mr Greeff appeared to have agreed to 'give' a portion of to the owner of Section 3, such arrangement offended against s 2 of the ALA if it were contemplated that, by extending onto his section, he acquired ownership of the garden area so as to grant to the owner of Section 3 ownership or some other limited real right to a portion of the newly extended roof. However, if it were not the acquisition of rights of ownership that was contemplated but a lease of the garden area, the minutes did not reflect any discussion concerning the payment of quid pro quo for the right to build on a common area belonging to the members of the Body Corporate. (See [19] – [20].)

The only way to regularise the contemplated structure was to pass ownership to him of that portion of the common property that he intended to build on and incorporate it into his existing unit. Both s 2 of the ALA and s 17 (2) of the STA required a written recordal of a decision by all the members of the body corporate to alienate a portion of the common property — reflecting an understanding by the members of the Body Corporate, that they are alienating a portion of common property. The applicable legislation left no room for informal disposition of portions of common property, because each registered owner of a section also recorded on their title an undivided share in the common property in accordance with their participation quota. One structure could not be built on land owned by two different persons without a written recordal of where and how ownership of the structure would vest in terms of applicable legislation. (See [44], [47] , [51], [53].)

The Body Corporate 'may' by unanimous resolution alienate common property and execute a deed for that purpose (s 5(1)*(a)*), and thereafter 'must' by special resolution approve the extension of a unit (s 5(1)*(h)*). A decision to alienate a portion of common property must conform with s 5(1)*(a)* of the STSMA in both form and substance, unanimously; therefore, it must be an informed decision and not a decision taken

merely by default. Proof must be provided that the meeting at which the decision was taken was properly convened. (See [46], [49] and [74].)

The informal manner in which decisions and ostensible resolutions were taken, and the lack of written proof of its propriety, left doubt about the existence of a prior written resolution having been circulated timeously to all members (see [74]). Mr Greeff had failed to establish the necessary criteria for the granting of a declaratory and mandatory order (see [75] – [76]). He did not prove both an adoption of a unanimous resolution in terms of s 5(1)*(a)* of the STSMA, to alienate a portion of the common property to respondent, and an adoption of a special resolution to allow respondent to extend his unit onto the common property in terms of s 5(1)*(h).* Having not proved a right of extension, he ought not to have been granted the relief he sought, and accordingly the appeal would be upheld. (See [106] – [108].)

PROCON GT CAPITAL (PTY) LTD v WOLDEYESUS AND ANOTHER 2024 (3) SA 531 (WCC)

Consumer protection — Consumer agreement — Lease agreement — Consumer's right to demand service of generally expected quality — Supplier failing to perform service to such standards — Refund to consumer of reasonable portion of price paid for services performed and goods supplied, having regard to extent of failure — Consumer Protection Act 68 of 2008, s 1*(e)*(v) sv 'service', ss 54(1)*(b)*, 54(2)*(b)*.

The first and second defendants (Woldeyesus and another) invoked the abovementioned sections of the CPA in opposition to a summary judgment application brought by Procon GT Capital (Pty) Ltd, for arrear rental and other agreed charges in respect of a written lease agreement between them, to operate a restaurant from the commercial premises leased. The matter proceeded on an unopposed basis, but on the understanding that the court would not disregard the defences in the defendants' amended plea and their affidavit opposing the first summary judgment application, which was withdrawn when the present second application was launched. (See [3] – [6].)

In their amended plea the defendants submitted that, at the time that the lease agreement was negotiated, the plaintiff undertook that it would evict the other restaurant business (Yonas) operating from the same building as soon as the defendants had paid their rental deposit for their premises. This undertaking, they submitted, was the basis on which they had signed the lease agreement, proceeded

to pay the rental, agreed to assume liability of an amount which was due to the plaintiff by Yonas, and allowed the plaintiff to offset their cash deposit against the arrears still owing by Yonas. (See [7], [16].)

Ultimately, it took approximately nine months to evict Yonas, who continued to trade unlawfully and in direct competition with the defendants from premises on the ground floor in the same building. As a result of this, the defendants were unable for a period of approximately nine months 'to trade freely without interference from unlawful occupiers'. The defendants pleaded that these circumstances entitled them to a rental reduction as contemplated in s 54 of the Consumer Protection Act 68 of 2008 (the CPA) (See [7.2], [7.3].)

Section 54(1)*(b)* of the Consumer Protection Act 68 of 2008 (the CPA) provides that, '(w)hen a supplier undertakes to perform any services for or on behalf of a consumer, the consumer has a right to the performance of the services in a manner and quality that persons are generally entitled to expect'; and s 54(2)*(b)* that, 'if a supplier fails to perform a service to the standards contemplated in subsection (1), the consumer may require the supplier to . . . refund to the consumer a reasonable portion of the price paid for the services performed and goods supplied, having regard to the extent of the failure'. And the definition of 'service' in the CPA includes (at *(e)*(v)) 'access to or use of any premises or other property in terms of a rental'.

At issue was whether, in these circumstances — ie alleged performance by the plaintiff in respect of the lease agreement in a manner and quality less than persons were generally entitled to expect — the defendants could validly plead that they were entitled to a reduction as a defence to a claim for arrear rental, and so resist summary judgment.

Held: Section 54 applied to this matter by virtue of the definition of 'service' in the CPA. As to the onus of proof, if the service provider claimed payment, in circumstances where the consumer alleged that the services were defective and thus that the consumer was entitled to a price reduction or to withhold his performance under the *exceptio non adimpleti contractus*, the service provider would have to prove the amount payable as a reduced price. (See [11].)

The approach of the National Consumer Tribunal in interpreting s 54(1)*(b)*, supported the notion that regard could be had to conduct that did not amount to breach of contract (see [27]). For the purposes of summary judgment, the defendants did enough to raise a defence based on s 54(1)*(b)* read with s 54(2)*(b)* of the CPA (see [22]). In the words of s 54(1)*(b)*, the plaintiff's conduct fell short of performance of the rental service in a manner and quality that persons would generally be entitled to expect, having regard to the circumstances and, particularly, conditions agreed upon between the parties before and after the signing of the lease agreement (see [28]). The plaintiff bore the onus to prove a reduced price, and therefore an opposing affidavit in summary judgment proceedings would not be scrutinised for the same degree of clarity as a plea, and, given also that a plaintiff must in effect be considered to have an unanswerable case, summary judgment would not be granted. (See [29].)

SKG AFRICA (PTY) LTD v SOUTH AFRICAN LOCAL GOVERNMENT ASSOCIATION AND OTHERS 2024 (3) SA 540 (ECEL)

Access to information — Access to information held by public body — Information required for exercise of right to fair administrative action — Applicant seeking, via urgent application, documents relating to tender (under PAIA) and reasons for award (under PAJA) — Court ordering state parties involved in tender to supply requested documents within 48 hours — Promotion of Access to Information Act 2 of 2000, s 25(1), s 27; Promotion of Administrative Justice Act 3 of 2000, s 5(2), s 9(1).

The applicant, a losing tenderer, approached the court on a basis of urgency for orders (i) under s 25(1) of the Promotion of Access to Information Act 2 of 2000 (PAIA) for the furnishing of documents relating to the award of the tender; and (ii) under s 5(1) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) for the furnishing of written reasons for the decision.

The requested documents, listed in para 4 of the applicant's notice of motion, included copies of all bids submitted in response to the tender and the respondents' evaluation and adjudication reports. The applicant also asked the court to reduce to 48 hours the 90-days s 5(2) of PAJA allowed for the supply of reasons (reductions of this nature were authorised under s 9(1) of PAJA). The applicant pointed out in this regard that, notwithstanding its repeated requests for the documents, the 30-day period set by s 25(1) of PAIA for their furnishing had already passed — a deemed refusal under s 27 of PAIA. Regarding urgency, the applicant argued that the matter would take up to a year to finalise if it were allowed to proceed in the normal course, by which time the

successful tenderer would have already commenced the implementation of the tender. Since it was only entitled to claim damages from first respondent in case of fraud, it was exposed to irreparable financial prejudice if the application was not heard as a matter of urgency.

The respondents opposed the application, complaining that the applicant's case straddled two pieces of legislation — PAIA in respect of the request for documents and PAJA in respect of the request for reasons — that prescribed different periods for the processing of requests for information. They also denied that a decision was taken to refuse the applicant's request for information or that its right to administrative justice was infringed. Finally, they contended that the applicant failed to make out a case for the truncation of the 90-day period in s 5(2) of PAJA.

Held

While it was true that the application straddled two pieces of legislation, the applicant was nevertheless justified in approaching the court for intervention. It was trite that PAIA's objective was to facilitate access to information required for the exercise or protection of any right, including the right to fair administrative action. Here the requested information would enable the applicant to decide whether to apply for the review and setting-aside of first respondent's decision to award the tender to third respondent. Moreover, the grounds cited by the applicant for urgency also served to support its prayer for the reduction of the 90-day period provided for in PAJA for the provision of the requested information. The court accordingly ordered the respondents to hand over copies of the documents listed in para 4 of the notice of motion within 48 hours of the order. (See [10], [17], [22] – [23], [29].)

he applicant's non-compliance with the rules of the above honourable court relating to service, time periods and form be condoned, and that the application be disposed of forthwith as a matter of urgency in terms of the provisions of rule 6(12) read with rule 2(2) of the Promotion of Access to Information Rules. The first respondent, alternatively the second respondent, further alternatively the first and second respondents jointly, be ordered to produce for inspection and collection by the applicant, within 48 hours of service of this order on the first and second respondents, copies of the documents listed in para 4 of the notice of motion, in terms of s 82 of the Promotion of Access to Information Act 2 of 2000. Each party to pay its own costs.

SUPERCART SOUTH AFRICA (PTY) LTD v VANESCO (PTY) LTD AND ANOTHER 2024 (3) SA 550 (GJ)

Discovery and inspection — Anton Piller orders — Reconsideration — Onus and standard of proof on inspection.

Applicant (Supercart) and first respondent (Vanesco) were involved in a business dispute, and Supercart was apprehensive that Vanesco would destroy or conceal evidence supportive of its case. This caused Supercart to approach a High Court ex parte for an *Anton Piller* order for (i) the search of Vanesco's premises and the residence of its director (second respondent), (ii) the attachment of documents, and (iii) their copying and secure storage pending the ordinary discovery process. The order was executed. Here Vanesco applied for its reconsideration and setting-aside.

Held, that, in order to *obtain* an *Anton Piller* order, an applicant had to establish prima facie —

(1) that it had a cause of action against respondent that it intends to pursue;

(2) that the respondent had in its possession specific documents or things that constituted vital evidence in substantiation of applicant's cause of action, but in respect of which it could not claim a real or personal right; and

(3) that it had a real and well-founded apprehension that this evidence may be hidden or destroyed or in some manner spirited away by the time the case came to trial or to the stage of discovery.

Held, further, that on *reconsideration* of the order, the applicant had to establish (1) above on a prima facie basis, and (2) and (3) above on a preponderance of probabilities (see [54] – [55], [66], [70]).

Held, further, that requirement (2) required enquiry into —

(a) whether the order sufficiently specified the items to be attached;

(b) whether the items so specified were 'of great importance' to applicant's case; and

(c) whether the items found in respondent's possession and attached met the specification (see [60]).

Held, further, that there was no bar to a court setting aside or varying the offending parts of an *Anton Piller* order and confirming the inoffensive parts (see [73]).

Held, further, that, where the order was challenged on the ground of bad faith or non-disclosure in the founding affidavit, or where execution did not comply with its terms,

the onus was on the respondent to prove the relevant facts on a preponderance of probabilities (see [74], [76]).

Held, further, that, on analysis, Supercart had not acted mala fide in seeking the order or failed to disclose facts, and that the order was executed according to its terms (see [4], [86], [92], [146]).

Held, further, that the items specified were important to Supercart's case (see [99], [107]); were sufficiently precisely described (see [114]); and were found at Vanesco's business premises, albeit that no items found at second respondent's residence met the specification (see [118] – [121]).

Held, further, that there were objective grounds to apprehend that respondents would conceal evidence (see [126], [131], [133] – [135]).

Held, accordingly, that the *Anton Piller* order had to be varied to exclude certain items from its scope, and that the sheriff with custody of the items had to destroy, delete or return them or their copies (see [163]). So ordered.

UFEZELA SECURITY SERVICES (PTY) LTD t/a SENFORCE v ZENZILE AND ANOTHER 2024 (3) SA 608 (FB)

Small Claims Court — Proceedings of — Nature — Approach to adjudication — Grounds for review of decision of court — Small Claims Court Act 61 of 1984, s 46*(c)*.

The first respondent, Mr Zenzile, brought a claim against applicant company (Ufezela) in the Small Claims Court. Mr Zenzile made his case and Ufezela's representative then asked the Commissioner for leave to hand in her documents and for leave to make Ufezela's defence with reference thereto. The Commissioner refused leave and gave judgment for Mr Zenzile.

Ufezela brought an application to review the Commissioner's judgment in the High Court. This was in terms of s 46 of the Small Claims Court Act 61 of 1984, which provides:

'The grounds upon which the proceedings of a court may be taken on review before a . . . division of the Supreme Court . . . are —

. . .

(c) gross irregularity with regard to the proceedings.'

Held, that the Commissioner's refusing Ufezela's representative leave to hand in the documents or to make Ufezela's case with reference to them was a violation of the rules of natural justice and a 'gross irregularity' per s 46*(c)*'s terms (see [10]).

Held, further, in passing:

- A Small Claims Court's process was inquisitorial and informal, but the approach to be adopted by an adjudicator was the same as in any other civil court. The Commissioner was required to hear and weigh the evidence, determine what was probable, apply the law, and reach a reasoned conclusion. (See [9].)
- The rules of natural justice applied, and their non-observance could ground review in a High Court (see [9]).
- The Small Claims Court was not a court of record, but the legislature might need — against the background of the Constitution — to revisit this position, since the record was an important tool in the reviewing court's hand to determine the considerations operative in the adjudicator's mind when she or he made the decision (see [6] – [7]).

The decision of the Commissioner set aside and Zenzile granted leave to apply for an order that the proceedings in the Small Claims Court be reopened (see [11]).

WAMJAY HOLDING INVESTMENTS (PTY) LTD v AUCKLAND PARK THEOLOGICAL SEMINARY 2024 (3) SA 614 (GJ)

Enrichment — Claim based on — Defence of non-enrichment — Mala fide exception — Money paid to respondent for applicant's takeover of respondent's lease — Court subsequently finding that lease lawfully cancelled by landlord — Mere knowledge that validity of underlying agreement was contested sufficient to put respondent on notice not to dissipate money paid to it under agreement with applicant — Respondent not establishing non-enrichment defence.

Prescription — Extinctive prescription — Commencement — Claim based on enrichment — Completion of cause of action — Enrichment claim for refund of money paid by A for taking over lease from B, which lease was subsequently found by court to have been lawfully cancelled by landlord — Warranty against eviction obliging B to defend landlord's claim — Debt only became 'immediately claimable' when B's defence against cancellation of lease failed — Prescription running from date of court order, not when money paid by A to B — Prescription Act 68 of 1969, s 12(1).

On 28 March 2011 Auckland Park Theological Seminary (ATS) and Wamjay Holdings (Pty) Ltd concluded a cession agreement in which ATS ceded to Wamjay its rights under a long lease with the University of the Witwatersrand. On 13 October 2011 representatives of ATS and Wamjay executed a written notarial deed of cession, and

pursuant to these agreements, Wamjay paid R6,5 million to ATS. After Wamjay took possession of the premises, the University cancelled the lease and litigation commenced, with ATS and Wamjay on the same side disputing the validity of the University's cancellation of the lease. This litigation was ultimately settled by the Constitutional Court. It held that the agreement between the University and ATS involved a delectus personae, so that the University was entitled to cancel the lease in the face of ATS's decision to cede its rights to Wamjay. (See [2] – [3], [5].)

The present case concerned Wamjay's application to recover the R6,5 million it had paid to ATS, based on unjustified enrichment. Its case was that it had made the payment, but did not have possession of the land which was the legal cause of this payment, so that ATS had been unjustifiably enriched and therefore must repay the R6,5 million to it. ATS' defences were that any claim which Wamjay might have had, had prescribed; and that Wamjay had not satisfied the requirements to succeed in a claim based on unjustified enrichment. (See [4] – [6], [8].)

The court encapsulated the issues as follows:

• *As to prescription defence*, the question was when Wamjay's cause of action was perfected, ie when ATS's alleged debt to Wamjay became 'immediately claimable' as contemplated in s 12(1) of the Prescription Act 68 of 1969. The answer depended on when its cause of action became complete. The precise question that unlocked the answer to the 'immediately claimable' question was: if either a buyer or a lessee was dispossessed of the subject of the underlying agreement, then at what stage may he or she sue the seller or lessor? (See [37], [43].)

• *As to the merits*, whether Wamjay established that ATS was enriched; and its corollary, whether the defence of non-enrichment was applicable. Wamjay alleged that ATS has retained all the R6,5 million which Wamjay paid to it in terms of the cession agreement, while ATS, raising a non-enrichment defence, said that it retained none of it. (This defence holds that, if at the time when the application or action was launched, the defendant's enrichment had extinguished, it was not obliged to restore anything to the plaintiff.) In this regard the question was whether the recipient of money could raise the defence of non-enrichment where it spent the money it received, genuinely believing itself entitled to do so, but where it ought to have realised that it had been unjustifiably enriched. (See [22] – [31], [72].)

Held

As to the prescription defence

In Roman and Roman-Dutch law the concept of a 'warranty against eviction' was taken literally, with the corollary that a bona fide possessor or occupier of property who was the victim of a breach of the warranty could only sue when actually evicted. Under the modern law of sale, the approach appears to be that a bona fide purchaser, faced with a claim from a third party, could on mere receipt of the claim sue the seller, based on a breach of the warranty against eviction. When it came to lease, the position under modern law was not significantly different, but there were some important differences. One was that, in lease, the lessee did not enjoy possession in the legal sense; possession and the right to use and enjoyment were different things; the lessee's rights were far more dependent on the position of the lessor than the rights of a buyer of property. A contract of lease (in the absence of an express or implied agreement to the contrary) conferred a right of undisturbed use and enjoyment on the lessee of identified property. The warranty against eviction was simply a way of describing the proposition that the lessor had an obligation to ensure that this right is actually conferred. The reason why there had to be actual eviction was because it was only on actual eviction that this right was lost. (See [44] – [46], [49] – [55].)

A lessee's damages arose only when they lost their use and enjoyment of the property; a lessee was under no obligation to defend a claim of a third party to the property. If the lessor then failed to take adequate steps to avoid the loss of the lessee's possession, by failing to defend the claim (by not putting up a *virilis defensio*), then the lessee had a claim in damages against them. The defendant had a responsibility to raise every plausible defence to the third party's claim. A perfected claim, in these specific multiparty contexts, only arose where it was clear that the defendant had no basis to resist the claim of the third party to the return of the property. The premise remained that the plaintiff was only taken to have suffered loss once there were no defences available to the defendant to resist the third party's claim for restoration of the property. Unless the claim was 'unassailable', a party such as ATS had an obligation to put up a *virilis defensio*; failing to do so would expose it to a damages claim (See [56] – [58], [60.3].)

If the contract was a nullity from the outset, it could not confer rights, and so a party such as Wamjay was limited to an enrichment claim. But the ultimate issue, when it came to claims of innocent tenants under the law of lease, was whether the landlord had a plausible basis to defend the right of occupation. This approach must be applied in all cases, regardless of whether the ultimate legal conclusion, resulting from the

failure of the landlord to do so, would be that the agreement between landlord and tenant was a nullity

from the outset, or simply had been breached by the landlord. If there was some plausible basis for the landlord to defend the right of occupation, there could be no 'actual eviction' until that attempt had been made and had failed. (See [60.10].)

The law of lease obliged ATS to put up a vigorous defence to the University's claim to avoid breaching the warranty against eviction, and Wamjay to give ATS a chance to put up this defence before suing it, the only exception being, arguably (in the law of lease), if the University's claim was unassailable. The proposition that the University's claim was unassailable was open to serious doubt in a context in which the SCA and Constitutional Court took different views on the issue. The outcome of the litigation was by no means inevitable. Accordingly, ATS's debt to Wamjay was not due at any time before the *virilis defensio* failed, and Wamjay was 'actually evicted' — and that had to be when the Constitutional Court handed down its judgment. It followed that the defence of prescription would fail (See [60.13.2] – [60.13.6], [60.14], [61].)

As to the enrichment claim

The requirements which must be alleged and proved by a plaintiff in every enrichment claim were *(a)* that the plaintiff was impoverished; *(b)* that the defendant was enriched; *(c)* that the enrichment of the defendant was at the plaintiff's expense; and *(d)* that the defendant's enrichment was without legal cause (sine causa). Our law of unjustified enrichment was made up of various actions, inherited from Roman law, described as *condictiones* or conditions. Each of these *condictiones* had elements which had to be established in addition to the general requirements. The SCA recently once again confirmed that there was no general enrichment action in our law. Therefore, for Wamjay to succeed in an enrichment claim, it had to bring itself within the parameters of one of the *condictiones* on which it relied. Here, the agreement purported to cede rights which could not objectively be ceded because the agreement was invalid from the outset. Therefore the *condictio indebiti*, which applied where money was transferred in terms of a contract which was void ab initio, was the applicable condictio. (See [62] – [64].)

The real dispute between the parties, on the merits, related to one of the requirements of the general action — ie that the defendant must have been enriched. ATS accepted that there is an exception to the non-enrichment defence: a defendant could not rely on the defence if it parted with the money mala fide, ie when it knew that the money

was paid without legal cause. One need not conclude that such a party acted in bad faith, in the true sense, to disentitle it to this defence; mere knowledge of the fact that the validity of the underlying agreement was hotly contested, in a case with facts similar to the present, should be enough to put a defendant on notice not to dissipate the money paid to it in terms of the agreement which it concluded with the plaintiff. ATS could not rely on a defence of non-enrichment, even if it was not mala fide in the true sense — it must have anticipated that the University's claim could succeed and, at the very least, ought to have anticipated it; to spend the money in those circumstances was inappropriately cavalier. Another reason why the defence of non-enrichment could not succeed on the facts of this case, was that ATS had not adduced any facts to support a defence of non-enrichment. In the light of the presumption of enrichment, ATS had to explain, comprehensively, what it did with the money (if the money was spent to its benefit, how could it claim not to have been enriched); and why did it not retain the money when it knew that the University took the view that there was no causa for the cession agreement. Its failure to do so, converted the presumption into a positive finding of enrichment. Accordingly, Wamjay was entitled to the relief which it sought in its notice of motion, and it would be so ordered. (See [67], [68.4], [74] – [75], [77], [80], [82], [87].)

South African Criminal Law Reports (June 2024)

DIRECTOR OF PUBLIC PROSECUTIONS, KWAZULU-NATAL v NDLOVU 2024 (1) SACR 561 (SCA)

Rape — Sentence — Life imprisonment — Minimum sentence in terms of Criminal Law Amendment Act 105 of 1997 — Application of s 51 prior to amendment of part I of sch 2 to Act by Criminal and Related Matters Amendment Act 12 of 2021 — Where complainant raped by multiple perpetrators, but only one perpetrator charged — Sufficient to show that victim raped more than once, whether by solitary accused on trial or any co-perpetrator or accomplice, regardless of whether such other person had been prosecuted and convicted of same.

The respondent was convicted in a magistrates' court of rape. The 22-year-old complainant was kidnapped from her home by three men in the early hours of 29 November 2014 and forcibly taken to a neighbouring homestead. There she was repeatedly sexually molested by her assailants who took turns to rape her. The respondent was the only one of the three perpetrators to be arrested. On conviction,

applying the provisions of s 51(1) of the Criminal Law Amendment Act 105 of 1997 (the 1997 Act), read together with part I of sch 2 thereto, before it was amended by Criminal and Related Matters Amendment Act 12 of 2021, the court found that there were no substantive or compelling circumstances to depart from the prescribed minimum sentence of life imprisonment.

The High Court dismissed an appeal against the conviction, but, applying the decision in *S v Mahlase* [2013] ZASCA 191, in circumstances where the respondent was the only perpetrator to be tried, found that the provisions of the 1997 Act were not applicable. The court accordingly substituted the sentence with one of 15 years' imprisonment. The appellant appealed in terms of s 311 of the Criminal Procedure Act 51 of 1977 against this decision on a point of law. (See [9] – [10]].)

Held, that, bearing in mind the basic principles of statutory interpretation, the way in which s 51(1) of the 1997 Act was couched at the time was clear. It unambiguously provided that a regional court or High Court should sentence a person it had convicted of an offence referred to in part I of sch 2 to imprisonment for life. Crucially, part I listed the circumstances in which a sentence of life imprisonment was ordained, and those were 'not to be departed from lightly or for flimsy reasons'. The conclusion in *Mahlase* was subversive of the manifest purpose of the provision which was designed to bring within its reach those found guilty of the listed crimes, and single them out for the most severe sentence a court could impose in the absence of substantial and compelling circumstances. Accordingly, to the extent that *Mahlase* concluded that the so-called 'other rape incidents' had to be proved before s 51(1) could be invoked, that was wrong. What the section required was no more than evidence that the rape victim had been raped more than once, whether by the solitary accused on trial or any co-perpetrator or accomplice, regardless of whether or not the co-perpetrator or accomplice had been prosecuted and convicted of the rape committed during the same incident. (See [60] – [65].) The appeal was accordingly upheld, and the question of law determined in favour of the state. The sentence of life imprisonment imposed by the trial court was reinstated. (See [77].)

ZUMA v DOWNER AND ANOTHER 2024 (1) SACR 589 (SCA)

Appeal — Execution — Application to execute pending appeal — Order setting aside, as abuse of process, private prosecution brought by criminal accused (ex-

RSA President) against lead prosecutor in case against him and journalist covering proceedings — Suspension of order would prolong and perpetuate abuse — Suspension of order would compromise public confidence in courts and administration of justice — Appeal against order immediately executing order declined.

The appellant was former President Jacob Zuma. He faced multiple charges of corruption, fraud, racketeering and money-laundering. Since making his first appearance in court in June 2005, he had launched numerous legal challenges in respect of his prosecution, resulting in the continued delay of the commencement of his criminal trial. Importantly for present purposes, in September 2022 Mr Zuma instituted a private prosecution in the Pietermaritzburg High Court against, firstly, the first respondent, Mr Downer, who had at all relevant times served as the lead prosecutor for the National Prosecuting Authority in Mr Zuma's case; and, secondly, against the second respondent, Ms Maughan, who was a senior legal journalist, who had been reporting on Mr Zuma's criminal-charges legal challenges for well on 20 years. This prompted the respondents to approach the Pietermaritzburg High Court where they obtained an order setting aside the private prosecution as an abuse of process (main order). Mr Zuma subsequently instituted appeal proceedings. Both respondents then, consequent to an application in terms of s 18(1) read with s 18(3) of the Superior Courts Act 10 of 2013, obtained an order (execution order) in the High Court, that, pending the outcome of Mr Zuma's appeal proceedings, the setting-aside of the private prosecution was to remain in force. (The effect of the execution order was that the private prosecution was put on hold pending Mr Zuma's appeal attempts.) The present matter concerned Mr Zuma's appeal to the Supreme Court of Appeal, against the execution order, under s 18(4)(ii) of the Superior Courts Act, in which he argued that, in effect, the main order should not be put into effect until the appeal process had been exhausted (ie such that he should be able to proceed with his private prosecution in the interim).

Held, that the private prosecutions constituted a clear case of abuse of process which a court had the duty to prevent: In respect of Mr Downer, the private prosecution was instituted for an ulterior purpose, in that it formed part of a so-called 'Stalingrad strategy' aimed at obstructing, delaying and preventing his criminal trial, and was aimed at having Mr Downer removed as prosecutor in Mr Zuma's trial. And in respect

of both Mr Downer and Ms Maughan, the contemplated private prosecutions were without foundation in both fact and law. (See [11], [26] – [28] and [30].)

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

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

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

S v LENKOPANE 2024 (1) SACR 607 (NWM)

Fundamental rights — Fair trial — Breach of — What constitutes — Awaiting- trial detainee refused medical attention for toothache over lengthy period — Violation of fair-trial rights under s 35(2) *and* (f) of Constitution — Sufficient basis to set aside convictions and sentences.

The appellant was convicted in a regional court of two counts of rape and was sentenced to two terms of life imprisonment. The trial was beset by numerous postponements, changes of legal representatives and the availability of the magistrate. The situation was exacerbated by the toothache which the appellant complained of on 20 November 2020, for which he was denied medical attention. The trial court endeavoured to get the erstwhile legal representative to convince the appellant to proceed, even with the toothache, but that did not materialise. The appellant was remanded in custody until 19 January 2021, but no order was made for him to receive

medical attention. The issue of his toothache was not canvassed on 19 January 2021, but the complaint about the toothache was raised again on 21 January 2021 when the court was informed that the appellant was in excruciating pain. The court then ordered that medical attention be afforded to the appellant and remanded the case to a later date for completion.

On appeal it was contended that the appellant's fair-trial rights under the Constitution had been infringed, in that he had, inter alia, been denied medical attention.

Held, that the right of the appellant to medical attention as an awaiting-trial detainee was not given effect to by the court a quo, which constituted an intrusion on the right to a fair trial envisaged in s 35(2)*(f)* of the Constitution. This on its own constituted a sufficient basis to overturn the convictions. (See [34].) The convictions and sentences were ultimately set aside. (See [39].)

LW v KCA 2024 (1) SACR 626 (GJ)

Harassment — Nature of — Final protection order granted, prohibiting appellant from informing others that respondent raped her — Appellant's communications sometimes strident and demanding, but that not measure of reasonableness in context of epidemic of gender-based violence — Conduct not amounting to harassment — Order set aside on appeal — Protection from Harassment Act 17 of 2011, ss 1 and 9(4).

In an appeal against the grant of a final protection order in terms of s 9(4) of the Protection from Harassment Act 17 of 2011 (the Act) the court dismissed the application on the facts, holding that, taken together, the respondent's non-disclosures, his dishonesty and the likelihood that the magistrate would have refused relief in the event of full disclosure, warranted not only the discharge of the interim protection order, but also the denial of a final protection order. A party seeking relief ex parte had a duty of the utmost good faith to the court and required the applicant to disclose all material facts impacting upon the court's decision, including facts and potential defences that might favour refusal of the relief sought. If it appeared on the return day that the applicant breached that duty, the court had a discretion to set aside the order granted ex parte and to refuse relief altogether. (See [66] and [86].)

Despite this finding, the court examined whether the actions amounted to harassment as envisaged by the Act. The matter arose from the 'outing' of the respondent as a

sexual offender by her communicating to certain institutions (two arts foundations and a university) in which the respondent was mentioned by name. The appellant did this because of her treatment by the respondent whilst in a previous romantic relationship, and her comments were bolstered by similar experiences by another woman with whom she had made contact. The court accepted that the appellant's conduct complied with the requirements of the definition of harassment in terms of s 1 of the Act, save for that in para *(d)* relating to unreasonableness. It held that, although the appellant's communications were sometimes strident and demanding, and the language and tone used not always measured, that was not the measure of reasonableness in the context of an epidemic of gender-based violence. The conduct of the appellant was neither predatory nor persecutory. She had engaged in the communication not only for her own ends, but also to prevent the commission of an offence and to reveal a threat to public safety. Taking all of those factors into account, it could not be said that the appellant engaged in the communications unreasonably. (See [129] – [130].) The appeal was accordingly upheld, and the order set aside. (See [134].)

ZUMA v PRESIDENT OF SOUTH AFRICA AND OTHERS 2024 (1) SACR 660 (GJ)

Prosecution — Private prosecution — Provision of security — Exemption from — Interaction of s 9 of Criminal Procedure Act 51 of 1977 and rule 54 of Uniform Rules of Court.

The court dismissed an application for leave to appeal against the earlier decision of the court refusing the applicant's application to institute a private prosecution against the first respondent. In the event, though, that a petition to the Supreme Court of Appeal was successful, the court deemed it necessary to address two issues, namely that the court had misdirected itself and flouted s 34 of the Constitution by failing to deal with the applicant's defence in respect of failure to pay a security deposit as required in terms of s 9 of the Criminal Procedure Act 51 of 1977. The second contention was that the court had misdirected itself by failing to recognise that the court in part A of the application condoned the late payment of a security deposit by the applicant.

Held, as to the applicant's defence that the provisions of s 9 did not apply in cases of process issued in terms of rule 54 of the Uniform Rules of Court, that the parties'

affidavits reflected that non-compliance with s 9 was one of the grounds of review the applicant relied on. However, at no point in his supplementary answering affidavits did he assert that, when he issued summons, his then attorney of record had approached the registrar based on the purported s 9 exemption defence. Instead, he had initially vacillated between saying that security had been paid and that it would be paid. In fact, neither his attorney nor he issued the summons personally and had approached the office of the registrar, therefore bringing the applicant into the ambit of s 9 which required that the registrar only issue the summons when he was satisfied that the private prosecutor had paid the security deposit. The security deposit had not been paid and the purported exemption created in rule 54(1) therefore found no application. (See [12], [13] and [20] – [22].)

Held, as regards condonation for failure to pay security, that the court had invited the applicant's current attorney of record to furnish it with proof that the court in part A condoned the late payment of security. Having not heard from his attorney, in its judgment in respect of part B, the court ruled that no such condonation had been granted. The applicant's current attorney had an ethical duty to disclose to the court that the judge who dealt with part A had not acquiesced in his request to modify the order granted by the court in that part to reflect that it granted condonation, because it had not done so. By not making such disclosure, the applicant's attorney failed in that duty. The court did not determine the question whether condonation might be granted because the applicant had not applied for condonation in part B, and it therefore did not misdirect itself or breach s 34 of the Constitution by dealing with the issue as it did. (See [23] – [24].) The application was dismissed.

S v WB 2024 (1) SACR 666 (MM)

Harassment — Order — Breach of — Proof of — Interim protection order not properly served on accused — Onus — State bore onus of proof — Affidavit in support of alleged breach of order made seven months after breach and certification not under oath — Accused ought to have been given benefit of doubt — Conviction and sentence set aside — Protection from Harassment Act 17 of 2011.

The appellant was convicted of having breached a protection order under the Harassment Act 17 of 2011, obtained by his neighbour, the complainant. However, it appeared that service of the interim order was by way of a certificate by a police officer that he had served a copy thereof on the appellant. The appellant denied that he was given a copy of the interim order. He stated that he was only asked to sign a document on 2 February 2021 and was told to be in court on 25 February 2021. He testified at his trial that the date had slipped his mind, and that he had presented himself late in the afternoon, to the police, only to be told to return the following day. The interim order had, however, already been made final. He further testified that he did not receive a copy of it. There were inconsistencies in the state's case, in that the appellant was arrested on 30 March 2021, but the affidavit supporting the contravention of the order was signed on 11 October 2021 and the dates of the breaches were 29 July and 8 October 2021. The annexure to the charge-sheet indicated that the contravention occurred on 24 March 2021 and that he contravened the order granted on 25 February 2021.

Held, that the state bore the onus to prove the contravention. It had a huge mountain to climb, however, as it was common cause that the final order had not been served on the appellant. Further, the contents of the document signed by the appellant matched the appellant's version of what happened on that day, as the first sentence thereof requested him to appear before a court on the date written towards the end. There was a typed inscription where the police officer, who made him sign, filled in his name alongside where it said, 'I certify that I have delivered the copy of the interim protection from harassment order personally.' As the certification had not been made under oath, and the police officer had not been called to testify, his assertion in the alleged certification had, however, not been tested. (See [18] – [19].)

Held, further, that in the circumstances there was doubt whether the interim order was served or properly served, which should have been taken into account in favour of the appellant. The court had accordingly erred in its application of the law. (See [20].)

Held, accordingly, that the appeal had to be upheld, and the conviction and sentence set aside. (See [26].) The appeal is upheld. The order granted by the trial court is hereby set aside and it is substituted with the following:'The accused is found not guilty and discharged.'

SAP SE v Systems Applications Consultants (Pty) Ltd
[2024] 2 All SA 639 (SCA)

This is the appeal from the Gauteng Local Division, Johannesburg, against the finding of Tsoka J, (sitting as a court of first instance) in the case of Systems Applications Consultants (Pty) Ltd v Systems Applications Products [2022] 1 All SA 824 (GJ) – Ed.

Civil Procedure – Recusal application – Appeal against dismissal – Whether the conduct of presiding officer created a reasonable apprehension of bias on application of the established test – Presumption of judicial impartiality may be displaced by cogent **evidence** – Judicial officer should not hesitate to recuse himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reason, was not or will not be impartial.

Claiming damages in an action instituted against the appellant ("SAP") in the High Court, the first respondent ("SAC") alleged that it had concluded a Software Distribution Agreement (SDA) with a German company ("SAPSI"), in respect of a software security product ("Securinfo") that had been developed by it. The broad thrust of SAC's case was that, subsequent thereto, SAP acquired a controlling share in SAPSI and an interest in a competing security product and thereafter unlawfully interfered in the SDA.

During the trial, the appellant's Counsel was in the middle of cross-examination of a witness when the judge appeared to become annoyed by the questioning and announced that he was taking a break, and that Counsel should inform him when he was done with the questioning. The parties were not advised as to how long the break would be, or the reasons therefor. On resumption, Counsel for the appellant drew the judge's attention to the perception of bias created. That was followed by an application for recusal, which was refused. The present appeal ensued.

Held – The key issue for determination was whether the conduct complained of by SAP created a reasonable apprehension of bias on the application of the established test.

While judicial officers can form provisional views, it remains the fundamental duty of every presiding officer not to close their mind to changing those provisional impressions, until the finalisation of the matter. A cornerstone of any legal system is the impartial adjudication of disputes that come before the courts. What is required is not only that the trial be conducted open-mindedly, impartially and fairly, but that such conduct be manifest to all those who are concerned in the trial and its outcome. The

requirement that justice must not only be done, but also to be seen to be done has been recognised as lying at the heart of the right to a fair trial. That necessarily presupposes that the judicial officer is fair and unbiased and conducts the trial in accordance with those rules and principles or procedure which the law requires. The presumption of judicial impartiality may be displaced by cogent evidence. A judicial officer should not hesitate to recuse himself or herself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reason, was not or will not be impartial. A reasonable, objective and informed person in SAP's position would apprehend that a presiding judge, who prevents its Counsel from cross-examining a witness in response to a challenge from such witness to be shown why his credibility is being impugned; then irritatedly absents himself from the hearing, without first adjourning; and, whilst at the same time directing that the hearing continue in his absence until Counsel has finished, showed himself to have closed his mind to the evidence and the submissions of Counsel.

The appeal was upheld and the application for recusal was granted.

Syce and another v Minister of Police [2024] 2 All SA 662 (SCA)

Civil Procedure – Special leave to appeal – Requirements – One of the factors which constitute a special circumstance for granting special leave to appeal is that the prospects of success are so strong that a refusal of leave may result in a manifest denial of justice.

Costs – Abandonment of order – A party who abandons an order on appeal is usually liable for the costs of the appeal up to the date of abandonment.

Personal Injury/Delict – Award of damages – Arrest and detention – Unlawfulness of detention – A lawful detention carried out pursuant to a lawful arrest could become unlawful if the suspect was entitled to be released on bail – Failure to inform accused of right to apply for bail – Failure by police to counter allegations of breach of accused's rights leading to finding of unlawful detention.

Before the court was an application for special leave to appeal against orders of the High Court, sitting as a court of appeal.

In December 2014, the first applicant ("Mr Syce") was stopped by police and his vehicle was searched. Detecting the smell of alcohol on Mr Syce's breath, a police officer requested him to undertake a breathalyser test. The test reading indicated that Mr Syce's blood alcohol content was over the legal limit. He was arrested on suspicion of drunken driving and detained overnight, as was the second applicant ("Mr

Blignaut"). In July 2015, Mr Syce and Mr Blignaut instituted action against the respondent (the "Minister"), claiming payment of damages arising from their allegedly unlawful search, arrest and detention. The Magistrates' Court found in favour of the applicants on the unlawful search claim and awarded an amount of R30 000 each as damages. The remaining claims were dismissed. On appeal to the High Court, the arrest and detention were confirmed as having been lawful. The court awarded the costs of the appeal to the Minister. It dismissed the Minister's appeal in relation to the costs of the action and dismissed the applicants' cross-appeal. That led to the present application.

Held – One of the factors which constitute a special circumstance for granting special leave to appeal is that the prospects of success are so strong that a refusal of leave may result in a manifest denial of justice. That was considered to be the case in the present matter.

There were two issues which had to be decided in the appeals. The first was whether the order dismissing the unlawful arrest and detention claim should stand; and the second was whether the High Court order upholding the Minister's appeal against an order that interest be paid on the award of damages, as well as costs, was an appropriate order.

The arrest in this case was shown to have been lawful. The Minister bore the onus of proving the lawfulness of the detention. A lawful detention carried out pursuant to a lawful arrest could become unlawful if the suspect was entitled to be released on bail. In this case, Mr Syce had challenged the necessity for his continued detention after a blood sample had been obtained. He also stated that he had not been informed of his right to apply for bail. His right to apply for bail included the right to seek his release in terms of section 59 of the Criminal Procedure Act 51 of 1977. The police led no evidence to counter those allegations. The detention not having been proven to be lawful, Mr Syce was awarded R40 000 as damages.

Turning to the order for costs of the Minister's appeal, the court held that a party who abandons an order on appeal is usually liable for the costs of the appeal up to the date of abandonment. Where those costs are not tendered, the appellant would be entitled to seek such an order. In that event, the appellant may be entitled to costs of

obtaining the order. Mr Syce and Mr Blignaut were directed to pay the costs up to the date of abandonment of the order for interest.

Technology Corporate Management (Pty) Ltd and others v De Sousa and others [2024] 2 All SA 684 (SCA)

This is the appeal from the Gauteng Local Division, Johannesburg, against the finding of Boruchowitz J, (sitting as a court of first instance) in the case of De Sousa and another v Technology Corporate Management (Pty) Ltd and others reported at [2017] 3 All SA 47 (GJ) – Ed.

Corporate and Commercial – Company law – Conducting of business of company – Alleged unfair or prejudicial conduct as contemplated in Companies Act 61 of 1973, section 252 – Enquiry is whether, objectively speaking, the conduct complained of was unfairly prejudicial to the shareholder or part of the shareholders – Unfair prejudice to a shareholder as an employee does not fall within the section unless it has an impact on interests as shareholder – Absence of proof of deliberate pattern of behaviour designed to force shareholders out of company resulting in prejudice not being established.

An application for leave to appeal was brought in respect of the High Court's order, under section 252 of the Companies Act 61 of 1973 (the "Act"), that the first applicant ("TCM") should purchase the company shares owned by the first respondent, Mr Luis de Sousa, and the second respondent, Mr Jose Diez.

TCM had been founded by the second appellant (Mr Cornelli) and Mr de Sousa. The company expanded and the staff complement increased. In 2003, Mr Cornelli identified the need to establish an acceptable BEE profile. He identified the fourth respondent (Mr Hassim) as a suitable person to introduce into the company to enhance its BEE profile to a suitable level. The need to sell 25,1% of the share capital to Mr Hassim resulted in the dilution of the stakes of the existing shareholders of TCM. The relationship between Mr Cornelli and Mr de Sousa subsequently deteriorated, and in 2009, Mr de Sousa was dismissed. He brought an application in terms of section 252 of the Companies Act, seeking an order that either TCM, or Mr Cornelli, or the third applicant, purchase his and Mr Diez's shares in TCM for a price of R160 million or an amount to be determined. Mr Diez was still employed when those proceedings commenced and was never dismissed, but resigned from his employment with TCM on 2 April 2013. Mr de Sousa's application resulted in the High Court order to which the application or leave to appeal related.

Held – The relationship between a company and its members, as well as the members *inter se* is contractual and based primarily on the memorandum of incorporation. While that remains the ordinary rule, legislation governing companies in South Africa recognises that in certain circumstances, even if the majority shareholders act strictly in accordance with the contractual terms governing the shareholder relationship, they may have exercised their powers in a way that was oppressive or unfairly prejudicial to minority shareholders. The courts have therefore been vested with statutory powers to override the majority's exercise of its contractual powers in order to remedy such oppression or unfair prejudice. At the time the present disputes arose, the applicable provision was section 252 of the Act. The concept of the affairs of a company being conducted in an unfairly prejudicial manner is concerned with the effect of the conduct, not the motives of those responsible for it. The enquiry is whether, objectively speaking, the conduct complained of was unfairly prejudicial to the shareholder or part of the shareholders. The mere fact that a course of action by the company operates to the prejudice of a member does not suffice to entitle them to a remedy under section 252. The unfairness and the prejudice must affect the shareholder as a shareholder. Unfair prejudice to the shareholder as an employee does not fall within the section unless it has an impact on their position or interests as a shareholder. Save in extremely unusual circumstances the prejudice will be commercial prejudice.

Taken individually or collectively, the events in the present matter did not establish a deliberate pattern of behaviour designed to force the respondents out of the company. Accordingly, no prejudice was established. The appeal was therefore upheld.

AD Trade Belgium SPRL Private Limited v Central Bank of Guinea and others and related matters [2024] 2 All SA 806 (GP)

Civil Procedure – Application to reopen matter – Court's discretion must be exercised judicially and upon consideration of all relevant factors and is a matter of fairness to both parties – Failure to identify and describe submissions sought to be placed before court rendering court unable to determine whether such submissions were in fact material and relevant to the application.

Civil Procedure – Discovery – Request for further particulars – Rule 21 of the Uniform Rules of Court entitles any party to proceedings to direct a request for further

particulars to any other party to those proceedings – Request may be made to a non-partisan litigant, and the fact that it had not filed a plea was irrelevant to the request.

Based on an arbitration award issued in its favour against the Republic of Guinea, the applicant issued summons against Guinea, the Central Bank of Guinea, the third defendant ("Standard Bank"), and the South African Reserve Bank, for declaratory relief and payment of the amounts owed to it by Guinea in terms of the arbitration award. Standard Bank did not enter an appearance to defend the action and did not deliver a plea but delivered a discovery affidavit. AD Trade served a request for further particulars on Standard Bank, in response to which Standard Bank stated that the information and/or documentation sought was no longer in its possession or that the information sought was irrelevant alternatively not required for purposes of preparing for trial, further alternatively not a permissible interrogatory. That led to AD Trade launching an application for an order compelling Standard Bank to deliver to it the further particulars requested. After receiving AD Trade's replying affidavit, Standard Bank launched an application to strike out certain paragraphs in the affidavit, asserting that the content of those paragraphs raised new matter and/or made out a case in reply. In response, AD Trade applied for leave to deliver a supplementary affidavit setting out the reasons that the allegations sought to be struck from its replying affidavit were not disclosed in the founding affidavit, disclosing certain bank account statements discovered by Standard Bank and reporting the sale of a property belonging to Guinea.

Shortly before the handing down of judgment in the various applications, Standard Bank sought to place further material before the court. It was directed to launch an application for the reopening of the application to compel.

Held – Whether or not to allow the reopening of a matter falls within the discretion of the court. That discretion must be exercised judicially and upon consideration of all relevant factors and is a matter of fairness to both parties. The relevant factors to be considered include the reason why the evidence was not led timeously, the degree of materiality of the evidence, the balance of prejudice, the stage which the particular litigation has reached, and the general need for finality in judicial proceedings. As Standard Bank had failed to identify and describe the supplementary submissions it sought leave to place before the court, the court was unable to determine whether such supplementary submissions were in fact material and relevant to the application.

The degree of materiality of the supplementary submissions directly impacted the assessment of prejudice to the parties which in turn informed the question of fairness to the parties. the application to reopen was thus dismissed.

In the striking-out application, contrary to Standard Bank's submission, AD Trade's replying affidavit did not introduce new material, and the impugned paragraphs simply expanded on the contentions made in the founding affidavit. The striking-out application was also dismissed.

AD Trade's application to file a supplementary affidavit was aimed at placing bank statements of the accounts held by the Central Bank, which were discovered by Standard Bank, and to which reference was made in the application to compel, before the court. As the bank statements were not new to Standard Bank, the introduction thereof was not prejudicial to it. Leave to file the supplementary affidavit was granted.

That left AD Trade's application to compel Standard Bank to provide an adequate response to its request for trial particulars in terms of rule 21 of the Uniform Rules of Court. In deciding the issue of relevance, it was noted that AD Trade's action involved a dispute regarding the ownership of money held by the Central Bank in its accounts with Standard Bank. The ownership of the funds was obscure. Rule 21, which entitles any party to proceedings to direct a request for further particulars to any other party to those proceedings, applied to Standard Bank who viewed itself as a non-partisan litigant. The fact that it had not filed a plea was irrelevant to AD Trade's request. Finding that the further information requested was relevant and necessary for trial preparation, the court ordered Standard Bank to furnish the relevant information.

Botes and others v Tariomix (Pty) Ltd t/a Forever Diamonds and Gold and others [2024] 2 All SA 830 (NWM)

Insolvency – Liquidation application – Effect of withdrawal of application – Role of court – Once a court makes a provisional order, followed by a rule nisi, it is for the court to set aside that order and to determine whether there is cause for granting an order placing the company under liquidation – The mere withdrawal of the application by the liquidating applicant cannot render the court's duties redundant and nugatory.

The first and second applicants were creditors of the first respondent ("Tariomix"). They obtained a provisional liquidation order against the company. In the present

matter, the Court had to decide whether Tariomix and/or other interested parties, had made out a case militating against the provisional liquidation order being made final. The specific issues raised related to the nature of liquidation proceedings; whether a notice of withdrawal by the applicants, delivered after Tariomix had been placed under provisional liquidation, could terminate the liquidation proceedings without more; and the status of intervention proceedings by other affected creditors in such a case.

Tariomix was provisionally liquidated on the strength of the application brought by the first and second applicants, who alleged that its business model was a Ponzi scheme which involved investors buying into diamond parcels, which Tariomix had promised to resell at high profits. The scheme ultimately led to investors losing large sums of money and resulted in Tariomix being indebted to the applicants and unable to pay its indebtedness to them - thereby committing acts of insolvency.

Held – The present case was not about whether Tariomix should be liquidated. It was placed under provisional liquidation on 23 February 2023, and a return date was set. The first and second applicants, the liquidating creditors, elected to withdraw their application, and there were now applications to intervene as applicants by other creditors who sought to be the future liquidating creditors. Tariomix argued that because of the withdrawal by the liquidating creditors, the provisional order had to fall as there was no application in law or in fact. Thus, the intervening future liquidating creditors could not successfully intervene as there was no application or case in which to intervene.

The judgment was limited to the facts, which involved a withdrawal application after the provisional order for liquidation had been granted. A provisional liquidation order immediately alters the legal status of the person against whom it is granted (irrespective of whether it is a natural or juristic person) on the day that a competent court makes the order. From the date when Tariomix was placed under provisional liquidation to the date of the final determination of the matter, the directors of Tariomix were barred from running the day-to-day affairs of the company until the application was finally determined on the return date and subject to the court not making the provisional liquidation order final.

Once a court makes a provisional order, followed by a rule *nisi*, it is for the court to set aside that order. It is the obligation of the court to determine whether there is cause

for granting an order placing the company under liquidation. The mere withdrawal of the application by the liquidating applicant cannot render that redundant and nugatory. The risk of abuse of court processes was explained, before the court concluded that once a provisional liquidation order is granted, the withdrawal thereof does not result in the automatic collapse of the provisional liquidation order or withdrawal of the application proceedings.

If a person instituting any proceedings wants to withdraw, they must tender costs. The relevant applicants did not make such tender. The liquidating creditors also failed to get the consent of the other parties, or to obtain leave of the court to withdraw. Their application was thus defective, and was dismissed.

FS Mining Wash Plant (Pty) Ltd v V-Flow SA (Pty) Ltd and another [2024] 2 All SA 849 (NWM)

Civil Procedure – Execution of order pending appeal – Section 18 of the Superior Courts Act 10 of 2013 – Should a party approach the court for an order to enforce the execution of the order pending appeal, and the execution order is granted, the party wishing to appeal against the order has an automatic right to appeal to the next highest court.

Civil Procedure – Rule nisi – Confirmation of – Requirements for interdictory relief – A rule nisi operates as an interim interdict, and the requirements for a final interdict are a clear right to the relief sought, an injury actually committed or reasonably apprehended, and the lack of an adequate alternative remedy.

The applicant ("FS Mining") was the owner of property which it leased to the first respondent ("V-Flow") for the use of chrome washing, subject to certain conditions. The exact terms of the contract, and additional verbal terms thereof, were in dispute between the parties. Essentially, the dispute concerned possession of, and access to, the property. On 13 March 2024, V-Flow took possession of the property and locked employees of FS Mining out.

In March 2024, a rule *nisi* was issued calling on the respondents to show cause why a final order should not be granted directing V-Flow and the second respondent ("Mavimbela") to restore to FS Mining its *ante omnia* undisturbed possession of the property. In the event that V-Flow refused to restore possession of the property as directed, the Sheriff of the Court would be authorised, with the assistance of locksmiths, the South African Police Service ("SAPS") and private security providers,

should assistance be needed, to seize and restore to FS Mining its *ante omnia* undisturbed possession of the property.

Held – Although there were numerous factual disputes in the matter, those were irrelevant to the issues for the court's determination, *viz* spoliation and confirmation of the rule *nisi*. The court was of the view that neither party should refuse the other party entry to the property. The contract determined that V-Flow leased the property from FS Mining, under conditions such as that FS Mining's personnel would operate the chrome washing machine. Both FS Mining and V-Flow were to have possession of the property and access to the chrome washing machines.

The question before the Court was whether the rule *nisi* issued should be confirmed or be discharged. The Court rejected the applicant's submission that the burden of proof to demonstrate why a rule *nisi* should not be confirmed, rested on the respondent. The onus to establish that the requirements of a rule *nisi* had been met (which requirements were that of a final interdict), rested on the applicant. The legal position is that a rule *nisi* operates as an interim interdict. The requirements for a final interdict are a clear right to the relief sought, an injury actually committed or reasonably apprehended, and the lack of an adequate alternative remedy. FS Mining was found to have discharged the onus of proof, and had established all the requirements for final interdictory relief. It was thus entitled to confirmation of the rule *nisi*.

On the basis that an appeal had been noted against the spoliation order, and the order was to be executed pending appeal, section 18 of the Superior Courts Act 10 of 2013 was relevant to the proceedings. Should a party approach the court for an order to enforce the execution of the order pending appeal, and the execution order is granted, the party wishing to appeal against the order has an automatic right to appeal to the next highest court. The notice of appeal was to be lodged with the Registrar of the Court in terms of section 18(5) of the Superior Courts Act.

Ncube v Liberty Group Limited [2024] 2 All SA 861 (GJ)

Insurance – Life insurance policy – Claim for specific performance – Repudiation of claim by insurer – Application for stay of proceedings – It was not in the interests of justice to stay proceedings in order to give the defendant an opportunity to establish a

defence which had not been pleaded in the plea and where the prospects of establishing a defence were merely speculative.

The plaintiff was the policyholder of an insurance policy concluded with the defendant ("Liberty") over the life of the insured ("Mr Mhlanzi"). Mr Mhlanzi died on 31 August 2017, entitling the plaintiff to claim payment of the benefit ("life cover"). The plaintiff duly lodged a claim with Liberty through its authorised agent on or about 27 September 2017, but Liberty failed, alternatively refused, alternatively neglected, to make payment of the claim. Liberty pleaded that the plaintiff was only entitled to payment if he was not a person of interest in ongoing police investigations surrounding Mr Mhlanzi's murder, and that the South African Police Service had not cleared the plaintiff as a person of interest in its ongoing investigations. The plaintiff consequently caused summons to be issued for payment in terms of a life insurance policy. He essentially sought specific performance of the insurance contract. Prior to the trial, the plaintiff had brought an application for summary judgment. The application was, however, dismissed. In its plea to the plaintiff's action in the present proceedings, Liberty sought a stay of the proceedings pending the final determination by the police and the results of an inquest.

Held – A stay of proceedings is normally only granted in exceptional cases and the power is exercised sparingly. There is no rule in law which stays civil proceedings where a criminal prosecution is pending. Instead, a stay will only be granted where there is an element of State compulsion impacting on the accused's right to silence. It was not in the interests of justice to stay proceedings in order to give the defendant an opportunity to establish a defence which had not been pleaded in the plea and where the prospects of establishing a defence were speculative at best. The stay was refused.

In the main action, the plaintiff bore the onus of alleging and proving the facts necessary to bring him within the terms of the policy, while Liberty bore the onus of alleging and proving facts necessary to support an exception to general liability. However, Liberty failed to plead any provisions of the policy or of the common law, and any relevant material facts, which could serve as a defence to the claim. Its Counsel conceded that the plea did not disclose a defence. The plaintiff was successful in discharging the relevant onus of proof and an order was made directing Liberty to pay out in terms of the policy. Liberty's persisting in opposing the plaintiff's

claim in the absence of a defence attracted the censure of the court, as its conduct was considered to be vexatious and put the plaintiff to unnecessary expense in instituting action and prosecuting his claim after his application for summary judgment was wrongly dismissed. An order for costs on the scale as between attorney and client was therefore made.

Poulter v Commissioner for the South African Revenue Service [2024] 2 All SA 876 (WCC)

Tax – Income Tax – Appearance before Tax Court – Taxpayer's right to representation – Lay representative's right of appearance – Section 33 of the Legal Practice Act 28 of 2014 prohibits anyone who is not a legal practitioner from appearing for or acting for another in a court of law – Whether Tax Court possessed discretionary power to permit lay representation in the course of regulating its own procedures depended on whether it was a superior court within the common law's understanding of the concept – Tax Court functions as a body of ultimate assessment in terms of the Tax Administration Act 28 of 2011, and its function is essentially that of an administrative tribunal – Taxpayer is entitled to be represented in proceedings before the Tax Court by a lay representative.

The appellant appealed against a decision of a tax court confirming the original assessment of her taxable income for 2018 and ordering her to pay the respondent Commissioner's costs on the scale as between attorney and client. The Tax Court's orders were made without hearing the taxpayer (who did not attend the proceedings in that court) or her father (Mr Van der Merwe), who had sought audience there as the taxpayer's authorised representative. The Tax Court held that Mr Van der Merwe, who was not a legal practitioner, was not entitled to appear in the court.

On appeal, the appellant argued that the Tax Court had been wrong in holding that Mr Van der Merwe, whose authority was supported by a power of attorney given by the taxpayer, was not entitled to appear on her behalf in that forum. It was also submitted that the court in any event had erred in granting what the appellant called "default judgment" without considering the evidence that was before the court in the form of the content of the dossier provided for in rule 40 of the Tax Court Rules.

Held – Section 33 of the Legal Practice Act 28 of 2014 prohibits anyone who is not a legal practitioner from appearing for or acting for another in court. The section is concerned with prohibiting persons who are not legal practitioners from acting as if they were legal practitioners. It is not directed at giving laypersons rights of appearance that they did not already enjoy. Significantly, section 33 uses the term

"court of law". The section will therefore apply to Mr Van der Merwe's right of appearance in the Tax Court only if that court is a "court of law" or if there is a statutory provision limiting the right of representative appearance in the Tax Court to legal practitioners. Whether the Tax Court possessed the discretionary power to permit lay representation in the course of regulating its own procedures depended on whether it was a superior court within the common law's understanding of the concept, ie a court with inherent jurisdiction to regulate its process and procedure and develop the common law. Such courts are undoubtedly "courts of law". Section 166 of the Constitution identifies the courts of law in our judicial system. The Tax Court is plainly not a court referred to in section 166(a) to (d) of the provision. In order to be characterised as a court of law, the Tax Court would need to qualify as an institution within the ambit of section 166(e), namely "any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Court of South Africa or the Magistrates' Courts". The Tax Court functioned as a body of ultimate assessment in terms of the Tax Administration Act 28 of 2011. Stepping into the shoes of the Commissioner for that purpose, it fulfils an administrative function directed at achieving one of the important goals of the Act, namely the correct assessment and recovery of taxes. Its function was essentially that of an administrative tribunal.

Concluding that a taxpayer is entitled to be represented in proceedings before the Tax Court by a lay representative, the court upheld the appeal.

Reiscor Two (Pty) Ltd t/a Bootleggers v Anheuser-Busch Inbev Africa (Pty) Ltd and others and a related matter [2024] 2 All SA 902 (GJ)

Corporate and Commercial – Company law – Business rescue – Business rescue plan – Creditors' vote against plan – Application by business rescue practitioners, in terms of sections 153(1)(a)(ii) and 153(7) of the Companies Act 71 of 2008, to set aside vote rejecting business rescue plan – Whether it was reasonable and just to set aside the creditors' vote on the ground that it was inappropriate, involved a value judgement which required a single enquiry taking account of all circumstances – Creditors' vote inappropriate where creditors had not constructively engaged with business rescue practitioners on concerns regarding soundness of business rescue plan.

The court in this matter had to decide on an application by business rescue practitioners, in terms of sections 153(1)(a)(ii) and 153(7) of the Companies Act 71 of 2008, to set aside a vote rejecting the business prescue plan of the applicant on the grounds that it was inappropriate, and a counter-application by one of the creditors of the company for the company's liquidation.

Held – Regarding the application by the business rescue practitioners, the issue was whether the business rescue plan would obtain a better return for the company's creditors or shareholders than a liquidation would produce. That question demanded a reliable comparison between the liquidation scenario and the business plan scenario. The question of whether it was reasonable and just to set aside the creditors' vote on the ground that it was inappropriate involved a value judgement which required a single enquiry taking account of all circumstances.

The business plan envisaged a winding down of the operations of the applicant and the realisation of the applicant's business to maximize the return to creditors when compared to a liquidation scenario. It was recorded that creditors' claims were not to be compromised.

The reasons for the creditors' voting against the plan were that it made conclusions without providing the supporting primary facts; that the valuation of the immovable property from which the company business was conducted was inadmissible hearsay and unreliable; that a key assumption of the plan was the recovery of an amount from a debtor of the applicant, which was itself in business rescue, with no certainty regarding that recovery; that the sale of the business to a third party had not been fully disclosed but was redacted and that further investigations of the company's affairs was required. The Court was of the view that had the major creditors genuinely entertained concerns about the soundness of the plan, on the basis now alleged, they would have raised those with the business rescue practitioners either before or at the meeting when the plan was presented. The concerns could have been addressed by amending the plan or by voting to adjourn the meeting to prepare a revised plan.

Business rescue practitioners have a statutory obligation to investigate the affairs of the company. There was no evidence in this case that they failed to comply with their obligations. If the creditors have reason to suspect that the business rescue practitioners are not to be trusted their remedy is to remove them rather than call for

an opportunity to investigate the conduct of the business rescue process by the business rescue practitioners. The business rescue practitioners had attempted to work towards co-operation, even before the meeting, to amend the business rescue plan to cater for the concerns raised. They invited the major creditors to discuss their concerns and to propose amendments to the plan to address those concerns. The major creditors did not respond to the invitation, and never engaged with the business rescue practitioners at all.

The contention that the creditors' vote was inappropriate was upheld, and the vote was set aside. The application or liquidation was dismissed.

END-FOR NOW