LEGAL NOTES VOL 7/2024

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LE ROUX AND ANOTHER v JOHANNES G COETZEE & SEUNS AND ANOTHER 2024 (4) SA 1 (CC)

Prescription — Extinctive prescription — Commencement — Knowledge of debt — Knowledge of facts — Prescription triggered when creditor obtaining 'knowledge . . . of facts' giving rise to debt — Claims against legal practitioners — Whether 'facts' include knowledge of legal conclusion that mandate breached or erroneous advice given — Prescription Act 68 of 1969, s 12(3).
Legal practitioner — Professional negligence — Claim for damages — Prescription — Commencement — Knowledge of facts giving rise to debt — Such 'facts' may include knowledge of legal conclusion that mandate was breached or that incorrect advice was furnished — Prescription Act 68 of 1969, s 12(3).

In this matter Mr Steenkamp granted Mr and Mrs Le Roux an option to purchase his farm. The option could be exercised within two months of Mr Steenkamp's death, which ultimately occurred in September 2003.
Thereafter, the Le Rouxs met with an attorney, Mr Coetzee, and mandated him to advise them and exercise the option on their behalf. This he undertook to do. Prior to leaving his office, Mrs Le Roux asked if they were required to sign anything. Mr Coetzee said no. Mr Coetzee then wrote to Mr Steenkamp's executor and exercised the option. This in late September. It was then discovered that, prior to his death and in breach of the option, Mr Steenkamp had sold and transferred the property to a Mr Nel. This caused the Le Rouxs to institute proceedings against Mr Steenkamp's executor and Mr Nel to enforce the option and claim transfer.
It was during those proceedings, in November 2007, that the Le Rouxs came to learn that Mr Coetzee's exercise of the option had been defective. This emerged during Mr Le Roux's cross examination, when it was put to him that Mr Coetzee had failed to obtain the Le Rouxs' written authorisation to exercise the option, a contravention of s 2(1) of the Alienation of Land Act 68 of 1981 that visited the exercise with nullity.
The High Court dismissed the action early in September 2009. Later in September 2009 the Le Rouxs served summons on Mr Coetzee for breach of mandate. He

[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!**

responded with a special plea of prescription. It implicated s 12 of the Prescription Act 68 of 1969 which provides that:

'(1) . . . prescription shall commence to run as soon as the debt is due.

. . .

(3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises . . . .' (See [35].)

Mr Coetzee's plea took the form that his non-compliance with the Alienation of Land Act was a conclusion of law, and accordingly, unlike a fact giving rise to the claim, the Le Rouxs were not required to have knowledge of it, for prescription to begin to run.

By contrast, the Le Rouxs argued that the non-compliance was a fact that they were required to have knowledge of, in order for the running of prescription to be triggered.

The High Court agreed with the Le Rouxs and dismissed Coetzee's plea, and later granted him leave to appeal to the Supreme Court of Appeal (SCA).

The SCA overruled the High Court, relying on a series of cases which provided that a claimant need only have knowledge of the facts, and not of any legal conclusion stemming from the facts, in order for prescription to commence (see [12]).

Here, those facts comprised the consultation, the mandate, the erroneous advice about signature and the letter to the executor. These, ruled the SCA, the Le Rouxs had had knowledge of when Coetzee wrote to the executor and when the option lapsed, so causing them loss. It further acknowledged that the cross-examination was the first time the Le Rouxs became aware of the statutory non-compliance, but that this, as a legal conclusion, had no relevance to when prescription began (see [13]).

The Le Rouxs applied to the Constitutional Court for leave to appeal against the judgment of the SCA.

The issue was whether, in an action for negligence against a legal practitioner, the facts that s 12(3) contemplated included knowledge of the legal conclusion that the mandate has been breached or erroneous advice furnished (see [14], [24]).

The Constitutional Court *held* that they could (see [79], [132]). This would, inter alia, equalise the position of legal practitioners to that of auditors and medical practitioners: in actions for medical and auditing negligence expert advice identifying the negligence was regarded for the purposes of s 12(3) as a 'fact' (see [87]). It would also be inconsistent with the 'knowledge' requirement for prescription to begin to run in the absence of knowledge of the erroneous advice or mis-exercise of the mandate. Indeed, it would be unjust (see [91], [131]).

Accordingly, knowledge of the final fact required to trigger prescription (the statutory non-compliance) was obtained in November 2007, with the result that the three-year prescription period had not been completed, when the Le Rouxs served their summons on Mr Coetzee (see [132], [142]).

Leave to appeal granted; the appeal upheld; and the order of the Supreme Court of Appeal set aside and substituted with an order dismissing Coetzee's appeal against the judgment of the High Court (see [146]).

Van Zyl AJ would have granted leave to appeal and upheld the appeal, but on different grounds (see [147]).

In his view a statement (as in a statute) of what the law is, is a fact, while the consequence flowing from an application of the rule to the facts, is a legal conclusion (see [203], [210]).

Accordingly, the content of s 2(1) of the Alienation of Land Act (that an agent requires a buyer's written authority to validly conclude a purchase of land on the buyer's behalf) is a fact, while the consequence of non-compliance with s 2(1) (invalid exercise of the option), is a conclusion of law (see [210]).

Thus when, during Mr Le Roux's cross-examination, the Le Rouxs came to learn of the non-compliance with s 2(1) and invalidity, they became aware of the last fact required to complete their knowledge of the facts giving rise to the debt and triggering prescription, as well as the legal conclusion flowing therefrom (see [205]).
On this basis, with prescription running from November 2007, the Le Rouxs will have brought their breach of mandate action in time (see [6]).
Rogers J took issue with Van Zyl AJ's distinction between the content of a law (by Van Zyl AJ's characterisation a fact), and the conclusion to be drawn from it (law) (see [221]).
In Judge Rogers' view, the distinction was unsupported by authority, and in requiring the creditor to have knowledge of the content of the law in order for prescription to be triggered, might render prescription ineffective (see [221], [230]).

KOUGA LOCAL MUNICIPALITY v ST FRANCIS BAY (WARD 12) CONCERNED RESIDENTS ASSOCIATION AND OTHERS 2024 (4) SA 70 (SCA)

Local authority — Municipality — Rates — Special rating areas — Whether residents' association may run process preparatory to municipality's determination of special rating area — Local Government: Municipal Property Rates Act 6 of 2004, s 22.

Appellant municipality amended its rates policy to create a procedure by which owners within its jurisdiction could initiate the establishment of a special rating area (SRA), and it passed a bylaw to give effect to this amendment.
Second-respondent association conducted a process toward establishment of such an area in compliance with the policy and bylaw, and submitted an application to the municipality for such establishment, which the municipality acceded to.
First-respondent association then applied to the High Court for an order setting aside the municipality's decision to establish the SRA. It granted the order as well as leave to the municipality to appeal to the Supreme Court of Appeal (SCA).
First respondent's argument was that s 22 of the Local Government: Municipal Property Rates Act 6 of 2004 permitted only a municipality to run the process to establish an SRA; that accordingly the rates policy in permitting owners to run the process toward establishment of the SRA was inconsistent with s 22 and void; and that consequently all decisions flowing from the void policy were likewise void (see [13] – [14], [18]).
First respondent's assertion was that the word 'municipality' in s 22 was restricted to its executive and legislative manifestations; appellant's contention was that it included the community as well (see [27], [29]).
Held by the SCA, that the wider meaning — that 'municipality' included the community concerned — was the correct interpretation. This meaning was consistent with the meaning of the word in the interrelated suite of legislation of which the Act was a part, and it was also consistent with the dictionary definition of the word. (See [27] – [30], [34].)
It was, moreover, a pragmatic interpretation — the agitating ratepayers would be the obvious persons to run the establishment process — and one that would further the constitutional objective of involvement of communities in local government. It also spared municipalities the administrative and cost burdens of running such processes (see [31] – [32], [41]).

First respondent's contention failing, it followed that the policy was valid, and likewise the decisions flowing from it (see [14]).
Appeal upheld, order of the High Court set aside, and substituted with an order dismissing first respondent's application (see [41]).

MURAVHA v MINISTER OF POLICE 2024 (4) SA 84 (SCA)

Appeal — Record — Lost and unrecoverable record — Reconstruction impossible — Trial court's findings on facts disputed — Right to fair trial requiring remittal of matter to trial court for hearing de novo before different judge — Serious misdirection for appeal court to decide matter on trial court's summary of evidence.

In October 2017 the appellant appealed to a full court against the Polokwane High Court's dismissal of a damages claim he had instituted against the Minister of Police for the harm he incurred when police shot him during a riot in August 2014.
The entire record of the trial proceedings was lost, but according to the trial court's summary of the evidence, the exact location of the shooting and whether the appellant had participated in the riot were disputed. Faced with mutually destructive versions, the trial court dismissed the appellant's claim.
In his notice of appeal, the appellant argued that the trial court had misdirected itself on the facts. He also indicated that he did not agree with the trial court's summary of the evidence. But the full court, having ruled that it could hear the appeal on what was before it and that the appellant's right to a fair trial would not be affected by this, dismissed the appeal on the facts. The full court's summary was not, however, in line with that of the trial court. On the question of the missing record, the full court held that the appellant had done all he could to secure it and ought therefore not to be mulcted in costs.
The appellant obtained special leave to appeal to the Supreme Court of Appeal. The SCA directed counsel to attend to the reconstruction of the record and to report back on whether reconstruction was possible. They reported that reconstruction was impossible, inter alia because the presiding judge and counsel's trial notes were no longer available.
Held
The parties' attempts to retrieve the record were unsatisfactory. While it was not surprising that the judge no longer had his trial notes, it was implausible that counsel would no longer have theirs where an appeal had been likely. Their failure to keep them constituted a dereliction of duty. (See [17] – [18].)
The full court incorrectly assumed that the facts were not in dispute. They clearly were, and the absence of the trial court record meant that the appellant was deprived of a fair trial before the full court, whose reliance on the trial court's summary of the evidence constituted a serious misdirection. (See [20] – [21].)
The consequence was that the appeal had to be upheld and the matter remitted to the trial court for a rehearing before a different judge. In view of their lacklustre compliance with the rules relating to the filing of the record, each party should pay its own costs. So ordered. (See [22] – [23].)

MURRAY AND OTHERS NNO v NTOMBELA AND OTHERS 2024 (4) SA 95 (SCA)

Practice — Applications and motions — Review — Record of proceedings sought to be reviewed — Whether competent for court, at instance of applicants in review application, to order delivery of rule 53 record of impugned decision before determining legal points in limine disputing legal competence of review application itself — Uniform Rules of Court, rule 53(1)*(b)*.

This case concerned the question of whether it was competent for a court, at the instance of applicants in a review application brought under rule 53, to order, under the rule, delivery of a full record of the impugned decision, prior to determining legal points in limine raised by the respondents disputing that the main proceedings amounted to a proper review contemplated in rule 53. The first and second respondents had launched an application, under rule 53 and relying on PAJA, in the High Court (Free State) against the appellants, in the latter's capacities as joint liquidators of Phehla Umsebenzi Trading 48 CC (in liquidation), to review and set aside their decision declining to effect the transfer of a property the respondents had purchased from Phehla prior to its being placed in liquidation. The appellants had responded by delivering, simultaneous with their answering affidavit, a notice in terms of rule 6(5)*(d)*(iii), indicating their intention to raise various legal points in limine, disputing the legal competence of the main application. Most importantly, the appellants submitted that the impugned decision did not amount to administrative action, and accordingly was not subject to judicial review. This prompted the respondents to bring the interlocutory application that formed the subject-matter of the present appeal. They sought, in terms of rule 30/30A, the setting-aside of the appellants' rule 6(5)*(d)*(iii) notice as an irregular step, given the appellants' failure to dispatch the record of their decision in compliance with rule 53(1)*(b)*. The respondents also sought an order compelling the appellants to file the record of proceedings relating to the impugned decision in terms of rule 53(1)*(b)*. The High Court granted both relief. The appellants consequently appealed to the Supreme Court of Appeal (SCA).

Before the High Court, and in the SCA, the appellants' position was that the High Court could not order them to supply the record of its decision that was the subject of the review proceedings *before* determining the in limine legal points raised in their notice impugning the legal competence of the review application. The contrary stance of the High Court, that prompted it to grant the relief it did, was that it could only determine the legal points in the main application once the full record had been produced, and that the rule 6(5)*(d)*(iii) notice was accordingly premature. Whether the High Court was correct formed the focus of the Supreme Court of Appeal's judgment.

The *majority* of the SCA ('the court') held that the general legal position was that, in respect of review proceedings contemplated in rule 53, the applicant was entitled as of right — derived from rule 53(3) itself — to a record of the decision sought to be reviewed. This was so, having regard to the fact that the rule afforded an applicant an opportunity to amend their notice of motion and supplement their founding affidavit should they deem it necessary based on a perusal of the record. (See [19[, [21], [35] and [39].) This general principle was subject to the single exception, as articulated in the CC case of *Standard Bank*, that a court ought not to order the production of a rule 53 record prior to its first determining the question whether it had the requisite jurisdiction to entertain the claim asserted by an applicant in the first place. (See [12] and [28].)

The court held that, should a court enter into *the substantive merits of the review proceedings*, *before* the record of the impugned decision was provided to an applicant, as the appellants would have it, this would have the potential to disarm the applicant in the review proceedings and, most likely, put paid to their quest to review the impugned decision. The inevitable consequence of such an approach, the court stressed, would not only be subversive of the applicant's rights under rule 53(3), but also deny them their right to have the real dispute resolved by the application of law decided in a fair public hearing before a court, in breach of their right of access to courts entrenched in s 34 of the Constitution. (See [36] and [39].)

The court held that it was accepted that the High Court in this case had jurisdiction to entertain the review application under consideration (see [41]). It added that the points of law raised in their rule 6(5)*(d)*(iii) notice were at the heart of the relief sought in the review application. Those issues should only be determined once the review application itself had become ripe for hearing, which stage would only be reached once the respondents, as applicants in the review proceedings, had decided whether or not to exercise their indisputable right under rule 53, and all of the issues had become crystallised before the High Court. (See [39], [41] and [43].) The court concluded that the appeal ought to be dismissed with costs (see [47]).

The *minority* in a dissenting judgment held that it would have ordered that the appeal be upheld and that the order of the High Court be set aside (see [73]). It disagreed with the main judgment's position that there was only one exception to the general principle that an applicant in review proceedings was, as of right, entitled to access to the record of the decision under rule 53(3), ie when the jurisdiction of the reviewing court was called into question. This approach was too narrow, it held. (See [63] and [69].) The minority accepted that, to achieve the purpose of rule 53, it was inappropriate for a court to entertain the merits of a review before the applicant has been provided with the record and has been given the opportunity to amend its notice of motion and supplement its founding affidavit. However, the appellants in their rule 6(5)*(d)*(iii) notice did not ask a question that went to the merits of the review; instead, they asked whether a decision by any liquidator to resile from an executory agreement, rather than to elect to enforce it, constituted administrative action — and thus was reviewable at all. It was directed at the inherent legal nature of the discretion afforded all liquidators to resile from an executory agreement. If such a question was determined in favour of the appellants, it would follow that the rule 53 procedure had no application, and the respondents would have no right to insist on access to the record. The High Court, the minority held, ought to have addressed the legal issue raised in the appellants' notice. (See [69] – [72].)

PASIYA AND OTHERS v LITHEMBA GOLD MINING (PTY) LTD AND OTHERS 2024 (4) SA 118 (SCA)

Company — Shares and shareholders — Shareholders — Dilution of shareholding — Legality — Resolutions to approve loan and to issue new shares to securitise it — Resolutions validly passed — Board acted in best interests of company, including shareholders — High Court's decision to refuse declaratory relief invalidating resolutions upheld.

Company — Governing legislation — Repeal of 1973 Companies Act by 2008 Companies Act — Effect — Repeal not affecting rights acquired or obligations incurred before repeal (effective 1 May 2011) — Dispute about such rights and obligations to be determined under 1973 Act.

Court — High Court — Jurisdiction — Declaratory relief — Test for granting of — Two legs — Applicant to prove interest in existing, future or contingent right or obligation — Court then to decide whether case appropriate for exercise of its discretion to grant declaratory relief applied for — Superior Courts Act 10 of 2013, s 21(1)*(c)*.

The appellants, shareholders in the first respondent (LM), in 2020 approached the Grahamstown High Court (the High Court) for an order, in the form of declaratory relief under s 21(1)*(c)* of the Superior Courts Act 10 of 2013 (the SC Act), setting aside a loan agreement concluded between LM and the eleventh respondent (LI) in 2009; setting aside the resulting changes to LM's shareholding as assented to by LM's shareholders and board in April 2009; and directing that any dividends to be paid by LM to its shareholders be paid in accordance with the shareholding as it was *before* the allegedly unlawful changes.

Section 21(1)*(c)* of the SC Act provides that a High Court 'has jurisdiction . . . in its discretion, and at the instance of any interested person . . . to enquire into and determine any existing, future, or contingent right obligation, notwithstanding that such person cannot claim any relief consequential upon the determination'.

With one exception, LM and LI's shareholders were the same individuals. In 2004 LM's board proposed asking LI for a short-term loan secured against the issuance of LM shares to LI in the event of default. LM's board proposed that its authorised share capital be increased. LM's shareholders approved the loan and increase in share capital in April 2009. The loan agreement was concluded in July 2009.

When LM was subsequently unable to meet LI's demand for the repayment, LI perfected its security through the issuance of fresh shares in LM, resulting in a dilution in the appellants' shareholding. Displeased with the resulting hit to their dividends, the appellants approached the High Court for the abovementioned declaratory order. They claimed that the loan had not been properly approved by LM's shareholders, that they were not adequately informed of its consequences and that the transaction was riddled with unlawfulness. The High Court refused to grant the declaratory relief sought, mainly because of the appellants' 11-year delay in instituting the proceedings. The High Court refused, however, to award party and party costs sought by the respondents.

In an appeal to the Supreme Court of Appeal, the appellants contended that the High Court erred in its application of the test for declaratory relief by ignoring its first leg, namely whether the appellants had a protectable interest, in favour of the second leg, where delay played a role. The respondents contended that the loan agreement was lawful and had been properly authorised and approved by LM's board and shareholders. The two main issues that arose on appeal were therefore (i) whether the High Court had erred in dismissing the appellants' application for declaratory and consequential relief; and (ii) whether the loan was unlawful. The respondents cross-appealed the High Court's refusal to award costs against the appellants.

During the appeal hearing a considerable time was spent on whether the old (1973) or new (2008) Companies Act applied to the dispute. The events giving rise to the dispute occurred before the 2008 Companies Act came into operation on 1 May 2011, but the appellants argued that the new Act applied to the rights and obligations accrued under the transactions as from that date. The respondents submitted that the 1973 Act applied to the dispute.

Held

As to (i): An applicant seeking declaratory relief must satisfy the court that he or she was a person interested in an existing or contingent right or obligation. If the court was

satisfied on that count, it then had to decide whether the case was a proper one for the exercise of the discretion conferred on it under s 21(1)*(c)* of the SC Act. The appellants' contention that the High Court had wrongly applied the test was mistaken: the High Court had not misdirected itself on either the facts or the law and had exercised its discretion judiciously. The appellants' attack on the High Court's judgment based on the wrongful exercise of its discretion accordingly had to fail. (See [46] – [51].)
As to (ii): The 1973 Act governed the dispute because its repeal in 2011 did not affect rights that had vested under the loan agreement in 2009. The undisputed facts showed that the loan was lawfully authorised, concluded and repaid; that the changes to the shareholding were lawfully authorised and effected; and that the dividends were declared and paid in accordance with the changed shareholding. The resolutions were properly explained to LM's shareholders, and its board had acted in the company's best interests in securing the loan. Moreover, any claim the appellants might have had for delivery of shares that would have entitled them to more dividends had in any event prescribed. Since the appellants acted perfectly within their rights by questioning the reduction in their shareholding, a punitive costs order against them was correctly refused by the High Court. (See [52] – [82].)
Appeal and cross-appeal dismissed (see [84]).

CASH CRUSADERS FRANCHISING (PTY) LTD v CASH CRUSADERS FRANCHISEES 2024 (4) SA 141 (WCC)

Appeal — Execution of judgment pending appeal — Application to execute pending appeal — Interim interdict — Finality — Interdict compelling compliance with cancelled franchise agreement — Cancellation already implemented when interdict granted — Court, citing final effect of interdict and breakdown in relationship between parties, treating interdict as final and appealable, and refusing order for execution pending appeal in view of overwhelming and irreparable harm execution would cause respondents — Superior Courts Act 10 of 2013, s 18(1), s 18(2) and s 18(3).

The applicant was a franchisor and the respondents its franchisees in terms of a franchise agreement that was cancelled by the respondents, who represented 40% of the applicant's business and who had proceeded to set up a rival business in defiance of an interim interdict granted in favour of the applicant on 3 October 2023 (the October order). The October order interdicted the respondents from cancelling the franchise agreement and directed them to comply with it pending final determination of the dispute by an arbitrator or a court. It also directed the applicant to refer the dispute to arbitration within 60 days, after which the interdict lapsed if there was no enrolment or referral to arbitration. The parties referred their dispute to arbitration, with the result that the interdict was, despite the passage of the 60-day period, still in effect — see [21], [50]. The court that had granted the October order ruled that the applicant did not breach the franchise agreement and that its cancellation by the respondents was therefore invalid. The respondents applied for leave to appeal to the Supreme Court of Appeal.
In the meantime, the applicant made the present application for an order declaring that the October order was interim in nature and hence not suspended by the application for leave to appeal or any further appeals. Alternatively, it sought execution pending appeal under s 18(1) read with s 18(3) of the Suprior Courts Act 10 of 2013 (the Act).

The respondents in turn filed a counter-application for suspension of the order pending appeal under s 18(2) of the Act.
Section 18 of the Act, headed 'Supsension of decision pending appeal', in s 18(1) and (2) envisages two kinds of decisions, those with final effect, in which case execution is suspended pending appeal save in exceptonal circumstances, and those that were interlocutory and without final effect, in which case execution was *not* suspended pending appeal save in exceptional circumstances. Section 18(3) requires an applicant for execution to prove, on a balance of probabilities, that he or she will suffer irreparable harm if the order is not granted and that the other party will not suffer such harm.
Counsel for the respondents argued that the *en bloc* enforcement of the franchise agreements against them would cause the respondents immense irreparable harm since they had already begun trading independently. He argued that the October order, by effectively setting aside the cancellation of the franchise agreement and ordering specific performance, had final effect that removed it from the ambit of s 18(2). This was denied by counsel for the applicant, who argued that the October order was interlocutory, not final, and that the respondents would *not* suffer irreparable harm if they were forced to comply with franchise agreements they had freely entered into. Counsel for the applicant also emphasised the irreparable harm that the departure of the respondents would do to the applicant's income.
Held
The October order, though cast as an interlocutory one, had a final effect on the parties. By seeking to restore the status quo ante, it was determinative of the *lis* between the parties and hence appealable. And given the breakdown in trust and confidence between the parties, it was also in the interests of justice to treat the order as a final decision. (See [43], [51].)
As to execution pending appeal, that the parties' agreement to have the issue of cancellation decided in arbitration, despite the application for leave to appeal, was sufficient to give rise to the exceptionality required by s 18(1) of the Act. The issues between the parties would be ventilated on arbitration, and it was not for the court to second-guess the arbitrator. (See [64] – [66].)
As to irreparable harm, the respondents would suffer immense irreparable harm if execution were to be granted. They had already ordered and obtained stock that they would not be able to sell if the October order was executed. They would be unable to purchase stock from the applicant as required by the franchise agreement. The harm they would suffer was overwhelming while the applicant's harm was ameliorated by the fact that the matter would be heard in due course by an arbitrator. In any event, the meaning of s 18(3) was that, if the loser would suffer irreparable harm, the order had to be stayed even if it would cause the victor irreparable harm. (See [75] – [76].)
In the result, the court found that the October order fell under s 18(1) and was appealable, and that execution had to be stayed. It accordingy refused the applicant's application for a declaratory order and dismissed its alternative application under s 18(3). (See [77] – [78].)

DLHOMO AND OTHERS v CHALWA NO AND ANOTHER, SMALL ENTERPRISE DEVELOPMENT AGENCY INTERVENING 2024 (4) SA 161 (KZP)

Trust — Trustee — Appointment of administrator — Application by intervening party to appoint administrator — High Court lacking jurisdiction — Power to appoint

administrator statutory preserve of Master of High Court — Trust Property Control Act 57 of 1988, s 20(1).
Trust — Trustee — Removal from office — Application by trustees for removal of co-trustee based on breach of her fiduciary duties — Impugned conduct including unauthorised litigation, remuneration increases and charging finder's fee on donation from co-founder of trust — Continuance in office would be detrimental to trust property and beneficiaries — Application granted — Trust Property Control Act 57 of 1988, s 20(1).

Messrs Dhlomo, Soutter and Heeger (the Trustees), and Ms Chalwa, were appointed by the Master of the High Court (the Master) as trustees of the National Construction Incubator Trust (the Trust), also referred to as the 'Incubator', a public-benefit organisation co-founded by the Small Enterprise Development Agency (SEDA), as part of a Department of Small Business Development initiative to develop and mentor emerging construction companies within Southern Africa. (See [8] – [14].)
Ms Chalwa was appointed as the Incubator's chief executive officer (CEO) to preside over its daily functioning. When an investigation raised allegations of serious misconduct against her, a meeting between her and the Trustees was held, but she walked out before its conclusion. Thereafter, she locked the Trustees out of the Incubator's premises and disallowed them access to its IT infrastructure. And, ignoring a subsequent notice of her suspension, she next enrolled an urgent application — ultimately struck from the roll — for an interdict preventing the Trustees from attending on the premises of the Trust, and for associated relief. In April 2023 the Trustees placed her on terms to comply with the notice of suspension and restore their access to the Incubator's premises and IT infrastructure. Unbeknownst to them, in the same month, Ms Chalwa 'procured' their removal as the trustees of the Trust, the Master issuing new letters of authority to two new trustees.
The new trustees, having opened a new banking account, then brought an application to unfreeze the Trust funds blocked in the existing account. While this application was pending, Ms Chalwa requested donor funding to be made into the new account, alleging that the account had been verified by National Treasury and the Master. However, on 16 May 2023, the Master withdrew the new trustees' letters of appointment, and confirmed that the Trustees and Ms Chalwa, and no one else, were in fact the trustees of the Trust. The next day, the Trustees enrolled an urgent application against Ms Chalwa, obtaining an interim interdict against her operating a banking account in the name of the Trust and encouraging payments into it, and barring her from making payments from the trust without the written consent of the Trustees. However, despite the order, the next day Ms Chalwa signed off on a payment schedule. (See [28] – [31].)
In the present case the Trustees applied (in their personal capacities) for the removal of Ms Chalwa as trustee of the Trust, based on her alleged failure to act in accordance with her fiduciary duties towards the Trust (see [34]); and SEDA applied to intervene. SEDA sought the appointment of an administrator to investigate the Trust's financial affairs and the conduct of the current trustees; for all four trustees to be temporarily suspended pending the outcome of such investigation; and for the Master to issue letters of authority to the administrator, allowing the administrator to take over the daily administration of the Trust (see [39], [47]). SEDA asserted that the conduct both of the applicants and the respondent, allowed the court to exercise its inherent jurisdiction to appoint an administrator. (See [44].)

In their founding affidavit, the Trustees alleged, inter alia, that Ms Chalwa had misappropriated Trust funds, had unilaterally granted herself a 25% salary increase, and had received a commission payment or finder's fee of R125 000 for a donation to the Trust by SEDA (see [92]).

Held

As for the substantive relief SEDA sought, the court had no jurisdiction in these circumstances to make such an order. The power to appoint an administrator was the statutory preserve of the Master. The application to have an interim administrator appointed would accordingly fail. (See [54] – [60].)

As to the main application, the chronology of events reflected examples of where the respondent failed in her duty to act in accordance with the trust deed. The exposure of her financial maladministration triggered a set of events and litigation in this division whereby she tried to remove the applicants from the Trust. She purported to represent the Trust, while, in direct conflict with her duties as a trustee, she embarked on a path of self-preservation at the expense of the Trust. She was no longer acting on behalf of the Trust, but to protect her misconduct from exposure by the other trustees. She engineered the removal of the trustees by the Master through deceit and encumbered the Trust with the costs of the litigation (see [94] – [97]).

Instead of dealing with the notice of suspension and her position in conjunction with the other trustees within the parameters of the trust deed, she directly and deliberately conducted herself contrary to her fiduciary duty to the Trust. As its CEO, she ran the Trust as an independent entity, enriching herself at the expense of the aims and objectives stated in the trust deed, to the detriment of the beneficiaries. The most disturbing aspects were her remuneration increase and the finder's fee. Her remuneration as the CEO, outside of mere expenses that she was entitled to as a trustee, could only be ratified by a resolution at a meeting of the Trustees. There was no resolution authorising the large increase, merely the submission in her papers that the Incubator's management board had approved the increase. (See [98], [100], [110].)

And, as for the finder's fee, SEDA, as the founder of the Trust, was legally obligated to fund the Trust; it was the Trust's primary donor and beneficiary. The board's decision to pay to the CEO a finder's fee in such circumstances was incomprehensible, especially in light of a trustee's duty to the Trust. All she did was deplete the funds available to the Trust that could be used for the purposes of incubation. This was a clear example of maladministration, another illustration of the respondent acting outside of her duties towards the Trust and failing to protect the income of the Trust (See [102], [106].)

She was not entitled to pay or distribute the funds in the way she did; these payments were made contrary to the objectives of the Trust and accordingly were directly prejudicial to the Trust property and the beneficiaries.

Precedent made it clear that trustees will be removed when their continuance in office would be detrimental to the trust property and the beneficiaries. The reality, on the undisputed facts in this application, was that it was in the Trust's interest, SEDA's interest and all the beneficiaries' interest, that Ms Chalwa be removed as trustee. Ms Chalwa's conduct was the antithesis of what the fiduciary duties of a trustee demanded; her continuance in office would indeed be detrimental and prejudicial to the welfare of the Trust and all its beneficiaries. She should accordingly be removed as a trustee of the Trust. (See [112], [118] – [120], [122].)

RAUTENBACH AND OTHERS v GOVERNING BODY, HOëRSKOOL DF MALAN AND ANOTHER 2024 (4) SA 191 (WCC)

Administrative law — Administrative action — What constitutes — Public school governing body's decision to change school name — Whether having direct external effect — Promotion of Administrative Justice Act 3 of 2000, s 1 sv 'administrative action'.
Administrative law — Review — Of public school governing body's decision to change school name — Procedural fairness — Whether sufficient consultation with interested parties — Promotion of Administrative Justice Act 3 of 2000, s 4(1).
Education — School — Public school — Governing body — Powers and functions — Whether extending to changing school name — South African Schools Act 84 of 1996, s 20(1).

Mr Rautenbach and others, alumni of Hoërskool DF Malan, aggrieved by a decision of the school's governing body (the SGB) to change the school's name to DF Akademie, applied to have the decision, made at a meeting on 6 May 2021, set aside under the Promotion of Administrative Justice Act 3 of 2000 (PAJA) (see [66] – [68]). Their grounds of review were that —

- the decision exceeded the powers and functions vested in the decision- maker (s 6(2)*(a)*(i)), in that governing bodies' powers were limited to those listed in s 16 of the South African Schools Act 84 of 1996 and did include the power to change a school's name (see [74], [82], [84]);
- the administrative action was not lawful, reasonable and procedurally fair (ss 3 and 4(1)), in that it did to comply with the fair-procedure requirements to either hold a public inquiry in terms of s 4(2) or to follow a notice-and-comment procedure in terms of s 4(3), alternatively another procedure to give effect to the procedural fairness requirement in s 3. The main complaint against the procedure followed by the SGB was that there was no proper consultation, that people were not provided with a proper opportunity to discuss the question of the name change at meetings held (see [86], [171]);
- in making the decision, the SGB relied upon irrelevant considerations and failed to consider relevant considerations (s 6(2)*(e)*(iii) of PAJA); and
- the decision was not rationally connected to the information before the SGB (s 6(2)*(f)*(ii)*(cc)*).

The name changing process was initiated after the SGB was confronted with a number of complaints about the schools' name — after Dr Daniel Francois Malan, who, as Prime Minister from 1948 – 54, implemented and enforced racial-segregation laws based on the policy of apartheid. One of the complaints was from the DF Malan Must Fall group. At a 18 June 2020 SGB meeting it was resolved to consider the matter, and to commence with some or other process to eventually make a decision on it, and report to the DF Malan Must Fall group regarding the process to be initiated. On 22 June 2020 the SGB addressed a letter to all parents, learners, alumni and school staff on its database, advising them of its decision to embark on the process to ultimately arrive at a decision in respect of the name change, and inviting them to contact the SGB should they wish to assist with facilitating the anticipated dialogue. On 30 July 2020 the SGB decided to identify a person or body to advise it on such a process, and to act as a facilitator.

Dr JF Marais was elected as facilitator, and the SGB accepted his view that a debate about the school's name should be grounded in the school's identity. The SGB also accepted Dr Marais' proposed community-based, inclusive process, where no decision would be taken upfront, and all relevant parties would be invited to participate in discussions about the school's identity. A steering group was formed, comprising 16 individuals associated with the school and representing potentially different views, and trained by Dr Marias to host the discussion groups in an impartial way. All interested parties were invited by the SGB, by letter dated 8 March 2021, to attend any of the number of discussion groups to be held over March 2021.

The next phase of the process — once a saturation point was reached where no new issues were emerging frm the discussion sessions — was where all the information gathered at the discussion groups was sent to the Unit for Innovation and Transformation at the Faculty of Theology of the University of Stellenbosch, for quantitative and qualitative analysis. After the Unit presented its final report, the SGB decided (on 22 April 2021) that its chairperson and Dr Marais should discuss the next step. Dr Marais was satisfied there was a sufficient number of participants to indicate — with specific reference to the core characteristics of the school — that the school community was ready to have discussions about the school's future; that they were aware that retention of the school's name could be a risk. (See [48] – [52].)

On 6 May 2021 the SGB held a meeting, attended by all 13 voting members, plus the two co-opted and non-voting members, where they, inter alia, discussed the core characteristics of the school's identity and the political risk attached to the existing name. Shortly before this meeting, Dr Marais prepared a short report on his conclusions, which was distributed to each of the members prior to the meeting. Each member of the SGB was requested to state his or her view (except for one member who had left the meeting by then), and unanimously agreed with Dr Marais' assessment that the school symbols, which included its name, should be reviewed. It was decided to appoint a new task team to assist the SGB in determining the criteria against which a new name could be evaluated, and to decide on a process through which a new name would be identified; and if so, how the school community should be included in that process (See [53] – [60].)

On 5 August 2021 the new task team invited all recipients on the SGB's database to suggest new names. It received 626 proposals, 301 of to retain the name DF Malan and 325 for various new names. Four of the proposed names made it to the short list. 'DF Akademie' was ultimately selected, by voting- crowd platform with 85% out of 3466 votes over the runner-up. Thereafter, between 20 and 25 October 2021, members of the SGB ratified the name, thereby deciding that DF Akademie was to be the new name to be submitted to the Department of Education for confirmation. (See [59] – [63].)

The SGB opposed the application on the grounds of unreasonable delay, it not having been made within the 180-day period PAJA required; and that the decision did not constitute administrative action as defined in PAJA. It was not final, as the SGB had not yet convened a meeting to amend the school's constitution; it had not exercised its powers as an organ of state (see [65], [118] – [119]); and the decision had no direct external legal effect adversely affecting the rights of any person (see [127] – [132]).

The applicants' reply to the finality ground was that, since there was no requirement in s 18(2) of the School's Act 84 of 1996 that the name of the school was to be recorded in the constitution, the coincidental recordal thereof was of no significance (see [71] – [72]).

Held

As to whether a final decision had been made, that while s 18 of the Schools Act required that the governing body of the school must adopt a constitution (to deal with certain procedural aspects regarding meetings), it did not require the school's name to be established therein. The decision, once taken by the governing body, if it had such power, was lawful and binding. (See [137] – [139].)

As to the effect of the delay in launching the review proceedings, that given the enormous public interest the matter had evoked, it would be in the interest of justice to grant an extension of time in terms of s 9(2) of PAJA, as requested by the applicants in their notice of motion (see [143], [145]).

As to whether the Schools Act permitted the SGB to change the school's name, that while the Act did not explicitly grant a governing body the power to change a school's name, that did not mean that the governing body had no such power. There was nothing in the Act that prohibited a governing body from exercising such a power. Section 16 of the Act confirmed that the power to govern a school only vested in the school governing body; and s 21 gave it broad powers to deal with a range of governance issues. It was therefore not helpful to look at specific provisions of the Act which prescribe certain functions and powers and conclude that those were the only functions and powers a governing body has in terms of the Act. The Act must be interpreted having regard to the purpose thereof. All the functions listed in s 21 placed the governing body in a fiduciary duty towards the school, to act in the best interest of the school. This included its mandate to develop a mission statement of the school in terms of s 20(1)*(c).* Based on the core characteristics which the SGB adopted at the 6 May 2021 meeting, there was agreement by the SGB that the school symbols, which included its name, should be reviewed. Its power to change the name of the school derived from these provisions. The conduct of the SGB fell squarely within the powers given to it in terms of s 20(1) of the Schools Act. (See [147], [151], [153], [157], [159].)

As to whether the decision amounted to administrative action in terms of PAJA, on the SGB's own version, it was authorised to act in terms of the Schools Act; it purported to exercise a public power and was therefore an organ of state, which made the provisions of PAJA applicable (see [73]). And its decision did have a direct external legal effect. All the applicants were invited to take part in the name change process initiated by the SGB, which clearly made them an indispensable interested party to this whole process. When they became participants in the process they were entitled to fair and just administrative action, and after having been aggrieved by the process that was followed, they were entitled to vindicate their right to just administrative action. (See [167] – [170].)

As to whether the process that was followed resulted in administrative action that was fair and rational, that it is common cause that the SGB had no idea what process had to be followed, as there was no clearly defined process for the change of the school's name, and no legal precedent that could be followed. It was eminently reasonable for the SGB to appoint a facilitator to act as an independent person to facilitate the process; and not unreasonable or irrational for the SGB to follow the advice of Dr Marais as to the approach to be adopted in respect of changing the school's name. The overall process, with its underlying components, which resulted in the SGB's decision, was a proper one; it could not be faulted; it was not offensive to the provisions of PAJA. (See [173], [178].)

The process undertaken to bring about a name change of the school from that of an apartheid-era Prime Minister placed a very difficult task on the shoulders of the SGB. A proper and fair process with proper consultation, given the circumstances of this

case, was undertaken. All the parties forming part of the school community were required to give their input about the proposed name change. Although it was characterised as a process to review the 'symbols' of the school, it was all part of the process to bring about a change of the name. This was known to all the parties, and they expressed their views about it. There could therefore be no question that there was no proper consultation. The process embarked upon by the SGB constituted fair administrative procedure, which included adequate consultation and a proper chance by all concerned to give their input. The applicants did not show that they were entitled to the relief sought; the application would be dismissed. (See [186], [189], [191], [193].)

SCHOONHOVEN AND OTHERS NNO v SCHOONHOVEN AND OTHERS 2024 (4) SA 240 (KZP)

Trust — Beneficiary — Capital beneficiary — Identification — Interpretation of trust deed.
Trust — Trust deed — Rectification — Declaratory relief — Such relief should be claimed through action proceedings, not motion proceedings.

This matter, brought to the High Court on motion proceedings, concerned the proper interpretation of the trust deed for the Schoonies Familie Trust — registered in 1998 by its founder, Mr Schoonhoven, who passed away in May 2015. The stated purpose of the trust was to provide for Mr Schoonhoven's family. The four applicants were the trustees of the trust, the first to third of which being the sons of the deceased. They sought that it be declared that 'the capital beneficiaries of the Schoonies Familie Trust . . . (the trust), shall be determined by the Trustees of the Trust as at the date of the Trust's termination', and 'that the Trustees of the Trust as at the Trust's termination shall make the determination . . . from the list of potential capital beneficiaries set out in paragraph 1.2*(b)*(i) to (vii) of the Trust Deed, under the heading Woordomskrywings'. The first to 11th respondents were 'potential capital beneficiaries of the Trust', mainly relatives of the deceased. Opposition was entered only by the first respondent, the brother of the first and second applicants and an ex-trustee of the trust.
The matter turned on the proper interpretation of clause 27 of the trust deed and clause 5.3 of the deceased's final will, read with the definition of 'kapitaalbegunstigdes' ('capital beneficiaries') in the trust deed. There was a dispute as to the proper translation of the definition, but the court favoured the first respondent's version, namely that capital beneficiaries comprised 'the beneficiaries to whom the trust fund will be transferred during the existence or on termination thereof, in accordance with the terms of the trust deed, *and which beneficiaries will be elected* [or selected] in accordance with the terms of the trust deed from the ranks of [the seven specified categories of persons listed in para 1.2*(b)*(i) to (vii)]'. The implication, the court asserted, was that 'someone' had to elect or select the capital beneficiaries. Clause 27 provided the deceased with the right, by way of a testamentary directive or stipulation, to, inter alia, direct *how the trust fund was to be divided* amongst the capital beneficiaries upon the termination of the trust, and to indicate *which capital beneficiaries* were to receive whatever portion of the trust fund. In his will the deceased sought to exercise this right, in clause 5.3 thereof, by determining that *the capital beneficiaries* shall receive in equal shares the net proceeds of the trust. He did not, however, *identify the capital beneficiaries* to share in the trust fund.

The applicants' stance was that, in terms of the definition of 'capital beneficiaries', understood in the context and purpose of the trust, *the trustees were to decide* who the capital beneficiaries were, from the categories as set out in subparas (i) – (vii): In explanation the applicants submitted that the trust deed was constructed with a design in mind, which allowed the trustees to manage the trust assets on behalf of the beneficiaries with maximum flexibility, and this included the discretion to elect the capital beneficiaries. For the respondents, however, the deceased determined the formula for the distribution of the trust fund in his will, in terms of which *all the capital beneficiaries* would be entitled to share equally when the trust vests.
The court held that the applicants had failed to prove their interpretation of the trust deed and will (see [70]): The court noted that the problem for the applicants was that, while the trust deed clearly presupposed an election of persons as capital beneficiaries from the ranks of the categories listed, it was silent on *who was entitled or required* to make the election. Further, the deceased, when seeking to exercise the right granted to him in clause 27 of the trust deed, for whatever reason, failed to define the capital beneficiaries, bringing one back to the definition in the trust deed. (See [63] and [64] and [70].) The court noted that the applicants had failed to provide any evidence as to the deceased's intention at the time of, or the context surrounding, the signing of the version of the trust deed in question, to support their interpretation. (See [63] and [64].) The meaning the applicants sought to ascribe to the definition of capital beneficiaries was not borne out by the words, context or purpose of the trust deed. (See [70].)
The court held further that the relief sought by the applicants amounted to a rectification of the trust deed. Accordingly, in line with case authority, the applicants ought to have brought an action, instead of an application, to seek such relief. (See [67] – [69].)
The court accordingly dismissed the application (see [72]).

SOUTH AFRICAN HERITAGE RESOURCES AGENCY AND OTHERS v MANDELA AND OTHERS 2024 (4) SA 264 (GP)

Heritage — Heritage objects — Meaning of 'heritage object' — National Heritage Resources Act 25 of 1999, ss 32(1) and (2).

In 2019, using statutory power, first applicant, the South African Heritage Resources Agency, declared certain classes of objects 'heritage objects' (see [31], [50], [53], [59]). The statutory power to make such a declaration was given to the Agency by s 32(1) of the National Heritage Resources Act 25 of 1999, which provided:
'(1) An object or collection of objects, or a type of object or list of objects, whether specific or generic, that is part of the national estate and the export of which SAHRA deems it necessary to control, may be declared a heritage object, including —
. . .
(e) objects of cultural and historical significance; . . . .'
The declaration, made in *GG* 42407, GN 587, created classes 3.5 and 3.6 of heritage object:
'3.5 Objects related to significant political processes, events, figures and leaders in South Africa; [and]
3.6 Objects related to significant South Africans, including but not limited to writers, artists, musicians, scientists, academics, educators, engineers and clerics as well as events of national importance; . . . .' (See [31.7].)
This status brought such objects into the scope of s 32(19):

'No person may export . . . from South Africa any heritage object without a permit issued by [the South African Heritage Resources Agency].'
In 2021 first respondent, a Gauteng resident, and the owner of certain objects (the Mandela Objects), consigned them to second respondent, an American auction firm, to sell by auction. Pursuant thereto, first respondent exported them to the USA. (The Mandela Objects comprised, inter alia, sunglasses, a tennis racket and exercise bike used by Nelson Mandela, as well as a book he had signed.) (See [25], [31.10] – [31.12].)
Later in 2021, the Agency became aware of this and applied for an order interdicting first respondent from allowing any of the Mandela Objects to be sold to a third party (see [10.1], [25], [27]).
The premise of the application was that the Mandela Objects, in the Agency's view, fell into classes 3.5 and 3.6 of heritage object, were therefore heritage objects, and subject to the export condition in s 32(19). That is, that a permit need have been issued by the Agency to export them. No such permit had been sought by first respondent (see [31], [53], [57]).
In issue was whether the Mandela Objects were 'heritage objects' (see [35], [57]).
Held, that, on a plain reading, classes 3.5 and 3.6 were so wide that they were not 'clear', a prerequisite for laws by which heritage resources were to be managed (s 5(3)) (see [49]).
Held, further, that, read contextually and purposively, for an object to be a heritage object, it had, in addition, to have characteristics akin to the following. It had to —
(1) be a resource of national significance;
(2) be instrumental in the nurturing and conservation of a legacy worthy of being bequeathed to future generations;
(3) be unique and precious in a manner that cannot be renewed;
(4) help us to define our cultural identity;
(5) lie at the heart of our spiritual well-being;
(6) foster in us the power to build our nation;
(7) have the potential to affirm our diverse cultures;
(8) shape our national character;
(9) contribute to redressing past inequities;
(10) educate, deepen our understanding of society, and encourage us to empathise with the experience of others;
(11) facilitate healing, and material and symbolic restitution; and
(12) promote new and previously neglected research into our rich oral traditions and customs. (See [63].)
The Mandela Objects did not possess any of these characteristics and therefore were not 'heritage objects'. Accordingly, no right requisite for the grant of the interdict had been established (see [64], [68]).
Application dismissed (see [81]).

STEYN v STEYN NO AND OTHERS 2024 (4) SA 285 (GP)

Trust — Discretionary family trust — Sequestration — Application by trustee who is also creditor of trust — Conflict of interest in context of family feud — Applicant seeking to secure payment for herself to detriment of beneficiaries, whom she intended to punish by sequestration of trust — Amounting to abuse of process — Application dismissed.

Trust — Sequestration — Discretionary family trust — Semble: Commercial insolvency not constituting ground for sequestration of discretionary family trust.

The applicant, acting in her capacity as creditor, sought the sequestration of a trust of which she was both trustee and a beneficiary. The trust was a discretionary family trust. The members of the family were involved in an ongoing dispute about trust finances. The applicant cited herself, another trustee and a beneficiary as respondents. A provisional sequestration order was granted and a return date set.
The trust property (farmland) was rented to the third respondent, the applicant's brother, who lived there with his wife. He stopped paying rent as agreed because the trustees refused to appoint him co-trustee. The applicant responded by applying for the sequestration of the trust, claiming that it was insolvent and owed her around R480 000 for moneys she had spent on it (it was not clear how the trust incurred this alleged debt, and the court expressed doubt whether the applicant was a true creditor at all — see [40] – [41], [61]). There was also an amount of about R360 000 owing to Standard Bank Ltd in respect of the mortgage loans taken out to acquire the farms. The third respondent's 'rent' was paid to the bank as instalments on the mortgage loans. At the time of the application, the farms were estimated to be worth about R2,3 million.
The applicant did not rely on an act of insolvency by the trust, claiming instead that it was 'commercially insolvent'. The third respondent argued that the application was self-serving and not in the interests of the beneficiaries. He also alleged that the applicant's motivation for the application was to force him to buy her out as beneficiary.
Held
Though lacking legal personality, trusts qualified as 'debtors' under s 2 of the Insolvency Act 24 of 1936 and could be sequestrated — through their trustees — under s 12 of the Act. While it was doubtful that commercial insolvency could be relied on as a ground for the sequestration of a family discretionary trust — which as a rule did not conduct business in a strict sense — the applicant in any event failed to prove commercial insolvency. Although sequestrations generally had to be in the interests of the body of creditors, the facts of this case required a serious assessment of the positions of the beneficiaries. (See [24], [34], [44] – [46], [52].)
Trustees could also be trust beneficiaries, but they were not permitted to use their position as trustees to benefit themselves to the detriment of the other beneficiaries, whose interests they were supposed to advance. Here the applicant had brought the application to advance her own personal interests, contrary to her position as trustee. It was a textbook example of conflict of interest. Seen in context, the application was nothing less than an abuse of process by the applicant to resolve her family dispute with the third respondent. Given the apparent solvency of the trust in the light of the estimated value of the farms, there was no justifiable reason for a sequestration that would, moreover, be detrimental to two of the trust beneficiaries. Application accordingly dismissed. (See [30] – [32], [36], [47] – [53], [64].)
The court, having pointed out that the third respondent's suspension of payments was due to poor communication and that the dispute could be solved by mediation, expressed the hope that the parties would engage each other on the continued existence of the trust and reach an agreement on how the applicant could be reimbursed for her expenses. (See [50], [65].)

STRYDOM AND OTHERS v COOMANS AND OTHERS 2024 (4) SA 302 (NWM)

Costs — Attorney's fees — Disallowance — Request for reasons where written judgment setting out reasons — Mindless or frivolous litigation — In interests of justice to grant costs order depriving attorneys of costs associated with request for reasons.

In this judgment Reid J addressed the applicants' attorneys' 'request for reasons' in respect of Reid J's dismissal of the applicants' application for leave to appeal. Pertinently, the attorneys had made the request, despite the fact that Reid J had handed down a written judgment containing the reasons for the judgment and order. The attorneys' conduct in such circumstances, Reid J held, amounted to mindless or frivolous litigation, hinting at a fee-generating practice, for which it would be grossly unfair to expect the attorneys' client to pay. (See [8] and [11].) The actions prejudiced both the client, through unnecessary billing, and the court, through the wasting of precious judicial resources. (See [7] and [9].) The court held that it would be in the interests of justice in these circumstances to grant an order depriving the applicants' attorneys of a fee for the drafting and filing of the request for reasons, the perusal of the reasons given, or any other actions in relation to the request for reasons for the judgment. (See [11] – [15].)

VENTER AND ANOTHER v ELS AND ANOTHER 2024 (4) SA 305 (WCC)
Consumer protection — Consumer agreement — Fixed-term agreement — Expiry and renewal — Early cancellation clause in written lease agreement — Whether subject to CPA's prohibition against early termination of fixed-term agreement — CPA not applicable because lease in question not concluded in ordinary course of landlord's business — Proper interpretation of Consumer Protection Act 68 of 2008, s 14(2)*(b)*.

During September 2020 the applicants and the respondent concluded a written lease agreement in terms whereof the respondent would lease the property from 1 December 2020 to 31 December 2023. During February 2023 the respondent approached the first applicant to renew the lease beyond 31 December 2023. The applicants, who had decided to sell the property, were reluctant to conclude a further lease agreement, and informed the respondent that any lease agreement would be subject to a three (3) month notice period. This was reflected in clause 29.2 of the lease agreement, which stated that '(t)he Landlord shall be entitled to terminate this Agreement on 3 (three) months written notice to the Tenant before termination date'.
When the applicants sold the property (in October 2023), the sale agreement made provision for the applicants to give the purchasers vacant occupation on 1 April 2024. The applicants then notified the respondent to vacate in accordance with clause 29.2 of the lease agreement. The respondents, however, took the view that, since the lease they concluded was a fixed term agreement, it was subject to s 14 * of the Consumer Protection Act 68 of 2008 (the CPA), which prohibited the early termination of the lease agreement.
By mid-February 2024 it became clear that the respondent would not vacate the property, and so the applicants approached the court on an urgent basis for eviction of the respondent (and all those holding title under him) if they failed to vacate the property on or before 31 March 2024. The urgency arose from the applicants' obligation to give the purchasers of the property vacant occupation by 1 April 2024.
Held, as to urgency, that the applicants would not be afforded substantial redress if the matter was heard in the ordinary course (see [15] – [21]).

Held, as as whether the provisions of s 14(2)*(b)* of the CPA were applicable to the lease agreement, that they were not — the lease of the property was not done on a continual basis or in the applicants' ordinary course of business (see [43]).
Held, as to the proper interpretation of s 14(2)*(b)*, that (as stated by Delport), s 14 was 'not directed at fixed-term agreements where the period of the agreement was open for negotiation between the parties and the consumer enjoyed the freedom to determine the duration to suit his needs'. Section 14(2)*(b)* should be seen as factoring in extra protections for the consumer, by nullifying contractual terms binding a consumer to a fixed term contract contrary to the provisions of s 14(2)*(b)*(i), without allowing the consumer to terminate the agreement upon the expiry of the fixed date without penalty or charge. If it were interpreted simply as identifying potential contractual clauses which would be of no force and effect, as it would be nullified by s 14(2)*(b)*, it would achieve the purpose of protecting the consumer while at the same time promoting a sustainable and accessible marketplace for the consumer. (See [33], [46] – [47].)
Held, that s 29(2) of the lease agreement was accordingly valid and binding on the respondent, and the three months' written notice given to the respondent, in terms thereof on 21 December 2023, validly cancelled the lease agreement with effect from 31 March 2024. The respondent and all those holding title under him would be directed to vacate the property on or before 31 March 2024.

WB v RB AND ANOTHER 2024 (4) SA 316 (KZD)
Medicine — Medical records — Disclosure — In divorce proceedings — Interlocutory application — Applicant alleging mental state of respondent, his former spouse, rendering her unfit to be primary caregiver of children — Hospital refusing to disclose medical records of respondent, who was diagnosed with bipolar disorder, on grounds of confidentiality — Competing rights of privacy and best interests of children — Relevance and genuine need — Court ordering disclosure of respondent's diagnosis and treatment, and of results of alcohol and drug test — National Health Act 61 of 2003, s 14(2).
Marriage — Divorce — Disclosure of medical records — Disclosure sought in interlocutory application to determine primary residence of children — Applicant alleging mental state of spouse rendering her unfit to be primary caregiver of children — Hospital refusing to disclose medical records of respondent, who was diagnosed with bipolar disorder, on grounds of confidentiality — Competing rights of privacy and best interests of children — Relevance and genuine need — Court ordering disclosure of respondent's diagnosis and treatment, and of results of alcohol and drug tests — National Health Act 61 of 2003, s 14(2).

The applicant, who was divorcing from the first respondent, sought an interlocutory order, pending a decision on the primary residence of their children, directing second respondent — a medical facility that had treated the first respondent for bipolar disorder — to make available the first respondent's medical records, including the results of drug and psychological tests. The order was sought under s 14(2) of the National Health Act 61 of 2003. Section 14(1) prohibits the disclosure of confidential medical information, but subject to the exclusions in s 14(2), which allow disclosure where the user consented to it in writing; where a court order (or the law) required it; or where the non-disclosure would pose a serious threat to public health.
According to the applicant, the requested information was necessary to assess the first respondent's suitability for an award of primary residence. This would require the

wholesale disclosure of the therapy notes, file notes and medical notes relating to her treatment. The applicant argued that the interests of the children were paramount and trumped the first respondent's right to privacy, and that, since the first respondent had not indicated the harm she would suffer if her medical records were to be released, he was entitled to all of them.

The first respondent opposed the application on the grounds that the envisaged disclosure would invade her right to privacy and that the applicant, instead of seeking the welfare of the children, intended to use the information against her in the looming proceedings between the parties. To allay her fears in this regard, the applicant suggested that the records be handed over to a health professional, but the first respondent argued that the applicant would see them anyway. Crucially, however, the first respondent did not dispute the relevance of the requested records, only the extent of the disclosure.

Before instituting the abovementioned s 14 proceedings, the applicant served a subpoena duces tecum on the second respondent under rule 38 of the Uniform Rules of Court. The second respondent, however, refused to comply with it in the absence of consent by the first respondent or a court order.

The court listed the issues raised in the present application as follows —

- whether there was a blanket privilege that would prevent the second respondent from disclosing the first respondent's medical records to the applicant;
- whether the best interests of the children required the disclosure of the medical records, without restriction, to determine the suitability of the first respondent to be awarded primary residence of the minor children;
- whether the medical records were relevant to the proceedings.

Held

There was no blanket privilege against disclosure. The court had a discretion, to be exercised by weighing up the rights to privacy and dignity, the issue of medical privilege, and the best interests of the children. The overarching factor was whether the records were *relevant* to the issues before court, which was not disputed in casu. (See [34, [37] – [38].)

This did not mean that the first respondent was not deserving of a measure of protection, particularly since she had herself sought the help and treatment that resulted in her diagnosis. To allay her legitimate fears regarding the use of the information against her in the coming proceedings, the order would be restricted to exclude the results of any psychological or psychometric testing. (See [39] – [40].)

The court, having emphasised that its order would be in the best interests of the children, directed the second respondent to provide a medical report to a clinical or forensic psychologist appointed by the applicant, disclosing the first respondent's dates of admission and discharge, her diagnosis and treatment plan, the results of alcohol and drug tests, the medication prescribed for her and the prognosis and recommendations of the second respondent in respect of continued treatment. (See [46].)

South African Criminal Law Reports July 2024

SYCE AND ANOTHER v MINISTER OF POLICE 2024 (2) SACR 1 (SCA)

Arrest — Without warrant — Criminal Procedure Act 51 of 1977, s 40(1) — Lawfulness of — Whether police official had discretion to arrest accused for allegedly driving under influence of alcohol — Breathalyser test proving positive — Provisions

of s 65 of National Road Traffic Act 93 of 1996 imposing restrictions upon liberty of person having committed such offence — Section envisaging detention as means to obtain evidence of prohibited conduct and to secure its reliability — Arrest lawful.
Bail — Granting of by police official — Detained person to be informed of right to bail to enable exercise thereof before first appearance in court — In absence of such, continued detention unlawful — Criminal Procedure Act 51 of 1977, ss 50 and 59.

The two applicants applied for special leave to appeal against a decision of the High Court in respect of their claims for damages for unlawful arrest and detention. Only the circumstances of the first applicant are relevant for the purposes of this headnote. The first applicant had been driving his motor vehicle when he was stopped by police who wished to search the vehicle for drugs. No drugs were found, but as the police believed the first applicant to be under the influence of alcohol, he was subjected to a breathalyser test which indicated that his breath-alcohol level exceeded the maximum permissible limit. He was arrested and taken to hospital for a blood sample to be taken. He was then detained until midday the following day when he was allowed to go home and was told to appear in court on a certain date. He alleged that, despite his request not to be arrested, he was nonetheless arrested and detained. His claims were dismissed in the magistrates' court and that decision was upheld on appeal to the High Court.
In the present application the applicant contended, in respect of the arrest, that he had asked the arresting officer to allow him to walk to the nearby home of his girlfriend, but this was ignored. This came to be the central attack on the lawfulness of the arrest, namely an alleged failure by the arresting officer to exercise a discretion whether to arrest. In respect of his detention, he stated that there were no reasonable grounds justifying his detention after his blood was drawn and his personal particulars obtained by the arresting officer. He pleaded that the arresting officer and other police officers at the police station had failed to apply their minds in respect of his detention, and that he was not promptly informed of his right to apply for bail as required by s 50(1)*(b)* of the Criminal Procedure Act 51 of 1977 (the CPA). After considering and making findings re the interests-costs issue (see [61] – [73]), the majority, per Weiner JA and Goosen JA (Carelse JA and Tokota AJA concurring),
Held, that the alleged failure by the arresting officer to exercise a discretion had not formed part of the cause of action advanced by the first applicant. Even accepting that he had asked to be allowed to walk home, the request was in truth no more than that he be let off the hook. A police officer who had clear evidence in the form of a breathalyser test could not be criticised for refusing the transgressor an opportunity to merely walk away. Further, the provisions of s 65 of the National Road Traffic Act 93 of 1996 imposed restrictions upon his liberty because of the nature of the offence the applicant was suspected of having committed. The statute envisaged detention as a means to obtain evidence required for the proof of the prohibited conduct and to secure its reliability. The ambit of a police officer's discretion not to arrest a person suspected of committing an offence in terms of s 65 therefore had to be construed in the light of this, and the discretion not to arrest and detain could only arise if the broader objects of the section could be met without imposing restrictions upon the liberty of the subject. The application for leave to appeal on this ground had to fail. (See [31] – [35].)
Held, further, s 50 of the Criminal Procedure Act contemplated that a detained person had to be informed of their right to bail in order that it could be exercised, even before their first appearance in court. Section 59 of the CPA, which applied in the present case by virtue of the offence for which the first applicant had been arrested and

detained, provided for bail to be granted by a senior police officer. No evidence was presented, however, on behalf of the respondent to challenge the assertion that the first applicant was not informed of his right to apply for bail. Nor was evidence presented to explain the circumstances giving rise to his release in terms of s 59 shortly after midday on the following day. The absence of such evidence to justify the lawfulness of his continued detention after his return to the police station, meant that there was no evidence upon which the onus could be discharged. The High Court had therefore erred in finding that the continued detention was lawful. (See [44] – [52].) The application in this respect was upheld and the court awarded the first applicant R40 000 as damages for unlawful detention for the limited period of his detention. (See [60].)
Held, per Makgoka JA, agreeing on the order of the court, but noting that the reasoning underpinning the interests-costs issue should not have detained the court for as long as it does in the first judgment. The hallmark of the court's judgments had always been its brevity and linear reasoning. There were, of course, cases in which an expansive exposition was inevitable. The issue in question did not fall within that category. It could, and should, be disposed of pithily. (See [75].)

S v SIBEKO 2024 (2) SACR 25 (NWM)

Bail — Evidence adduced at bail proceedings — Admissibility of at subsequent trial — Section 60(11B)*(c)* of Criminal Procedure Act 51 of 1977 — Record of proceedings not automatically admissible at subsequent trial — In casu, unilateral introduction of record of bail proceedings by regional magistrate in judgment on conviction, and appellant not given opportunity to challenge evidence or offer explanation therefor — Violation of fair-trial rights — Convictions and sentences set aside, matter to begin de novo before different magistrate.

In an appeal against convictions for robbery with aggravating circumstances, kidnapping, and the unlawful possession of a firearm, the appellant contended that the magistrate had relied on evidence that had not been led during the trial, but constituted certain portions of the bail record. The appellant had not been given an opportunity to either challenge this evidence or to offer an explanation therefor. In her judgment dismissing an application for leave to appeal, the regional magistrate did not address the issue of the admissibility of the bail record.
Held, that the district-court record of bail proceedings may have been part of the record of proceedings that were transferred to the regional court, but that did not automatically render it part of the trial record. It was so that s 60(11B)*(c)* of the Criminal Procedure Act 51 of 1977 not only made the record of the bail proceedings part of the record of the subsequent trial record, but also any evidence given at the bail hearing admissible at trial, provided that the court hearing the bail application had warned the accused of the risk of such use. However, the regional magistrate seemed to have mistakenly interpreted this bail provision to mean that the record of the bail proceedings was automatically admissible in toto. (See [17].)
Held, further, that the unilateral introduction of the record of the bail proceedings in the judgment on conviction for the first time, constituted not only a gross irregularity in the proceedings, but also a material misdirection. The ill-conceived decision by the magistrate was unfair to the appellant, and the state as representative of the victim. The appellant had been ambushed by an unheralded admissibility ruling on the bail proceedings, and the ineluctable conclusion to be drawn from the judgment by the

regional magistrate was that more than a peek was impermissibly taken at the entire bail proceedings. Another consequence thereof was that she would have been privy to the previous convictions which the appellant disclosed, which s 60(11B)*(c)* of the CPA excluded. (See [23] – [28].) The appeal was upheld, and the conviction and sentence set aside, but the court ordered that the appellant be brought before a different regional magistrate for the matter to commence de novo.

S v NGCOBO 2024 (2) SACR 34 (KZP)

Plea — Plea bargain — Plea agreement in terms of s 105A of Criminal Procedure Act 51 of 1977 — Requirements — Agreement requiring authority being furnished to court confirming authorisation of prosecutor to enter into such agreement; complainant to be consulted; agreement to be confirmed by accused prior to conviction; and consideration to be given to whether sentence was just — In absence of those elements, conviction and sentence had to be set aside.
Plea — Plea bargain — Plea agreement in terms of s 105A of Criminal Procedure Act 51 of 1977 — Requirements — Provisions of ss 112(2) and 105A of Criminal Procedure Act 51 of 1977 not to be read together — Differences between provisions set out.

The accused had entered into a plea-and-sentence agreement with the state in terms of s 105A of the Criminal Procedure Act 51 of 1977. He was sentenced to three years' imprisonment, wholly suspended for five years. The magistrate recorded that the matter was on the roll for plea in terms of s 112(2) read with s 105A. On review,
Held, that those two sections were not meant to be read together. Section 112(2) dealt with the situation where an accused tendered a plea of guilty in writing before the court, which covered all the elements of the crime on which the presiding officer could question the accused to satisfy itself that the accused was guilty of the crime, whereafter sentence would be imposed at the discretion of the presiding officer. On the other hand, s 105A dealt with an agreement between the accused and the prosecutor, with the accused agreed to plead guilty to the offence and a lesser sentence in lieu of going to trial. Further, upon perusal of the record it was apparent that there was no authority furnished to the court confirming authorisation of the prosecutor concerned to enter into the plea-and-sentencing agreement; the complainant was not consulted at all; the agreement was not confirmed by the accused prior to conviction and sentence; and no consideration had been given as to whether the sentence was just. In the circumstances, the conviction and sentence had to be set aside. (See [9] – [13].)

S v TYOLO 2024 (2) SACR 39 (ECMk)

Witchcraft — Imputation of witchcraft in contravention of s 1*(a)* of Witchcraft Suppression Act 3 of 1957 — Resulting in death of elderly woman — Extent to which belief in witchcraft affects sentence.

The accused was charged with murder and a contravention of the Witchcraft Suppression Act 3 of 1957 (the Act) for having killed his aunt whom he believed had put a curse on his brother, causing him to suffer a debilitating illness. The accused travelled from Cape Town to East London and stayed with his brother and sister-in-

law where he discovered that another brother, who had grown up with him, was very ill. Approximately three months later, after a traditional ceremony at which the accused consumed a considerable amount of alcohol, he told his family that the deceased had put a curse on their brother. He invited the elderly deceased to come and stay with them, but on her arrival he attacked her with a panga, striking her several times on the head, which lead to her death. He then dragged her body into the road. Although under the influence of alcohol he was aware of what he was doing. He was convicted on both counts. Before sentencing the accused the court examined the approach by the legislature and the courts to witchcraft offences.
Held, that the Act must have been crafted, taking due cognisance of witchcraft beliefs. It expressly sought to suppress the practice of witchcraft and similar practices, notwithstanding the beliefs of individuals in society. It was accepted that those who named or indicated any other person as a wizard in contravention of the Act, typically did so out of a genuine subjective belief, but such conduct had been criminalised. In addition, murder, when the death of the victim resulted from or was directly related to such an offence, carried a minimum sentence of life imprisonment. That being the case, it was inapposite to rely on the underlying subjective belief in witchcraft alone as a substantial and compelling circumstance. (See [23].)
Held, further, that notwithstanding, it had to be accepted that a belief in witchcraft could still be mitigating in certain circumstances, notably when an accused acted out of genuine fear. (See [24].)
Held, however, it was in the best interests of society that a belief in witchcraft should not, at least on its own, be permitted to displace what sound, established sentencing principles required: considering the moral blameworthiness of the individual for the offence, having regard to all the facts. In casu, the accused's admitted a previous conviction for rape, there was no suggestion of regret, as was evident from the treatment of the body after the murder, and no mention in his statement in terms of s 112 of the Criminal Procedure Act 51 of 1977 that he would refrain from such conduct once released. In such circumstances, the belief in witchcraft, together with the other factors in favour of the accused, were not sufficiently substantial and compelling to justify the imposition of a lesser sentence. A sentence of life imprisonment for the murder of the deceased and a sentence of 20 years' imprisonment for contravention of s 1*(a)* of the Act, which were ordered to run concurrently with the sentence of life imprisonment, would be appropriate. (See [27] – [32].)

UCHECHUKWU v GOVUZA AND ANOTHER 2024 (2) SACR 51 (ECMk)

Sentence — Plea — Plea bargain — Plea-and-sentence agreement — Requirements — No provision made for oral plea-and-sentence agreement — Criminal Procedure Act 51 of 1977, s 105A.

The applicant sought the review of the criminal proceedings against him in a magistrates' court wherein he was charged with dealing in a dangerous dependence-producing drug, namely Tik, and sentenced to 10 years' imprisonment. He was represented by an attorney who, after conviction, stated in mitigation that there was a verbal plea-and-sentence agreement between the applicant and the state, in terms of which the applicant would be sentenced to a fine of R100 000. On review, the applicant further complained that he had not admitted in his plea that the substance was 'a dangerous dependence-producing substance', but a dependence-producing substance. Accordingly, the magistrate had misdirected himself in convicting him on

this basis. The peremptory requirements of s 105A of the Criminal Procedure Act 51 of 1977 (the CPA) had therefore not been complied with and this amounted to a gross irregularity.
Held, that the procedure adopted by the prosecutor was not consistent with the provisions of s 105A(4)*(a)*, which made it peremptory that the plea-and-sentence agreements had to be disclosed to the court before the accused was required to plead. The section made no provision for an oral plea-and-sentence agreement. Most importantly, the Director of Public Prosecutions had to authorise the prosecutor concerned to negotiate and enter into such agreements. It also appeared that the applicant's legal representative was not aware of the proper process sanctioned by s 105A. But that belief was not an excuse because, as a legal practitioner, he was obliged to familiarise himself with the provisions of the CPA, and particularly that section, before subjecting his client to the process. His ignorance and the assurances he gave on the sentence had influenced the applicant to plead guilty to the charge, wherein lay the unfairness of the trial. (See [10] – [11] and [15] – [16].)
Held, further, because of the discrepancy between the charge and his plea, there had been no meeting of the minds between the state and the applicant on the plea itself. It followed that the oral agreement, purportedly reached, was of no force and effect. (See [20] – [21].) The conviction and sentence therefore had to be set aside. (See [31].)

S v ANTONIO 2024 (2) SACR 62 (WCC)

Review — Special review in terms of s 304(4) of Criminal Procedure Act 51 of 1977 — In what cases — Ancillary orders to sentence — Order in terms of s 103(1) and (2) of Firearms Control Act 60 of 2000 — Such integral to overall sentencing consideration and subject to review under s 304(4).

The accused was convicted of a contravention of s 4*(b)* of the Drugs and Drug Trafficking Act 140 of 1992 (the Drugs Act) after having made formal admissions in terms of s 220 of the Criminal Procedure Act 51 of 1977 (the CPA). He had been found in possession of three tablets, as well as tablet pieces which contained methaqualone, a prohibited substance listed in part III of sch 2 to the Drugs Act. The court imposed a fine with an alternative of a sentence of imprisonment, and declared the accused unfit to possess a firearm in terms of s 103(1) of the Firearms Control Act 60 of 2000 (the FCA).
The magistrate referred the matter for special review on the basis that there was no evidence before the court that the accused abused drugs, the relevant provision of the FCA was therefore not triggered, and the order would be prejudicial to the accused. The court on review considered the question whether the court had power in terms of s 304(4) of the CPA to review ancillary orders such as the order under the FCA; and whether an ancillary order was a form of or an extension of the punishment as envisaged in s 276 of the CPA, and subject to review.
Held, that orders in terms of s 103(1) and (2) of the FCA could not be made separately to the sentencing, and often the nature and circumstances of the offence informed whether the provisions of either s 103(1) or (2) were triggered. Information elicited for the purposes of that enquiry therefore assisted the court when considering an appropriate sentence. Thus, whilst the enquiry appeared to be a separate process, it was interwoven and integral to the overall sentencing considerations. A determination in terms of s 103(1) or (2) was therefore a punishment consequent to an offence for

which the accused had been found guilty. That being so, it formed part of the sentence and could be reviewed in terms of s 304(4). The ancillary order was accordingly set aside. (See [17] and [22].)

S v PH 2024 (2) SACR 68 (WCC)

Drugs — Treatment centre — Committal enquiry in terms of s 35(7) of Prevention and Treatment of Drug Dependency Act 70 of 2008 — User's rights at enquiry — Court to afford user option to appoint legal representative and exercise all other constitutional rights — Any waiver of legal representation had to be well informed, unequivocal and unconditional.

A committal order, made pursuant to an enquiry in terms of s 35(7) of the Prevention and Treatment of Drug Dependency Act 70 of 2008 (the Act), came before the court by way of automatic review under s 302 of the Criminal Procedure Act 51 of 1977 (the CPA). The user, an experienced electrical engineer, was amenable to being assessed. He was, however, under the impression that he would be sent to a treatment centre for three weeks and was alarmed to discover that the minimum period was six weeks. He indicated that he felt out of his depth and wanted the services of a legal representative. The magistrate nevertheless continued engaging with the user and ultimately made an order committing the user for treatment, rehabilitation and skills development for a period not exceeding six months in terms of s 35(7), read with the provisions of s 39(9) of the Act.

Held: Inasmuch as there was no criminal charge pending against the user, he was still entitled to all the due processes of the law. While it was true that in most instances the involuntary committal of the user did not always involve a user in conflict with the law, it still formed part of the criminal justice system. But it was equally true that involuntary committal orders had grave implications for the users in terms of the intrusion on their liberty and their constitutional right to freedom of movement. It was crucial that the court seized with such a hearing took care in ensuring that it was conducted in accordance with the prescripts of the Act and the Constitution. Therefore it had to afford the user an option to appoint legal representation at the state's expense; the right to have insight into the evidence in possession of the state before the commencement of the hearing; the right to have the state prove his addiction beyond reasonable doubt; the right to adduce and challenge the evidence presented by the applicant or the state; and the right to appeal and review processes had to be explained. (See [21] – [25].)

Furthermore, any waiver of legal representation had to be well informed, unequivocal and unconditional. This was dependent on the facts of each case. In the present case the change of stance by the user, as far as the right to legal representation was concerned, rendered the initial waiver immediately ineffective. Even during the enquiry, the necessary opportunity to secure legal representation had to be afforded. (See [31] – [34].)

The magistrate clearly erred in not allowing the user to legal representation. This was further complicated by the fact that the user was not given an opportunity to call witnesses, although he expressly indicated that he would like to call his doctors as witnesses. The corollary of this was that the user who was without legal representation, and whose personal liberty was at stake, was not afforded the opportunity as evinced by s 35(3)*(c)* of the Act to present his side of the case. (See [48] – [49].) In the result, the committal order had to be set aside.

The committal order is set aside with immediate effect.

MABUSE AND OTHERS v MINISTER OF JUSTICE AND CORRECTIONAL SERVICES AND OTHERS 2024 (2) SACR 81 (GJ)

Prisoner — Rights — Parole — Prisoners having completed non-parole portion of sentence, but not released — Prisoners seeking intervention of court — Court expressing regret that little done to deal with complaints — Prisoners entitled to have fitness for parole assessed at earliest reasonable opportunity.

Each of the applicants in this matter was serving a life sentence when they approached the court. They had completed the non-parole portion of their sentence. The applicants applied for relief which was, at core, designed to compel the respondents to process their applications for parole, which they complained had been unreasonably delayed. The matter was instituted in December 2021, but their complaints were not readily apparent from their papers. However, as the applicants each appeared in person, and were litigating under the obvious constraints of incarceration, the court considered that it was under a duty both to construe their affidavits generously, in the light most favourable to them, and to question them closely on the precise contours of their complaints. This having been done, the gravamen of each of the applicants' cases became clear enough. It seemed that, in the year that it took for the application to get into court, very little had been done to identify and deal with the applicants' true complaints, and to process their parole applications expeditiously. The respondents' answering affidavit, in particular, was formulaic and technical. There was no effort to deal with the applicants' circumstances, or the issue of whether they were actually fit for parole, until their cases became the focus of judicial attention. Four out of five of the applicants were promptly assessed as fit for release once it became clear that the court was prepared to oversee their cases. The court noted that it seemed that this process of judicial case management was an essential ingredient of the respondents' ultimate willingness to address the applicants' grievances fully and appropriately. That was unfortunate. The applicants were entitled to have their fitness for parole assessed at the earliest reasonable opportunity. It seemed clear, from the fact that the court's intervention was necessary, that this entitlement was not fulfilled. (See [1], [8] – [9] and [21] – [22].)

S v KHAKA AND ANOTHER 2024 (2) SACR 86 (NWM)

Trial — Assessors — Absence of — Accused legally represented — No indication that presiding officer had conducted fact-based enquiry to establish whether appellants knew about s 93ter; would request trial court sit without assessors; or had waived such right — Court not properly constituted, and conviction and sentence set aside — Magistrates' Courts Act 32 of 1944, s 93*ter*(1).

The two appellants were convicted in a regional court of murder, and sentenced to 20 years' imprisonment. The appeal was premised, inter alia, on the ground that the court had not complied with the provisions of s 93*ter* of the Magistrates' Courts Act 32 of 1944. It appeared that the only interaction that the trial court had with the appellants' legal representative was to pose the following question: 'Excuse me Ms Mohammed without assessors the trial?' The legal representative responded to this by stating: 'Furthermore Your Worship I confirm that the trial proceed without assessors.'

Held, that the magistrate had not conducted a fact-based enquiry to establish whether the appellants knew about s 93*ter* and whether they would request the trial court sit without assessors. The magistrate's actions fell short of what was expected of a regional magistrate insofar as the provision was concerned. There had been no proper enquiry to determine whether the appellants had been apprised of their rights in terms of the section by the legal representative, and that they understood those rights to instruct their legal representative to waive them. The effect was that the court was not properly constituted, and the whole proceedings were vitiated by that irregularity. The convictions and sentences accordingly had to be set aside. (See [9] – [10].)

S v MOSITO 2024 (2) SACR 96 (NWM)

Theft — Sentence — Theft of 10 packets of sweets worth R120 — Accused sentenced to three years' imprisonment on basis that he had nine previous convictions for theft — Clear that accused had addiction problem — Sentence also failing to recognise minimal value of items — Replaced on review with sentence of same period, but half suspended on condition that he report to treatment centre.
Arms and ammunition — Declaration of unfitness to possess firearm in terms of s 103(1) of Firearms Control Act 60 of 2000 — Enquiry into fitness to possess firearm in terms of s 103(2) of Act — When necessary — Essential that enquiry be held each time accused is convicted.

The accused was convicted of theft for having stolen 10 packets of sweets worth R120. He was apprehended on leaving the shop. He pleaded guilty, answered all the questions put to him by the court, and was found guilty. The accused had nine previous convictions for theft committed during a period of 12 years. He was sentenced to three years' imprisonment. The magistrate dispensed with the enquiry into s 103(1) of the Firearms Control Act 60 of 2000 on the grounds that the accused had previously been declared unfit to acquire a firearm. The magistrate explained the accused's rights on review by saying that he had to submit any representations within seven days. It appeared that the accused had been referred to a rehabilitation centre for assessment, but was declared unsuitable for rehabilitation. He apparently obtained drugs whilst he was in custody awaiting trial. On review,
Held, as to the sentence, that the crime remained theft of items of minimal value and a relevant criminal record did not transform it into a more serious offence. Given the criminal history of the accused, it was undeniable that the criminal justice system had failed him. The magistrate was implicitly aware that the accused was grappling with an acute substance disorder. This was evident from the history of the matter and echoed in his plea of guilty and ex parte address in mitigation of sentence. Notwithstanding a failed attempt at seeking intervention for the accused at the treatment centre, a more concerted effort should have been made to consider alternative forms of punishment or intervention during the custodial sentence, if not for the accused, then at least for the interests of society. The magistrate had simply adopted a *non-possumus* approach, which had to be deprecated. (See [18] – [20].)
Held, as regards the operation of the Firearms Control Act, it was imperative that an enquiry be held on each occasion an accused was convicted. (See [21].)
Held, as to the explanation of the accused's rights on review, these were not correctly and sufficiently explained by the magistrate: the magistrate had erred in stating that the accused had seven days in which to make representations, whereas, in terms of s 303 of the Criminal Procedure Act 51 of 1977, the period was three days. (See [22].)

The sentence was ameliorated by suspending half of the sentence on condition that the accused report to the same treatment centre where he had previously been assessed.

S v NKOMO 2024 (2) SACR 109 (NWM)

Sentence — Correction of — Amendment of in terms of s 298 of Criminal Procedure Act 51 of 1977 — When permissible — Amendment made day after sentence imposed, in absence of accused — Provision to be interpreted restrictively — Court functus officio and could not invoke section — Court on review correcting sentence.

The accused was convicted in a magistrates' court of culpable homicide and was sentenced 'to 10 years' imprisonment on the count of murder of which three years' imprisonment [was] suspended on condition that the accused not be found guilty again of murder'. On the following day the court, as constituted the previous day, but without the presence of the accused, announced its intention to amend the sentence in terms of s 298 of the Criminal Procedure Act 51 of 1977 to provide that the sentence was to be suspended for a period of five years on condition that the accused not be convicted of culpable homicide. The regional magistrate then sent the matter on review in terms of s 304(4) of the CPA.
Held, that s 298 required the amendment of the sentence to occur 'before or immediately' it was recorded. In the present matter the magistrate could not invoke the section because he was functus officio. Section 298 of the CPA had to be interpreted restrictively. Furthermore, the purported s 298 proceedings had been conducted in the absence of the accused, which alone was a fatal irregularity. (See [9] – [10].) The sentence was reviewed and corrected by the replacement of the offence of murder with culpable homicide as part of the condition of suspension.

<u>All South African Law Reports July 2024</u>

Democratic Alliance v Minister of Co-operative Governance and Traditional Affairs and others [2024] 3 All SA 1 (SCA)

Constitutional and Administrative Law – National state of disaster – Section 27 of the Disaster Management Act 57 of 2002 – Constitutionality – Section 27 provisions not akin to a state of emergency, legitimising instead a drastic reduction in constitutional protections.

Constitutional and Administrative Law – Powers of Legislature – Whether Legislature may validly delegate its powers to a member of the executive – Whether section 27 of the Disaster Management Act 57 of 2002 amounted to plenary delegation of powers – Incorrectness of allegation that section 27(2) gave Minister more power than permitted by Constitution because it permitted a delegation of power, abdication of Parliament's oversight role, and a simulated state of emergency – Distinction between state of emergency and state of disaster undermining argument that state of disaster was akin to a state of emergency but without relevant constitutional safeguards.

During the government-mandated lockdown put into effect in response to the Covid-19 pandemic, the Democratic Alliance (the "DA") filed an application seeking an order declaring section 27 of the Disaster Management Act 57 of 2002 ("DMA") to be unconstitutional and invalid. The DA's application raised the following issues for

determination: whether section 27 of the DMA was unconstitutional because it constituted an impermissible delegation of plenary legislative power by Parliament; whether the aforesaid provision was unconstitutional because it permitted the creation of a *de facto* state of emergency without following constitutional requirements for the declaration of a state of emergency; and whether the same provision was unconstitutional because it failed to require the National Assembly to exercise its oversight role required by sections 42(3) and 55(2) of the Constitution. In the event of a finding of unconstitutionality on any of the three issues raised, the fourth issue arising would be the determination of a just and equitable remedy. The DA's case was that section 27(2) of the DMA gave the Minister more power than the Constitution permitted because it amounted to an impermissible delegation of power and in effect an abdication of Parliament's oversight role, and because it also permitted a simulated state of emergency.

Held – A number of factors are taken into account when a court determines whether the Legislature may validly delegate its powers to a member of the executive. Those include the constitutional provision in question, the power that provision confers on the Legislature, the nature and degree of the purported delegation, the subject matter to which it relates and, the impact of the delegation on the fundamental principles on which the Constitution is based.

The question addressed was whether section 27 of the DMA amounted to plenary delegation of powers. The issue had already been adjudicated upon in two other cases, and based on the doctrine of *stare decisis*, the court was bound by those precedents. Those decisions, having been accepted to be correct, rendered it incongruous to hold that section 27 was akin to a state of emergency. The Court explained the fundamental distinction between a state of emergency and a state of disaster. Once that distinction was understood, the complaint that the state of disaster was akin to a state of emergency but without the constitutional safeguards of section 37 lost its force. Nothing in the DMA suggested that it permitted a deviation from the normal constitutional order. The safeguards enunciated in section 37 therefore had to be seen against the backdrop of an appreciation that the provision in question legitimised a drastic reduction in constitutional protections in the first place. Consequently, the Court rejected the DA's contention that section 27 of the DMA enabled a situation in which government could grant itself dictatorial powers.

Having found that section 27 passed constitutional muster, the majority of the court dismissed the appeal.

Minister for Transport and Public Works:Western Cape and others v Adonisi and others and a related matter [2024] 3 All SA 49 (SCA)

Constitutional and Administrative Law – Principle of constitutional subsidiarity – Where legislative and other measures have been enacted to realise the rights and obligations in the Constitution, the foundational norms espoused in the Constitution should find expression in such legislative measures – To realise the rights in section 26 of the Constitution, recourse had to be had to the statutory regime made up of the Housing Act 107 of 1997, the Social Housing Act 16 of 2008 and the Spatial Land Use Management Act 16 of 2013.

Local Government – Provincial government's decision to sell property – Whether property should have been used to provide social housing – Lawfulness and

constitutionality of decision to sell property – No statutory provision required the provision of social housing at a specified location, and the contention that the Province and the City had not met their constitutional obligations regarding social housing delivery was uncorroborated by the evidence.

The decision of the Provincial Government of the Western Cape (the "Province") to sell two properties (collectively referred to as the "Tafelberg property") to a private entity was contested in the High Court by the respondents. It was contended that the Province had failed to consider various constitutional and legislative imperatives to take reasonable measures to enable black and coloured working class residents of the City, to access land and housing within the centre of the City, on an equitable basis. The respondents contended that the availability of the Tafelberg property for sale presented the provincial government, as an entity charged with the task of urgently re-engineering spatial inequality in the province and the City, with an opportunity to improve the availability of affordable housing within the City. The Court upheld the respondents' contentions. The main effect of the orders it granted was to declare the sale unlawful and to set it aside. In a second application, the respondents obtained a declaration that the Province's failure to inform the national government of its intention to dispose of the Tafelberg property had constituted a contravention of the Province's obligations in terms of Chapter 3 of the Constitution, and the Intergovernmental Relations Framework Act 13 of 2005.

The present appeal related to the orders made in both applications.

Held – The principle of constitutional subsidiarity is part of our constitutional framework. The foundational norms of the Constitution are expressed in general terms. Where legislative and other measures have been enacted to realise the rights and obligations in the Constitution, the foundational norms espoused in the Constitution should find expression in such legislative measures. To realise the rights in section 26 of the Constitution, the legislature enacted the Housing Act 107 of 1997, the Social Housing Act 16 of 2008 and the Spatial Land Use Management Act 16 of 2013. It was upon that statutory regime, rather than the Constitution, that the source of any right or obligation sought to be enforced had to be located.

Regarding the obligation to provide social housing in central Cape Town, the respondents did not plead, and the High Court had not identified, any statutory provision that required the provision of social housing at a specified location. The contention that the Province and the City had not met their constitutional obligations regarding social housing delivery was also uncorroborated by the evidence. There was, further, no support for the contention that the Province had an obligation to inform and consult the National Minister of its intention to dispose of provincial government land. Finally, the court found that the High Court had wrongly set aside Regulations issued in terms of the Western Cape Land Administration Act 6 of 1998. The Regulations in question governed the notice and comment procedure. It was found that the conclusion of a proposed sale under the Regulations provided for a cost effective, comprehensive and transparent process in which interested parties were presented with comprehensive details of the proposed transaction. The procedure put in place was held to be fair and balanced.

The appeal was accordingly upheld.

National Student Financial Aid Scheme and others v Moloi and others
[2024] 3 All SA 86 (SCA)

Constitutional and Administrative Law – Administration of national bursary scheme – Amendment of eligibility criteria in granting of financial aid to students qualifying for admission to higher education programme – Executive action – Reviewability – Principle of legality requires that the exercise of executive power must be rationally related to the purpose for which it is conferred – Reasonableness is a proportionality assessment as envisaged in section 36 of the Constitution, which provides for limitation of rights in terms of a law of general application, to the extent that the limitation is reasonable.

The first applicant ("NSFAS") was charged with the function of management of a bursary scheme established in terms of the National Student Financial Aid Scheme Act 56 of 1999 (the "NSFAS Act" or the "Act"). Its objective was to provide financial aid to eligible students who met the criteria for admission to a higher education programme. It managed the financial aid scheme in terms of guidelines issued by it, in consultation with the Minister in terms of section 4(b) of the Act. The guidelines were updated and published annually and were approved by the National Cabinet after input from the National Government departments vested with policy formulation and budget allocation for students.

In March 2021, the Minister released a media statement in which he announced changes to the 2020 guidelines for the bursary scheme based on a shortfall in the budget allocated to the scheme. The effect of the amendments was that, for 2021, no funding would be allowed for second or postgraduate university qualifications. The first to third respondents brought an application for review before the High Court, challenging the defunding of the postgraduate LLB degree (pursued as a second qualification) under the 2021 guidelines. They contended that they had a legitimate expectation that NSFAS would fund their LLB studies, as the degree was a "professional requirement" for employment as lawyers. The Court set aside the decision to exclude the postgraduate LLB programme from funding, as irrational and inconsistent with the objectives of NSFAS, which was to support deserving students.

Held – The decision under consideration was an exercise of executive powers and therefore was not administrative action falling under the Promotion of Administrative Justice Act 3 of 2000. In providing the framework for implementation of the bursary scheme, the guidelines were regulatory in nature. They constituted the organisational structure, a protocol or a set of rules that would guide and control the implementation and administration of the bursary scheme. The determination of the guidelines, including the eligibility criteria, was not a day-to-day, bureaucratic implementation of policy or legislation. The principle of legality requires that the exercise of executive power must be rationally related to the purpose for which it is conferred. The 2021 guidelines were adopted for a legitimate government purpose, which was the funding of the first undergraduate degree for each student, given the prevailing financial constraints, to enable NSFAS to fund as many beneficiaries as possible. The fact that the court might have dealt differently with the challenge of decreased budget was not a valid basis to interfere with the revised eligibility criteria. In considering whether the exclusion of the second degree LLB was unreasonable, the court pointed out that reasonableness is a proportionality assessment as envisaged in section 36 of the

Constitution, which provides for limitation of rights in terms of a law of general application, to the extent that the limitation is reasonable. The decision in this case was rational and reasonable, and the respondents had not established their case based on legitimate expectation.

The appeal was upheld.

Optivest Health Services (Pty) Ltd v Council for Medical Schemes and others [2024] 3 All SA 107 (SCA)

Pharmaceutical and Health – Medical schemes – Conduct of broker – Power of Council for Medical Schemes to investigate complaint concerning a broker – Contextual and purposive interpretation of section 44 of Medical Schemes Act 131 of 1998 leading to conclusion that Council had to have the implied auxiliary power to investigate a broker.

The appellant ("Optivest") was accredited as a broker by the Council for Medical Schemes (the first respondent) in terms of the Medical Schemes Act 131 of 1998 (the "Act") and the regulations made in terms of the Act.

The third respondent ("Open Water") was a company which was appointed by the second respondent (the Registrar) in terms of section 44(2) of the Act, read with section 134(1)(a) of the Financial Sector Regulation Act 9 of 2017 (the "FSR Act"), to undertake an inspection into Optivest after a tip-off was received from an anonymous former employee of Optivest regarding conduct that was alleged to be unlawful.

The powers of the Council to investigate alleged non-compliance with the provisions of the Act by an accredited broker in terms of section 65, by way of an inspection in terms of section 44(4) of the Act, read with the relevant provisions of the FSR Act were at the centre of the present appeal. The High Court held that it did have such power and dismissed an application by Optivest challenging the exercise of that power with costs. That led to the appeal.

Held – The issues on appeal were whether, upon a proper construction of *inter alia* sections 7 and 44(4) of the Act, the respondents had the power to investigate a complaint concerning a broker. It also involved the question of whether the respondents were obliged to utilise the mechanisms in section 47 of the Act, by giving Optivest the opportunity to respond to the complaint before embarking on the investigation of Optivest's activities. Related to those issues were the defences raised by Optivest that the decision by the Council to appoint Open Water to investigate Optivest was unlawful, procedurally unfair and lacked rationality.

Optivest submitted that in terms of section 44 of the Act, the Council could only investigate or inspect the affairs of medical schemes, (or other persons related thereto), but not brokers, despite them having been accredited by it under the Act. Although the Act did not define the meaning of the phrase "any person" in section 44(4)(a) or (b), a contextual and purposive interpretation was required in order to determine whether there was an implied ancillary power to investigate a broker under the Act. The Act regulated the accreditation, de-accreditation, remuneration and refunds to members as result of a misrepresentation or unlawful conduct of a broker. The regulations provided the remedies which the respondents could utilise to deal with

such non-compliance. Thus, on a contextual and purposive interpretation, taking into account the inter-relationship between the Act and the regulations, the phrase “any person” had to be interpreted to include a broker and the Council had to have the implied auxiliary power to investigate a broker. Optivest’s interpretation, which would exclude or limit that power to investigate brokers in the context of the Act and regulation 28, was untenable. It meant that the Council would not be entitled to conduct an inspection in order to perform its functions of monitoring or investigating any non-compliance with the Act and regulations.

In the majority judgment, it was held that the conduct of the Council and the Registrar was lawful and in accordance with the rule of law, was not procedurally unfair, or arbitrary, was rationally connected to the purpose sought to be achieved by the Act and did not offend against the principle of legality. The appeal was dismissed.

African National Congress v uMkhonto weSizwe Party and others
[2024] 3 All SA 137 (KZD)

Civil Procedure – Jurisdiction – Questions of jurisdiction are to be determined on the basis of the issues identified in the pleadings – Application pertaining to elections and political rights rather than pure trademark infringement should be pursued through the Electoral Court.

Civil Procedure – Urgency – Uniform Rule 6(12)(b) requires an applicant to specifically make out a case for urgency in the founding affidavit – Matters concerning elections should ordinarily be brought at the earliest available opportunity because of their potential impact on the elections.

Intellectual Property – Trademark infringement – Use of historical name by rival political party – No infringement where mark used by political party was unlikely to take unfair advantage of, or be detrimental to, the distinctive character or repute of the rival party’s registered mark, and could not be regarded as unauthorised use.

In an urgent application, the applicant (“ANC”) sought a final interdict against the first respondent (“MKP”), alleging that the MKP had infringed its trademark, registered pursuant to the provisions of the Trade Marks Act 194 of 1993. The ANC relied on section 34(1)(a) and (c) of the Trade Marks Act. It alleged that the MKP had, without authorisation from the ANC as the proprietor of the registered trade mark, used the identical mark or a mark so similar as to likely cause confusion or deception in the mind of the average South African voter to the extent that they would not be able to distinguish between the ANC and the MKP at the ballot box. It was also contended that the MKP had, through the use of the name uMkhonto weSizwe and oral misrepresentations by MKP leaders, engaged in conduct amounting to passing off under common law. The ANC contended that millions of voters would know that the name uMkhonto weSizwe and its logo were synonymous with the history of the ANC, and were therefore likely to cast a vote for the MKP while believing that they were in fact voting for the ANC. The unauthorised use of the mark and name said to be likely to deceive the public into believing that there was some connection between the two opposing parties.

Held – The issue of urgency had to be dealt with first, being one of the preliminary challenges on which the MKP sought to have the application dismissed. It contended

that no action had been taken by the ANC from the time when the MKP first gave notice of its intention to register as a political party in June 2023. Uniform Rule 6(12)(b) requires an applicant to specifically make out a case for urgency in the founding affidavit. The facts showed that the ANC took no steps to approach the courts for almost four to five months. Its explanation for urgency was entirely self-created, and the application should be dismissed on that basis alone. Importantly, matters concerning elections should ordinarily be brought at the earliest available opportunity because of their potential impact on the elections.

The next preliminary issue was the MKP's challenge to the jurisdiction of the court to entertain the application, on the ground that the matter should have been brought in the Electoral Court. Questions of jurisdiction are to be determined on the basis of the issues identified in the pleadings. The ANC's description of the purpose of its application and the disputes which arose, showed that it pertained to elections and political rights rather than pure trade mark infringement. It should therefore have pursued its case through the Electoral Court.

A further obstacle for the ANC related to its *locus standi*. The registration of the MKP as a political party was an administrative act which had not been successfully challenged. Through its registration, the MKP had acquired a vested interest in certain political rights (including the right to campaign under the name uMkhonto weSizwe, to use the abbreviation "MK", and to use the mark of a warrior bearing a spear and shield. Having not been challenged, those rights remained in place. That rendered the ANC without a cause of action.

On the merits, the Court concluded that it had not been established that the two marks resembled each other so closely that deception or confusion among voters was likely to arise. Further, the mark used by the MKP was unlikely to take unfair advantage of, or be detrimental to, the distinctive character or repute of the ANC's registered mark, and could not be regarded as unauthorised use.

The application was dismissed with costs.

Democratic Alliance v Speaker of the Knysna Municipal Council and others and a related matter [2024] 3 All SA 174 (WCC)

Local Government – Appointment of municipal manager – Unlawfulness – Application to review and set aside appointment, and to set aside all decisions made by him during his appointment – Political party having standing to bring application despite section 54A of the Local Government: Municipal Systems Act 32 of 2000 making MEC and Minister the enforcers of the requirements of the Act in relation to the appointment of a municipal manager – Party establishing an interest in the fact that the appointment was made, whether there was a correct exercise of public power in making such appointment, and the procedural correctness of the appointment – Appropriate remedy was for advertisement process to start afresh.

In 2021, the Knysna Municipality advertised the position of municipal manager. Three candidates were shortlisted and underwent an assessment and interview process. The fourth respondent was one of the three candidates, and although faring the best in the interview, fared less well in the competency assessment. An external consulting firm appointed to attend to the screening and shortlisting of the candidates compiled a

selection report for the selection panel, recommending the other two candidates for the post. However, the selection panel prepared its own report, recommending the fourth respondent. The municipal council accepted that recommendation and the fourth respondent was appointed as municipal manager.

Two separate applications challenging the lawfulness of the fourth respondent's appointment were brought. By the time the matters were heard, both had transformed to the extent that the issues and disputes, but for costs in the second application, were constrained to the first application in which the applicant was the Democratic Alliance ("DA"). The DA took the view that as the fourth respondent's appointment was unlawful, he was never the municipal manager for Knysna and it followed that he had no power to make any decisions. An order was sought setting aside all decisions made by him during his appointment. Although the applications were initially opposed, the Speaker for the municipal council eventually confirmed that the municipality recognised that the decision to appoint the fourth respondent could not be sustained. The respondents' position was that even if the decision was declared null and void, the court still had the power in terms of section 172(1)(b) of the Constitution to grant a just and equitable remedy. They opposed the applicant's prayer for all decisions made by the fourth respondent to be set aside.

Held – Section 54A of the Local Government: Municipal Systems Act 32 of 2000 applied and set out a very specific procedure for the appointment of a municipal and acting municipal manager, making the MEC and the Minister the enforcers of the requirements of the Act in relation to the appointment of a municipal and acting municipal manager. That formed the basis for the respondents questioning the applicants' standing in approaching the court. The question which arose was whether the DA was precluded from bringing the application because of the supervisory role of the MEC and the Minister. Notwithstanding the fact that the DA was or was not directly affected by the municipal manager's appointment, it established that, as a political party, it had an interest in the fact that the appointment was made, whether there was a correct exercise of public power in making such appointment, and the procedural correctness of the appointment.

One of the main issues on which the Court required submissions was whether it was expected to make findings on all the applicant's grounds for review. It concluded that it was unnecessary for the disposal of the case, to make determinations on all the grounds of review, or on the assessment process and whether the fourth respondent was eligible for appointment as a municipal manager.

Regarding the DA's seeking the setting aside of affected decisions, the Court emphasised that no decisions which would be the subject of an application to court for a section 172(1)(b) order were identified. Noting that the appropriate remedy should not be a cause for further, unnecessary litigation, the Court held that the most sensible remedy would be an order that the advertisement process began afresh.

Els v Health Professions Council of South Africa and others
[2024] 3 All SA 228 (WCC)

Pharmaceutical and Health – Health Professions Council – Disciplinary proceedings against practitioner – Part-heard proceedings – Court's intervention – Requirement of exceptional circumstances.

As a counselling psychologist in private practice, the applicant was being disciplined by the first respondent ("HPCSA"), the statutory professional body with which she was registered to practice, for having engaged in "multiple relationships". The substance of the complaint was that while the applicant was acting as a court appointed facilitator in a Children's Court enquiry, she offered professional therapeutic services to certain of the parties involved in that matter. Such conduct is regarded by the HPCSA as unprofessional and was alleged to be a breach of the so-called Professional Board for Psychology Rules of Conduct Pertaining to the Profession of Psychology. The disciplinary enquiry was set to begin on 3 October 2016 but did not proceed as planned. In May 2022, the applicant approached the court urgently for an order for a permanent stay of the inquiry. The application was dismissed, and the enquiry was to proceed. However, it was postponed repeatedly for various reasons.

The applicant then approached the erstwhile duty judge on Circuit, on only a couple of hours' notice to the HPCSA's Conduct Committee, for urgent relief interdicting the continuation of the inquiry while the applicant sought to pursue an internal appeal against the Conduct Committee's ruling on the admissibility of documentary evidence. Temporary relief (styled as an interim order) was granted. The applicant lodged an internal appeal with the second respondent (the "Registrar") on 25 September 2023 but was advised that the matter was incomplete and therefore not ripe for an internal appeal.

In the present proceedings, the applicant sought to launch a review within 21 days of the court's interim order, to procure the setting aside of the alleged "decision" of the Registrar not to entertain the internal appeal application. If the review was successful, the applicant hoped to persuade the reviewing court to remit the matter to the Registrar with directions that a duly constituted Appeal Committee consider the applicant's appeal against the Conduct Committee's refusal to permit the Children's Court record to be admitted into evidence and for witnesses to be cross-examined thereon. She would then seek to argue the admissibility point before the Appeal Committee and, if successful, to return to the disciplinary enquiry and request that it proceed on the basis of the admissibility point having been resolved in her favour.

Held – The applicant's case displayed the so-called Stalingrad approach to litigation where the applicant was seeking postponements of her disciplinary proceedings to approach the civil courts, in order to delay the prosecution of the matter. The Court did not believe that the applicant was *bona fide* in her desire to lodge an internal appeal, and in accordance with the relevant legal principles, a civil court would be reluctant to permit such a delaying tactic to be pursued.

A superior court will only intervene in uncompleted proceedings in a lower court (or other similar tribunal) in exceptional cases. What such circumstances are will be determined from case to case. In the absence of exceptional circumstances, reviews should ordinarily be brought at the end of proceedings in order not to threaten the effectiveness of all tribunals and courts.

The applicant had not established the requirements for final interdictory relief. In all the circumstances, she had failed to make out a case for intervention by the court in the disciplinary inquiry, and the application was thus dismissed.

Hamze Trading (Pty) Ltd v Alf's Tippers CC [2024] 3 All SA 248 (GJ)

Civil Procedure – Default judgment – Rescission application – A judgment might be set aside where judgment was granted by default of appearance by the defendant, provided that good or sufficient cause for the rescission is shown – Whether there had been effective service of the summons – Whether service that was effected by affixing at the registered office of the applicant could be valid service – Although Rule 4(1)(a)(v) permits service by affixing at the main door of a registered office where there is no-one to be found at that office, service effected at the post box to unit not constituting effective service in circumstances of case – Rescission refused, despite defective service of summons, where no bona fide defence was established.

In December 2021, the applicant and the respondent concluded a written agreement of *locatio conductio* in terms of which the respondent would provide to the applicant tipper trucks with drivers at an hourly rate of R245. The written agreement was subsequently amended orally, despite a non-variation clause in the original agreement. The relationship between the parties fizzled out, and the respondent terminated the contract in April 2022, due to the applicant's failure to make proper payment, and issued summons against the applicant for payment of R292,575.54. Default judgment was granted against the applicant, and a writ of execution was issued against its movable and incorporeal property. The present application, based on Rule 31(2)(b) of the Uniform Rules of Court or at common law, was for rescission of the default judgment.

Held – At common law, a judgment might be set aside where judgment was granted by default of appearance by the defendant, provided that good or sufficient cause for the rescission is shown. Rule 31(2)(b) restates the common law position, adding the limitation that it applies only to claims that are not for a debt or a liquidated amount and the requirement that the application be brought within 20 days of the applicant obtaining knowledge of the default judgment.

What constitutes good or sufficient cause has been examined by the courts in a series of judgments referred to in the present matter. The court's discretion is wide and it will generally expect that, in endeavouring to show good cause, an applicant will give a reasonable explanation of default, show that the application is made *bona fide* and that it has a *bona fide* defence to the plaintiff's claim that *prima facie* has some prospect of success.

On the question of good cause, the court had to consider whether there was a proper explanation for the applicant's default – which centred upon the facts surrounding service of the summons – and whether the applicant had put up a *bona fide* defence with at least *prima facie* prospects of success. In respect of service of the summons, it had to be decided whether service that was effected by affixing at the registered office of the applicant could be valid service or whether it was precluded by the respondent's standard terms and conditions. The court found that, contrary to case law referred to, rule 4(1)(a)(v) permits service by affixing at the main door of a registered office where there is no-one to be found at that office. The next question which arose was whether the service in question was effective. Based on the nature of the applicant's premises, the service that was effected at the post box to the unit in question did not constitute effective service under rule 4(1)(a)(v). It was not in

compliance with the sub-rule, which, where there is no employee present, allows affixing to the main door of the applicant.

Despite the above finding, the court was not satisfied that the applicant had raised any *bona fide* defence.

In the premises, the application for recission was dismissed.

Land and Agricultural Development Bank of South Africa v Lazercor Eight (Pty) Ltd and others (Gen-X Credit Opportunities Fund en Commandite Partnership intervening) [2024] 3 All SA 273 (WCC)

Corporate and Commercial – Business rescue proceedings – Application for forfeiture of business rescue practitioner's fees – Standing to seek relief – Section 157 of Companies Act 71 of 2008 deals with extended standing to apply for remedies posing a bar to standing to bring proceedings as the relief for forfeiture of business rescue practitioner's fees did not constitute a remedy in terms of the Act – Entitlement to make claim was limited to parties who were liable for payment of business rescue practitioner's fees – Standing as affected persons terminated once business rescue proceedings concluded.

The tenth to twelfth respondents (the "trust") and the thirteenth respondent ("Mr Smith") sought the forfeiture of the fees paid or due to be paid to the seventh respondent ("Mr Bester") as the business rescue practitioner ("BRP") of the first to sixth respondents (the "six companies"), and costs *de bonis propriis* against Mr Bester.

The issues raised in the matter included whether the trust and/or Mr Smith, as intervening parties, could seek relief in terms of the notice of motion of the applicant (the "Landbank") against the respondents; whether the trust and/or Mr Smith had the requisite standing in the proceedings to seek relief against Mr Bester for his role as BRP; and whether there was a legal basis for the forfeiture claim in respect of fees paid to Mr Bester.

When the six companies had found themselves in severe financial difficulty, Mr Smith, as sole director of the six companies and a trustee of the trust, resolved to commence business rescue proceedings in respect of the six companies. Mr Bester was appointed as BRP for all six companies. During that time, the Landbank had been attempting to enforce the terms of a loan agreement entered into with the six companies. On becoming aware of the business rescue, the Landbank brought an application essentially challenging the business rescue plan which had been adopted and seeking the removal of Mr Bester as BRP. The Landbank application was settled and the Landbank sought no further relief in these proceedings. The trust and Mr Smith then applied for leave *inter alia* to commence legal proceedings in the event that the Landbank did not proceed with certain relief claimed in the Landbank application. In that event, the trust and Mr Smith sought the removal of Mr Bester as BRP, the costs of their application and the costs of the Landbank application to be paid by Mr Bester on an attorney own client scale *de bonis propriis*. They further sought relief that Mr Bester be ordered to repay his BRP fees to the six companies with interest.

Mr Bester argued that it was not possible for an intervening party (the trust and Mr Smith) to seek relief in terms of the notice of motion of another party, and that they lacked standing.

Held – The trust and Mr Smith had been granted leave to seek the relief they did in the proceedings.

On the question of standing, section 133(1)(b) of the Companies Act 71 of 2008, which placed a moratorium on legal proceedings against an entity under business rescue, was critical. Presumably for that reason, neither the trust nor Mr Smith purported to act on behalf of the six companies. However, based on the provisions of section 157 of the Act (which deals with extended standing to apply for remedies), neither the trust nor Mr Smith had standing to bring the proceedings as the relief for forfeiture of the BRP's fees did not constitute a remedy in terms of the Act. Second, liability for payment of the BRP's fees rested on the six companies, and there was no apparent basis on which the trust and Mr Smith asserted an entitlement to make such a claim. Further, although the trust and Mr Smith were affected persons during business rescue proceedings, they had no standing after the business rescue proceedings had concluded.

The Court went on to find that it was not competent for it to grant an order for the forfeiture of the BRP's fees, and that a finding of gross negligence could not be made and there was therefore no case made for the relief sought.

Princeton Protection Services (Pty) Ltd v Western Cape Provincial Government and others and related matters [2024] 3 All SA 301 (WCC)

Civil Procedure – Application for interim interdict – Requirements – Existence of prima facie right – Right relied on must be that which required protection pending the main proceedings instituted for the final determination of a dispute relating to that right.

Civil Procedure – Condonation application – Late filing of answering affidavit and heads of argument – Where prospect of success alone not tilting scales sufficiently for lateness to be condoned, interests of justice not served by condoning lateness.

In five applications before the court, the respective applicants sought urgent interdictory relief in the form of the suspension of an implementation of a tender awarded by the Western Cape Department of Health and Wellness to three other entities, pending final determination of proceedings to review the Department's decision. Specifically, the interdict sought by the applicants was directed at three things. First, it was to prohibit the Department from terminating the contracts of those applicants with existing contracts with the Department. Second, it was to prohibit the implementation of the tender awarded to the three new entities. And last, it was to extend the contracts, on the same terms and conditions, of those applicants who had existing contracts with the Department before 1 April 2024.

Nine of the ten applicants provided private security services at the healthcare facilities of the Department. All the contracts were for fixed terms that were to terminate on 31 March 2024. In anticipation of the termination of the existing contracts by effluxion of time, the Department commenced a procurement process with the aim of concluding new contracts for the provision of security services effectively from 1 April

2024. The Department received 107 bids including those of the applicants. However, the applicants were excluded during the evaluation process, mostly for incomplete pricing schedules.

Held – The first matter to be addressed was an application by the eighth respondent for condonation of the late filing of its answering affidavit and heads of argument. Despite the shortcomings of the explanation for the late delivery of the eighth respondent's answering papers, the court was asked to condone the lateness on the basis that it would be in the interest of justice to do so. However, the prospect of success alone in this matter did not tilt the scales sufficiently for the lateness to be condoned. The lateness was deliberate and caused prejudice to the applicants. Taking into account the period of the delay, the absence of a satisfactory explanation for the delay, as well as prejudice to the applicants, it was not in the interests of justice to condone the late filing of the eighth respondent's answering affidavit, or the heads of argument.

The Court then examined the *prima facie* right relied upon in each application and pointed out that it is not just any right that an applicant can put up in proceedings for interim relief, but it must be the right that requires protection pending the main proceedings instituted for the final determination of a dispute relating to that right. It had to be determined whether the rights relied upon by the applicants, were the same rights sought to be vindicated in the review or whether the outcome of the review would have any bearing on the rights sought to be protected by the interim interdict. The review proceedings were only concerned with the right to just administrative action that was lawful, reasonable, and procedurally fair, and bore no relation to the rights put up by the applicants to support their claim to an interim interdict. The applicants, therefore, had failed to establish a *prima facie* right that required protection pending the finalisation of the review.

The applications were dismissed.

END-FOR NOW