LEGAL NOTES VOL 8/2024

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SOUTH AFRICAN LAW REPORTS AUGUST 2024

BESTBIER AND OTHERS v NEDBANK LTD 2024 (4) SA 331 (CC)

Mortgage — Foreclosure — Judicial execution — Immovable residential property — Primary residence — Compliance with rule 46A of Uniform Rules of Court — Whether rule 46A applied where property sought to be declared executable owned by trust but used as primary residence of trust beneficiaries and their employees — Generally speaking, rule 46A was applicable — Rule applied in respect of execution against residential immovable property of judgment debtor — Whether property could be classified as 'residential immovable property' was determined by characteristics and actual use of property — Did not matter that judgment debtor herself was not occupying property, or that property owned by trust — Fact that residential immovable property not 'primary residence' of judgment debtor only excluded operation of those special provisions of rule 46A that applied only to 'primary residence' property, but rest of provisions applied — Uniform Rules of Court, rule 46A and rule 46A(3)*(b)*.
Mortgage — Foreclosure — Judicial execution — Immovable residential property — Compliance with rule 46A of Uniform Rules of Court — Requirement that application to declare residential immovable property executable be on notice to 'any other party who may be affected by the sale in execution' — 'Any other party who may be affected by the sale in execution' — Employees (farmworkers) residing on immovable property owned by trust, against which execution sought — Farmworkers not affected by sale in execution — Rights adequately protected in terms of s 24 of Extension of Security of Tenure Act 62 of 1997.
The present matter concerned the interpretation of Uniform Rule 46A, which requires judicial oversight and consideration, by a court, of various factors, when a creditor sought to execute against 'the residential immovable
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property of a judgment debtor'. Issues to be considered in this matter included whether rule 46A applied where the property sought to be declared executable was owned by a trust, but occupied by natural persons in the form of beneficiaries of the trust, and employees of the trust, as their primary residence. Another question was whether, on the facts, the trust employees and beneficiaries qualified, in the words of rule 46A(3)*(b)*, as 'any other party who may be affected by the sale in execution' to whom

[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!**

notice of the execution application had to be given. This matter originated in an application in the Western Cape High Court brought by the respondent, Nedbank Ltd, against the first to fourth applicants, in their capacities as trustees of Goede Hoop Trust (the trust), for payment of a debt owed by the trust. Nedbank had also sought an order declaring to be specially executable immovable property offered by the trust as security for the debt, namely the Goede Hoop Wine Estate, on which the trust operated a wine farm. Nedbank approached the High Court on the strength of a settlement agreement in terms of which the trust admitted both its debt and Nedbank's entitlement to execute against the property. Before the High Court, the applicants had argued that rule 46A was applicable in the present circumstances: that is, where the property sought to be declared executable was owned by a trust, but also, as here, served as the primary residence of the trust beneficiaries, as well as the trust employees, in this case the farmworkers. In particular, the applicants argued that, under rule 46A(3)*(b)*, the application ought to have been on notice to the farmworkers. The High Court disagreed, holding that rule 46A had no application in the matter: the rule afforded protection exclusively for natural persons, and the trust could not be considered a natural person. The High Court accordingly granted Nedbank the relief it sought.

The applicants appealed to the Supreme Court of Appeal (SCA), which held that rule 46A demanded that, in all cases where the immovable property of the judgment debtor sought to be executed against *was used as residential immovable property*, a preceding enquiry had to be held directed at establishing whether the right to adequate housing, protected in s 26(1) of the Constitution, was impaired or potentially impaired. There was no reason why beneficiaries and employees of a trust who used the trust's immovable property as their primary residence ought to be excluded from the protection of rule 46A merely because the judgment debtor who owned the property was a trust and not a natural person. However, the SCA ultimately found that the applicability of the rule could not avail the applicants, because it had not been shown that the beneficiaries or farmworkers would be left vulnerable to homelessness if the property were sold in execution. Once again the applicants appealed, to the CC.

The CC held, referring to rule 46A(1), that, generally, rule 46A applied in respect of execution against the 'residential immovable property' of a judgment debtor, whilst certain special provisions applied only in respect of residential immovable property that was used as *the primary residence of the judgment debtor*. (See [74] and [81].) Whether property could be classified as 'residential immovable property' was determined by the characteristics and actual use of the property. It did not matter that the judgment debtor was not itself occupying the property. It also did not matter that the judgment debtor was a trust. If a trust owned a residential house, it was 'residential immovable property' if the beneficiaries resided in it, even though the trust itself as a legal entity could not reside in the property. (See [75] and [77].)

The court stressed that the fact that the residential immovable property was not the 'primary residence' of the judgment debtor only excluded the operation of those special provisions of rule 46A that applied only to 'primary

residence' property. The rest of rule 46A still applied, even though the property was owned by a trust. This included rule 46A(3)*(b)*, which required that every application to declare residential immovable property executable shall be on notice to the judgment debtor and 'to any other party who may be affected by the sale in execution . . .'. (See [78].)

On the facts, the court noted that the property in this matter had mixed characteristics and use. The farm was a business enterprise but the residential premises were used

as residential immovable property. The premises occupied by the trustees, the beneficiaries and the farmworkers were thus residential immovable property within the meaning of rule 46A(1). (See [80].)
The court went on to consider whether there was 'any other party who may be affected by the sale in execution' to whom notice had to be given. With respect to 'trust beneficiaries' residing on the farm, the court noted that, after any sale in execution, there would be a surplus, which this group could use to acquire alternative housing. (See [80].) The focus of the court's attention was the position of the farmworkers of the trust residing on the farm. The court noted that the farmworkers were occupiers for purposes of ESTA. By virtue of s 24 of ESTA, any new owner consequent to a sale in execution would be bound to respect any existing rights of the farmworkers residing on the property at the time of the sale in execution. As such, it could not be said that farmworkers' rights to adequate housing in terms of s 26(1) would be impaired by a sale in execution, their rights being adequately protected by s 24 of ESTA. (See [83] – [86].) The court concluded that the farmworkers were not persons 'who may be affected by the sale in execution' requiring notice of the application (see [87]).
In connection with the question of costs, the court described as self-serving the applicants' belated concern for the security of tenure of the farmworkers, noting that the rights of the farmworkers were raised for the first time in the affidavit opposing the application for confession judgment. The applicants, the court held, had improper motives — they used the farmworkers as a means to frustrate execution — justifying a departure from the usual rule in constitutional litigation that an applicant seeking to test the constitutionality of a statute ought not to be ordered to pay the costs of its adversaries. (See [91] – [92].)
The court accordingly dismissed the appeal with costs (see [93]).

CAPITEC LTD v COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE 2024 (4) SA 361 (CC)

Revenue — Value-added tax — Deductions — Tax fraction of loan-cover insurance payouts — Whether deductible under s 16(3) of VAT Act — Whether free-of-charge supply of loan cover to borrowers, who pay (exempt) interest and (vatable) fees on loan, amounting to taxable supply — Whether loan cover was supplied exclusively in course or furtherance of exempt activity — Significance of unpaid fees being 'capitalised' as debits on borrower's account and that loan cover related to total indebtedness of borrower — Significance of taxpayer's failure to plead apportionment — Value-Added Tax Act 89 of 1991, s16(3)*(c)*.
In terms of s 7(1)*(a)* of the Value-Added Tax Act 89 of 1991 (the VAT Act), value-added tax (VAT) must be levied on goods or services supplied by a vendor 'in the course or furtherance of any enterprise [they] carried on'. The supply of certain goods and services is exempt from VAT (under s 12). If the acquired supplies are used by a vendor for dual purposes — taxable and exempt — the amount of VAT on those supplies that are deductible as input tax * is apportioned under s 17. (See [3], [6] – [7].)
When lending to unsecured borrowers, Capitec Bank Ltd (Capitec) took out insurance against the risk of the loans becoming irrecoverable upon the borrower's retrenchment or death. In turn, Capitec's standard unsecured lending contract with its customers made provision for loan cover, matching the cover which Capitec had with the insurer — without any distinct charge therefor. Capitec levied interest, an exempt supply (s

12*(a)*); and initiation and service fees, taxable supplies, on which it charged VAT and claimed input tax deductions.

In arriving at the VAT payable by it in its VAT return for November 2017, Capitec — relying on s 16(3)*(c)* of the VAT Act — deducted an amount equal to the tax fraction of the amount it had paid to customers as loan cover. Section 16(3)*(c)* provides for such a deduction in regard to any payment made to indemnify another person in terms of any contract of insurance, subject to the proviso in subpara (i), that this only applied where the supply of the insurance contract was a 'taxable supply'. (See [8] – [13].)

Sars disallowed the deduction, issuing an additional assessment. Following Sars' disallowance of Capitec's objection to the additional assessment, Capitec appealed to the tax court. There, Sars submitted that the loan cover payments did not qualify for an input tax deduction in terms of s 16(3)*(c)*. This because the supply of the loan cover did not constitute a 'taxable supply': it was provided for no 'consideration' and had no 'value'; alternatively, the loan cover was in respect of an exempt supply. (See [14] – [15].)

The tax court upheld Capitec's appeal, reasoning that, although Capitec made no distinct charge for the loan cover, the cost of such cover was recovered at least in part through the service fees which Capitec charged. Those fees, it held, constituted consideration for the cover, and the unsecured lending business was thus an 'enterprise'; and that, even if there were no consideration for the loan cover, this would not disqualify the provision of such cover from being a taxable supply since the provision of loan cover gave Capitec a competitive and marketing advantage, which advanced its lending business, in which both interest and fees were earned. As to alternative ground for opposing the appeal, the tax court held that it was artificial to treat the provision of credit and the activities which earned the fees as distinct and separate transactions; the loan cover as exclusively advancing the making of exempt supplies. (See [17] – [19], [20].)

Next, Sars successfully appealed to the Supreme Court of Appeal. The SCA held, inter alia, that:

- Carving out the taxable component did not convert what was in essence an exempt supply into a taxable supply. The fees charged by Capitec were not charged on the supply of the loan cover to its customers. The insurance policies did not cover the earning of fees but the recovery of credit, and because the provision of credit was an exempt financial service, the loan cover was supplied in the course of making an exempt supply. (See [23], [28].)
- Capitec could not invoke s 16(3)*(c)* because the loan cover was provided for no consideration and, therefore, 'did not qualify as an enterprise as envisaged in s 1 of the VAT Act', which per definition required there to be a consideration for the goods or services supplied (see [28]).
- There was 'only one real ordinary insurance contract', namely the contract between Capitec and the insurer, but it benefited two parties, Capitec and the borrowers. Capitec was entitled to an input tax deduction in respect of VAT on the premiums it paid to the insurer, and was required to pay output tax on any indemnity payments it received from the insurer. (See [29] – [30].)
- The unpaid fees were 'capitalised' by being debited to the borrower's account, rendering them exempt because it amounted to the provision of additional credit, so that the loan cover was supplied in the course of making an exempt supply.
- Section 17 governed the apportionment of 'notional input tax', and applied to the apportionment of an amount deductible in terms of s 16(3)*(c)*, but because Capitec

had not pleaded apportionment, there was no basis for allowing an apportionment, Sars was right to have disallowed the entire deduction (see [32]).
The present case concerned Capitec's application to the Constitutional Court for leave to appeal against the SCA's order.
Capitec submitted that the provision of the loan cover was not gratuitous but was linked to the provision of credit, for which interest and fees were charged; and that it was a mixed supply, partly exempt and partly taxable, and that the SCA had erred in finding it was made exclusively in the furtherance of making exempt supplies. Capitec further took issue with the SCA's findings on s 17, submitting that s 16(3)*(c)* was not 'input tax' related and s 17 dealt only with the apportionment of amounts deductible as 'input tax'; with the SCA's invocation of capitalisation, submitting that the unpaid fees did not lose their character as such simply because they had been debited to the customer's account and in that sense capitalised; and also with the SCA's analysis on the nature of the policies, submitting that its policies with the insurers were not legally relevant to the characterisation of Capitec's own supply of loan cover to its customers. Sars supported the SCA's reasoning. (See [34] – [34].)

Held, as to jurisdiction and leave to appeal

Leave to appeal would be granted. Several points of law of general public importance were raised, including the correct characterisation of supplies made free of charge — issues transcending Capitec and the banks' interests (see [49] – [51]).

Held, as to the issues on the merits

Whether the loan cover was provided free of charge

The case must be approached on the basis that the loan cover was provided free of charge. The contracts with the borrowers were explicit in stating that there was no charge for the loan cover. It was not permissible to allocate some unspecified part of the interest and fees as a notional charge for providing the loan cover. (See [55] – [57].)

Whether such 'free-of-charge supply' was disqualified from being a 'taxable supply'

While s 7(1)*(a)* did not itself impose a requirement that the supply must be for consideration, for the supply to fall within the scope of s 7(1)*(a)*, it must be supplied in the course or furtherance of an 'enterprise'. The definition of 'enterprise' did not require that *all* goods or services supplied in the course of that activity must be supplied for a consideration. It was not unusual for a for-profit business to supply some goods or services free of charge; the business may do so for marketing or advertising purposes. Goods thus supplied were undoubtedly supplied by the vendor in the course or furtherance of the enterprise, even though they were supplied free of charge. While such goods have a nil value, so that the VAT on that supply in terms of s 7(1)*(a)* was also nil, it was nevertheless important for such items to be classified as taxable supplies, because on this depended the vendor's right to deduct, as input tax, the VAT it had to pay in acquiring the goods which it supplied free of charge. Capitec's supply of the loan cover was not disqualified from being a 'taxable supply' merely because it was supplied free of charge, and the Supreme Court of Appeal erred in finding otherwise. (See [59], [61], [63].)

Whether the loan cover was supplied exclusively in the course or furtherance of an exempt activity

That it was not: In order to determine whether the loan cover was an exempt, taxable or mixed supply, it was the purpose of Capitec's provision of the loan cover to its borrowers that was important. The evidence made it clear that free loan cover was provided because it made Capitec's loan offering to unsecured borrowers more

attractive; it was a marketing benefit. Accordingly, the loan cover was a mixed supply made in the course and furtherance of Capitec's exempt activity of lending money for interest and its enterprise activity of lending money for fees. (See [67], [68], [71].)

Whether it mattered that the unpaid fees were 'capitalised' by being debited to the borrower's account and that the loan cover related to the total indebtedness of the borrower

That it did not: The precise legal character of the borrower's debt in respect of which the loan cover indemnified the borrower said nothing about whether Capitec's activity was an 'enterprise' and whether the loan cover was offered in the course or furtherance of that enterprise. The question was not what benefit the borrower obtained from the free cover, but why Capitec conferred the benefit of free cover on the borrower. This question was answered once it was concluded that the free loan cover was offered in the course and furtherance of Capitec's lending business of earning exempt interest and taxable fees. (See [74], [76].)

Where the supply of a contract of insurance was a mixed supply, made in the course or furtherance simultaneously of an exempt activity and an 'enterprise' activity, the vendor was not entitled to deduct the tax fraction of the full amount of payments made in terms of the insurance contract, as Capitec sought to do, because, given that the enterprise activity (ie the fee-earning component) was only 5 – 13% of the whole, the rest being an exempt activity (that is, interest-earning), it would disturb the scheme that deductions against output tax were only permitted in respect of inputs consumed, used or supplied in the course or furtherance of the taxable activity. (See [80].)

While apportionment in terms of s 17 would yield an acceptable result, the language of the Act did not accommodate it. It only applied to determine what portion of such VAT the vendor may deduct as 'input tax'. Section 16(3)*(c)* was a special tailor-made deduction in the case of the supply of a contract of insurance. The amount which the vendor could deduct in terms of s 16(3)*(c)* was not 'input tax'. However, the fact that the Act made no explicit provision for apportionment in this situation was not dispositive of apportionment. The vendor could claim the tax fraction of a portion of the payments made in terms of the insurance contract, invoking an apportionment implicit in s 16(3)*(c)*, interpreted in the context of the scheme of the Act as a whole. Section 72(1) could perhaps be called in aid to support this approach; it empowered Sars to decide how a particular provision should be applied or the calculation of tax done if, in consequence of the way in which a vendor conducted its business, 'difficulties, anomalies or incongruities' have arisen or may arise in regard to the application of the provisions of the Act. (See [82], [86], [87], [91].)

Whether Capitec's failure to plead apportionment should result in Capitec being deprived of any deduction at all

When Capitec sought a deduction in full, Sars should have responded that it would permit a partial deduction, and it should have sought from Capitec the information required to determine a partial deduction. It was not correct for Sars to have disallowed the deduction in full; Sars, as an organ of state subject to the Constitution, should not seek to exact tax which was not due and payable. The order that the tax court should have made, would now be made: referring the assessment back to Sars for further examination and assessment, with a view to determining an appropriate apportionment. (See [92], [94] – [96].)

COCA-COLA BEVERAGES AFRICA (PTY) LTD v COMPETITION COMMISSION AND ANOTHER 2024 (4) SA 391 (CC)

Competition — Promotion of competition — Merger control — Merger — Breach of merger approval conditions prohibiting retrenchments as result of merger — Causation — Correct test for determining causal link between merger and retrenchments — Competition Act 89 of 1998, s 12A; Rules for Conduct of Proceedings in Competition Commission, rule 39(2)*(b)*.
Competition — Promotion of competition — Merger control — Conditions — Notice of Apparent Breach in terms of Rules for Conduct of Proceedings in the Competition Commission, rule 39(1) — Special statutory review under rule 39(2)*(b)* — Standard of review — Competition Act 89 of 1998, s 12A; Rules for Conduct of Proceedings in Competition Commission, rule 39(2)*(b)*.

Coca-Cola Beverages Africa (Pty) Ltd (CCBA) was created in 2015 in a large merger of several bottling operators, approved by the Competition Commission (the Commission) and the Competition Tribunal (the Tribunal) subject to restrictions on post-merger retrenchments. These included maintaining the aggregate employee numbers from the four merged operations for a period of three years from approval date (condition 9.1); and that retrenchments outside of bargaining units were limited to 250 employees in category Hay Grade 12 which applied to skilled positions (condition 9.2). The conditions expressly excluded 'necessary steps taken by the merging parties in terms of s 189 of the Labour Relations Act 66 of 1995 [the LRA] should operational requirements in the ordinary course of business that were not merger specific necessitate that such steps be taken'.
CCBA wrote to the Commission on 19 January 2019, informing it of the challenges faced as a result of rising input prices (especially of sugar after a 'sugar tax' was introduced) and the deteriorating economic situation, warning that retrenchments for operational requirements may be required. Shortly thereafter, CCBA also addressed notices to the Food and Allied Workers Union (FAWU) and National Union of Food, Beverage, Wine, Spirits and Allied Workers (NUFBWSAW), in terms of s 189(3) of the LRA — unions that its employees were members of — notifying them that it was embarking on a restructuring process.
On 16 April 2019 the Commission notified CCBA that it had received a complaint from FAWU of a breach of the merger conditions, also requesting information on a number of issues pertaining to the possible retrenchments. CCBA responded on 6 May 2019, repeating its reasons for retrenchment and denying any breach of the merger conditions, pointing out, inter alia, that the total number of employees continued to exceed the number required in condition 9.1, and that the retrenchments were 'for reasons unrelated to the merger'. The Commissioner and CCBA exchanged further correspondence, during which CCBA implemented the retrenchments of 368 workers within the bargaining unit. This led to FAWU and NUFBWSAW launching unfair dismissal proceedings in two separate cases.
On 24 October 2019 the Commission issued a 'Notice of Apparent Breach' in terms of rule 39(1) of the Rules for the Conduct of Proceedings in the Competition Commission (Commission Rules). This rule provides that '(i)f a firm appears to have breached an obligation that was part of an approval or conditional approval of its merger, the Commission must deliver to that firm a Notice of Apparent Breach'. Rule 39(2) further regulates that '(w)ithin 10 business days after receiving [such notice], a firm may *(a)* submit to the Commission a plan to remedy the breach; or *(b)* request the

Competition Tribunal to review [such notice] on the grounds that the firm has *substantially complied* with its obligations with respect to the approval or conditional approval of the merger'. CCBA opted for a review in terms of rule 39(2)*(b)*. The Tribunal ruled that rule 39(2)*(b)* provided for 'a separate and context specific form of review' to determine breaches of merger approval conditions, in which the sole question to be decided afresh was whether in fact the firm had substantially complied with its merger conditions. The Tribunal's test for determining whether there was a sufficient nexus between the merger and the retrenchments for a finding of breach of the merger conditions, was to ask whether, on an assessment of the probabilities, the preceding merger, on the one hand, or the alleged operational requirements, on the other, was the true reason for the retrenchments. It concluded that the probabilities favoured CCBA's reasons for the retrenchments, and that CCBA had 'substantially complied' with the merger conditions and was not in violation thereof. (See [26] – [29], [58].)

The Commission appealed to the Competition Appeal Court (the CAC), which overturned the Tribunal's ruling. It held that the Tribunal erred in holding that s 27(1) of the Act conferred anything other than ordinary review powers. The question was whether the Commission acted reasonably in deciding that there was an apparent breach. As to the correct test for causation, the CAC held that the Tribunal applied the incorrect test: the correct one was whether there was 'some nexus between the retrenchments and the merger', or an 'an outcome that can be shown as a matter of probability to have some nexus associated with the incentives of the new controller'. (See [30] – [33], [59].)

The present case concerned CCBA's application for leave to appeal to the Constitutional Court (the CC). The substantive issues were —

- the nature and standard of the review rules 39(1) and (2) of the Commission Rules;
- the test was for determining whether subsequent retrenchments were causally linked to the merger or were merger-specific, where merger approval was conditional on there being no retrenchments as a result of the merger; and
- whether the CAC was entitled to interfere in the Tribunal's factual findings.

As to jurisdiction and leave to appeal, the CC found that the substantive issues raised arguable points of law of general public importance; and that the application raised a consitutional matter: How subordinate legislation was to be interpreted in relation to both the national legislation and the right to administrative justice in the Promotion of Administrative Justice Act 3 of 2000 (PAJA), in determining the nature and standard of review. It was also in the interests of justice to grant leave to appeal. (See [35] – [41].)

Held

As to the nature and standard of review

Rule 39(2)*(a)* provided a single permissible ground for review, namely that the firm had substantially complied with its obligations, ie that there was no breach. This was the objective inquiry that the Tribunal undertook. The firm must place the requisite evidence before the Tribunal to demonstrate substantial compliance. It bore the onus. If it discharged the onus, that was the end of the matter. The CAC's confinement of the review to assessing whether the Commission acted lawfully, reasonably and procedurally fairly in deciding to issue the Notice of Apparent Breach, was irreconcilable with the specific wording of rule 39(2)*(b)*; in fact it ignoring it and replacing the special review ground the subsection stipulated with the ordinary administrative-law review grounds. The test for review was simply that laid down in the

text of rule 39(2)*(b),* ie whether objectively CCBA substantially complied with its obligations under the conditions attached to the merger. (See [47] – [57].)

As to the test for causal nexus or merger specificity

On the CAC's approach of only requiring 'some nexus', a finding of merger specificity and breach was inevitable; there would always be 'some nexus' between the merger, on the one hand, and on the other the incentives of, and subsequent decisions and outcomes in, the merged enterprise (see [60]). The test for a breach of a merger condition must be applied in the context of, and with due regard to, the purpose and wording of the Act which contemplated an actual breach of a condition before punitive action may be taken. It could not be said that there was a breach where the principal reason for the firm's actions had nothing to do with the merger (see [63]). The setting in which the causation enquiry arose in this case was an amalgam of statute and contract. The approach to legal causation in a contractual setting involved identifying a proximate cause by applying good business sense (see [67]), and called for a blend of rigour and fairness (see [68]).

In seeking to identify the 'true reason' for the retrenchments, the Tribunal tested for the requisite link between the merger and the retrenchments and found this wanting. Its reasoning was consistent with the authorities relating to the test for causation in the contractual and statutory settings. The CAC was accordingly wrong in finding that the Tribunal applied the incorrect test for a causal nexus. (See [69], [70].)

As to whether the CAC was entitled to interfere in the Tribunal's factual findings

The Tribunal's analysis of the facts was cogent and revealed no misdirection, or any clear error. In these circumstances there was no basis for the CAC to interfere in the factual findings. (See [71] – [91].)

The CAC mischaracterised the nature of the appeal and applied the wrong tests in respect of both review and causation. There was no basis in law or fact for overturning the judgment of the Tribunal. The appeal would therefore succeed. (See [93].)

MAFISA v ROAD ACCIDENT FUND 2024 (4) SA 426 (CC)

Court — Powers — To make settlement agreements orders of court — To unilaterally amend settlement agreement — Court obliged to ensure settlement agreement competent and proper — Need for court to raise concerns with parties — Grounds of concern should be clear and may not be based on information retrieved from inadmissible evidence.

Motor vehicle accident — Compensation — Claim against Road Accident Fund — Final settlement — Power of court to unilaterally amend settlement agreement — Court obliged to ensure settlement agreement competent and proper — Need for court to raise concerns with parties — Grounds of concern should be clear and may not be based on information retrieved from inadmissible evidence.

This matter concerned the entitlement of a judge presiding in a Road Accident Fund matter to unilaterally amend a settlement agreement concluded by the litigating parties. The background was as follows: The applicant, Mr Tumelo Mafisa, had sustained bodily injuries in a motor vehicle collision. He issued summons in the Free State High Court seeking damages against the respondent, the Road Accident Fund. On the first day of the trial heard before Daniso J, the matter was stood down on request by the parties for settlement negotiations. Next day the parties advised Daniso J that they had settled the matter. There was no hearing and no evidence was adduced. They approached Daniso J in chambers, to request that a draft consent

order incorporating the terms of a settlement agreement, in terms of which the RAF agreed to pay damages for loss of earnings and general damages, be made an order of court. The judge indicated that she was not entirely satisfied with the terms of the draft order, and reserved judgment. Daniso J later handed down a written judgment, that held that there was no adequate proof that the plaintiff had sustained any loss of income, and that amended the draft order by only allowing damages in respect of general damages. Importantly, Daniso J, in delivering said judgment, had not at any prior point notified the parties of her concerns regarding the quantum of damages, and had considered expert statements in the court file that had not been admitted into evidence. The applicant sought, without success, leave from the High Court and the SCA to appeal against Daniso J's order. So, the applicant sought leave to appeal from the Constitutional Court. The RAF, the only respondent, filed a notice to abide.

The CC confirmed that it had jurisdiction to hear the appeal: the High Court's failure to apprise the parties of its concerns, and to proceed to unilaterally amend the settlement agreement, implicated the right to a fair public hearing. Further, it was in the interests of justice for the Constitutional Court to hear the appeal. (See [30] – [31].) The CC identified the following as the issues to be considered: Was a court empowered to amend a settlement agreement concluded by the parties? If a court considers that it should not make a compromise an order of court, what procedures should it follow? And, what was the appropriate remedy, if any?

Held, that a compromise, whether embodied in a court order or not, generally brought an end to the dispute between the parties. Once there was a compromise, there was no longer a *lis* (dispute) between the parties. However, this did not mean that a court had no power to raise concerns over settlement agreements. When asked to make a settlement agreement an order of court, a court had to ensure that the agreement was competent and proper before it could be given the seal of a court order. And a settlement agreement would be competent and proper if it *(a)* related directly or indirectly to the dispute between the parties; *(b)* accorded with both the Constitution and the law and was not at odds with public policy; and *(c)* held some practical and legitimate advantage. (See [48].)

Held, that the parties, once informed of a judge's concerns regarding the settlement agreement reached, may decline to address these concerns — in which case the judge would refuse to make the settlement an order of court — or address the issues raised — in which case the court, if satisfied with the parties' submissions, would make the settlement agreement an order of court, and if not, decline to do so. (See [51] and [52].) [The court added that the fact that a judge refused to make the settlement agreement an order of court did not mean that the agreement was invalid; whether it was valid or not depended on its terms and the law (see [51]).]

Held, further, that, where a judge raised concerns, the grounds thereof should be clear and may not be based on information retrieved from inadmissible evidence (see [50]).

Held, on the facts, that the High Court exceeded its jurisdiction when it unilaterally amended the settlement agreement. Its unilateral alterations to the agreement were improper. As there was no hearing since the parties had settled the dispute between themselves, it was improper and irregular for the High Court to have considered the actuarial and industrial psychologist's reports to reject the agreed settlement for loss of earnings, as those reports were not properly before the court. It also failed to raise its concerns with the applicant and the RAF. Had it done so, the parties could have elected to address the court's concerns or declined to do so. In the latter case, the court would have been entitled to refuse to make the settlement an order of court on

any of the established grounds, if this were justified. In the result the appeal had to be upheld and the order of the High Court set aside. (See [54].)
Held, as to the appropriate remedy, that, as there was no evidence of impropriety in relation to the settlement agreement, there was no basis for a remittal. Furthermore, there was nothing that caused the judge to refuse to make the settlement agreement an order of court, apart from the actuarial and industrial psychologist's reports (which were not evidence). The order of the High Court had to be replaced with one making the original settlement agreement agreed to by the parties an order of court. (See [55].)

RISSIK STREET ONE STOP CC t/a RISSIK STREET ENGEN AND ANOTHER v ENGEN PETROLEUM LTD 2024 (4) SA 447 (CC)

Minerals and petroleum — Petroleum — Retail — Unreasonable contractual practice — Arbitration under s 12B of PPA — Remedial power of arbitrator to correct unfair or unreasonable contractual practice — Whether extending to relief allowing retailer continued occupation of leased premises after expiry of operating lease — Whether relief sought needed to be specified in request for arbitration — Petroleum Products Act 120 of 1977, s 12B.

Rissik Street One Stop CC (Rissik), a retailer of petroleum products, had since 1998 leased premises from Engen Petroleum Ltd (Engen) in terms of an operating lease agreement (operating lease). Engen, a manufacturer, marketer and bulk distributor of petroleum, diesel and chemical products, had sublet the premises to Rissik, the former as lessee, in terms of a notarial deed of lease (the notarial lease) with the owner of the premises. The operating lease in question commenced on 1 April 2015 and was scheduled to end on 30 June 2018. When the owner of the premises required a R3 million payment from Engen as a condition to renew the notarial lease, Engen paid, and it was renewed. Engen, in turn, sought to recover this amount from Rissik, by making payment thereof a condition for renewing the operating lease. Unable to agree on such payment, the operating lease was not renewed.
In terms of the operating lease, Engen was obliged to furnish Rissik Street with at least 12 months' notice if it intended not to renew it; and, in the event of the non-renewal, Rissik Street had the right to sell the business during the 12 months' notice period prior to the termination of the lease (see [51.4]). The lease also provided that Engen could not unreasonably withhold its consent to any proposed sale (see [51.5]), and recognised that Rissik had an 'entrenched value' in the business and was entitled to realise such entrenched value.
Engen gave notice of termination on 2 October 2017 and advised Rissik Street that the operating lease would terminate on 31 October 2018, and also of their right to seek a purchaser for the business. On 25 May 2018 Rissik Street identified two potential purchasers, but Engen refused to give its approval, also refusing to give reasons therefor upon Rissik Street's request. For this stance, Engen relied on clause 10.1 of sch 3 of the operating lease, which provided that '(t)he exercise of any discretion by [Engen] contemplated by the provisions of this Schedule 3 shall be absolute and unfettered, and [Engen] need not furnish the [Rissik Street] with its reasons for any such exercise'.
In response, on 25 July 2018 Rissik Street submitted a request for arbitration to the Controller of Petroleum Products (the Controller) in terms of s 12B of the Petroleum Products Act 120 of 1977 (the PPA, quoted at [50]), alleging an unfair or unreasonable contractual practice on the part of Engen. This, in that Engen's refusal to provide

reasons left Rissik unable to determine whether Engen's consent had been unreasonably withheld, and so unable to exercise its right in terms of the operating lease and unreasonably frustrating Rissik's right to sell its business. No response to the request for arbitration was, however, received from the Controller, nor to subsequent requests for updates. On 17 January 2019, and while still waiting for the Controller's decision, Rissik identified another potential purchaser of the business, but Engen adopted the stance that it did not need to consider the application as the operating lease had terminated by effluxion of time on 31 October 2018. (See [10] – [13], [61].)

On 22 January 2019 Engen gave Rissik written notice to vacate the premises. When Rissik refused, Engen instituted eviction proceedings (in March 2019) in the High Court. Before the High Court hearing commenced, the Controller, acting in terms of s 12B, finally referred the matter to arbitration (in July 2019). Rissik Street opposed the application, also bringing a counter-application for the proceedings to be stayed pending the decision of the Controller. The High Court found in favour of Rissik, holding, inter alia, that granting an eviction order while finalisation of the arbitration proceeding was pending, would defeat the purpose and spirit of s 12B of the PPA, which had introduced arbitration (see [19] – [27]).

Engen subsequently successfully appealed to the Supreme Court of Appeal (the SCA), which held that there was no legal basis for Rissik to remain in occupation since non-renewal of the operating lease was not a matter referred to arbitration; and that while Rissik was entitled to be furnished with reasons for Engen's refusal to accept the offers to purchase the business, this could not give rise to a right that would allow Rissik to continue to occupy the premises when no such right was asserted in the request for referral to arbitration (see [28] – [36]).

The present case concerned Rissik's application for leave to appeal to the Constitutional Court (CC).

Satisfied that the issues related to the powers of an arbitrator and raised arguable points of law of general public importance that engaged its jurisdiction, the CC granted leave to appeal on the basis that the interests of justice warranted determinative pronouncements in order to bring clarity to contractual practices within the retail fuel industry (see [46] – [49]. It identified the following main issues:

- Whether the remedial power of an arbitrator under s 12B(4) of the PPA included allowing a party to an agreement to continue in occupation of the leased premises after the expiration of the operating lease, in circumstances where neither a renewal nor an extension of the operating lease was sought but where the continued occupation may be necessary to correct an unfair or unreasonable contractual practice (see [45.3], [46]).
- Whether a party who submitted a request for a referral to arbitration in terms of s 12B of the PPA alleging an unfair or unreasonable contractual practice, was obliged, at the time of request, to set out the relief it sought in its request for a referral to arbitration, and whether an arbitrator would be precluded from considering such relief in any award if it was not sought as part of the request for the referral (see [45.4], [47]).
- Whether a court could grant a stay of eviction proceedings pending the determination of arbitration under s 12B of the PPA (see [45.5]).
- The basis upon which the High Court was empowered to stay the eviction proceedings (see [54] – [55]).

In the High Court, Engen had disputed Rissik's assertions that eviction would bring an end to its ability to sell the business, but in the CC conceded that this was in fact so.

Engen nevertheless persisted in its stance that Rissik's right to sell could survive the currency of the operating lease (see [67]).

Held

In the High Court the relief sought was an order for eviction, while in the arbitration the issue was a complaint that Engen has unreasonably frustrated Rissik Street's right to sell their business. An award arising out of the arbitration may influence the ongoing occupation of the premises, but these were not the same issues in substance. Accordingly, s 6(1) of the Arbitration Act, which provided for the stay of arbitration proceedings, could not be called in aid. The basis upon which the High Court was empowered to stay the eviction proceedings was s 173 of the Constitution, which provided that superior courts have the inherent jurisdiction to regulate their own processes in the interests of justice. (See [54] – [57].)

If Engen had an absolute and unfettered discretion to refuse to consent and not furnish reasons, then it would not be possible for Rissik Street to properly exercise its right to sell the business when it remained unaware of what factors Engen considered in deciding to grant or refuse consent to a proposed sale. Whether Engen's conduct in this respect constituted an unfair or unreasonable contractual practice, was a matter for the arbitrator to determine. There was a reasonable possibility that the arbitrator may determine that the refusal to provide reasons constituted an unfair or unreasonable contractual practice. And, even if it were found that clause 10.1 of sch 3 applied, whether such a stance was unfair or unreasonable would still require consideration because there was a reasonable possibility that the arbitrator may find that reliance on clause 10.1 was an unfair or unreasonable contractual practice. (See [64] – [65].)

By conceding that eviction would end Rissik's ability to sell the business, Engen accepted that Rissik's entrenched value in the business would dissipate in Rissik's hands if it were evicted. It acquired the right to sell the business within a limited time frame of 12 months and made bona fide attempts to do so. Regard being had to Engen's stance in refusing to consent to the sale without providing reasons, again it could not be rejected as a reasonable possibility that the arbitrator would find that Engen frustrated Rissik Street's 12-month window of opportunity to sell the business. As a reasonable possibility, the arbitrator might make an award granting Rissik Street a further period of occupation to compensate it for as much of the 12-month selling period as it was deprived of due to the unfair or unreasonable contractual practice. (See [67] – [70].)

The occupation of the premises may therefore be significant in the scheme of any corrective award that may arise in terms of s 12B. If Rissik Street were evicted, it would not be able to sell the business, including the goodwill that it had built up, and Engen, which had no equitable claim to that goodwill, would reap the benefits of it in the consideration it would be able to garner from a potential new tenant. This was inequitable and counter to the transformational objectives of the PPA, entrenching the inequality in the fuel industry between wholesalers and retailers by providing Engen with an undue benefit that it was never entitled to in the form of the goodwill to the business. Section 12B enjoined the parties to look beyond the written terms of their contracts, recognising the normative framework of fairness and reasonableness that the section introduced as an overarching framework governing all contracts in the retail fuel industry. And s 12B vested wide remedial powers in the arbitrator, 'necessary to correct such practice'. The pleadings in the arbitration were still to be filed, and Rissik may well in those pleadings seek the relief of ongoing occupation pending the sale of the business. This would be consistent with the complaint it had submitted. If the

arbitrator found in favour of Rissik Street, then it may well follow that the corrective award necessary would be one allowing Rissik Street the opportunity to sell the business (See [70] – [72], [78].)
Section 12B did not require an aggrieved party to specify the relief that it sought at at the time of requesting a referral to arbitration. While the terms of the arbitration must mirror the complaint, the relief that was considered, and ultimately granted, was not required to be spelt out in the request to the Controller, and the relief in the form of an award was, in any event, a matter for the arbitrator to determine. It could not be that an aggrieved party must set out the relief it sought in its request and that it may in future be barred from doing so if it did not. Such a narrow approach was inconsistent with what has been described as the wide remedial power of an arbitrator acting in terms of s 12B. (See [79].)
The interests of justice presented a compelling argument for the invocation of the CC's inherent power to stay the eviction proceedings pending the finalisation of the s 12B arbitration. Paramount amongst those interests was the right of Rissik Street to seek effective relief in the s 12B arbitration in respect of Engen's alleged unfair or unreasonable contractual practice. An eviction would render nugatory Rissik Street's right to seek effective relief in the s 12B arbitration. The appeal would be upheld, with the result that the order of the High Court must prevail. (See [83], [88], [91].)

CENTRE FOR CHILD LAW AND OTHERS v SOUTH AFRICAN COUNCIL FOR EDUCATORS AND OTHERS 2024 (4) SA 473 (SCA)

Education — Schools — Teachers — Code of ethics — Breach — Assault on learner — Appropriate sanction — South African Council for Educators Act 31 of 2000, s 14.

In this matter second and third respondent teachers assaulted learners. The mothers of the learners lodged complaints with the South African Council for Educators (SACE), which investigated the incidents and concluded that the teachers should be charged with assault. SACE duly did so.
A disciplinary hearing was then convened, and the first appellant (the Centre for Child Law) and the second and third appellants (the mothers) were invited to attend, which they did.
On the day in question, proceedings commenced and the teachers pleaded guilty, with the hearing ultimately progressing through to sanction. At no point, though, were the appellants given an opportunity to make representations, present evidence or give input on the sanctions, which the disciplinary panel ultimately determined to be removal from the roll of educators and a fine, with the removal wholly suspended and the fine suspended in part (see [6] – [7]).
The Centre and the mothers then applied to the High Court (1) to review and set aside the presiding officer's decisions and SACE's approval thereof; (2) to order SACE to review its sanctions policy and redraft it so as to include rehabilitative sanctions, and the guideline that the affected child's best interests were to be considered; (3) for condonation of bringing the review outside of the 180 days allowed by the Promotion of Administrative Justice Act 3 of 2000 (PAJA).
The High Court refused condonation and dismissed the review, but granted the order that SACE review its sanctions policy. The Centre and the mothers appealed to the Supreme Court of Appeal (SCA).
Issue (1) was the delay. Factually, the appellants had at some point become aware of the decisions and had asked SACE for its reasons, which SACE had failed to supply.

The 180-period given by PAJA had passed, and the appellants had then brought the proceedings. The High Court reasoned that if the 180 days started to run only when the litigant became aware of the decision *and* the reasons, then the litigant could wait indefinitely to commence ('as long as it pleases him') (see [9] n4). But Constitutional Court authority directed that only when the injured party became aware of the decision *and* the reasons, did the 180 days start (see [10]).
And here, *held* the SCA, absent reasons, the 180 days had not begun when the appellants instituted their application (see [11]).
Issue (2) was mootness. SACE said that, because the sentences had been served and the sanctions policy under which the teachers had been censured had been replaced, the matter was moot (see [12]).
The SCA noted, however, that, although mootness did bar, there was an exception where it was in the interests of justice to hear the matter, which was pointed to when adjudication might have practical effect. Here, indeed, there would be practical effect: if the determinations were set aside then SACE would need to reconsider them (see [13]).
Furthermore, the sentences had been suspended, not served, and the sanctions policy had not yet been revised (see [14]).
Issue (3) was the review. The sentencing decisions were procedurally unfair because the children and parents were given no opportunity to give input thereon; wrong in law because of the failure to take account of the children's rights; and arbitrary because the sanctions policy allowed the presiding officer no discretion (see [27]).
Issue (4) was remedy. Appropriate would be a limited remittal (the teachers having already been struck from the roll and fined), for SACE to consider rehabilitative sanctions (see [30]).
Appeal accordingly upheld, the High Court's order set aside and substituted with an order that (i) the decisions of SACE to approve the plea-and-sentence agreements and confirm the sanctions were invalidated and set aside; and (ii) the decisions be remitted for reconsideration in light of the best interests of the children and rehabilitation (see [31]).

DIS-CHEM PHARMACIES LTD v DAINFERN SQUARE (PTY) LTD AND OTHERS 2024 (4) SA 489 (SCA)

Arbitration — Arbitrator — Jurisdiction — Interpretation of arbitration clause — Whether arbitrator having jurisdiction to determine unjustified enrichment claim — Whether application for order declaring arbitrator lacked such jurisdiction was premature — Whether arbitrator erred in dismissing special defence of jurisdiction.

Dis-Chem Pharmacies Ltd (Dis-Chem) had referred a claim for arbitration — based on enrichment — for the amount it overpaid in turnover rental to its landlord, Dainfern Square (Pty) Ltd (Dainfern), the owner of Dainfern Square Shopping Centre. The lease agreement's arbitration clause provided that, '(i)n the event of any disputes or difference or doubt or question arising between the parties as to the interpretation of any provision of this Agreement of Lease or the implementation thereof, and the parties being unable to resolve the issue, then in the discretion of either party, the issue shall be submitted to arbitration'.
Dis-Chem alleged that Dainfern applied an incorrect interpretation in generating the invoices in the course of implementing the formula (in annexure F to the lease agreement) for collection of turnover rental. Dainfern raised two special pleas, one on

jurisdiction, contending that the arbitrator did not have the requisite jurisdiction because the claim fell beyond the ambit of the parties' terms of the arbitration agreement — it was for unjustified enrichment and not grounded in contract, and did not pertain to the interpretation of any provision of the lease or the implementation thereof.

The present case concerned an appeal to the Supreme Court of Appeal against a High Court order which set aside an arbitrator's dismissal of the two special pleas. In making his ruling, the arbitrator had concluded that it was a claim relating to the lease agreement because it involved the interpretation of annexure F. Dainfern had approached the High Court for a review of the arbitrator's findings, as well as declaratory relief that the dispute did not fall within the arbitration clause and was accordingly incorrectly referred to arbitration by Dis-Chem. The High Court granted the relief sought, holding that since the arbitration clause did not make provision for a claim based on unjustified enrichment, it did not find application. (See [9], [12] – [13], [16].)

At issue was whether, on a correct interpretation of the arbitration clause, the second respondent, the arbitrator, had the requisite jurisdiction to adjudicate the enrichment claim.

Held

On a proper construction of the text of the arbitration clause, 'any disputes or differences, doubts or question arising between the parties', may be categorised as either an *interpretation* of any provision of the agreement of lease; or *the implementation* of the lease agreement. The phrase may also be construed as including both interpretation and implementation as referenced above. (See [14].)

The High Court erred in overlooking the nature of the dispute. Central to Dis-Chem's claim was the determination of the dispute as to the correct interpretation in the course of the implementation of annexure F of the lease agreement, relating to turnover rental. Until that determination was made, the issue as to whether any party was unjustifiably enriched or impoverished did not arise. Even on a narrow construction, the objection to the invoices arose during the course of the implementation of the calculation clause in annexure F of the lease agreement. Dainfern applied a wrong interpretation of the calculations in annexure F to the lease agreement. The entitlement it may have to recover from Dainfern depended entirely on the determination of a dispute as to the correct interpretation and the implementation of certain provisions of the lease agreement, in this case annexure F. Therefore, the objection fell squarely within the ambit of the arbitration clause, within the arbitrator's jurisdiction. (See [18], [22] – [23].)

The High Court also erred in granting a declaratory order in circumstances where the merits of the claim had not reached finality and certainty. Dainfern prematurely approached the High Court to seek a review against what it perceived to be a 'wrong' decision of the arbitrator. It couched the review in the form of declaratory relief, despite being aware that the arbitration had not reached finality and certainty on the merits of the claim. The appeal would thus succeed, and the High Court's order set aside. (See [26].)

MINISTER FOR TRANSPORT AND PUBLIC WORKS, WC AND OTHERS v ADONISI AND OTHERS 2024 (4) SA 499 (SCA)

Housing — Right to housing — Provision of social housing — Location — Whether obligation on state to provide housing at specific location — Constitution, s 26; Housing Act 107 of 1997; Social Housing Act 16 of 2008.
Provincial government — Land — Sale — Whether absence of asset-management plan invalidating sale — Whether duty to investigate whether property can be used by national government — Whether property 'surplus' — Whether Sea Point, Cape Town, within 'restructuring zone' — Whether failure to inform national Minister of intention to sell was breach of IGRFA — Whether sale procedure irreconcilable with meaningful public participation — Government Immovable Asset Management Act 19 of 2007 — Western Cape Land Administration Act 6 of 1998 — Intergovernmental Relations Framework Act 13 of 2005.

At the heart of this matter was an erf in Sea Point, a suburb near Cape Town's CBD. The erf was owned by the Western Cape Province, which sold it to a third party. This resulted in two applications to the Western Cape High Court, Cape Town, to set the sale aside.
In the first application, the applicants were residents of Cape Town (Ms Adonisi and three others — hereafter 'the residents'), a voluntary organisation (Reclaim the City) and a trust (the Ndifuna Ukwazi Trust). The respondents were the Western Cape's Premier, Provincial Government, Minister of Transport and Public Works, Minister of Human Settlements, and the City of Cape Town.
In the second application, the applicants were the National Minister of Human Settlements, the National Department of Human Settlements, and the Social Housing Regulatory Authority. The respondents were the Western Cape's Premier, Minister for Transport and Public Works, and the City of Cape Town.
The High Court's order in the first application was that:
• The City and Provincial Government had failed to comply with their obligations under the legislation enacted to give effect to ss 25 and 26 of the Constitution (the Housing Act 107 of 1997 and the Social Housing Act 16 of 2008), and 'in so failing to comply . . . [the City and Province] have failed to take adequate steps to redress spatial apartheid in central Cape Town'.
• The City and Province comply with their statutory and constitutional obligations.
• The decision to sell was set aside.
• Sea Point fell into a restructuring zone.
• Regulations 4(1) and 4(6) of the Western Cape Land Administration Regulations (PN 595 *PG* 5296 (16 October 1988)), made under the Western Cape Land Administration Act 6 of 1998 (WCLAA), were unconstitutional and invalid, and the disposal in terms of these regulations was unlawful. (See [28].)
The High Court's order in the second application was that:
• The failure of the Province to inform the national Minister of Human Settlements and the national Department of Human Settlements of its intention to dispose of the erf and to consult and engage with them, was a contravention of the Province's obligations under ch 3 of the Constitution and the Intergovernmental Relations Framework Act 13 of 2005.
• The decision of the Premier and Provincial Cabinet to sell the erf was reviewed and set aside.
• Regulations 4(1) and 4(6) (above) were unconstitutional and invalid. (See [29].)

The High Court subsequently granted leave to appeal in part, and the Supreme Court of Appeal (SCA) in respect of the remaining issues. Meanwhile, the third-party buyer had cancelled the sale. Nonetheless, despite the matter being moot, the parties and SCA agreed that the appeal should be heard. This owing to the importance of the issues (provision of social housing and the roles of the different spheres of government) and the need for their clarification (see [30]).
The issues in the SCA were as follows:
• Whether the residents could rely directly on s 26 of the Constitution (the right of access to adequate housing). *Held*, per the principle of subsidiarity, that they could not, and that they ought to rely, at first instance, on the legislation enacted to give effect to the right, namely the Housing Act and Social Housing Act (see [31], [33], [36]).
• Whether the above Acts obliged the City and Provincial Government to provide social housing at a specific location, namely in the centre of the City. *Held*, that no provision of the Acts required this, and this accorded with Constitutional Court authority that 'the Constitution does not give a person a right to housing at government expense at a locality of his or her choice'. (See [37], [39], [40], [50].)
• Whether the Province and City had in fact complied with their statutory obligations to provide social housing . *Held*, that the evidence demonstrated that they had (see [44], [49], [51]).
• Whether the absence of an asset-management plan, required by the Government Immovable Asset Management Act 19 of 2007 (GIAMA), invalidated the sale. *Held*, that it did not (see [56], [59] – [60]).
• Whether the High Court was correct in finding that under the GIAMA and the WCLAA that the Province was required to investigate whether the property could be of use by a provincial department or by national government. *Held*, that no provision of these Acts required this (see [62]).
• Whether there was merit to the contention that the sale of the property was inconsistent with the GIAMA (ss 5(1)*(f)* and 13(3)) owing to the property not being 'surplus'. *Held*, that there was not: on the facts the property was surplus (see [64]).
• Whether, as the High Court had held, Sea Point was within a restructuring zone (s 1 of the Social Housing Act). *Held*, on interpretation of the government notices allegedly providing for this, that they did not include Sea Point in a restructuring zone (see [65], [73], [79] – [80]).
• Whether the High Court was correct in finding that the Province was mala fide in not approaching the national Department of Human Settlements for clarification of Sea Point's status. *Held*, that the evidence ran against this finding (see [81], [84]).
• Whether the High Court was correct in finding that the failure of the Province to inform the national Minister of its intention to sell the property breached ch 3 of the Constitution and the Intergovernmental Relations Framework Act 13 of 2005 (IGRFA). *Held*, that IGRFA was the
legislation enacted to give effect to ch 3, and the Act in its s 5 provided that 'In conducting their affairs . . . provincial governments . . . must seek to achieve the objects of this Act, including by . . . *(b)* Consulting other affected organs of state in accordance with formal procedures, as determined by any applicable legislation . . .'. Held, further, that ss 3(2) and 3(3) of the WCLAA determined such procedures, and they had been complied with. (See [87], [90], [92].)
• Whether the sale procedure in regs 4(1) and 4(4) were 'irreconcilable with . . . meaningful public participation' and thus unconstitutional. *Held*, that it was a fair procedure: Regulation 4(6) provided that a contract concluded in accordance with reg 4(1) was only a 'proposed disposal' and subject to compliance with s 3(2) of the

WCLAA, which required publication of notice of the proposed disposal, and a call for representations thereon. Thus while the Province solicited and considered representations, the transaction remained only a proposal, and it was completed and became a disposal only once the Province, after consideration of the representations, made a decision to proceed with it. (Regulation 4(1) provides that after receipt of the representations, the Provincial Government has 21 days in which to resile from the contract.) (See [94] – [96], [99], [101] – [102].)
Appeal upheld, the High Court orders set aside, and replaced with orders dismissing the respective applications (see [103]).

VENATOR AFRICA (PTY) LTD v WATTS AND ANOTHER 2024 (4) SA 539 (SCA)
Company — Directors and officers — Director — Liability — Claim by company A against directors of company B for loss caused to it by directors of B causing B to carry on business recklessly, grossly negligently or fraudulently with A — Company A claiming s 218(2) read with s 22(1) rendering directors of B liable to it — Whether claim excipiable — Companies Act 71 of 2008, ss 22(1) and 218(2).

Appellant, Venator, contracted with another company, Siyazi, for Siyazi to provide it with certain services. However, Siyazi, according to Venator, carried on its business recklessly, negligently or fraudulently, such that it caused Venator loss. This prompted Venator to institute an action against Siyazi's directors, one Watts and one Bekker, for recoupment of its loss (see [3] – [4]).
The apparent basis of the claim was that the directors had caused Siyazi to contravene s 22(1) of the Companies Act 61 of 2008, and thus in effect themselves had contravened s 22(1). This contravention brought down upon them the application of s 218(2), and established their liability to Venator (see [4]).
Section 22(1) provides that:
'A company must not carry on its business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose.'
And s 218(2) that:
'Any person who contravenes any provision of this Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention.'
In response, the directors raised an exception. It was that s 22(1) applied to companies, and s 218(2) to persons, and that the particulars did not allege a contravention of the Act by the directors. The High Court upheld the exception, set aside the particulars, and granted leave to Venator to file amended particulars of claim (see [7], [13]).
Later, on Venator's application, it granted leave to appeal to the Supreme Court of Appeal (SCA).
The SCA confirmed the High Court's finding (see [36]). It noted the following.
• Section 22(1) duties the company, not the directors, and to read s 22(1) to mean that directors can infringe it, reads in what is not there (see [28]).
• Section 76 sets out a director's duties to his company, and s 77 the company's remedies when the director breaches his duties. Id est, the legislature confines a director's liability (see [29] – [31]).
• In the Act the legislature specify who is liable for what and when, and it would run against this careful specification to read s 218(2) to create a 'general liability of all persons who contravene the . . . Act in favour of all who suffer loss as a result thereof' (see [32] – [33]).
Appeal dismissed, and the High Court's order confirmed (see [36]).

ABSA BANK LTD v SAUNDERSON 2024 (4) SA 552 (NCK)

Practice — Judgments and orders — Summary judgment — Amended rule 32 — Founding affidavit — What should be contained therein — Whether plaintiff should be allowed to tender evidence in form of annexures — Discussion — Uniform Rules of Court, rule 32.

In this matter the plaintiff, Absa Bank Ltd, sought summary judgment against the defendant, Mr Saunderson, for, inter alia, payment of various debts owing by the latter to the former in terms of various credit agreements entered into between the plaintiff, as creditor, and the defendant, as debtor. Amongst a number of defences raised by the defendant was one to the effect that the supporting affidavit relied upon by the plaintiff in the application went beyond the boundaries as prescribed by rule 32(2) of the Rules, in that it sought to introduce evidence, by way of attaching certain documents to the affidavit, which would result in the application becoming a 'mini trial', and thereby defeating the purposes of summary-judgment proceedings, which was to allow the court to summarily dispense with actions that ought not to proceed to trial because they do not raise a genuine triable issue.
In order to determine the defence, the court had regard to what a supporting affidavit should contain under the new Uniform Rule 32, in particular whether a plaintiff should be permitted to attach documentation in support of its submissions. The court noted that it was clear that the amended rule required of a plaintiff to prepare and file a *more comprehensive supporting affidavit* than used to be the case, in which the plaintiff was specifically required to state why the defences pleaded by the defendant did not raise issues for trial, and to substantiate its contentions in this regard in such a manner as to afford the court a proper opportunity to determine whether the defences raised in the plea were bona fide defences and not sham defences raised with the purpose of delaying proceedings (see [25] and [31.1]). The court concluded that a more liberal approach was necessary inasfar as the allowance of additional evidence was concerned. It was permitted, the court held, as long as the evidence that was provided by the plaintiff served only to support the contentions by the plaintiff as to why the defences as pleaded by the defendant did not raise issues for trial and, in the event of this evidence being documentary in nature, same was attached to the supporting affidavit so that the defendant in the matter was in a position to answer thereto. (See [35].) Such an approach, the court held, would in fact better enable the court to decide whether the matter ought to proceed to trial, and would not undermine the purpose of the summary-judgment procedure (see [36] and [37]).
The court, with the above in mind, decided that annexures attached to the plaintiff's affidavit ought to be allowed, and dismissed the defence (see [38]).
The court went on to dismiss the further defences raised as not being bona fide, and granted the relief sought.

EKURHULENI METROPOLITAN MUNICIPALITY v BUSINESS CONNEXION (PTY) LTD AND OTHERS 2024 (4) SA 571 (GJ)

Appeal — Suspension of judgment pending appeal — Refusal of leave to appeal by Supreme Court of Appeal — Application to President of Supreme Court of Appeal for order referring application for leave back to Supreme Court of Appeal for reconsideration — Application to President having effect of suspending execution of

judgment against which leave to appeal is being sought — Superior Courts Act 10 of 2013, s 17(2)*(f)*.

Section 17 of the Superior Courts Act 10 of 2013 regulates leave to appeal against a Superior Court judgment while s 18 regulates the suspension (or otherwise) of the decisions being appealed against. Section 17(2)*(f)* provides that if an application for leave to appeal goes all the way to the Supreme Court of Appeal and it, too, refused leave, final recourse may be had to the President of the Supreme Court of Appeal, who may, if 'a grave failure of justice would otherwise result or the administration of justice may be brought into disrepute', refer the decision back to the Supreme Court of Appeal for reconsideration.
The question before the Johannesburg High Court in the present matter was whether s 18(1) applied to a request for reconsideration under s 17(2)*(f)*, in other words, whether a request to the President of the Supreme Court of Appeal in terms of s 17(2)*(f)* automatically suspended the execution of the decision sought to be appealed against pending the final decision of the President. The Johannesburg High Court found that it did, ie that the normal rule applied. (See [12], [35], [39].)

JD BOTHA & SONS SIGNS (PTY) LTD v MULTI CRANES & PLATFORMS (PTY) LTD 2024 (4) SA 583 (GJ)

Enrichment — Condictio sine causa — When available — Services performed by another — Services rendered and materials supplied in value far exceeding quoted amount — Enrichment claim for value of such services and repairs where recipient refusing to pay more than quoted amount — Calculation of quantum of claim.

JD Botha & Sons Signs (Pty) Ltd (JDBS), a manufacturer, supplier and installer of signs, signboards and signage, had accepted a quote from Multi Cranes & Platforms (Pty) Ltd (MCP) of R4479, for repairs to former's mechanical crane. JDBS paid on completion of the repairs (2 June 2016). The machine was, however, still not in proper working condition, requiring further assessment and additional repairs, which JDBS insisted should be made. On 19 September 2016, after the fault had been repaired and the crane was again fully operational, MCP invoiced JDBS R81 961,60 for the subsequent repairs. JDBS refused to pay, claiming that it understood that these additional repairs would be included in the original quotation for R4479, and

that it was on this basis that it had instructed MCP to proceed with the repairs. (See [8] – [10].)
MCP, having rejected JDBS' settlement offer for reimbursement of certain expenses, instituted action against JDBS in the Johannesburg Magistrates' Court. It alleged that in June 2016 it was tacitly agreed that it would repair the crane and that JDBS would be liable to pay its usual charges for such repairs. In the alternative, the MCP claimed payment of the invoiced amount based on unjust enrichment. The magistrates' court found that MCP had not proven its case based on contract, but upheld its alternative claim (see [14] – [19]).
The present case concerned JDBS' appeal to the High Court. At issue were whether, on the evidence led at the trial, (1) MCP had established that it was entitled to payment from the appellant on the basis of unjust enrichment; and (2) the quantum of the respondent's claim had been established on a balance of probabilities (see [24]). In the latter regard, JDBS submitted that the magistrate erred in his assessment of the

quantum by including in the claim amounts (in respect of labour and spare parts) which were actually profits which the MCP would have earned on the agreement (see [20]).
Held
As to (1), that in order to succeed with a claim based on unjust enrichment, MCP had to prove that it was impoverished and JDBS enriched at its expense, and that the enrichment was unjustified, ie without a legal cause. There could be no doubt that JDBS benefited from the services rendered by the respondent, but failed to make payment for those services. JDBS was enriched at the respondent's expense, which enrichment was unjustified, in that there clearly was no agreement that the respondent would render services for free to the appellant. And JDBS failed to discharge the duty to rebut its claim based on the *condictio sine causa*. MCP had made out a case for unjust enrichment and therefore was entitled to payment. (See [26], [34] – [35].)
As to (2), if a person was enriched as a consequence of services performed by another, the measure of enrichment is the value of the service; profits earned on the rendering of services and the supply of material could not be added to and included in a claim for unjust enrichment. On the probabilities, the amounts which JBDS was charged for the parts represented the amounts for which the respondent would have been able to on-sell the parts, once acquired from the manufacturer, to any of its other clients. This was an indication of the value of the parts to MCP, and no doubt the spare-part prices represented the value of these parts to MCP and therefore was the amount by which it had been impoverished. Similarly, the charges for the labour were the value to MCP which could have been realised by doing work for another client instead of doing the repair work for JDBS, which was therefore enriched by the amount of the labour charges and by the amount which the respondent charged in respect of the material supplied to repair the crane. MCP, on the other hand, was impoverished by these amounts. There was no reason why the amount of MCP's usual charges in respect of the repairs should not be regarded as reflecting the value of the services which the respondent rendered. MCP had established its claim for unjustified enrichment in the amount of R81 961,60. (See [38] – [41].)
The court a quo was therefore correct in granting judgment in favour of MCP against JDBS, and the appeal would therefore be dismissed. The patent error in the amount of the judgment of the court a quo was, however, corrected. (See [43].)

LEGAL PRACTITIONERS INDEMNITY INSURANCE FUND NPC AND OTHERS v ROAD ACCIDENT FUND AND OTHERS 2024 (4) SA 594 (GP)

Motor vehicle accident — Compensation — Claim against Road Accident Fund — Claim form — Validity — Updated RAF 1 claim form (July 2022) and associated Board Notice (BN 271 of 2022) declared invalid — Simpler 2008 RAF 1 claim form to be used until minister amends it — Claimants whose claims were rejected or ignored by RAF for failure to comply with 2022 claim form granted eight months' grace to resubmit claims on 2008 form — Minister directed to publish revised form within six months — Promotion of Administrative Justice Act 3 of 2000, s 4(1); Road Accident Fund Act 56 of 1996, s 24(4)*(a)*.

The first applicant, a provider of indemnity insurance to the legal profession, asked the Pretoria High Court to set aside (i) the decision of the Minister of Transport to publish a new prescribed RAF 1 claim form (the new Claim Form) on 4 July 2022 and (ii) its precursor, Board Notice 271 of 2022, issued by the Road Accident Fund (RAF) on 6 May 2022 (the Board Notice). The applicants argued that the newly introduced

requirements made it difficult for poor and illiterate accident victims to claim from the RAF by prescribing the submission of a series of corroborating documents that had to 'be included and form part of the claim's supporting documents when lodging a claim' (see [36] – [37], [43]). The applicants based their challenge on the Promotion of Administrative Justice Act 3 of 2000 (PAJA), alternatively on legality.
The RAF, the public entity charged with administering the payment of compensation to road accident victims, opposed the application, while its controlling minister, the Minister of Transport (as second respondent), abided by the court's decision. The other applicants were (i) road accident victims whose claims had been rejected by the RAF for not complying with the requirements of the new Claim Form; and (ii) law firms specialising in RAF claims. In addition to the RAF itself, its board and CEO were also cited respondents.
Under s 24(4)*(a)* of the Road Accident Fund Act 56 of 1996 (the RAF Act) claims not submitted in the prescribed form are invalid. The Minister provided no record of his decision, save a single memo stating that the Minister, not the RAF, had the power to publish RAF claim forms.
The court ruled that neither the minister's decision to prescribe the new Claim Form nor the Board Notice was lawful. The Minister had not even considered whether the new Claim Form would promote the objects of the RAF Act, a basic requirement for its rationality and legality. The Minister's decision was in addition invalidated by his failure to comply with s 4(1) of PAJA, which had required him to hold a public enquiry, or a notice-and-comment or other fair procedure, before adopting the new Claim Form, which he patently had not done. The Board Notice was, in turn, invalid because the RAF's decision to issue it unlawfully encroached on the
Minister's powers to prescribe the particulars of the claim form. (See [34], [39] – [48].)
The court pointed out that it could not in this case — as it usually would — simply set aside the above decisions and remit them to the Minister for reconsideration. A regime had to be put in place to avoid a regulatory lacuna until the Minister had lawfully exercised his power. (See [49] – [52].)
The court accordingly made the order set out below, under which new claimants could in the interim revert to the simpler 2008 RAF 1 Form, and those claimants whose claims were rejected or ignored by the RAF for failure to comply with the 2022 form were granted eight months' grace to resubmit claims on the 2008 form.
The court stressed that RAF claimants were often poor, had compromised literacy and limited access to legal services, and that the RAF 1 Form should never become an instrument to obstruct valid claims. The Minister would have to consider the constitutional rights of claimants in deciding on the contents of the RAF 1 Form. (See [37].)

MLAMLI v JOHNSTONE NO AND ANOTHER 2024 (4) SA 611 (ECMk)

Motor vehicle accident — Compensation — Claim against Road Accident Fund — Lodgment — RAF may not refuse delivery of lodgment documents for purported non-compliance with Board Notice 271 of 2022 or on any other ground not contemplated by Road Accident Fund Act — Such refusal unlawful — RAF to acknowledge receipt of lodgment documents — Road Accident Fund Act 56 of 1996, s 24(1)*(b)*.

The applicant was injured in a motor vehicle accident in August 2022. In February and March 2024 his attorneys' attempts to lodge a compensation claim against the Road Accident Fund (RAF) failed when the RAF refused to accept delivery because some

of the documents required under Board Notice 271 of 2022 (the Board Notice of 2022) and the updated RAF 1 Form (introduced July 2022) were missing. Then, when the applicant furnished the missing information, the RAF failed to respond at all.
The applicant, contending that the first and second respondents (the RAF's regional manager and the RAF itself) had rejected his claim because the RAF was hellbent on thwarting claims against it, by way of an urgent application requested the Makhanda High Court to issue an order declaring the respondents' conduct unlawful. He argued that the RAF had been obliged to accept his claim and to acknowledge it in writing. For their part, the respondents argued that they were perfectly entitled to reject incomplete claims and that the applicant could relodge when he had acquired the missing documentation.
The matter was governed by the Road Accident Fund Act 56 of 1996, which, according to precedent, had as objective the widest possible protection of those who had suffered bodily injuries in motor vehicle accidents (see [31]).
Held
The application should succeed. First, the risk of prescription supplied the required urgency. And the RAF's failure to acknowledge receipt of the documents constituted a breach of s 24(1)*(b)* of the Act, which required it, in the case of delivery by hand, 'to acknowledge receipt . . . and the date of such receipt in writing'. The RAF also had no legislative authority to refuse lodgment, even where the claim was susceptible of rejection under the Act. Here the claim submitted by the applicant had been sufficiently compliant to enable the RAF to investigate it. The respondents' contention that they were entitled to reject lodgment was wrong because it elevated form over substance, was rigidly technical, and subverted the object of the Act. (See [24], [33] – [36], [45].)
The court went on to point out that its decision took into account the recent full- bench judgment of the Pretoria High Court in *Legal Practitioners Indemnity Insurance Fund NPC and Others v Road Accident Fund and Others* 2024 (4) SA 594 (GP), which invalidated both the updated RAF 1 Form and the Board Notice of 2022, and ruled that the old (2008) claim form had to be used until the Minister of Transport amended it. (See [41].)
The court accordingly made an order, inter alia, (i) declaring the respondents' refusal to accept delivery of the applicant's lodgment documents unlawful; (ii) directing them to accept such delivery; and (iii) directing them to stop rejecting lodgment documents for the ostensible reason that they did not comply with the Board Notice of 2022 or the 2022 RAF 1 Form. (See [46].)

SMITH NO AND ANOTHER v MALAN NO AND ANOTHER 2024 (4) SA 624 (FB)

Company — Winding-up — Unlawful alienations and preferences — Payment made by business rescue practitioner to executor of deceased estate after lodgment of application for winding-up — Dispositions after winding-up void unless court orders otherwise — Court's discretion to validate — Where BRP and executor concluded agreement of lease in order to plant crops and generate profits for company under business rescue — Balance to be struck between rights of creditors and executor — Payments validly made — Companies Act 61 of 1973, s 341(2).

When Golden Ribbon Trading 86 (Pty) Ltd (Golden Ribbon) was in business rescue, its business rescue practitioner (BRP) had concluded an agreement with one Mr Malan in terms of which Golden Ribbon leased Mr Malan's farm, Weltevreden. This, in terms of a business rescue plan, as well as an amendment thereto, accepted by Golden

Ribbon's creditors, in terms of which it would rent several farms, including Weltevreden, in order to plant crops and generate profits for the company (see [19]).
Before Golden Ribbon was placed in liquidation — but after the liquidation application was lodged with the registrar — the BRP paid what was due under the lease agreement to Mr Malan's executors, Mr Malan having passed away. The liquidators applied to have this payment declared void as provided for in s 341(2) of the Companies Act 61 of 1973 — which renders dispositions made after winding-up void, 'unless the Court otherwise orders' — and that it be repaid to them, citing the executors of Mr Malan's estate as the respondent.
At issue was whether s 341(2) applied; and if so, whether the court should, in exercising its discretion, order otherwise.
Held
The default position ordained by s 341(2) was that every disposition of its property by a company being wound up was void, the exercise of a court's discretion under the proviso serving to balance all relevant interests. However, a court may in terms of the proviso to s 341(2) validate a payment, enjoying a wide discretion in this regard. The availability of this remedy to creditors catered entirely for any undue hardship if such existed, while the exercise of a court's discretion under the proviso served to balance all relevant interests. (see [28] – [31]).
A balance should be struck between the rights of Golden Ribbon's creditors and those of the executor in these particular circumstances. Fairness, good faith and an honest intention should be of paramount importance. An inequitable result should, if at all possible, be prevented. Here, the opportunity granted to the business rescue practitioner to rent the deceased's farm, as well as farms of other people and entities, in order to produce a harvest, was to the advantage of Golden Ribbon and its creditors, who would benefit to the prejudice of the deceased estate if the payment were not validated. Justice and fairness required that the executor should not be ordered to pay back that which has been received. The payment by the business rescue practitioner would be validated, and the main application dismissed. (See [42] – [45].)

MV TAI HARMONY: SURE SUCCESS STEAMSHIP SA v MV TAI HARMONY AND OTHERS 2024 (4) SA 640 (ECGq)

Practice — Applications and motions — Urgent applications — Procedure — Certificate of urgency — Role of presiding judge — Respondents' right to fair hearing — Eastern Cape Practice Directives, rule 12*(a)*.
Shipping — Admiralty law — Maritime claim — Enforcement — Security arrest — Top-up application — What applicant must prove — Genuine and reasonable need for increased security and prima facie claim — Test for prima facie claim — Low-level test used in applications to found or confirm jurisdiction not applicable to top-up applications — Admiralty Jurisdiction Act 105 of 1983, s 5(2)*(d)*.
Shipping — Admiralty law — Maritime claim — Enforcement — Security arrest — What applicant must prove — Genuine and reasonable need for security and prima facie claim — Test for prima facie claim — Low-level test used in applications to found or confirm jurisdiction not applicable to security arrests or top-up applications — Admiralty Jurisdiction Act 105 of 1983, s 5(2)*(d)*.

The applicant (Sure Success) filed an urgent ex parte application for an order, under s 5(2)*(d)* of the Admiralty Jurisdiction Regulation Act 105 of 1983 (the Admiralty Act), directing the respondents to furnish increased (top-up) security in respect of claims

Sure Success was pursuing against the third respondent, PBL, in London arbitration proceedings. Section 5(2)*(d)* empowered admiralty courts * to order 'that any security given [in respect of a maritime claim] be increased, reduced or discharged'. To enrol its application, Sure Success obtained an urgency directive under rule 12*(a)* of the Eastern Cape Practice Directives. The respondents argued that they were not given a fair hearing during the rule 12(a) procedure (see below).

Sure Success was the registered owner of the ship *Ever Success*, which it had over the period July 2022 – April 2023 time-chartered to PBL. In terms of the charterparty, PBL was to pay for all bunkers. When a dispute over unpaid bunkers arose between Sure Success and PBL, the matter was, in accordance with the charterparty, referred to London arbitration.

As security for its London arbitration claims, Sure Success on 18 August 2023 applied for the arrest, in Gqeberha, South Africa, of the ship *Tai Harmony* as an associated ship of *Ever Success*. The Gqeberha High Court (per Makula J) granted the application, authorising the sheriff to effect a security arrest of *Tai Harmony* under s 5(3) of the Admiralty Act. Section 5(3) allowed admiralty courts to arrest 'any property' for the purpose of providing security for in rem or in personam claims instituted or to be instituted 'in the Republic or elsewhere'.

According to precedent, the essential averments for an arrest under s 5(3) were: *(a)* at a prima facie level: that the claimant has a maritime claim enforceable in the nominated forum; *(b)* on a balance of probabilities: that the maritime claim was enforceable in South Africa by way of an action in rem or in personam; that the claimant had a genuine and reasonable need for security; that the ship to be arrested was the ship in respect of which the claim lay or an associated ship (s 3(6) and s 3(7)*(c)* of the Admiralty Act allowed South African courts to arrest an 'associated ship' instead of the ship in respect of which the claim lay).

Sure Success alleged that *Tai Harmony* was an associated ship of *Ever Success* because its registered owners, the first and second respondents (the respondents), and PBL had a common controller (under associated-ship provisions of the Admiralty Act, charterers like PBL were deemed owners for the duration of the charter (see s 3(7)*(c)*). The respondents denied any association with PBL, which, though cited as third respondent, took no part in the top-up application.

At time of the arrest of *Tai Harmony*, the unpaid-bunkers claim had not yet crystallised, with the result that the quantum of the security sought in the arrest application related only to a claim for unpaid hire. On 22 August 2023 the respondents provided security, by way of a letter of undertaking, in respect of the unpaid-hire claim (Sure Success indicated that it intended to amend its submissions in the London arbitration proceedings to include also the bunker claim).

On 18 September 2023 the respondents brought an application to set aside the arrest of the *Tai Harmony* on the ground that it was not an associated ship of the *Ever Success* (the main application). The main application was yet to be heard.

Sure Success contended that the security provided for the unpaid-hire claim (USD867 000) was insufficient because it had in November 2023 settled the bunkers claim in an amount of USD365 000 (USD436 000 with interest and costs). Sure Success wanted a new letter of undertaking for the increased sum.

The respondents resisted the top-up application on the grounds that Sure Success had failed to (i) make out a prima facie claim or (ii) establish an association between them and PBL. In relation to (i), Sure Success argued for the application of the low-level threshold used in applications to found or confirm jurisdiction, according to which

an applicant would succeed on a prima facie basis even where the probabilities were against it.
Under the abovementioned rule 12*(a)* of the Eastern Cape Practice Directives, the applicant's lawyer had to sign 'a certificate of urgency' setting out the reasons for urgency. The judge seized with the certificate would then 'make a determination solely from that certificate as to whether . . . the matter [was] sufficiently urgent' to be heard on an urgent basis. Besides arguing that *no case for urgency* was made out by Sure Success, the respondents contended that the s 12*(a)* procedure was unconstitutional because it deprived them of their right to a fair hearing.
Held
As to the respondents' right to a hearing on the rule 12*(a)* certification: A presiding judge seized with a certificate of urgency was required only to make a prima facie determination on whether the matter should be enrolled on a day other than an ordinary motion court day. A rule 12*(a)* directive did not finally dispose of the issue of urgency. The respondents had filed a comprehensive answering affidavit, as well as written heads of argument on urgency, and accordingly all issues relating to urgency were adjudicated at the hearing itself, not when the directive was issued. The respondents' right to a fair hearing was therefore not violated by the procedure adopted. (See [39] – [41], [48].)
As to urgency: The urgency for Sure Success resided in the imminent hearing of the main application for the setting-aside of the arrest. Had the top-up application not proceeded by way of urgent directive, it would have been determined after the main application, thereby depriving Sure Success of the opportunity of asking the court hearing the main application for a dismissal if the increased security was not furnished. In addition, the degree of relaxation of the rules was no greater than the exigencies demanded by the case. The respondents' assertion of non-urgency would accordingly be dismissed. (See [42] – [45].)
As to the merits — prima facie claim for increased security: The low-level test argued for by Sure Success, while justified in applications to found or confirm jurisdiction, was not suitable in applications for security arrests (and by parity of reasoning, in applications for an increase in security), which were aimed not at establishing jurisdiction, but at obtaining final relief. In applications for security arrest or top-up, the court had to determine whether a prima facie case was made out on the proved facts. * Here, the security furnished on 22 August 2023 was *plainly insufficient*, as the bunker claim had at this point not yet crystallised and no quantifiable loss incurred. Moreover, the respondents' denial of association with PBL conflicted with Makaula J's finding that such an association existed. There was, in the light of these findings, sufficient evidence to establish on a prima facie basis that Sure Success had a claim for increased security against the respondents. (See [75] – [77], [79], [84], [86].)
As to the merits — genuine and reasonable need for increased security: The reasons advanced by Sure Success for the increase in security appeared to be plausible and sound. In the absence of increased security, there would be little prospect of Sure Success obtaining payment of its claims if successful. Accordingly, Sure Success had on a balance of probabilities established the requirement of a genuine and reasonable need for such security. (See [88] – [95].)
The respondents would therefore be ordered to furnish, within five days, top-up security in the form of an additional letter of undertaking in respect of the unpaid-bunker claim, alternatively a new letter of undertaking for the increased claim (see [98] – [101]).

DIRECTOR OF PUBLIC PROSECUTIONS EASTERN CAPE v COKO 2024 (2) SACR 113 (SCA)

Rape — Defences — Consent — Nature of — Mere submission, acquiescence or lack of resistance not conveying willingness for act of sexual penetration — Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, s 3.
Rape — Defences — Consent — Nature of — Initial consent to participate could be withdrawn — Continued engagement thereafter in act of sexual penetration would constitute contravention — Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, s 3.
Appeal — Record — Voluminous record — Inclusion of unnecessary documents — Wanton disregard of rule 8(6)*(j)*(i) of Rules of Supreme Court of Appeal could result in sanctioning of those responsible.

The respondent had been convicted of rape in terms of the provisions of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, read with s 51(2)*(b)*, (3) and (6) of the Criminal Law Amendment Act 105 of 1997. On appeal, the High Court set aside the conviction and sentence. The appellant appealed against this decision. The court also heard submissions by three amici curiae in support of the appeal.
At the heart of the matter was the interpretation and approach adopted by the High Court to two crucial elements of the statutory crime of rape, namely the nature of consent to a penetrative sexual act and the form of intention required for conviction.
The charge arose from a developing relationship between the complainant and the respondent. The complainant was adamant throughout that she did not want to lose her virginity. She, however, consented to sleep over at the respondent's home. They sat on the respondent's bed and watched a movie on television. The complainant wore pyjamas without underwear (as was usual for her). They kissed each other for some considerable time and the respondent then began to take off the complainant's pyjama pants. She thwarted this by closing her legs. To put her at ease the respondent assured the complainant that he had no intention to have sexual intercourse with her, and she allowed him to take off her pyjama pants. They continued kissing and then the respondent began to perform oral sex on her. She did not object to that. The respondent testified that whilst he was performing oral sex, he also took off his pants. Then, according to the complainant, he climbed on top of her as she lay on her back and started kissing her. She dropped her guard and relaxed. The next thing, she felt a sharp pain in her vagina and realised the respondent was penetrating her vaginally. When he did this, she froze and started crying. She immediately attempted to push him off her whilst at the same time saying that he had to stop as he was hurting her. He did not heed her plea, but paused momentarily, and thereafter carried on.
Held, that mere submission, or acquiescence, or lack of resistance did not convey a willingness to engage in a penetrative sexual act. Thus, none of those would constitute consent. Further, the reference in s 3 to 'an act' could, on a rational basis, only be understood as a reference to 'a specific physical act'. The section did not refer to 'acts' that the complainant could consent to. Such an interpretation would lead to 'insensible or unbusinesslike results' or fundamentally undermine the apparent purpose of the legislation. It would be incongruent with the Sexual Offences Act to construe the

agreement to one form of sexual act to encompass all kinds of sexual acts. This meant that the complainant's willingness to engage in other acts should clearly be communicated to the perpetrator, either explicitly or tacitly. (See [56] and [61].)
Held, further, that the High Court recognised that the lack of resistance did not constitute consent to a sexual act. This notwithstanding, it went on to find that the complainant was an active participant because she did not object to several activities performed by the respondent before he penetrated her. It further found that no force was used, nor was she coerced, although the evidence supported her version that she was just lying there in shock of what was happening. Consent to penetrative sex had to be communicated by the complainant to the accused, however, and consent to foreplay did not constitute consent to an act of penetration. (See [69] – [70].)
Held, further, that it was noteworthy that after the penetration for the first time the complainant persistently demonstrated her unmistaken objection to continued penetrative sex by pushing the respondent away and telling him to stop, and that he was hurting her. Even on his own version, he accepted that the complainant told him that it was painful, but he merely paused and continued without establishing from the complainant whether he could continue. Thus, subsequent to the withdrawal of consent previously granted, any continued engagement in an act of sexual prenetration in relation to which consent had subsequently been withdrawn would constitute a contravention of s 3. (See [75] and [77].)
Held, further, that, taking into account the conspectus of the evidence, there could be no doubt that rape was proved beyond a reasonable doubt in the present case and the High Court's interference with the findings of the trial court was not warranted. The inevitable consequence was that the conviction by the trial court fell to be reinstated. Insofar as the sentence imposed by the trial court was concerned, different considerations applied, and the matter had to be remitted to the High Court to determine whether the sentence imposed by the regional court was appropriate. (See [84] and [88] – [90].)
The court found it regrettably necessary to comment adversely on the state of the record which comprised three volumes running to 398 pages. Included were irrelevant documents that had no bearing on what was at stake in the appeal, such as the transcript of the addresses of the legal representatives during the application for leave to appeal, and the transcript of the argument when the appeal was heard in the High Court, all of which amounted to 105 pages of the record. That was a flagrant disregard of rule 8(6)*(j)*(i) of the Rules of the Supreme Court of Appeal. Practitioners were cautioned that, should this sort of wanton disregard for its rules persist, the court might well seriously consider sanctioning those responsible as a mark of its displeasure. (See [97] – [98].)

HLAPE v MINISTER OF POLICE 2024 (2) SACR 148 (SCA)

Arrest — Without warrant — Criminal Procedure Act 51 of 1977, s 40(1) — Failure to exercise discretion to arrest — Onus — Burden of proof — Party alleging failure to exercise discretion bearing onus of proof thereof — In casu, no evidence of failure to exercise discretion.
Arrest — Without warrant — Criminal Procedure Act 51 of 1977, s 40(1) — Exercise of discretion to arrest — Principles in relation thereto set out.

The appellant appealed against the dismissal by the High Court, of his appeal from a judgment in a magistrates' court, which had dismissed his claim for unlawful arrest and

detention. He contended on appeal, inter alia, that the police had failed to exercise their discretion to arrest him for being in possession of dagga, and that his detention in the police cells for three days was unlawful.

Held

There were three important principles in the exercise of a discretion when effecting an arrest: first, once the required jurisdictional facts that flowed from s 40(1) of the Criminal Procedure Act 51 of 1977 (the CPA) were present, a discretion arose as to whether to arrest. Secondly, where a party alleged the failure to exercise a discretion to arrest, that party bore the onus to prove that allegation. Thirdly, that the general requirement was that any such discretion had to be exercised in good faith, rationally and not arbitrarily.

The evidence relating to the arrest was that the appellant had failed to respond to the officer's question whether he was in possession of dagga and there were no facts placed before the arresting officer in order for him to exercise a discretion or a value judgment to consider other means, other than an arrest, of securing the appellant's presence in court. The appellant did not present evidence that the officer acted in bad faith, arbitrarily or irrationally as his intention would then have presumably been not to secure the appellant's attendance at court. On the contrary the officer testified during cross-examination that he informed the appellant of the reason he was arresting him for being in possession of dagga. There was therefore no evidence supporting the allegation that there was no exercise of a discretion to arrest or that the arrest was made in bad faith, irrationally or arbitrarily. (See [12] and [14] – [15].) The appeal was ultimately dismissed.

S v LENTING AND OTHERS 2024 (2) SACR 157 (WCC)

Evidence — Witnesses — Appointment of intermediary in terms of s 170A(1)(b) of Criminal Procedure Act 51 of 1977 — Witnesses were children when viewing events forming substance of subsequent trial, but had since attained majority — Uncontroverted evidence of clinical psychologist that necessary for such witnesses to testify through intermediary — Court ordering accordingly.

Evidence — Witnesses — Appointment of intermediary in terms of s 170A(1)(b) of Criminal Procedure Act 51 of 1977 — Application of where offences committed before its coming into effect — Provision not affecting substantive rights and therefore applicable to both pending and future cases.

In a criminal trial involving 20 accused persons on 123 charges of murder and the illegal possession of firearms and ammunition, the state wished to lead the evidence of two witnesses who had been minors at the time of the offences. They had since attained majority. Both had been witnesses to scenes of extreme violence and were traumatised by the events. The state applied, inter alia, to lead their evidence through an intermediary in terms of ss 170A of the Criminal Procedure Act 51 of 1977. The state led the evidence of a clinical psychologist who testified that the second witness suffered a mild intellectual impairment. She recommended that both witnesses testify through an intermediary. As the first witness would need someone to assist him if he became psychotic, it had to be a person who could see that the witness was decomposing into psychosis.

After examining the history of amendments to s 170 over the years, the court held that s 170A(1)(a) dealt with young witnesses, whereas para (b) applied to witnesses who suffered from a physical, psychological, mental or emotional condition. The amendments, however, came into effect after the commission of offences and the general rule was that a statute was as far as possible to be construed as operating only on facts that came into existence after its passing. Despite this, the court held that a distinction had to be drawn between those amendments that were merely procedural in nature and those that affected substantive rights. New procedural legislation designed to govern only the manner in which rights were asserted or enforced did not affect the substance of those rights and therefore such legislation was presumed to apply immediately to both pending and future cases. (See [34] – [35].)

Held, that the evidence of the clinical psychologist remained uncontroverted, and it was her view that if the two witnesses were to be called to testify in court without the assistance of a court-appointed intermediary, they could decompensate during their evidence. It was clear from the evidential material placed before the court that the two witnesses suffered from psychological and emotional conditions as envisaged in the amended s 170A(1)(b). They would suffer undue psychological trauma and mental stress if they testified without the assistance of an intermediary. (See [52] – [53].) The court ordered accordingly.

S v MOKONE AND ANOTHER 2024 (2) SACR 175 (GP)

Appeal — Powers of court on appeal — Legal representative representing two accused who had conflicting versions — Conflict of interest raised for first time on appeal — No bar to irregularity being raised for first time on appeal — Criminal Procedure Act 51 of 1977, s 322(1).

In an appeal against the convictions and sentences of the two appellants in a regional court it was contended that there had been a conflict of interest by the legal representative of the two accused in a matter where the first appellant was found guilty of two counts of rape and a count of robbery with aggravating circumstances, and the second appellant was found guilty on two counts of rape. Both appellants were sentenced to life imprisonment on each of the counts of rape. They were represented by the same legal-aid attorney. The complainant had testified that she and three companions were walking at night in the street and two men approached them. One grabbed her arm and the other chased after her companions who fled. The appellants took her to a nearby field and both raped her, one after the other. They then left and, when they reached a passage, both raped her again. The first appellant also took a jacket she was wearing. The first appellant testified that he had sexual intercourse with the complainant, and the second appellant had intercourse with the complainant and another woman. The second appellant testified that on the night in question he and the first appellant were listening to music and drinking, and he became intoxicated. When they reached his home he immediately fell asleep. He denied having sexual intercourse with the complainant. It was put to him that the first appellant had testified that they had intercourse with both the other woman and the complainant. He insisted that no intercourse had happened. The second appellant raise the question of a conflict of interest for the first time on appeal.
Held, that, in answer to the question that arose as to whether a conflict of interest could be raised for the first time on appeal, there was no bar to an irregularity being raised

for the first time on appeal. This was covered by s 322(1) of the Criminal Procedure Act 51 of 1977 (the CPA). (See [13].)
Held, further, the second appellant had not had a fair trial. Not only was his version not put to the state witness, but it was not put to the first appellant either. Although legally represented, the second appellant's representation was illusory. Where basic rights had been infringed, the second appellant had not received a fair trial and his convictions and sentences had to be set aside. Even if the conflict only arose later on in the trial, there was a duty on the legal representative to withdraw. (See [24] – [26].)
Held, further, that the conflict of interest did not affect the convictions and sentences of the first appellant, and the appeal against his convictions and sentences had to be dismissed.

DIRECTOR OF PUBLIC PROSECUTIONS, WESTERN CAPE v BONGO 2024 (2) SACR 183 (SCA)

Corruption — Contravention of s 4(1) of Combating of Corrupt Activities Act 12 of 2004 — Element of gratification — What constitutes — Accused having offered money to public officer in form of blank cheque and asked to name his price to sabotage parliamentary enquiry — Not necessary to offer specific sum of money as gratification.
Appeal — Reservation of question of law — Question of law — What constitutes — Misdirection by trial court as to elements of offence of corruption and erroneous reliance on previous consistent statement constituting questions of law — Order discharging respondent set aside and matter remitted for trial de novo.

The applicant sought leave to appeal against the High Court's refusal of the state's application to reserve questions of law for determination by the court in terms of s 319 of the Criminal Procedure Act 51 of 1977 (the CPA). The questions all related to the trial court's decision to discharge the respondent at the close of the state's case in terms of s 174 of the CPA. The respondent was arraigned in the High Court on one count and two alternative counts of corruption. The state alleged that the respondent had wrongfully and intentionally offered to give gratification to the Senior Manager: Legal and Constitutional Services in the office of the Speaker of Parliament to induce him to fake illness, take sick leave, or otherwise assist the respondent to delay or stop an enquiry conducted by a Portfolio Committee into the affairs of Eskom.
The respondent pleaded not guilty. The state called several witnesses and, after it closed its case, the respondent applied for discharge in terms of s 174, which was granted. The state then filed an application to reserve six questions of law in terms of s 319. Two of these questions were considered by the court in the present matter. They were: whether the trial court correctly applied the elements of the offence of corruption when it found that the state did not prove the offence of corruption as a result of no arrangements having been made with the official for payment; and whether the trial court properly used what it found to be the respondent's previous consistent statement, to accept that the uncontested version of the respondent was credible and the state's version lacked credibility, for the purposes of the s 174 application.
Held, that, as to the first question, it was manifest that the element of gratification had been established, at least on the official's version. The respondent had allegedly offered money to him, albeit in the form of a blank cheque, namely that he was asked to name his price. He had refused the offer of gratification and there were accordingly no arrangements for follow-up meetings. They could hardly be a more straightforward and unambiguous account of the unlawful offering of gratification to a public officer to

induce him to perform a proscribed act. That the trial court was oblivious to this unequivocal and overweight evidence of the commission of the crime of corruption could only be ascribed to this fundamentally erroneous understanding of the elements of that crime. (See [47] – [48].)
Held, further, that the trial court was of the erroneous view that the respondent's request for the official to collapse the enquiry could only constitute the crime of corruption if the latter had been offered a specific sum of money as gratification. Apart from it conflicting with established legal principles, that understanding was oblivious to the purposely wide definition accorded to 'gratification' in terms of s 1 of the Prevention and Combating of Corrupt Activities Act 12 of 2004. (See [52].)
Held, as to the second question, the respondent's argument, that the trial court, although finding that the statement was a previous consistent statement, did not refer to it in order to admit it as a previous consistent statement, but merely to demonstrate that it was not a previous inconsistent statement as contended for by the state, was at odds with the trial court's unambiguous statements in the record. There could therefore be little doubt that the trial court had found corroboration in the statement for the version put to the state witnesses on the respondent's behalf. The respondent had not adduced any evidence under oath and the trial court therefore committed a material misdirection by holding that the statement had probative value. (See [55] – [57].) The court held therefore that the two questions had to be reserved for determination by the court and that they were determined in favour of the state. The order of the trial court discharging the respondent was set aside and the matter remitted for trial de novo. (See [62].)

S v NKOSIKHONA 2024 (2) SACR 200 (GJ)

Bail — Application for — Onus — On accused — Section 60(11) of Criminal Procedure Act 51 of 1977 — Exceptional circumstances — Possibility that appellant be found guilty on basis of common purpose not exceptional circumstance to release accused on bail.

The appellant appealed from the refusal of bail in a regional court where he was facing a charge of premeditated murder. He contended, inter alia, that the court a quo misdirected itself by accepting video evidence showing him having a discussion with other Zulu males prior to the shooting of the deceased, and incorrectly assumed that the appellant associated himself with the killing of the deceased on the basis of common purpose. He contended that he disassociated himself from the actions of the shooter.
Held, the appellant bore the onus to satisfy the court, on a balance of probabilities, that exceptional circumstances existed which in the interests of justice permitted his release. A mere denial of the considerations and/or probabilities of events, as contained in s 60(4) – (9) of the Criminal Procedure Act 51 of 1977, would not suffice in order to succeed in convincing the court of the existence of exceptional circumstances. The appellant had not presented viva voce evidence to discharge the onus and relied on an affidavit accepted as an exhibit in the bail proceedings. In his affidavit he stated that, although he was in the company of the shooter, he left the scene as he was in shock. He stated that he was also not found in possession of a gun, and he cooperated fully with the police. (See [25] and [26].)
Held, further, that, from the evidence available, it was clear that the appellant did not try to stop the shooter firing a shot and, furthermore, after the shot was fired, he walked

back to his home without alerting the police. This did not appear to be an act of disassociation. In addition, should the appellant be found guilty on the basis of common purpose, this was not an exceptional circumstance to release the appellant on bail. (See [39].) The appeal was dismissed.

S v SEDI 2024 (2) SACR 210 (FB)

Bail — Application for — Nature of enquiry — Fundamental difference between objective of bail proceedings and that of trial — Possible guilt of accused relevant only to extent it may have bearing on interests of justice.

In an appeal against the refusal of bail in criminal proceedings against the appellant in a magistrates' court, on a charge of the breach of a protection order in terms of s 17 of the Domestic Violence Act 16 of 1998, the court noted that the magistrate hearing the application believed that he was involved in a criminal trial and not a bail application, and even recorded in his handwriting after the parties' closing arguments: 'guilty'.

Held

There was a fundamental difference between the objective of bail proceedings and that of the trial. In a bail application the enquiry was not really concerned with the question of guilt, which was the task of the trial court, but the court was concerned with the question of possible guilt only to the extent that it may bear on where the interests of justice lay in regard to bail. The focus at the bail stage was to decide whether the interests of justice permitted the release of the accused pending trial, and that entailed, in the main, protecting the investigation and the prosecution of the case against hindrance. The court had misdirected itself materially both on the facts and the legal principles. It had also become unnecessarily emotional, with the magistrate recording that 'this case will go to the regional court where you can be sentenced to 10 years' imprisonment', without considering that the parties, had a 10-year-old child and that they were in a relationship for about 11 years. In the process the court had neglected to consider s 28(2) of the Constitution, which stipulated that the child's best interests were of paramount importance in every matter concerning the child. If the appellant were kept in custody pending a criminal trial that might take months to be finalised, he would surely be dismissed by his employer and in such case the child would have to forfeit maintenance. (See [13] – [19].) The appeal against dismissal of bail was upheld. Bail was set at R2000 on certain strict conditions regarding contact.

S v MAHLANGU 2024 (2) SACR 219 (GP)

Rape — Sentence — Statutory rape — Accused, 18-year-old student, enticed by 14-year-old girl to have intercourse — Accused sentenced to eight years' imprisonment — Sentence set aside on appeal and replaced with suspended sentence — Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, s 15(1).

The appellant was charged in a regional court of contravening s 15(1) of the Sexual Offences and Related Matters Amendment Act 32 of 2007 (statutory rape). He was sentenced to eight years' direct imprisonment. It appeared that the appellant was an 18-year-old grade 12 student, and the complainant was a grade 8 student, who was 14 years old at the relevant time. Video footage confirmed that the complainant had

approached the appellant after having expressed interest in him, and asked him to accompany her. At some point the complainant sought to kiss the appellant but he advised her to stop, as there was a video camera, and that they should move to another location. When reaching the new location, they continued kissing and engaged in consensual sexual intercourse. That was captured on CCTV footage. The complainant did not report the incident on her own and the investigation commenced when a few days after the incident the school governing body decided to institute disciplinary action against the complainant. The state conceded that the complainant had played a very active role during the sexual encounter and that she had not been forced to participate.
On appeal, the court held that the magistrate had failed to take into account the fact that the appellant was a first offender and did not have the mind-set of a mature adult. He had also pleaded guilty. The prosecution had proposed a suspended sentence, alternatively a sentence in terms of s 276(1)*(h)* of the Criminal Procedure Act 51 of 1977. In the circumstances, a suspended sentence would be appropriate, even though the consensual sexual encounter with the complainant was a serious offence. However, the court was required to consider all the facts, in particular the mitigating factors, as well as the circumstances that led to the incident. (See [18] – [36].) The sentence was replaced with three years' imprisonment, wholly suspended for five years.

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Afriforum v Economic Freedom Fighters and others (Rule of Law Project - Free Market Foundation as *amicus curiae*) [2024] 3 All SA 319 (SCA)

Civil Procedure – Application for recusal of judge – Allegation of apprehension of bias – Presumption of impartiality – Test for recusal involves the applicant bearing the onus of establishing bias or a reasonable apprehension of bias – Whether a reasonable, objective and informed person would, on the correct facts, reasonably apprehend that the judge had not, or would not bring, an impartial mind to bear on the adjudication of the case.

Constitutional and Administrative Law – Hate speech – Singing of “kill the boer” song – Prohibition of hate speech in section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 – Impugned words must be based on one of the identified prohibited grounds, and words must be capable of being reasonably construed to demonstrate a clear intention to be harmful or to incite harm and to promote or propagate hatred – Constitution requiring a measure of tolerance and reasonably well-informed person would understand that singing of the song was no more than the exercise of the right to freedom of expression.

The appellant (“AfriForum”) lodged a complaint in the Equality Court, in terms of section 20 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the “Equality Act”), averring that the respondents had committed hate speech in terms of section 10(1) of the Act. The complaint centred, in the main, on the words in a song sung by the respondents, translating to “Kill the Boer – the farmer”.

Before dealing with the merits of the appeal, the Court had to address an application instituted by AfriForum for the recusal of one of the judges of the court, based on comments she had made about AfriForum in a previous case, which AfriForum perceived to display bias against it.

Held – It is assumed that judges can disabuse their minds of any irrelevant personal beliefs or predispositions. The effects of the presumption of impartiality are that a judge will not lightly be presumed to be biased. That presumption is not easily dislodged, and cogent evidence demonstrating bias or a reasonable apprehension of it is required. Judges have a duty to sit in any case in which they are not obliged to recuse themselves. The presumption of impartiality must always be taken into account when conducting the inquiry into bias or a reasonable apprehension of bias. The test for recusal is objective, with the applicant bearing the onus of establishing bias or a reasonable apprehension of bias. The question is whether a reasonable, objective and informed person would, on the correct facts, reasonably apprehend that the judge has not, or will not bring, an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of Counsel. The test requires a reasonable apprehension that the judicial officer *might* be biased, not that they *would* be biased. In this case, it could not be said that the test for recusal had been met or that there was any reason to apprehend bias from the judge in question.

The legal principles regulating the prohibition of hate speech incorporate a delicate balance between the fundamental rights to freedom of expression, dignity and equality. Freedom of expression is protected under section 16(1) of the Constitution. However, section 16(2) qualifies that right by excluding from its protection the advocacy of hate based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm. Speech that is merely unpopular, offensive or shocking remains protected under section 16(1). Hate speech is expressly prohibited under section 10 of the Equality Act. Section 10(1) postulates a two-stage hate speech inquiry. The first leg is directed at establishing that the impugned words are based on one of the identified prohibited grounds. If that is established by the complainant, the second leg of the inquiry is to determine whether the words could reasonably be construed to demonstrate a clear intention to be harmful or to incite harm and to promote or propagate hatred.

With regard to the hate speech complaint, the reasonably well-informed person would understand the context in which the song was sung. The Constitution requires a measure of tolerance and the singing of the song was no more than the exercise of the right to freedom of expression. The appeal was dismissed.

AIG South Africa Limited v 43 Air School Holdings (Pty) Ltd and others [2024] 3 All SA 344 (SCA)

Corporate and Commercial – Insurance – Indemnity for interruption of business – The fact that multiple entities were insured did not mean that the policy was a joint one and the nature of the interest in the subject matter established that the policy was a composite one – Failure to give insurer notification of claim suspending insurer's liability in terms of policy.

The appellant ("AIG") was the insurer of the second respondent ("43 Air School") and, in terms of the insurance policy, was also said to be the insurer of the remaining respondents as associated companies. Business interruption cover was provided for in the policy, and covered interruptions to the business of the insured caused by a defined event that occurred during the period of insurance. The insured event included the outbreak of infectious or contagious diseases, such as Covid-19, within a radius of 25 km of the premises.

An outbreak of Covid-19 occurred within a radius of 25 km of the business address of the third and fourth respondents ("PTC" and "JOC") and of the address of 43 Air School. Consequently, 43 Air School submitted two claims to AIG relating to two business interruptions, and a third claim relating to a Covid-19 outbreak within 25 km of PTC's and JOC's premises. AIG's repudiation of the claims led to the respondents approaching the High Court for relief. The court's granting of the relief sought led to an appeal by AIG, which denied liability for the first and second claims of 43 Air School, contending that no evidence was adduced to trigger AIG's liability under the policy. It also disputed 43 Air School's entitlement to claim under the policy, relying on the outbreak of Covid-19 in multiple premises based on its contention that the policy was a joint one in respect of 43 Air School, PTC and JOC. The third claim was said to be bad in law because it was based on the respondents' erroneous contention that the policy was a joint one, and because 43 Air School did not comply with the reporting clause in the policy in respect of the third claim. The defence to PTC's claim was that it was not an insured under the policy and had not complied with the reporting clause, and the defence to JOC's claim was solely that JOC did not comply with the reporting clause.

Held – The issues were whether the policy in respect of business interruption was joint or composite; whether the respondents had to comply with the reporting clauses in the policy before bringing the application and before rendering AIG liable under the policy; whether PTC was insured under the policy; and whether 43 Air School, in respect of its first and second claims, had proved that it ought to be indemnified for its loss.

The mere fact that there are several entities insured under one policy does not make that policy one of joint insurance. The nature of the interest in the subject matter is the decisive determinant. If their interest in the subject matter of the insurance is joint, in that they are exposed to the same risk and would suffer the same loss on occurrence of the peril insured against, that may be indicative of the policy being joint. However, where their interests are different, even though it is in respect of the same subject-matter, the policy would not be a joint one, but composite, which is intended to insure each of the insured separately in respect of its own interests. The subject matter of the business interruption insurance was the gross profit of the insured entity. As the different entities did not have a common interest in each other's gross profit, the policy was composite rather than joint.

Further, the reporting requirement was a condition precedent to the liability of the insurer in the sense that a failure to comply with it suspended AIG's liability under the policy.

43 Air School was found to have established the required link between its losses and the outbreak of Covid-19 within the agreed radius of its premises in the first two claims. AIG's liability in that regard was established in respect of those claims, but not the third claim. AIG's defences to the claims by PTC and JOC were upheld.

Botha and others NNO v Jonker and others [2024] 3 All SA 365 (SCA)

Insolvency – Liquidation of close corporation – Liquidator's powers and duties – First meeting of creditors – Section 78(1) of the Close Corporations Act 69 of 1984 requiring consent of the Master to convene a meeting after the expiry of one month from the date of final order of liquidation – Consent of Master may be obtained after a meeting has been summoned but before the meeting is held.

The respondents were summoned to appear at a second meeting of creditors of a close corporation ("CC") in liquidation, for the purposes of an enquiry into its affairs. The respondents obtained a rule nisi before the High Court, setting aside as invalid the proceedings of the first meeting and all resolutions adopted at the meeting. The rule nisi was confirmed on the return date. The Court reasoned that section 78(1) of the Close Corporations Act 69 of 1984 was peremptory in requiring the consent of the Master to convene a meeting after the expiry of the period of one month from the date of final order of liquidation. The present appeal was brought by the joint liquidators of the CC.

Held – Two issues arose for consideration on appeal. The preliminary question was whether the liquidators had, by their conduct, acquiesced in the High Court order, thereby waiving their right of appeal. The second, substantive question concerned the meaning and effect of section 78(1) of the Close Corporations Act.

Apart from the fact that the liquidators had summoned a meeting of creditors, authorised by the High Court order, there was no evidence which pointed to a waiver of rights or acquiescence in the order. Nor was that the only inference to be drawn from the summoning of the meeting. Accordingly, the onus to prove acquiescence could not be discharged.

The formal administration of the liquidation of a close corporation commences when the liquidator is appointed. Upon appointment the liquidator takes charge of the affairs of the corporation. The duty to execute the liquidation process, in accordance with legislation and subject to the control and oversight of the Master, commences upon appointment. Section 78(1) imposes the duty to summon the first meeting of creditors and members, upon the liquidator. It requires that the meeting be summoned not later than one month after the final order of liquidation is made. The section does not specify how the meeting is to be summoned. Since a liquidator of a close corporation is appointed at the stage of provisional liquidation, the authority to summon the first meeting of creditors must necessarily be exercised by the liquidator. The wording of the section showed that it was intended that the liquidator's authority was to be limited, and that the consent of the Master was a necessary condition for the exercise of the authority conferred by the section. It had to be construed as conferring upon the Master the power to either grant or withhold consent to a liquidator acting in terms of section 78(1). The central question related to when the required consent may be obtained. The respondent contended that the Master's consent to summon a meeting after the expiry of the period, had to be obtained prior to the meeting being summoned, and if that was not done, the act of summoning the meeting was unauthorised and invalid. The plain language of the section established that if the liquidator exercised the authority to summon the meeting after the expiry of the one-month period, it could only be exercised with the consent of the Master. The section, however, did not state that consent must be obtained prior to the meeting being summoned. The consent of the Master may be obtained after a meeting has been summoned but before the meeting is held. In this case the Master was asked to consent after the meeting had been held, and correctly refused consent.

The High Court's conclusion was confirmed by the majority on appeal.

In a dissenting judgment, the view was that that there is nothing in the text of section 78(1) that precludes the Master from granting consent, even retrospectively, to the summoning of a meeting of creditors and members of the corporate entity in liquidation, which has already taken place even after the expiry of the period of one month as prescribed in the section.

Irankunda and another v Director of Asylum Seeker Management: Department of Home Affairs and others (Scalabrini Centre of Cape Town as *amicus curiae*) [2024] 3 All SA 384 (SCA)

Immigration – Asylum applications – Principle of non-refoulement – Refugee status sur place – Renewed application – Whether a person whose application for refuge has been declined is entitled to submit further applications, and whether any renewed application had to be made only after applicant returned to country of origin – Once a refugee sur place claim was made, there was no basis to demand that an asylum seeker returned to their country of origin pending the determination of their application.

The appellants were Burundian nationals, seeking to submit further asylum applications in South Africa after their initial applications were unsuccessful. The first respondent (the "Director") had determined that the appellants could not again apply for asylum in South Africa without returning to their country of origin. The High Court dismissed the appellants' application, leading to the present appeal.

Held – The issue on appeal was whether a person whose application for refuge has been declined is entitled to submit further applications, and if so, the circumstances under which such applications may be submitted, and the factors to be taken into account when considering such applications. The Court had to consider the relevant international instruments foundational to refugee law; our domestic refugee legislation; and some foreign law. The Refugees Act 130 of 1998 gives effect to the relevant international legal instruments, principles and standards relating to refugees. The merits of the appeal were considered within that framework.

This case implicated two interrelated concepts of international law. The first was the customary international law principle of non-refoulement, in terms of which a person fleeing persecution should not be made to return to the country inflicting it. The second is refugee status sur place, which refers to a person who was not a refugee when he left his country, but who became a refugee at a later date due to circumstances arising in his country of origin during his absence. South Africa has not yet developed a significant jurisprudence on sur place refugee claims, and the court looked to foreign law.

The appellants did not flee Burundi because of any persecution, nor did they have a well-founded fear of persecution upon their arrival in South Africa. On their version, their alleged fear of persecution only arose in 2015, when, according to them, the political situation in Burundi changed for the worse, with widespread political violence. The appellants alleged that thousands of Burundians had fled the country, and those who remained were subjected to oppression, torture, rape, and sexual violence. Alleging that it was not safe for them to return to Burundi, as they would be placed at risk of persecution or serious threat to their lives, safety and/or physical freedom, the appellants considered themselves to be sur place refugees, and made new applications for asylum as such. Regarding whether a person whose refugee application has been declined is entitled to submit subsequent applications, the court

established that there was no bar to subsequent claims, as long as there was a valid basis therefor. Such person may not submit one application after the other when the previous one had been finally determined. For such applicants, the period between the final rejection of their asylum and their departure, was regulated by the Immigration Act. Without any permit to remain in the country, such applicants were regarded as illegal foreigners as defined in the Immigration Act, section 32 of which provided that "any illegal foreigner shall depart unless authorised by the Department to remain in the Republic". Once a refugee sur place claim was made, there was no basis to demand that an asylum seeker returned to their country of origin pending the determination of their application; or to reject the application on the basis that the initial one had been finally determined. The appeal was upheld.

Old Mutual Unit Trust Managers Limited v Living Hands (Pty) Ltd and others [2024] 3 All SA 407 (SCA)

Delict/Personal Injury – Claim for damages in delict, based on alleged negligent omission by financial institution which caused client to suffer pure economic loss – Whether elements of delictual liability, consisting of wrongfulness, negligence and causation, were established – Investment manager not attracting any liability in delict for subsequent misappropriation of investment funds by client's own directors where funds were paid out on client's instruction and in terms of investment agreement.

The first to third respondents in their capacities as the trustees of a trust, instituted action against the appellant ("OMUT"), claiming damages in delict, based on a negligent omission by OMUT which caused the trust to suffer pure economic loss. Unusually, the undisputed primary cause of the loss was the criminal conduct of individuals comprising the controlling mind of the first respondent, a trust administration company. At the relevant times, it was the sole trustee of the trust and the sole plaintiff when the action was instituted. The High Court upheld the claim, but OMUT was granted leave to appeal the order dismissing its claim for apportionment against the first respondent, and a contribution from the fourth to ninth respondents (the "third parties").

In 2002, the first respondent entered into an agreement with OMUT pertaining to the buying, selling and switching of units in portfolios administered by OMUT, a manager as defined in the Collective Investment Schemes Control Act 45 of 2002. In 2004, OMUT was presented with a letter confirming the appointment of Fidentia Asset Managers ("FAM") as the portfolio manager of the trust, and an instruction by FAM to OMUT to liquidate R150 million of the trust's assets with immediate effect, and to transfer the proceeds into FAM's trust account. The first respondent subsequently informed OMUT that it was calling up its entire investment portfolio with OMUT with immediate effect, and requested OMUT to transfer the funds to the first respondent's bank account. OMUT requested confirmation of authority, and on receipt of a letter from the first respondent, it paid all the funds which the first respondent had invested through OMUT in various collective investment schemes, totalling R1 130 319 447,32, into the first respondent's designated bank account. The first respondent transferred the investment portfolio to FAM, after which an amount of R854 654 of the funds were misappropriated by the first respondent's directors. The respondents alleged that by repaying the funds to the first respondent, OMUT had acted wrongfully and that the

Fidentia wrongdoers would not have been able to act as they did, had OMUT complied with its alleged duties.

Held – On appeal the central issue was whether the respondents had established wrongfulness, negligence and causation, which were the elements of delictual liability. The appellants had to show that an entity in the position of OMUT, which carried out an instruction of its client to call up an investment, owed a legal duty not to cause harm to the beneficiaries of the trusts administered by that client. OMUT had acted as any reasonable investment manager would have done. It ensured that the instruction from the first respondent was properly authorised, and then acted upon it as contractually bound to do. The respondents' loss occurred as a result of theft and fraud by its directors. None of the statutory and constitutional provisions on which they relied granted them a right of action, or a basis for inferring a claim for civil damages at common law. In any event, the loss was not foreseeable. It would be unreasonable and overly burdensome to impose liability on OMUT.

The High Court's finding of negligence was based, not on any failure by OMUT to act prudently, but on its failure to notify the regulatory bodies (not specified) of the disinvestment. That finding was erroneous as there was nothing to report to any regulatory body. The findings on causation were also unsupportable. The loss was too remote to be recoverable from OMUT as damages and was not of a kind that was reasonably foreseeable. The appeal was accordingly dismissed.

City of Cape Town v Various Occupiers and another [2024] 3 All SA 428 (WCC)

Property – Eviction – Application by city to evict people living on pavements in city – City required to meaningfully engage with unlawful occupiers, and court must establish whether there is a risk that order of eviction would render occupiers homeless – Safe spaces offered by city constituting suitable alternative accommodation in circumstances relating to occupiers in the present case – Overriding question is whether eviction was just and equitable.

In terms of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998, the City of Cape Town sought to evict approximately 200 people (the "Occupiers") who lived on seven pavements or road reserves that the City owned around its central business district ("CBD"). It offered all the people it sought to evict alternative accommodation in "safe spaces" that it had developed in the City centre. Some of the occupiers were willing to take up the City's offer, but others questioned the suitability of the safe spaces and wanted the City to explore alternatives with them, and to find joint solutions.

The City brought the application not only to vindicate its rights as owner, but also in the public interest, and to vindicate the rights of members of the public who used the CBD.

Held – Section 26(3) of the Constitution prohibited evictions without an order of court having been made after considering all relevant circumstances. Two central factors which a court must consider in an eviction application by an Organ of State are whether the municipality has meaningfully engaged with the occupiers, and whether there is a risk that the order of eviction would render the occupiers homeless. The overriding question of whether eviction was just and equitable had to be assessed in light of the above two considerations. Explaining what meaningful engagement entailed, the Court warned against imposing a process that was so burdensome that it unduly

inhibited a municipality from legitimately pursuing the eviction of unlawful occupiers. In the present case, while imperfect, meaningful engagement with the Occupiers did occur. On the avoidance of homelessness, the Occupiers argued that the City wrongly did not offer them accommodation in temporary relocation areas built in terms of the City's Emergency Housing Programme. They wanted houses of their own, not temporary shelter in safe spaces. However, it was found that in the circumstances in which the Occupiers found themselves, the safe spaces were suitable alternative accommodation. That might or might not be true for all occupiers in all circumstances. In this case, the safe spaces constituted adequate alternative accommodation, being better than the occupiers' current conditions, and offered enough to meet the standard of adequacy. The rules of the safe spaces might have been too restrictive, but had since been relaxed to accommodate all the Occupiers' legitimate concerns.

On careful consideration of all the relevant factors, the Court concluded that eviction was just and equitable. To ensure that the eviction did not impact unduly harshly on the Occupiers, the conditions under which it would be carried out was regulated by the court. A detailed order was therefore made, to ensure that the Occupiers' rights were fully respected.

Dangerous Goods International SA (Pty) Ltd v Jag Freight (Pty) Ltd and another [2024] 3 All SA 481 (WCC)

Corporate and Commercial – Unlawful competition – Application for provisional liquidation on basis that entity was an alleged unlawful competitor of the applicant – Court will ordinarily refuse application for winding-up of a company if the company bona fide disputes the existence of the alleged debt on which the applicant's claim is based on reasonable grounds.

The applicant was a global logistics company specialising in the transportation of hazardous goods worldwide. The second respondent ("Geysman"), who was the sole director and shareholder of the first respondent ("JAG"), had been employed by the applicant in 2015 and was suspended from employment in 2023. According to the applicant, Geysman had breached the fiduciary duties which he owed the applicant while employed by it, by utilising JAG to unlawfully compete with the applicant. Based on the allegation of unlawful competition, and a further allegation that the only reason for the existence of JAG was to compete unlawfully with the applicant, the applicant sought to place JAG under provisional liquidation on the ground that it was just and equitable to do so in terms of section 344(h) of the Companies Act 61 of 1973, alternatively in terms of section 81(1)(c)(ii) of the Companies Act 71 of 2008. The winding-up order was sought on the basis that JAG was an alleged unlawful competitor of the applicant.

Held – The issues were whether unlawful competition is a legal ground for a provisional winding-up order; whether the applicant had locus standi to bring the application; and whether the applicant had satisfied the requirements for a provisional winding-up order.

Unlawful competition gives rise to two causes of action, namely a delictual claim for damages and/or a claim for interdictory relief. The applicant was entitled to pursue those remedies against the respondents. South African law has, to date, not recognised unlawful competition as a ground for the granting of a winding-up order on the just and equitable ground.

The applicant was neither a director nor a shareholder of JAG, and to qualify as having the necessary locus standi to bring the application, it had to establish that it was a creditor of JAG. In the absence of a direct debtor-creditor relationship, the applicant relied on the law of attribution or vicarious liability of JAG for the wrongs of Geysman to establish the necessary vinculum iuris between itself and JAG. The Court accepted that Geysman's unlawful conduct could be attributed to the first respondent. The applicant had thus established a vinculum iuris to JAG and consequently had locus standi to bring the application.

In terms of what is known as the "Badenhorst Rule", even if the applicant establishes its claim on a prima facie basis, a court will ordinarily refuse an application for the winding-up of a company if the company bona fide disputes the existence of the alleged debt on which the applicant's claim is based on reasonable grounds.

The test at the provisional stage of a liquidation application requires an applicant to establish an entitlement to an order on a prima facie basis. The applicant's claim for disgorgement of secret profits related to Geyman's conduct and lay against him personally, and could not be pursued against JAG, who owed the applicant no fiduciary duty.

A further claim for damages arose from the diverting of the applicant's work to JAG and usurping of the applicant's contracts in favour of JAG. Even though the applicant established its entitlement to claim damages on a prima facie basis, the claims against JAG were disputed bona fide on reasonable grounds.

The provisional liquidation application was accordingly refused.

Grenco Projects and Construction CC v Hermanus Esplanade Dev Co (Pty) Ltd [2024] 3 All SA 504 (WCC)

Corporate and Commercial – Construction agreement – Non-payment of amounts due based on payment certificates – Application for provisional winding-up order – Section 344(f) of the Companies Act 61 of 1973 provides that a company may be wound up by the court if it is unable to pay its debts as described in section 345 – Section 344(h) of Companies Act provides that a company may be wound up if it appears to the court that it is just and equitable – Debtor bears onus of showing that a debt which has been prima facie established, is bona fide disputed on reasonable grounds – Court has discretion to refuse a winding-up order and to make another order.

Alleging that the respondent was indebted to it in a significant sum, the applicant sought the respondent's provisional liquidation. Reliance was placed on payment certificates issued by the respondent's principal agent in terms of a construction contract. The winding-up order was sought on the grounds of an alleged inability by the respondent to pay its debts, alternatively that it would be just and equitable for the respondent to be wound up.

Held – Section 344(f) of the Companies Act 61 of 1973 provides that a company may be wound up by the court if it is unable to pay its debts as described in section 345. Section 345(2) provides that in determining, for the purpose of section 345(1), whether a company is unable to pay its debts, the court shall also consider the contingent and prospective liabilities of the company. Evidence that a company has failed on demand to pay a debt, payment of which is due, is cogent prima facie proof

of inability to pay its debts. The fact that the value of a company's assets may exceed the amount of its liabilities (ie that it is factually solvent) does not preclude a finding that the company is unable to pay its debts – particularly if those assets are not readily realisable and the company has no funds with which to meet current demands. Factual insolvency is not per se a ground upon which a company can be wound up, but it may a factor in proving that the company is unable to pay its debts. Section 344(h) of the Act provides that a company may be wound up by the court if it appears to the court that it is just and equitable. The reaching of the conclusion by the court that winding-up would be just and equitable involves the exercise, not of a discretion, but of a judgment on the facts found by the court to be relevant. Once, however, such conclusion is reached, the making of the order for the winding-up does involve the exercise of a discretion. Where the application is opposed and factual disputes are raised, the question is whether on the evidence contained in all the affidavits, a prima facie case for the grant of such order has been established on a balance of probabilities. Winding-up proceedings ought not to be used to enforce payment of a debt, the existence of which is bona fide disputed on reasonable grounds. The debtor bears the onus of showing that a debt which has been prima facie established, is bona fide disputed on reasonable grounds. The respondent need not demonstrate a probability of a good defence to the claim, only that there is a dispute to the claim. If a case for winding-up is made up, section 347(1) confers a discretion on the court whether to wind-up the company or to grant another order.

In the present case, the applicant's claims underlying the payment certificates were bona fide disputed by respondent on reasonable grounds. Payment certificates are, as a matter of general principle, not immune from dispute. However, the effect of the parties' agreement was that payment had to be made pending arbitration even where the respondent had established that the claims underlying the payment certificates were bona fide disputed on reasonable grounds. The applicant had therefore established that it would be just and equitable for the respondent to be wound up. Despite that, the court accepted factors raised by respondent in favour of the exercise of the court's discretion to refuse a winding-up. Instead of dismissing the application, the Court decided that it should be stayed pending finalisation of the arbitration proceedings.

Member of the Executive Council for Local Government, Environmental Affairs and Development Planning, Western Cape Province v Knysna Municipality and others and a related matter [2024] 3 All SA 529 (WCC)

Local Government – Decision by municipal council – Appointment and remuneration of senior manager – Non-compliance with section 83(1) of the Local Government: Municipal Finance Management Act 56 of 2003, which required senior managers to meet the prescribed financial management and competency levels – Decisions reviewed and set aside on basis that they were irrational and unlawful because they did not comply with and were not authorised by the relevant legislation, and the municipal council had ignored relevant considerations.

The second respondent (Dr Ngqele) in the two applications before the court had been appointed by the municipal council of the Knysna Municipality as Director: Community Services. The applicant in each application challenged the lawfulness of the decision. Although the selection panel had not recommended Dr Ngqele for the position, the municipal council resolved to appoint him.

Held – Such appointment and employment resolutions must comply with the Local Government: Municipal Systems Act 32 of 2000 and the Local Government: Regulations on Appointment and Conditions of Employment of Senior Managers. Before making a decision on an appointment, a municipal council must satisfy itself that the candidate meets the relevant competency requirements for the post. In terms of section 83(1) of the Local Government: Municipal Finance Management Act 56 of 2003, under Part 2 which deals with "Financial Administration", senior managers must meet the prescribed financial management and competency levels. Based on the information that served before the council when the appointment resolution was adopted, compliance with the threshold requirement of two years' experience at senior management level was not shown. The municipality sought to obtain the information after the appointment resolution had been adopted but before the employment resolution had been adopted. There was no evidence to suggest that the council had considered and interrogated the further information in light of what had already served before it in order to ascertain whether the threshold requirement of two years' experience at senior management level had been complied with. Further new evidence had been placed before the Court in the present proceedings in circumstances where it was unclear as to why such information was not placed before the decision-maker and the basis on which the Court was to assess the reviewability of the impugned decisions in light of such new information. It was concluded that the appointment and employment resolutions were irrational and unlawful because they did not comply with and were not authorised by the relevant legislation, and the council had ignored relevant considerations regarding qualifications. Those were recognised grounds of review under both the principle of legality and the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). The resolutions were also vitiated by unreasonableness. As that was a recognised ground of review under PAJA but not under the principle of legality, it had to be determined whether the appointment resolution and the employment resolution fell within the definition of administrative action under PAJA. The Court found that the resolutions met all the threshold elements to constitute administrative action and did not constitute the exercise of executive power. The decision regarding the remuneration payable to Dr Ngqele was also reviewable under PAJA in that it was found to be irrational and unlawful.

The review and setting aside of the decisions was suspended for a period of six weeks from the date of the order for the municipality to put in place alternative measures.

Moodley v Public Service Commission and others [2024] 3 All SA 565 (WCC)

Constitutional and Administrative Law – Public service – Appointment of senior manager – Required experience at senior level – Whether findings of Public Service Commission are binding – Section 196(4)(f)(ii) of the Constitution not empowering Public Service Commission to make binding decisions in respect of grievances regarding appointments – Interpretation of directive regarding required experience showing impugned appointment to be lawful.

The applicant sought the review and setting aside of the decision of the first respondent (the "PSC") that the fourth respondent did have experience at a senior managerial level; the decision of the second respondent (the "MEC") not to abide by the findings of the PSC that the appointment of the fourth respondent was irregular; and the decision to shortlist and appoint the fourth respondent into the post of Chief

Executive Officer: Red Cross War Memorial Children's Hospital. The applicant, who had also been shortlisted and interviewed for the post, contended that the decisions were arbitrary, irrational and unlawful.

Held – The issues raised related to jurisdiction; whether administrative action as defined in the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") was involved; whether the PSC's findings and recommendations were binding; and the meaning of "experience at a senior managerial level" in the "Directive on Compulsory Capacity Development, Mandatory Training Days and Minimum Entry Requirements for SMS" issued by the Minister for Public Service and Administration in March 2017.

The MEC's decisions, which were sought to be challenged in this matter, constituted administrative action and were subject to review in accordance with the principle of legality and under PAJA.

The jurisdictional issue related to whether the Labour Court or the present court had jurisdiction in the matter. The applicant relied on his right to administrative justice as well as the right to equality before the law and the equal protection and benefit of the law provided for in section 9(1) of the Constitution. His case concerned, in the main, the allegations that the appointment of the fourth respondent was irregular, and that a material error of law was made insofar as the Directive was concerned. Those matters clothed the present Court with jurisdiction.

In so far as the dispute required an interpretation of the relevant regulatory provisions, the generally accepted approach to interpretation was applied.

On the merits, a critical question was what the effect was of the findings and recommendations of the PSC in a letter and report. That was material because if, as contended by applicants, those conclusions were binding on the MEC, she could not have legally departed from them and the fact that she did do so would then be unlawful and susceptible to being set aside on review. Applying the established principles of statutory interpretation, the court found that section 196(4)(f)(ii) of the Constitution did not empower the PSC to make binding decisions in respect of grievances such as those of the applicant. The PSC report and letter to the effect that the appointment of the fourth respondent was irregular, was thus not binding.

The second key aspect on the merits concerned the meaning of "5 years of experience at a senior managerial level". The court's interpretation of the Directive was contrary to the applicant's interpretation. The MEC did not err in that regard and the shortlisting and appointment of the fourth respondent was not irregular on that basis. The application was dismissed.

Omni Software Solutions (Pty) Ltd and another v Koekemoer and others [2024] 3 All SA 604 (WCC)

Corporate and Commercial – Unlawful competition – Interim interdict against unlawful use of confidential and proprietary information belonging to company, approaching and soliciting company's clients, and passing off products, systems and/or services – For competition to become unlawful it must infringe upon legal convictions of the community – Requirements for temporary interdict established.

Pending final determination of an action to be instituted against the respondents, the applicants ("Omni") sought a temporary interdict preventing the first, second and sixth respondents from unlawfully competing with either of the individual applicants by, *inter alia*, using any information which constituted proprietary and/or confidential information in connection with Omni's business, poaching Omni's clients, and passing off their products and services as those of Omni. The interdict was also sought to prevent the said respondents from disclosing any of Omni's confidential information.

The first respondent ("Ms Koekemoer") had been appointed by the first applicant ("Omni UK") as sole director of the second applicant ("Omni SA"), and due to her critical role in running Omni SA, she secured a significant 20% ownership interest in the business. The fifth respondent ("Mr Bekker") was the sole director of the second respondent ("ASV"), which he started while he was still employed by Omni SA. ASV then directly competed with Omni SA. The sixth respondent ("Epicode"), the director of which was Ms Koekemoer's husband, was said by Omni to be used by Ms Koekemoer and the other respondents as a front to conduct ASV's business, alternatively to frustrate the relief sought in the present application. According to Omni, Epicode was peddling ASV's software and unlawfully competing with Omni.

Held – As the sole director of Omni SA, Ms Koekemoer had fiduciary duties in terms of sections 76(3)(c) and 76(2)(a) of the Companies Act 71 of 2008 and the common law, to act in the company's best interest and not in conflict therewith. The issue for determination was whether Omni had satisfied the requirements for an interim interdict against Ms Koekemoer and Epicode arising from unlawful competition perpetrated by way of using confidential and proprietary information belonging to Omni; approaching and soliciting Omni's clients in South Africa and the United Kingdom; and passing off the products, systems and/or services offered by Koekemoer and Epicode as being those of Omni and/or as being related to and/or affiliated with Omni.

Unlawful competition gives rise to two causes of action, namely a delictual claim for damages and/or a claim for interdictory relief; and the applicant may pursue either of those remedies against the respondents. Based on the facts in this case, the court was satisfied that Ms Koekemoer and her brother-in-law ("Mr Koorsen") were involved in filching Omni's client lists and utilising Omni's licencing agreement. Epicode clearly competed with Omni in terms of products that were developed by Omni at great expense. Two clients which Epicode had solicited from Omni, were lured with Epicode's product being passed off as that of Omni alternatively that such product was affiliated with Omni.

The relief sought by Omni was analogous to a temporary interdict. For competition to become unlawful it must infringe upon the legal convictions of the community. Ms Koekemoer had been paid a lucrative salary for doing her job as an employee of Omni SA and was given additional incentive in the form of a 20% share in Omni without any financial investment by her. Her dishonest conduct towards the company despite that, was described by the court as morally reprehensible. Omni had a right to the protection of its goodwill against unlawful infringement, thus establishing a *prima facie* right to the relief it sought. The prejudicial nature of Ms Koekemoer's conduct led to a well-grounded apprehension of harm and the balance of convenience favouring the relief sought. An interim interdict was accordingly granted.

On Farm Holdings (Pty) Ltd v Van den Heever NO and others [2024] 3 All SA 629 (ECG)

Civil Procedure – Claim for damages arising from repudiation of agreement – Application for absolution from the instance – Whether agreement was rendered unlawful by Sub-Division of Agricultural Land Act 70 of 1970 – Contextual, unitary interpretative exercise applied to establish nature of agreement – Test for absolution is whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff – In matters of interpretation, court should normally refuse absolution unless the proper interpretation appears to be beyond question.

An agreement relied on by the plaintiff in support of its claim against the defendants, was alleged to have provided that two trusts, in which the defendants were trustees, would make three farming properties available to a company ("Bridge Farm") for it to conduct a dairy farming enterprise. The plaintiff ("On Farm") alleged that Bridge Farm had appointed On Farm as its sole and exclusive manager of the dairy farming enterprise. On Farm would pay the two trusts collectively the sum of R1 million per annum annually. The plaintiff's case proceeded on the basis that it had accrued various rights and entitlements in terms of the agreement and that it had suffered damages in consequence of the defendants' repudiation thereof.

The defendants denied that the material terms of the agreement were correctly detailed by the plaintiff. They contended that if in fact the agreement was binding between the parties, the terms were that the defendants had undertaken to lease the farm properties to Bridge Farm for not less than 10 years, but pertinently excluded portions of the farm properties from the operation of the lease. The defendants pleaded further that the farm properties were agricultural properties (as defined in the Sub-Division of Agricultural Land Act 70 of 1970) leased for 10 years, and accordingly in accordance with section 3(d) of the Act, such lease was unlawful and void. On Farm countered that the agreement was not a lease, and thus avoided the Act. It also argued that the exclusion of certain of the properties did not constitute an undivided portion of agricultural land on a proper interpretation of the Act.

At the end of the plaintiff's case, the defendants applied for absolution from the instance.

Held – Absolution may be granted at the end of the plaintiff's case if at that stage there is no evidence to support the plaintiff's claim, or insufficient evidence upon which a court acting reasonably might find for the plaintiff. There is then no prospect that the plaintiff's claim might succeed and in those circumstances the defendant should be spared the trouble and expense of continuing to mount a defence to a hopeless claim. The test is whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. In matters of interpretation, the court should normally refuse absolution unless the proper interpretation appears to be beyond question. It has been held that where a plaintiff's case depends on a document, and its interpretation is in issue, the interpretation upon which the defendant relies must be beyond doubt before an absolution application can succeed.

Where an agreement is contrary to legislation, its validity must be sought primarily in the wording of the legislation itself. In this matter, there were two issues. First, the agreement had to be a lease to potentially be struck by the Act, and second, the

question was whether or not, if it was a lease, it was in fact struck by the Act. Section 3(d) of the Act provided that no lease in respect of a portion of agricultural land of which the period is 10 years or longer shall be entered into unless the Minister has consented in writing. It was common cause that there was no consent. A plaintiff seeking to enforce a contract subject to the Act must allege and prove compliance with the statutory requirements in the event of the contract being subject thereto. Applying the proper approach to a contextual, unitary interpretative exercise, it could not be said to be beyond question that a court, applying its mind reasonably to the issue of the nature of the agreement, could or might (not should, nor ought to) find for the plaintiff.

The defendants' claim for absolution from the instance was dismissed.

END-FOR NOW