LEGAL NOTES VOL 9/2024

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BECHAN AND ANOTHER v SARS CUSTOMS INVESTIGATIONS UNIT AND OTHERS 2024 (5) SA 1 (SCA)

Revenue — Tax Administration — Search and seizure — Execution of warrant against third parties on premises identified in warrant — Search of anything on premises identified in warrant permitted, including motor vehicle parked on premises on suspicion that contained material relevant to taxpayer — Tax Administration Act 28 of 2011, s 61(3).

The first appellant was Mr Bechan, the sole director of the second appellant, Bechan Consulting (Pty) Ltd. They appealed to the Supreme Court of Appeal (the SCA), with its leave, against the High Court's dismissal of their application to compel Sars to return certain items seized, purportedly unlawfully, from Mr Bechan's motor vehicle during the execution of a warrant in respect of the taxpayer, Bullion Star (Pty) Ltd (Bullion Star). Sars officials had noticed a motor vehicle parked on the premises and had seen numerous files and notebooks, as well as electronic equipment, inside. These, according to the inventory of their search, included laptop computers, cellular phones and various financial documents and bank statements pertaining to Bullion Star (see [5]).

The High Court rejected appellants' contention that the scope of the warrant was limited to Bullion Star's property; that it did not apply to third parties such as themselves, who happened to be on the premises at the time of its execution, and that therefore Sars had unlawfully seized their property. The High Court held that Sars was entitled to search for and seize items relevant to Bullion Star, as the warrant specifically authorised its officials to search anywhere on the premises.

The main issue before the SCA was whether a warrant issued in terms of s 60 may be executed against third parties. Its approach was that this depended on the interpretation of the warrant, read together with the TAA's search and seizure provisions. In the latter regard the SCA pointed to s 61(3)*(a)*, which provides that, in carrying out a search, the Sars official 'may open or cause to be opened or removed . . . anything which the official suspects to contain relevant material'; and to s 61(3)*(c)*, that they may 'seize and retain a computer or storage device in which relevant material is stored for as long as it is necessary to copy the material required'.

[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!**

Held, in dismissing the appeal, that these provisions were location- and not taxpayer-specific. Section 61(3) did not limit the execution of a warrant to the business of the taxpayer. It contemplated that in executing a warrant, Sars officials may search anything on the premises; that persons other than the taxpayer may be present on the premises identified in the warrant and in possession of material relevant to the taxpayer. (See [13], [16], [21].)

EDWARD NATHAN SONNENBERG INC v HAWARDEN 2024 (5) SA 9 (SCA)

Delict — Specific forms — Pure economic loss — Interception of funds by hacker — Liability of creditor — Risk of indeterminate liability and vulnerability to risk in determination of wrongfulness — No wrongfulness and hence no liability where debtor could reasonably have taken steps to protect against risk of interception
Conveyancer — Liability — Delictual liability for failure to warn purchaser of danger of interception of funds by hacker — Risk of indeterminate liability — No wrongfulness and no liability where purchaser could reasonably have taken steps to protect against risk of interception.

On 23 May 2019 Ms Hawarden, a divorced pensioner, purchased immovable property for R6 million. The estate agency charged with the sale of the property sent Ms Hawarden an email asking her to pay a deposit of R500 000 into their trust account. The email contained a warning about cybercrime and advised Ms Hawarden to call the agency to verify its banking details before paying, which she did. The payment went through without a hitch.
On 21 August 2019 Ms Hawarden — whose email account had been hacked in a 'business email compromise' (BEC) scam — received an email purportedly sent by the conveyancing attorneys, ENS (the appellant). The email, which was a fake sent by the scammer, contained false banking details for ENS for the payment of the balance of the purchase price. Ms Hawarden was not a client of ENS and there was no contractual bond or attorney-client relationship between them.
The next day an unsuspecting Ms Hawarden went to her bank for assistance with the payment to ENS. She discussed the option of furnishing a bank guarantee instead of doing an EFT with a bank official but, reassured by a contemporaneous phone conversation with a representative of ENS, opted for an EFT in the interest of expedition. She did not during this conversation verify that the banking details she had were indeed the correct ones, ie that they matched those of ENS. The result was that she paid the R5,5 million into the scammer's account.
Ms Hawarden sued ENS in delict for the R5,5 million out of the Johannesburg High Court. Her claim was one for pure economic loss resulting from ENS's failure (omission) to warn her about BEC-related risks and, specifically, about the need to verify banking details before making payments. She pleaded that the reasonableness of imposing this duty on ENS resided in the fact that ENS was a large and sophisticated attorneys' firm whereas she was an elderly pensioner without the knowledge or resources to protect herself against cybercrime. She pointed out that, instead of using a secure payment option, ENS chose instead to use an unprotected email attachment, thereby exposing her to the risk of BEC.
ENS denied that its conduct was wrongful, negligent or caused the loss. It specifically denied that it had a legal duty to advise Ms Hawarden on safe payment.
The High Court found for Ms Hawarden, ruling that ENS's failure to warn Ms Hawarden was wrongful and negligent, and caused the economic loss she had suffered.

Conveyancing attorneys had a duty to protect purchasers from BEC scams, and ENS's omission in this regard was negligent and sufficiently linked to the loss for it to be actionable. As to the determinacy of liability, the High Court found that it was provided by the fact that liability was confined to Ms Hawarden and the quantum of the purchase price. The High Court accordingly ordered ENS to pay Ms Hawarden the R5,5 million. ENS appealed to the Supreme Court of Appeal, which —**Held**
The matter could be decided on the element of wrongfulness without traversing the other requirements for delictual liability. Wrongfulness — which depended on the reasonableness of imposing liability in the light of public-policy considerations and constitutional norms — had to be considered in the light of the following:
• Ms Hawarden had not been a client of ENS at the relevant time, and that there had been no contractual relationship between Ms Hawarden and ENS.
• Her loss was caused by the infiltration of her email account, not by failings in the ENS system.
• She had been warned by the estate agents of this very risk, and had chosen to heed the warning by verifying their banking details, but had inexplicably failed to do so three months later in respect of ENS.
• She had ample means to protect herself: she could have avoided the risk by verifying ENS's banking details when she spoke to them while at the bank, or asked the bank's employees to assist her in doing so.
• Any warning by ENS of the risk of BEC scams would have been meaningless because by that time the hackers were already embedded in Ms Hawarden's email account, consequently the risk had already materialised.
• Ms Hawarden had, after weighing her options, elected to forego a bank guarantee for an EFT. She had to take responsibility for her failure to protect herself against a known risk.
• The High Court should have declined to extend liability in the present matter. Its finding that ENS's failure to warn Ms Hawarden attracted liability posed the danger of indeterminate liability not only for the attorneys' profession, but also for all creditors who sent their banking details to their debtors via email, who would be required to protect their payments from interception by hackers. (See [17], [20] – [21], [25] – [26].)
The Supreme Court of Appeal accordingly upheld the appeal and substituted the High Court's order with one dismissing Ms Hawarden's claim.

ISLANDSITE INVESTMENTS 180 (PTY) LTD v NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND OTHERS 2024 (5) SA 20 (SCA)

Company — Business rescue — Directors — Authority to represent company in opposing confirmation of provisional restraint order obtained against it under Prevention of Organised Crime Act 121 of 1998 — Directors having no such authority — Authority residing with business rescue practitioners — Companies Act 71 of 2008, s 66(1).

The National Director of Public Prosecutions (the NDPP) had obtained a provisional restraint order in the High Court, on an ex parte basis and under s 26(3) of the Prevention of Organised Crime Act 121 of 1998 (POCA), in respect of the property of Islandsite Investments 180 (Pty) Ltd (the company). The company had been in business rescue in terms of ch 6 of the Companies Act 71 of 2008 (the Act).
Seeking to oppose confirmation of the provisional restraint order, the company's directors appointed attorneys and delivered a notice of intention to oppose and an

answering affidavit deposed to by one of the directors. In response, the NDPP launched an application in terms of rule 7(1) of the Uniform Rules of Court, which allows a party to dispute the authority of attorneys who purport to represent another party. At issue was whether the directors, on the one hand, or the BRPs, on the other, had the requisite authority to appoint attorneys to represent the company. The directors opposed this application too, again purporting to represent the company. The confirmation or otherwise of the provisional restraint order was held over pending the determination of the issue of representation. The court then determined that '(t)he directors and or shareholders of the [company had] no standing to oppose these proceedings without the approval of the business rescue practitioners'.

The present case concerned the company's appeal against this order to the Supreme Court of Appeal. The fourth and fifth respondents were the appointed business rescue practitioners (the BRPs). At issue was whether the provisions in the Act relating to business rescue provided an exception to the general provisions of s 66(1) regarding the powers of directors, that, in general terms, unless other parts of the Act provided otherwise, the directors had authority to represent the company. The question was whether the provisions of ch 6 of the Act concerning business rescue provided otherwise. (See [14].)

Held

The definition of business rescue in s 128 of the Act connoted proceedings to facilitate the rehabilitation of a company. To achieve that goal, those proceedings provided for the temporary supervision of the company by persons other than the directors. The only qualification to the word 'supervision' was that it was temporary. It was supervision in every respect. In addition, the management of the company's affairs, business and property was part of the process. It was implicit in the definition that the BRPs were the persons engaged in the supervision of the company. (See [15].)

Further, the Act provided that directors were obliged to continue to exercise their general functions, but could do so only 'subject to the authority' of the BRPs (s 137(2)); obliged directors to surrender all books of the company and to provide information on material transactions, litigation and the assets and liabilities of the company to the BRPs (s 142); defined BRPs as appointed to 'oversee a company' during business rescue proceedings; and accorded BRPs 'full management control of the company' in place of the board and management (s 140). Also, POCA litigation directly implicated the property of the company, which fell within the ambit of the authority of the BRPs (s 133(1)*(a)*). (See [16] – [20].)

In light of these provisions, there was no warrant for finding that the directors had the requisite authority to appoint attorneys to litigate on behalf of the company. The clear interpretation of the Act afforded the BRPs that authority in the POCA litigation. This was in particular so because property of the company was implicated in the POCA litigation. It followed that the order of the High Court could not be faulted and that the appeal would be dismissed. (See [23].)

KB AND ANOTHER v MINISTER OF SOCIAL DEVELOPMENT 2024 (5) SA 30 (SCA)

Children — Surrogacy — Parents A and B unable to produce gametes — Donors C and D providing gametes from which several embryos developed — One embryo implanted into B and child E born — B's uterus subsequently removed — A and B desiring that surrogate mother S carry one of remaining embryos — Barred by s 294 of Children's Act from doing so — Section 294 requiring that, at minimum, A or B's

gamete be used to fertilise S — Whether s 294 infringing existing child E's best interests — Children's Act 38 of 2005, s 294; Constitution, s 28.

A married man and woman (A and B) wanted a child, but, unable to produce the required sperm and eggs (gametes), turned to donors. Eggs from donor C were fertilised by sperm from donor D, resulting in the development of several embryos. One of them was implanted into B by an embryo-transfer procedure, resulting in pregnancy and the birth of a child, E. A and B wanted a second child, and to this end a second embryo was transferred into B, which again resulted in pregnancy. However, a medical emergency resulted in the loss of the fetus and the removal of B's uterus.
Still desiring a second child, A and B agreed with S that she would be implanted with one of the remaining embryos to bear proposed child F. To this end a surrogate motherhood agreement was entered into between A, B and S. All that was required for the implantation process to begin was confirmation of the agreement by the High Court. Section 296(2) of the Children's Act 38 of 2005 provides in this regard that '(n)o artificial insemination of the surrogate mother may take place . . . before the surrogate motherhood agreement is confirmed by the court . . .'. The obstacle, though, was s 294 of the Act, which required, as a prerequisite for the validity of a surrogate motherhood agreement, that 'the conception of the child contemplated in the agreement is to be effected by the use of . . . the gametes of at least one of the commissioning parents . . .'. Since the embryos proposed to be used were the product of donors C and D's eggs and sperm, this requirement could not be satisfied (see [16]).
A and B then approached the High Court for a declarator that s 294 was unconstitutional. A and B claimed that it was in E's best interests to have a sibling he was genetically linked to, and that s 294 infringed this interest. Knowledge of origin, they argued, would be important to E's self-identity. A remedial reading-in was proposed. The High Court dismissed the claim, but granted leave to appeal to the Supreme Court of Appeal (see [1], [6], [10]).
The Supreme Court of Appeal held as follows:
• Section 294 sought to protect the interests of F (the child to be born) rather than E (see [20]).
• No source could be found for E's alleged right to a genetically linked sibling (see [21]).
Appeal dismissed (see [34]).

MINISTER OF MINERAL RESOURCES AND ENERGY AND OTHERS v SUSTAINING THE WILD COAST NPC AND OTHERS 2024 (5) SA 38 (SCA)

Administrative law — Administrative action — Review — Remedial powers of court — Just and equitable remedy — Appeal against court a quo's setting-aside under *PAJA* of decisions granting exploration right and two renewals thereof — Failure to consider just and equitable relief under s 172(1)*(b)* of Constitution — Order setting aside decisions suspended pending outcome of third application for renewal — Constitution, s 172(1)*(b)*; Promotion of Administrative Justice Act 3 of 2000, s 6(2)*(e)*(iii).
Constitutional law — Courts — Powers — Declaration of invalidity — Remedial powers — Just and equitable relief — Appeal against court a quo's setting-aside under PAJA of decisions granting exploration right and two renewals thereof — Failure to consider just and equitable relief under s 172(1)*(b)* of Constitution — Order setting aside decisions suspended pending outcome of third application for renewal —

Constitution, s 172(1)*(b)*; Promotion of Administrative Justice Act 3 of 2000, s 6(2)*(e)*(iii).

This appeal to the Supreme Court of Appeal (the SCA) was against a High Court order which had set aside three administrative decisions — the granting of an exploration right and two renewals thereof — as procedurally unfair in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The SCA agreed with the High Court that that these decisions were reviewable for failure to adequately consult (or consult at all) with interested and affected communities (see [22] – [24]). It *held* that the logical corollary to the inadequacy of the consultation process was that when assessing (and ultimately granting) the application for an exploration right, a number of relevant factors were not considered, rendering the decision reviewable under s 6(2)*(e)*(iii) of PAJA. These included, but were not limited to, the detrimental impact that the surveying activities would have on the spiritual and cultural practices of the affected communities (see [25] – [26]).
However, the SCA further *held*, the High Court had failed to consider the question of just and equitable relief under s 172(1)*(b)* of the Constitution; once a ground of review under PAJA had been established, it was not the end of the matter — s 172(1)*(b)* also required the consideration of just and equitable remedy. Such a remedy must be proportionate, fair and just in the context of the dispute, ample and flexible, and should place substance above form. Courts need to be pragmatic in crafting just and equitable remedies in the exercise of their wide remedial powers. And, since the High Court had erred in not weighing up the relevant factors, the SCA was empowered to do so. (See [26] – [28].)
These factors included evidence provided of the economic and social benefits that would fail to materialise without the exploration being undertaken. The SCA noted that there had been an almost eight-year delay between the granting of the exploration right and the review, and that, acting in reliance on the validity of the decisions, there had been significant financial expenditure (in the region of R1,1 billion), dating back to 2012; that sight should not be lost of the public interest in the finality of administrative decision-making, the degree or materiality of the irregularity; and that the long delay and of the lack of legal certainty may well have a chilling effect on foreign investment. (See [28] – [29].)
Prior to the end of the second renewal period of the exploration right, application was made in accordance with s 82(1)*(b)* of the Mineral and Petroleum Resources Development Act 28 of 2002 to enter into a third renewal period. The SCA concluded that, as part and parcel of a proper consideration of this third renewal application, a further public participation process should be conducted to cure the identified defects in the process already undertaken. Consequently, while dismissing the appeal, it suspended the orders setting aside the granting of exploration right and its two renewals pending the outcome of the third renewal application. (See [31], [32].)

MOLADORA TRUST v MEREKI AND OTHERS 2024 (5) SA 51 (SCA)

Land — Land reform — Statutory protection of tenure — Protected occupation of land — Occupier — Rights — Right to graze livestock — Land Claims Court dismissing landowner's application for order directing occupiers to remove livestock they allowed to graze on land — Basis of decision that tacit agreement reached between landowner and occupiers allowing grazing of livestock — Defence of tacit consent or agreement

not raised by occupiers, and landowner's claim of no consent was uncontested — No proper factual foundation for LCC's findings — Appeal upheld.

This was an appeal to the Supreme Court of Appeal (the SCA) against the decision of the Land Claims Court to dismiss the application of the appellant, the Moladora Trust, in which it sought an order directing the first to third respondents (the respondents) to remove their grazing livestock from the appellant's farm. The respondents were 'occupiers' of the farm in terms of the Extension of Security of Tenure Act 62 of 1997 by virtue of the rights of occupation of their late mother. The appellant had sought the relief it did on the grounds that the respondents were keeping livestock on the farm without its consent. The respondents did not appear at the LCC hearing, nor did they file any affidavits in response to the application. The LCC dismissed the application based on its finding that a tacit agreement had in fact been concluded and tacit consent granted by the appellant to allow the respondents to keep and graze livestock.
The SCA noted that the LCC had considered whether there could have been tacit consent or tacit agreement in terms of which the respondents had been grazing their livestock on the farm, in circumstances in which no such case had been advanced by the respondents, and in the face of the uncontested allegations of the appellant that no agreement was concluded or that any consent had been given. (See [11].) Accordingly, the SCA held, the finding of the LCC, that tacit consent to graze livestock had been granted and that there was a tacit agreement with the appellant to that effect, was not based on any proper factual foundation (see [12]). Instead, the SCA asserted, the conclusion reached by the LCC rested on a foundation that was purely conjectural, not foreshadowed in the papers and of which the appellant had not been forewarned. It followed that neither the approach nor the conclusion reached by the LCC could be supported on appeal. Consequently, the appeal had to succeed. (See [13].)

ECHNOLOGY CORPORATE MANAGEMENT (PTY) LTD AND OTHERS v DE SOUSA AND OTHERS 2024 (5) SA 57 (SCA)
Company — Oppressive conduct — What constitutes — 'Unfair prejudice' — Insufficient for claimant merely to show that relationship between shareholders had broken down — No right of unilateral withdrawal for shareholder when trust and confidence no longer existed — Loss of trust or confidence in majority had to flow from affairs of company being conducted in manner that was unfairly prejudicial to minority — Unfair exclusion from management of company to detriment of minority's position as shareholder was quotidian example — Unfair prejudice arising therefrom may be overcome by offer to purchase minority's shares at fair price — Conversely, failure to make such offer where no prior unfair exclusion and no other unfair prejudice, was not in and of itself unfair prejudice — Unless minority suffered unfair prejudice, there was no obligation on company or majority shareholders to negotiate their exit other than in terms of memorandum of incorporation or any applicable shareholders' agreement, and it was not unfair prejudice if they refused to do otherwise — Companies Act 61 of 1973, s 252.
Company — Shares and shareholders — Shareholders — Dispute — Payment of litigation costs — General principle that company's money should not be expended on legal disputes between shareholders — However, in unfair prejudice claim, company would be justified in entering lis, and bearing costs of defending claim, where own interests at stake.
Company — Oppressive conduct — Relief — Order for company to buy out minority's shares — Need for court to consider impact of such order on company.

Constitutional law — Human rights — Right of access to courts — Right to fair hearing — Power of court to curtail cross-examination that was repetitive, irrelevant or attack on witness's credibility on collateral issues — Need for court to exercise such power with great caution — Any decision by judge to curtail cross-examination had to be approached with patience and discernment.
Evidence — Admissibility — Use of findings in civil case as evidence to prove facts in subsequent civil case involving different parties — Admissible as long as relevant — Rule in Hollington v Hewthorn ought not to be expanded beyond circumstances to which expressly applied.

This was an appeal in respect of an action, under s 252 of the Companies Act 61 of 1973, for relief from unfairly prejudicial conduct, brought by two minority shareholders in, and ex-directors of, the first appellant information technology company founded in 1987, Technology Corporate Management (Pty) Ltd (TCM), namely the first respondent, Mr Luis de Sousa (Luis); and the second respondent, Mr Jose Diez (Jose) (together referred to as 'the plaintiffs'). The defendants in that action, in addition to TCM, were the second appellant, Andrea Cornelli (Andrea) — current shareholder in TCM, as well as its present CEO, and co-founder along with Luis; the third appellant, Antonio da Silva (Tony) — a further current shareholder in, and director of, TCM; and the fourth and fifth appellants, Iqbal Hassim NO and Barry Kalmin NO, in their capacities as trustees of the Iqbal Family Trust, a further shareholder in TCM. What gave rise to the action was the deterioration of the relationship between, on the one side, Luis and Jose, and Andrea on the other, that began in 2004 around the time of the recruitment by Andrea of Iqbal Hassim for the purposes of enhancing TCM's BEE profile, which recruitment led to changes in TCM's corporate structure captured in heads of agreement, and sale-of-shares and shareholders' agreements. Luis and Jose cited various incidents of conduct on the part of Andrea that made them believe that he was conducting himself towards them with the ulterior motive of forcing them to leave TCM. Ultimately, by around 2008, Luis and Jose had resolved to exit TCM, and embarked on a process to secure the buy-out of their shares by TCM or the other shareholders. But agreement on the terms of exit and valuation of shares ultimately could not be reached. Stemming from events taking place during a meeting in February 2009 between Andrea, and Luis and his advisors, Luis was suspended from employment and subjected to disciplinary proceedings, ending in his dismissal, the fairness of which was confirmed by the CCMA. Jose was to voluntarily resign in 2013. Luis and Jose launched an action seeking relief in terms of s 252 of the old Companies Act in the Johannesburg High Court in December 2010, on the basis that the affairs of the company had been conducted, principally by Andrea, in a manner that was unfairly prejudicial, unjust or inequitable to them. The court granted the action, ordering TCM to purchase their shares at a value to be determined after consideration of a valuation of the shares by a referee. The appellants were ordered to pay costs on an attorney client scale. Leave to appeal was dismissed by the High Court. The appellants sought leave to appeal from the Supreme Court of Appeal, and were granted it. (See [29] – [32].)
The grounds on which the plaintiffs claimed they had been unfairly prejudiced were the following:
• They claimed that, from around 2007 – 2010, they had been *excluded* from participating in the conduct of the company. This, where they had a legitimate expectation to daily involvement and engagement in TCM's business, and recognition of their status as shareholders and directors. Luis claimed further that, because TCM

had always been effectively a small domestic company in the nature of a partnership between himself and Andrea, he was further entitled to recognition as an equal participant and contributor with Andrea. Luis claimed that, even if he had no legitimate expectations, his dismissal was prejudicial to his position as shareholder and resulted in his exclusion from the daily involvement and engagement in the business, and the recognition as shareholder and director, that he would otherwise have enjoyed.

- They claimed that they were 'locked in' to TCM, owing to Andrea's refusal to engage in bona fide discussions or negotiations with them with the aim of permitting them to dispose of their shares at fair value.
- They claimed that Andrea had conducted the affairs of the business in a manner lacking in probity, as a result of which they had lost faith and confidence in the management of the business by Andrea.
- Finally, they claimed that Andrea had procured that the funds of TCM were used for the purpose of discharging the legal costs incurred by the appellants in the aborted s 252 application proceedings that had preceded the main action, to TCM's financial detriment.

In addition to the determination of the above, other issues before the SCA included the appropriateness of the buy-out order granted by the High Court, as well as whether the appellants were denied a fair trial.**The law** — The SCA held that, in order for a claimant under s 252 of the old Companies Act to establish unfair prejudice, it was not sufficient for them to merely show that the relationship between the shareholders had broken down. There was no right of unilateral withdrawal for a shareholder when trust and confidence no longer existed. The loss of trust or confidence in the majority had to flow from the affairs of the company being conducted in a manner that was unfairly prejudicial to the minority. Unfair exclusion from the management of the company to the detriment of the minority's position as a shareholder was the quotidian example of situations falling within the section. The unfair prejudice may be overcome by an offer to purchase the minority's shares at a fair price. Conversely, a failure to make such an offer, where there was no prior unfair exclusion and no other unfair prejudice, was not in and of itself unfair prejudice. Unless the minority had suffered unfair prejudice, there was no obligation on the company or the majority shareholders to negotiate their exit other than in terms of the memorandum of incorporation or any applicable shareholders' agreement, and it was not unfair prejudice if they refused to do otherwise. (See [114].)

Exclusion — The SCA held that Luis, in terms of the heads of agreement and sale-of-shares and shareholders' agreements entered into in 2004/2005, had no legitimate expectation to continue to be retained by TCM as an executive director remunerated on the same basis as Andrea. (See [138], [141], [142], [148] and [150]). The SCA acknowledged that TCM *at its inception* was a classic example of a small domestic company operating on a basis of trust and mutual respect between its founders Luis and Andrea, that had given rise to a mutual understanding between them that they would work together to manage the company and its affairs on a basis of equality (see [122]). The court added, however, that changes in the nature of a company and its business may indicate that an earlier informal understanding of how the business should be conducted had ceased to be feasible, so that it fell away. A significant factor in bringing that about may be the advent of new shareholders who become involved in the business on a different basis. (See [122].) That was the case here: By 2004 the understanding between Andrea and Luis had ceased to exist: TCM had transformed into a very large company which had changed its shareholding structure and regulated that structure in a formal fashion through the aforementioned agreements. (See [118],

[122], [144], [146], [147], [150] and [251].) As for Jose, the court found that he had at no time during the relevant period been excluded from TCM as an employee, and remained an executive director who actively participated in board meetings. (See [249].) The court accordingly rejected Luis and Jose's claims of exclusion based on legitimate expectations. (See [150] and [249].)

Secondary claim based on dismissal — The SCA held that proof that his dismissal was unfair was a necessary precursor to Luis' contention that, as a result, he had suffered unfair prejudice in his capacity as a shareholder (see [170]). That the dismissal was unfair was not established, it held, and accordingly Luis' claim of unfair prejudice on this ground ought to be dismissed (see [172]). In reaching the conclusion, the court addressed the question of the relevance of the findings of the CCMA that the dismissal of Luis was procedurally and substantively unfair. The High Court had ruled these findings to be entirely irrelevant, based on the English Hollington v Hewthorn principle that had been accepted into SA law. That rule in its original formulation held that evidence that a party had been convicted of a criminal offence was not evidence, not even prima facie evidence, in a subsequent contested civil suit, but was the irrelevant opinion of another court (see [161]). There was court authority extending such rule to also prevent reliance on a judgment in one civil case as evidence to prove facts, in a subsequent civil case involving different parties. (See [162].) The SCA however, held that the rule in *Hollington v Hewthorn* should not be extended beyond the circumstances to which it expressly applied. In other instances, where it was sought to use findings in a previous case to prove facts in a subsequent case, the test for admissibility should be relevance and the court had to pay careful attention to the weight to be attached to the evidence thus tendered. It should be excluded if it diverted the case into a collateral enquiry. (See [165].) The SCA accordingly found that the rule was inapplicable in the present case (see [166]). It went on to hold that the CCMA was the only tribunal having jurisdiction in South African law to determine whether Luis had been unfairly dismissed from his employment, and its binding decision that he had not was plainly relevant to the same issue when raised in the s 252 proceedings. At the very least it raised a prima facie case for Luis to rebut that his dismissal had not been unfair. (See [170].) Luis had failed to do so, presenting no evidence and advancing no plausible reason for suggesting that the CCMA commissioner's assessment, that his dismissal was fair, was flawed in any respect (see [171]). It followed that, while his dismissal may have prejudiced him, he was not unfairly prejudiced in his capacity as a shareholder by it. (See [172].)

Absence of genuine negotiations and a fair offer — The SCA noted that the shareholders' agreement, into which all the shareholders had voluntarily entered, addressed the situation when a shareholder left TCM: it did not impose an obligation on remaining shareholders to acquire the departing shareholder's shares. (See [175] and [177].) The request from the disaffected shareholder that the remaining shareholders should negotiate a basis for their departure was a request to depart from what the parties had agreed. The refusal to agree to that could not on its own amount to unfair prejudice to the disaffected shareholder. (See [177].) How the situation otherwise gave rise to unfair prejudice was never explained by the plaintiffs (see [176]). The court accordingly also dismissed the plaintiffs' argument based on a failure to negotiate a fair share price. (See [188].)

Loss of trust and confidence due to a lack of probity — The SCA found that it had not been established on the facts that Andrea had conducted the affairs of the company, or treated the plaintiffs, in the manner alleged. (See [234].)

TCM's payment of litigation costs — The SCA described as sound the principle that generally the company's money should not be expended on disputes between shareholders. (See [242].) However, the court held, in an unfair prejudice claim, a company would be justified in entering the *lis*, and expending and bearing the costs of defending the claim, where its own interests were at stake. (See [244].) In respect of the s 252 application in question, TCM, whilst having no interest in whether the minority shareholder had been subjected to unfair prejudice, would be directly affected by the relief sought, namely an order to purchase their shares, and was accordingly entitled to resist the relief claimed against it. (See [245].)

Conclusion on unfair prejudice — The court concluded that the plaintiffs' case that the affairs of the company had been conducted, principally by Andrea, in a manner that was unfairly prejudicial, unjust or inequitable to them, was not established. (See [251].)

Comments on the relief granted by the High Court — The court held that, before making the buy-out order it did, the High Court needed to consider (1) whether any unfair prejudice suffered by the plaintiffs had been resolved by the two offers TCM made to purchase Luis and Jose's shares; and (2) if not, whether it was appropriate to make the buy-out order against TCM, having regard to the impact it would have on the company, its creditors and its customers, and given that the remedy was a broad, equitable one whose purpose was not to bring a company to its knees. (See [255] and [258].) The High Court, however, had been in no position to consider either, because there had been no evidence before it of the value of the shares. (See [257] and [258].) The court concluded that, if it had been appropriate for the High Court to grant an order, it ought to have confined it to declaratory relief in regard to its finding that there had been unfairly prejudicial conduct in terms of s 252. (See [259].)

Fair trial issues — During the course of the trial on various occasions the presiding officer had intervened in, and imposed deadlines on, the cross-examination of witnesses. There had also been some acrimonious exchanges with counsel. Whilst it was unnecessary to make any clear findings on whether the appellants had been denied a fair trial by the High Court — counsel requested the SCA to determine the appeal on the merits — the SCA determined that it be appropriate to make some observations for the guidance of judges who had to deal with long and complex matters beset with acrimony between the parties. (See [260] and [264].) Inter alia, it held that there was no doubting the judge's right to curtail cross-examination where it was repetitive, irrelevant or an attack on the witness's credibility on collateral issues, but it was a power to be exercised with great caution: any decision by a judge to curb its exercise had to be approached with patience and discernment. An important consideration would be whether similar constraints were placed upon counsel for the other party, so as to avoid the impression of disparate treatment of the two sides of the case, and the stage that has been reached in the cross-examination when the restriction was imposed. (See [268].) As to the exchanges between the High Court judge and counsel, the court stated it would have been better had they not occurred, and underlined the need for judges to avoid any impression that their personal feelings about counsel and the manner in which counsel was conducting the trial were influencing their ability to consider and weigh the issues in a dispassionate and impartial way. (See [269].)

The SCA in conclusion upheld the appeal, altering the High Court order, so that the plaintiffs' claim was dismissed with costs.

UBUHLEBEZWE MUNICIPALITY v RAMSUNDER 2024 (5) SA 189 (SCA)

Local authority — Buildings — Building plans — Approval — Remedial construction — Repairs — Whether approval required to commence remedial construction if remedial construction to be carried out in accordance with original approved plans — National Building Regulations and Building Standards Act 103 of 1977, s 4(1).

Appellant municipality was the owner of land which it leased to respondent, one Ramsunder. Ramsunder submitted plans for the construction of a shopping centre on the property to the municipality, which it approved. Ramsunder then erected the structures in accordance with the plans. Years later, during civil unrest, the shopping centre was destroyed. To curtail his losses, Ramsunder employed a construction company to rebuild the centre in accordance with the original approved plans. During the building operations, the municipality brought an urgent application in the High Court for interim relief comprising an interdict on all building operations on the property. Ramsunder had insufficient opportunity to oppose the application and it was granted pending the return date.
On the return date, the municipality applied for a final interdict on the same terms, but its application was dismissed by the High Court.
The municipality appealed to the Supreme Court of Appeal. The issue on appeal was whether the municipality had established the clear-right prerequisite to the grant of a final interdict. The right it relied on emanated from s 4(1) read with the definition of 'erection' in s 1 of the National Building Regulations and Building Standards Act 103 of 1977. (See [14] – [15].)
Section 4(1) provides:
'(1) No person shall without the prior approval in writing of the local authority in question, erect any building in respect of which plans and specifications are to be drawn and submitted in terms of this Act.'
While —
'"erection", in relation to a building, includes the alteration, conversion, extension, rebuilding, re-erection, subdivision of or addition to, or repair of any part of the structural system of, any building . . .'.
Did this require new plans to be drawn and approved prior to commencement of the remedial works (the municipality's contention), or were the already approved plans sufficient in the circumstance where the construction was strictly in accordance with their specifications (Ramsunder's contention) (see [16])?
Held, that in circumstances where plans had been approved, a building constructed in accordance with them, and the building later damaged, and where remedial construction in accordance with the already approved plans was sought to be undertaken, it was not a requirement that fresh approval had to be obtained in order to proceed with the remedial construction (see [21] – [22]).
The clear-right prerequisite to the grant of a final interdict was accordingly not established. Appeal dismissed (see [23] – [24]).

EBUNDU (PTY) LTD v BLAKE AND OTHERS 2024 (5) SA 197 (MM)

Costs — Taxation — Review — Available options, and their applicability and requirements discussed.
Costs — Taxation — Review — Default of appearance by notified party who neither opposed nor objected to taxation — Amounting to consent in absentia — Party electing

not to oppose taxation under rule 48, justly deprived of review under rule 53 — Application for setting-aside of taxation under rule 53 accordingly dismissed — Uniform Rules of Court, rules 48 and 53

The applicant, relying on rule 53 of the Uniform Rules of Court and the common law, sought the review and setting-aside of the taxation of the first respondent's bill of costs in a preceding action it had pursued against one Janson and the first respondent, Blake, which succeeded against Janson but failed against Blake. In line with the result, Janson was ordered to pay the applicant's costs, and the applicant those of Blake. The taxing master (the third respondent) issued the costs allocator in June 2019.
Despite having in May 2019 been served with a notice of taxation — with an untaxed bill of costs attached — the applicant neither opposed nor objected to the taxation, which was conducted in its absence. But when Blake in July 2019 demanded the allocated R252 000 costs from the applicant, it refused to pay, arguing that the taxing master had not applied his mind and could not have done so in the absence of submissions by both sides. The applicant indicated that it would be seeking the setting-aside of the taxation, which it proceeded to do only in June 2021, more than two years after receiving the notice of taxation and bill of costs. The applicant relied on rule 53 and the common law because reliance on rule 48 was precluded by its failure to attend the taxation.
The principal issue for the court was, therefore, whether a party who had received notice of taxation and failed to attend the taxation, or to oppose it or object to it, was entitled to seek its review under rule 53 and the common law.
Held
There were, besides rule 48, three other remedies available to a party aggrieved by a taxation: an application for rescission under rule 30; an application for rescission under the common law; and a rule 53 review. Rescission under rule 30 ('irregular step') was available where the taxation proceedings were tainted by a formal irregularity, such as where a party was entitled to notice but did not receive it. Rescission under the common law was available where it was sought on the ground of default of appearance at the taxation, in which case the applicant would have to comply with the requirements applicable to the rescission of default judgments (good cause, etc). Rescission under rule 53 — which regulated reviews in general and was of wide application — was not, however, available to an applicant who had been notified of the taxation but *deliberately chose not to oppose or object to it*. Such a party had to abide by his or her election, and could not challenge the taxation ex post facto under rule 53 (provided it was procedurally compliant). To hold otherwise would result in an absurdity and, moreover, render rule 48 nugatory. (See [31] – [43], [56], [61] – [65], [70] – [72].)
In the premises, the present applicant's entitlement to challenge the taxation was lost when it failed to use its opportunity to challenge the taxation, thereby consenting to it in absentia (see [68]).

FENYANE v NDENGANE NO AND OTHERS 2024 (5) SA 212 (GJ)

Administrative law — Administrative action — What constitutes — Decision by taxing master — Function of taxing master quasi-judicial, not administrative — Not amounting to administrative action.

Costs — Taxation — Who may appear — Admitted attorney without right of appearance in superior court may appear before taxing master — Legal Practice Act 28 of 2014, s 25(3).

The main issue in this review application was whether the court should order that the applicant — an admitted attorney, without a right of appearance in the superior courts under s 25(3) of the Legal Practice Act 28 of 2014 (the LPA) — be allowed to appear on behalf of her clients before the taxing master. (Section 25(3) is quoted at [42].)
The review was brought in terms of Uniform Rule 53 and was aimed at the taxing master's refusal to allow the applicant to appear on behalf of her clients at a taxation of a bill of costs, on the basis that she lacked a right of appearance under s 25(3). The respondents (the taxing master and six others) submitted inter alia that the taxing master was not a separate entity from the court, and as such the provisions of s 25(3) also applied to the taxing master. They also relied on the then Appellate Division judgment in *Bill of Costs (Pty) Ltd and Another v Registrar, Cape, NO and Another (Bill of Costs*, cited below), that the only persons given a right of audience before a taxing master of the Supreme Court were those who were allowed to practise in that court.
In addition to setting aside the taxing master's decision on review under s 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), the applicant sought declatory relief that the word 'appear' in the High Court, the Supreme Court of Appeal or the Constitutional Court, in terms of s 25(3) of the LPA, refers to appearance before judges of such courts, not to appearance before taxing masters of such courts; and that any duly admitted and enrolled attorney may appear on behalf of their client before a taxing master of such courts. The applicant submitted that, considering the context, purpose and background of the section, the only reasonable interpretation of 'appear' was to appear before a judge (see [5]).**Held**[*]
The function of a taxing master was quasi-judicial and not administrative, and accordingly PAJA had no application (see [39]). A taxing master, in the discharge of her functions under the control of the court, was an organ of state bound by the rule of law and the principle of legality. (See [40], [41].)
A taxing master acted in a quasi-judicial role with regard to the taxation of bills of costs that could not be equated to that of a judge. A quasi-judicial body did not fall within the ambit of 'courts' in s 166*(e)* of the Constitution; the taxing master was not a judicial officer as contemplated in s 166 of the Constitution; it was not an extension of the court since it had no powers to rehash the issues and rehear the matter. And it was clear that judges and taxing masters were appointed in terms of two very different empowering provisions and appointed by two very different authorities. There was something constitutionally special about a judge as opposed to an adjudicator sitting in another body, in that judges made law to an extent. It was simply untenable to suggest that a taxing master had the same status for the purposes of appearance, as a judge, to justify the limitation as suggested by the respondents. A taxing master derived authority to tax bills from Uniform Rule 70 and was accordingly a creature of statute, imbued with only those powers conferred by law. It was clear from rule 70 that a taxing master did not have the same powers as a judge. (See [45], [50], [53], [54], [62], [66].)
Uniform Rule 70(5A)*(d)* made provision for a taxing 'party' or an 'attorney' at taxation proceedings; it did not specify that such attorney must be one with rights of appearance. A purposive reading of it supported the argument that admitted attorneys, without a right of appearance, could appear before a taxing master. Accordingly, any

legal practitioner who has been admitted to practise as a legal practitioner by a South African High Court and who does not have a right of appearance, can practise and appear before any board, tribunal or similar institutions, including before a taxing master, who was an executive official performing a quasi-judicial function. (See [67], [69].)
The meanings of 'practice' and 'appear' in s 25(3), purposively interpreted, should be understood through the prism of both the preamble and s 3 of the LPA. The LPA did not define 'appear', neither did its predecessors. The term 'appear', in the context of s 25, had no convoluted inner obscure meaning; it simply meant that an admitted attorney could appear before a taxing master to represent a client. The purpose of the Constitution was to allow an admitted attorney to appear before a taxing master, without a right of appearance. Judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that did not, provided that such an interpretation could be reasonably ascribed to it. Admitted attorneys appearing before a taxing master gave effect to the spirit, purport and objects of the Bill of Rights and the right of access to justice enshrined in s 34 of the Constitution. Further, such an interpretation gave effect to the purpose of the LPA set out in s 3. Employing an admitted attorney, without rights of appearance, to appear before a taxing master, as opposed to an attorney with rights of appearance, or an advocate, meant a lower rate charged to clients. This was in line with the goal to broaden access to justice and to transform and restructure the legal profession. (See [76], [80] – [81], [83], [87], [92].)
Bill of Costs was handed down in 1979, over four decades ago, before a transformative constitution and the LPA. The common-law position relied on in that matter should therefore be interpreted in light of the constitutional normative framework, and the LPA which gave effect to the Constitution. Any law which prohibited a trade altogether or barred any citizen from practising it, limited the constitutional right to choose a profession and the right to practise the chosen profession (s 22). Such a limitation was unconstitutional and invalid unless it could be justified in terms of s 36 of the Constitution. There was no substantive reason why an admitted attorney should be deprived of the right to practise before a taxing master. The transformational and restructuring goal which the LPA sought to achieve would be encroached upon, particularly when considering s 22 of the Constitution, without justification. (See [102], [106] – [107].)
Accordingly, the declarory orders would be granted (see [108]).

KHASHANE v MINISTER OF HOME AFFAIRS AND OTHERS 2024 (5) SA 242 (GP)

Customary law — Customary marriage — Validity — Registration — Whether death of husband after celebration of marriage, but before registration thereof, invalidating its existence — Whether marriage may be registered posthumously — Recognition of Customary Marriages Act 120 of 1998, s 4.

In terms of s 2(1) of the Recognition of Customary Marriages Act 120 of 1998 (the Act), '(a) marriage which is a valid marriage at customary law and existing at the commencement of this Act is for all purposes recognised as a marriage'; s 4(3) provides that a customary marriage entered into before the commencement of this Act must be registered within 12 months after its commencement; and s 4(4)*(a)* that '(a) registering officer must, if satisfied that the spouses concluded a valid customary marriage, register the marriage . . .'.

The applicant concluded a customary marriage prior to the commencement of the Act, but her husband passed away before registration thereof. She claimed she was not aware that she was to register the customary marriage; and that when she attempted to register the estate of her late husband at the Master's offices she was denied because she did not possess a marriage certificate. She applied for condonation of the late registration of her customary marriage, and an order that the Master (the third respondent) register the estate of the late husband and appoint her executrix; asserting that her union was concluded in terms of customary law practices and, as such, should be recognised and registered — despite the subsequent demise of her husband. (See [2], [9], [20].)

At issue was whether the death of the husband after the celebration of the marriage, but before the registration of the customary marriage, invalidated its existence (see [3], [22]).

Held

It was clear that the marriage between the applicant and her subsequently deceased spouse was validly concluded in terms of customary law. The subsequent death of the husband should not be a bar to the registration of the marriage (see [43]).

While the Act was silent on the effect of the death of either party before the registration of a customary marriage, a narrow interpretation of the Act, which would result in the non-recognition of the marriage due to the subsequent death of one of the parties, was not in line with the broader societal and constitutional imperatives of recognising and protecting customary rights and practices. It was imperative to look at the spirit and purpose of the Act, and to recognise and validate customary marriages in the eyes of the law, granting them equal status with civil marriages. The purpose of registration was to provide formal recognition and documentation of what was, in essence, an already valid marriage. To deny the applicant this recognition, simply because her husband passed away before the administrative act of registration, would not only be punitive but would also undermine the very essence and objectives of the Act. (See [22] – [25].)

The first respondent and the second respondent (the Department of Home Affairs) accordingly directed to condone the late registration, register the marriage and issue the applicant with a marriage certificate (see [44]).

Legislation cited

The Recognition of Customary Marriages Act 120 of 1998, s 3(1), s 4: see *Juta's Statutes of South Africa 2022/23* vol 7 at 4-198, 4-199.

Case Information

T Segage for the applicant.

An application for posthumous registration of a customary marriage.

Order

The first respondent and second respondent, the Department of Home Affairs, are hereby directed to:

1. Condone the late registration of the customary marriage between the applicant and the late Nditsheni Samuel Mutswari.
2. Register the marriage between the applicant, Tshilidzi Petronella Khashane, and the late Nditsheni Samuel Mutswari as a valid customary marriage.
3. Issue the applicant with a marriage certificate attesting to the said registration within 30 days of this order.
4. The respondent is ordered to pay the costs of this application.

LEMBORE AND OTHERS v MINISTER OF HOME AFFAIRS AND OTHERS 2024 (5) SA 251 (GJ)

Immigration — Refugee — Asylum application — Illegal foreigner — Illegal foreigner evincing intention to apply for asylum — Requirement that show good cause for illegal entry and stay in South Africa before being allowed to make application — Whether authorities obliged to release detained illegal foreigner to attend good-cause interview — Difference between detention under s 34 and s 49 of Immigration Act — Refugees Act 130 of 1998.

Applicants were foreign nationals who had entered the country other than through official points of entry. They were discovered and arrested, brought before magistrates' courts, and charged with contravening ss 9(1) and 49(1)*(a)* of the Immigration Act 13 of 2002. At some point they evinced intentions to apply for asylum. They were being detained in terms of magistrates' courts' orders pending trial.

Applicants applied urgently to the High Court to interdict the respondents detaining, prosecuting and deporting them pending determination of their status under the Refugees Act 130 of 1998; for declarators that their detentions, subsequent to the expression of their intentions to apply for asylum, were unlawful; and that under the Refugees Act they were entitled to remain in the country pending finalisation of their asylum applications. They further prayed for an order that on admission of the applications, the respondents would be obliged to accept them, and to issue temporary asylum-seeker permits, pending finalisation of their asylum applications.

In issue was the proper interpretation of reg 8 of the Refugees Regulations, which provides:

'An application for asylum in terms of section 21 of the [Refugees] Act must —

(a) be made in person by the applicant upon reporting to a Refugee Reception Office;

. . .

(c) be submitted together with —

(i) a valid asylum transit visa issued at a port of entry . . . ;

. . .

(3) Any person who upon application for asylum fails at a Refugee Reception Office to produce a valid visa issued in terms of the Immigration Act must prior to being permitted to apply for asylum, show good cause for his or her illegal entry or stay in the Republic . . . .

(4) A judicial officer must require any foreigner appearing before the court, who indicates his or her intention to apply for asylum, to show good cause as contemplated in sub-regulation (3).'

Held, that regs 8(3) and 8(4) contemplated a two-stage approach: the individual concerned had first to demonstrate good cause for his illegal entry or stay, before being allowed to apply for asylum (see [64] – [65]).

In the case of a foreigner who had entered illegally and been arrested and detained, the authorities were not obliged to release the foreigner from
detention in order for him or her to attend the good-cause interview at a Refugee Reception Office. The detaining authority could either take the foreigner to the Office for the interview, or bring the relevant officials to the place of detention in order for the interview to be conducted there (see [78], [90]).

Only if the detainee demonstrated good cause, were the authorities obliged to release him or her (see [64]).

A further issue was the difference between detention under s 34 of the Immigration Act and under s 49 (see [72]).
Held, that s 34 did not create an offence, but was rather a part of the procedure before deportation of illegal foreigners (see [73]).
By contrast, arrest and detention in terms of s 49(1)*(a)* was not for the purpose of deportation, but rather for the prosecution of an illegal foreigner charged with contravening the section. (It as mentioned makes it an offence to unlawfully enter and stay in South Africa.) (See [73].)
Here, the applicants had failed to make a case for the interdicts and declarators that they sought: their detentions and prosecutions were lawful, and the respondents had confirmed that they would assist them to attend their good-cause interviews. The respondents had also undertaken that should they be successful in their interviews, that they would issue them with asylum transit visas and allow them to apply for asylum (see [89]).
Ordered, that the respondents were to take reasonable steps to give the applicants an opportunity to show good cause, and in cases where such was not shown, to allow for any review or appeal to proceed until finally determined (see [96]).

MINISTER OF WATER AND SANITATION v CLACKSON POWER (PTY) LTD AND ANOTHER 2024 (5) SA 280 (WCC)

Practice — Parties — Authority to institute proceedings — Juristic person — Rule 7(1) not providing only way to challenge authority of person to institute proceedings on behalf of litigant — Authority could be challenged on papers — Uniform Rules of Court, rule 7(1).

Rule 7(1) of the Uniform Rules of Court does not provide the only way to challenge the authority of a person to institute proceedings on behalf of a litigant (which is a juristic person). Their authority may be challenged on the papers. Rule 7(1) provides the benefit to the party challenging the authority that the proceedings are effectively stayed until the court is satisfied of the authority, but a litigant may elect not to make use of that benefit. There may be circumstances in which challenging the authority on the papers instead of rule 7(1) might warrant an adverse costs order. (See [50].)

MONTROSE MEWS BODY CORPORATE v MOELA NO AND OTHERS 2024 (5) SA 291 (GJ)

Access to information — Access to information held by private body — Generally — PAIA not applying in situations where duty to disclose information arose from pre-existing legal relationship between person seeking information and person holding information — PAIA was rather intended to apply where person seeking information from private body would otherwise have no right to it.

Rule 10 of the Management Rules found in annexure 1 of the Regulations to the Sectional Titles Schemes Management Act 8 of 2011, which rules bound the applicant, Montrose Mews, as a body corporate constituted out of a sectional-title scheme, provided that —
'(o)n the application of any member . . . the body corporate must make all or any of the books of account and records available for inspection and copying'.

The third respondent, Ms Mokoka, a member the applicant, had relied on the above to seek from the applicant access to certain of its bank statements. The applicant's response, that Ms Mokoka ought to make a request in terms of the Promotion of Access to Information Act 2 of 2000 (PAIA), prompted Ms Mokoka to raise a dispute with the Community Schemes Ombud Service. The adjudicator appointed by the Ombud granted an adjudication order directing the applicant to give Ms Mokoka access to the records. In the present application before the High Court, the applicant sought to review and set aside this award. The main issue to be addressed, it was agreed, was whether PAIA applied to a request made for information of the nature Ms Mokoka wanted. If it did, the adjudication order had to be set aside. If it did not, then the order stood.

The court found that Ms Mokoka had a right under the management rules to inspect the statements she wished to see 'on application' (see [15]). And PAIA did not apply to Ms Mokoka's request, because PAIA was never intended to apply in situations where a duty to disclose information arose from a pre-existing legal relationship between a person seeking information and the person holding that information. PAIA was rather intended to apply where a person seeking information from a private body would otherwise have no right to it. (See [5].) For a court to hold otherwise would be at odds with its obligation under s 39(2) of the Constitution, 1996, to promote the spirit, purport and objects of the Bill of Rights when interpreting legislation. The right of access to information in s 32 of the Constitution, and general legislation like PAIA that was intended to give effect to it, ought to be read to facilitate rather than encumber the dissemination of information. To subject a body corporate member's rights under the management rules to the strictures of PAIA would be a needless encumbrance, without foundation in the Constitution, or in PAIA itself. (See [22].) The court accordingly dismissed the application.

SAFELINE PHARMACEUTICALS (PTY) LTD v DIRECTOR-GENERAL, NATIONAL DEPARTMENT OF HEALTH AND OTHERS 2024 (5) SA 298 (GP)

Medicine — Regulation — Tender for procurement of medicines — Power to classify medicines for purposes of public procurement — Power to determine therapeutic class — Whether Regulator or Department of Health having such power — Medicines and Related Substances Act 101 of 1965, s 35(1)(iii).

The Department of Health (the Department) initiated a tender, inviting bids to procure pulmonary surfactants for the period May 2021 to 30 April 2024 (the 2021 tender). The invitation to bid was formulated on the basis of two therapeutic classes. The applicant, Safeline Pharmaceuticals (Pty) Ltd (Safeline), submitted its registered product, Poractant Alfa (Alfa), and third respondent, Abbvie (Pty) Ltd (Abbvie), its Beractant, both pulmonary surfactants. The bid invitation classified Alfa and Beractant as medicines of the same therapeutic class.

Safeline challenged the Department's award of the tender to Abbvie, and also its decision to classify Alfa and Beractant as belonging to the same therapeutic class (the contested classification). Ultimately, as Abbvie had almost completed performance, Safeline's substantive relief was confined to seeking declaratory orders as to the legality of the contested classification and of the award (see [5]).

Safeline's primary challenge was that the Department had no power to adopt the contested classification; that the Regulator enjoyed the exclusive competence to classify medicines. Hence, Safeline contended, the adoption of the contested

classification by the Department, and in particular its bid committee's drawing-up and publication of the invitation to bid for the 2021 tender, was unlawful. (See [7], [9], [13].)
At issue was whether the power of the Department to procure medicines, and Surfactant in particular, encompassed the power to specify in an invitation to bid that procurement would take place on the basis of the contested classification, or whether such power rested exclusively with the Regulator (see [9]).
Held
The Department had the power to procure medicines. Intrinsic to this power was the classification of goods or services into classes which permit of comparison. Therapeutic efficacy was an entirely rational criterion of classification. It followed that the contention that the Department lacked the power to define a therapeutic class would be rejected. (See [8], [11 – [12].)
The Regulator had a power to classify medicines, but only for the purposes of the Medicines Act. And those purposes did not include classification for the public procurement of medicines. Accordingly, the Regulator did not enjoy the power to make the contested classification. The Department may decide upon such a classification for the purpose of the public procurement of medicines, provided such classification satisfied the usual standards of lawful administrative action. (See [19].)
And, even if the Regulator enjoyed an incidental power of classification to undertake the contested comparison, there was no reason to interpret the Medicines Act to imply that the Regulator alone had this power. It followed that Safeline's application would be dismissed. (See [20], [23].)

SIZWE AFRICA IT GROUP (PTY) LTD v STANDARD BANK OF SOUTH AFRICA LTD 2024 (5) SA 308 (GJ)

Practice — Pleadings — Exception — To particulars of claim — Direct exception to plaintiff's particulars not available to third party due to absence of lis between them — Third party may, however, plead or raise exception to third-party notice — Uniform Rules of Court, rule 13(6) and (7).

A third party may not except directly to a plaintiff's particulars of claim, other than in the form of a plea to the third party notice (see [22]).
The excipient in the present matter Sizwe Africa (SA), was joined as a third party to an action instituted by the respondent, Standard Bank, against Sizwe Asset Finance (SAF) for breach of contract. SAF, as defendant, joined SA to the action on the basis that SA had breached a related contract between it and SAF. While defendant SAF did not raise an exception to Standard Bank's particulars of claim, third party SA did, and the question for the court was whether this was a permissible step for a third party to take.
Third party proceedings, which are governed by rule 13 of the Uniform Rules of Court, were designed to prevent a multiplicity of actions concerning the same or related subject-matter. It could be invoked by notice to a third party where one of the main parties to the action claimed that it was entitled to a contribution or indemnification from the third party in respect of the relief being claimed against it.
Standard Bank argued that the third party's joinder to the action did not make it into a defendant vis-à-vis the plaintiff since there was no *lis* between them. A third party could not therefore seek a dismissal of the plaintiff's claim against the defendant where the defendant did not itself seek this remedy. Standard Bank argued that upholding an

exception to the plaintiff's particulars at the instance of the third party would impermissibly interfere with the process as between plaintiff and defendant.
SA relied for its proposition that it *was* entitled to raise an exception to Standard Bank's claim on the wording of rule 13(6), which allowed a third party to 'contest the liability of the party issuing the third party notice' by 'filing a plea or other proper pleading'. It argued that 'other proper pleading' included an exception. SA argued that this view was strengthened by rule 13(7), which stated that '(i)n so far as the third party's plea relates to the plaintiff's claim the third party shall be regarded as a defendant', which made it clear that the third party was regarded as a defendant vis-à-vis the plaintiff.
Both Standard Bank and SA referred to the decision of the Durban High Court in *Khan NO v Maxprop Holdings (Pty) Ltd (Garlicke & Bousfield Inc Third Party)* 2017 JDR 1525 (KZD), in which an exception at the instance of a third party to the plaintiff's particulars of claim was upheld. The matter went on appeal as *Khan NO v Maxprop Holdings* 2018 JDR 2114 (SCA), where it was decided on a different issue. Standard Bank argued that both decisions were obiter because neither court had embarked on a discussion on whether there was a *lis* between the plaintiff and third party that entitled the latter to except to the plaintiff's particulars.
The present court favoured Standard Bank's argument, not only for the reasons relied on by it, but also because rule 13(1) set narrow parameters for the joinder of a third party, whose involvement derived from the *contribution or indemnification* being sought from it, in response to which it could put up a plea or other proper pleading setting out why it was not liable, eg because the claim against the defendant had prescribed or because no cause of action was established against it, and the defendant was for that reason not entitled to a contribution from the third party. Therefore, while the third party could raise a special plea or exception to the third party notice, it could not do so to the plaintiff's particulars of claim, for the simple reason that there was no *lis* between them. The court emphasised that the issue was not clearly addressed by the Supreme Court of Appeal in *Khan.* (See [21.2] and [21.3].)
The court found that, even if this conclusion was wrong, none of SA's exceptions to Standard Bank's claim had any merit (see [25] – [69]).

TEKETE AND OTHERS v MINISTER OF SAFETY AND SECURITY 2024 (5) SA 325 (WCC)

Costs — Liability for — Costs after rejection of offer of settlement 'without prejudice save as to costs' (Calderbank offer) — Court's discretion — Punitive costs order not necessarily indicated.
Costs — Party and party costs — Scale — New rule 67A(3) (effective 12 April 2024) — Unusually complex and important matter — Taxation on scale B appropriate.
Costs — Punitive costs order — When to be awarded — Where defendant in damages action refusing to accept plaintiff's settlement offer made 'without prejudice save as to costs' (Calderbank offer) — Punitive costs not necessarily indicated — Factors to be considered by court.
Practice — Offer of settlement — Offer 'without prejudice save as to costs' (Calderbank offer) — Court's discretion on costs where rejected and award exceeding offer — Punitive costs order not necessarily indicated.

Late in 2007 the plaintiffs instituted action against the defendant for damages arising out of a police shooting in October 2005 that resulted in the death of their breadwinner. After 12 hearings on the merits and seven more on quantum, the Western Cape High

Court on 12 December 2019 decided the merits in plaintiffs' favour, holding the defendant liable for loss of support. The issue of costs was held over and the matter proceeded on quantum. The High Court awarded R1,436 million, after which it reverted to the issue of costs.

At the outset of the hearing on costs, the court's attention was drawn to the fact that the plaintiffs had in October and December 2022 provided the defendant with *Calderbank* offers * to settle 'without prejudice save as to costs', and with costs on party and party basis. Under the second offer, the defendant would pay the plaintiffs damages of R540 000 (the plaintiffs had decided not to rely on the first one).

As usual with *Calderbank* offers, the plaintiffs indicated that if the defendant rejected the offer and the sum awarded exceed it, the offer would be disclosed to court with a petition for an award of attorney and client costs. The plaintiffs submitted that their *Calderbank* offers had properly placed the defendant at risk of punitive costs, and that they would be out of pocket if awarded only party and party costs.

The defendant argued in response that the court should take into account that the State Attorneys' Office was dysfunctional and that the plaintiffs got more than what they proposed in the second *Calderbank* offer, and were hence not prejudiced. In the light of this, the defendant requested costs to be awarded on the ordinary party and party scale.

The court indicated that the following issues required determination: *(a)* the costs of the trial on the merits; *(b)* the *Calderbank* offer; and *(c)* the recently promulgated rule 67A(3) (effective 12 April 2024), which stated that a court was obliged, when making party and party costs orders, to indicate the appropriate scale out of A (lowest), B and C.

Held

As to (a): Counsel for the plaintiffs' argument that the defendant should be held liable for the costs relating to the merits trial on a party and party scale, was in keeping with accepted legal principle that costs follow the event, and appropriate in the present matter. (See [8] – [9].)

As to (b): In principle *Calderbank* offers — which were akin to rule 34 offers — were admissible in relation to costs and could be disclosed to the court for that purpose after judgment was handed down. Here, their disclosure after judgment on the merits was crucial, considering the history of the matter and plaintiffs' abovementioned submissions as to their effect. While it was true 17 years had passed since litigation was instituted and that costs would have been curtailed, had the defendant considered the *Calderbank* offer, it was not clear from the facts that the defendant's conduct had been vexatious or unreasonable. Since new information had come to light at a very late stage of the proceedings, making litigation inevitable, there was no reason to sanction the defendant with a punitive costs order. (See [15] – [16] and [20] – [24].)

As to (c): The purpose of rule 67A was for the court to exercise control over the rate at which counsel's fees could be recovered under a party and party award. Given that the parties were ad idem on the appropriate scale, and the complexity and importance of the case, counsel's fees should be taxed on scale B. (See [25] – [26].)

LATEGAN AND ANOTHER v DIRECTOR OF PUBLIC PROSECUTIONS, WESTERN CAPE AND ANOTHER 2024 (2) SACR 227 (SCA)

Sexual offences — Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 — Retrospectivity of — Application of provisions of ss 58 – 60 to offences committed prior to coming into effect of Act — Presumption in common law against operation of statutes retrospectively — Such retrospectivity was 'weak', relating only to procedural rules of evidence — Application of provisions to appellants not unfair in respect of defence they might wish to mount.

The appellants appealed against a decision of the High Court which had held in a review application by the first respondent (the DPP) that the provisions of ss 58 – 60 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 were inapplicable to the trial of the appellants in respect of crimes committed between 1974 and 1979, being before the commencement of the 2007 Act. They contended that the sections were not applicable as the Act did not have retrospective effect.
Held, that, the question was whether any of the appellants' existing rights had been adversely affected. In answering this, it was necessary to juxtapose the provisions of the three sections against the common-law position. In doing so, the courts' interpretation of the applicable common-law position was relevant. The common-law requirement pertaining to the admission of a previous consistent statement was that such evidence was admissible if presented voluntarily by a complainant who had made the complaint within a reasonable time after the commission of a sexual offence. As regards the statutory position introduced by the Act, the essence of ss 58 and 59 was to clearly stipulate that no adverse inferences could be drawn solely from the absence of a previous consistent statement made by the complainant in a sexual offence and from the length of the delay between the commission of that offence and the reporting thereof. The retrospectivity in the present instance did not impinge on any of the substantive rights of the appellants in respect of their future criminal proceedings. Insofar as this retrospectivity was a 'weak' retrospectivity relating only to procedural rules of evidence, no unfairness would be visited upon the appellants in respect of the defence that they might wish to mount during the criminal proceedings. The High Court was therefore correct in finding that the provisions of the sections were applicable to the future criminal proceedings of the appellants. (See [20] – [25].)

KHUBALO v MINISTER OF POLICE 2024 (2) SACR 238 (ECMk)

Damages — Measure of — For unlawful arrest, detention and contumelia — Police conducting search without warrant or permission of plaintiff and destroying liquour they believed to be illegal — Plaintiff arrested and manhandled in such manner that his private parts were exposed to public — Plaintiff awarded R80 000 for unlawful arrest and detention for period of 30 hours, and R20 000 for contumelia.

The plaintiff instituted action for damages against the defendant for wrongful arrest and detention and for malicious prosecution. His arrest occurred during a warrantless raid carried out under the control of a Lt Col Pika (who by the time of trial had been promoted to colonel). The plaintiff arrived at the scene of the raid dressed only in his

boxer shorts and asked what the police were doing. He was told that the police were seizing *umshovalale*. The plaintiff told the police that the brewing question was not *umshovalale* but *iqhilika*, a drink specifically excluded in the Eastern Cape Liquor Act 10 of 2003 from being illegal. The Act did not mention *umshovalale*. The police destroyed 324 litres of the liquor. When the plaintiff arrived on the scene, Col Pika asked him what the plant was that was growing close to the garage door where the liquor was kept. The plaintiff said that it was a dagga plant but that it was on the neighbour's side of the fence. The police uprooted and seized the plant and took it with the plaintiff to the police station where the plaintiff was detained in a cell. On the following day the police took the plaintiff to the court where the prosecutor decided not to prosecute, and he was then taken back to the police station where he was released after having spent 30 hours in custody. At the trial Col Pika was cross-examined and asked whether the police had a search warrant. He replied that the police did not do a search but that they saw the dagga and confiscated it. He said that they were not there to search for such but went there to confiscate umshovalale.
Held, that there was no law that permitted the conduct contended for in that response by the colonel where the police would simply go into a person's property without a warrant, and, without seeking permission from the owner, confiscate what they deemed to be illegal. It was not sanctioned by the provisions of s 40 of the Criminal Procedure Act 51 of 1977, relied upon by the defendant. It was certainly not permitted in terms of the Constitution, and in particular ss 9, 10 and 14 thereof. (See [19].)
Held, further, that the plaintiff had walked across to the where the police were, wearing only his night shorts. It was how he was manhandled by Col Pika that his private parts were exposed to the members of the community. The conduct of Col Pika in this regard was unlawful and wrong and the plaintiff succeeded in proving humiliation and degradation that impaired his honour as a free citizen. (See [30].) The defendant had accordingly failed to discharge the onus resting on him to justify both the arrest and detention. (See [32].) The plaintiff was awarded R80 000 for unlawful arrest and detention for period of 30 hours, and R20 000 for contumelia. (See [37] and [39].)

NZUZA AND OTHERS v NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND OTHERS 2024 (2) SACR 251 (GP)

Court — High Court — Jurisdiction — Offence committed in North West Province, but applicant seeking order in Gauteng against National Director of Public Prosecutions — Gauteng court having jurisdiction where main respondents, against whom relief sought, fell within jurisdiction of court.
Criminal law — Court — Powers of — Review — Decision to prosecute — Separation of powers — Courts could not lightly interfere with decision of Director of Public Prosecutions to institute prosecution — Not precluded, however, from determining whether rational connection between evidence and decision reached.
Prosecution — Permanent stay of prosecution — Application for — On ground of unreasonable delay — Delay caused by applicants and amounting to abuse of process — Application dismissed.

The applicants were miners on strike at Marikana in August 2012 who were indicted in the Mahikeng High Court on a number of counts, including seven counts of murder and the possession of firearms and ammunition. Through their lawyers they made representations on 26 August 2016 to the first respondent (the NDPP). After obtaining documentation from the Director of Public Prosecutions (the DPP) of North West, the

NDPP responded to the applicants' lawyers, refusing to review the DPP's decision to prosecute. The applicants then attempted once more to have the NDPP intervene and halt the prosecution at a meeting with the NDPP, and other officials in September 2017. In the present application they wanted the court to declare the continuation of their prosecution as unlawful and to review and set aside the NDPP's decision not to intervene and stop it. They contended that their prosecution had no reasonable prospects of success. This had led to an emotional and financial toll on their part because their legal bills had run into millions of rands while the serious charges against them had caused a lingering stigma against them. They also alleged that their freedom of movement had been limited as they frequently had to report to the police whenever they wished to travel outside the North West Province. Further, their prosecution was tainted by bias as members of the police who were caught on video and implicated by other evidence in the killings on 16 August 2012, had not been charged despite the recommendations of the commission of enquiry. They argued that there was no rational connection between the evidence before the NDPP and his decision.

Held, as to the question whether the Gauteng Division had jurisdiction where the offences were allegedly committed in the North West Province, and it was the DPP of North West who had indicted the applicant, the main respondents against whom relief was sought, the NDPP and its officials fell within the jurisdiction of the present court. (See [21].)

Held, as to the discontinuation of the prosecution, that the last interaction that the applicants had with the matter was on 10 October 2017 when they launched the application and had done nothing else after that, until June 2023 when they filed their written argument some six years later. The ineluctable consequence of failing to prosecute the review was the striking-off of the criminal trial from the roll in the Mahikeng High Court. The respondents had raised the argument that their application should be dismissed on this basis as the applicants had shown no seriousness in expediting its prosecution. The applicants' inactivity amounted to abuse of process when considered from all conceivable angles. An important consideration was that no where did the applicants explain their failure to ensure that the matter was expeditiously prosecuted. There was no mitigation for the conduct of the applicants and the only sanction would be to dismiss the matter on that basis. (See [42] – [45].)

Held, further, as to the review of the decision to prosecute, due to the separation-of-powers doctrine, a court would not lightly interfere with the decision made by the respondents to institute a prosecution. The circumstances in which this would happen were limited. The doctrine prevented the court in the context of the present proceedings from second guessing the veracity of the evidence. That did not however preclude the court from determining whether there was a rational connection between the evidence and the decision reached. At face value, the information before the NDPP was enough for him to make an informed decision. Prosecutorial independence was important and should not be trifled with. The material placed before the NDPP, and purely considering the respondents' answering affidavit, as well as the material included in the rule 53 record, was no basis for the court to review the decision to prosecute and set it aside. The application was accordingly dismissed. (See [53], [55] and [57].)

S v LIEBENBERG 2024 (2) SACR 269 (CC)

Court — Constitutional Court — Jurisdiction — Constitutional matter — What constitutes — Contention that matter raised constitutional issues, in that state had produced inadmissible evidence of prior conduct and disciplinary processes in criminal

trial — Magistrate not placing reliance on such evidence and did not have any bearing on her conviction in either event — Right to fair trial not infringed — Not constitutional matter — Leave to appeal refused.

The applicant was convicted in a regional court of numerous counts of fraud, forgery and uttering and was sentenced to six years' imprisonment. On appeal to the High Court, she was acquitted on the charges of forgery and uttering, and the sentence was reduced to four years' imprisonment. She applied for leave to appeal to the Supreme Court of Appeal, but that was refused. She contended that the matter raised constitutional issues or issues connected with decisions on constitutional matters, namely that the state adduced inadmissible evidence of her prior conduct and the disciplinary hearings depicting her bad character and criminal tendencies. Further, that the evidence of the statement made during the disciplinary process had been unconstitutionally obtained because she had been compelled to make a statement and her right to silence was not explained to her. She argued that the proceedings were therefore fundamentally unfair and irregular, and that it would be in the interests of justice to grant leave to appeal.

Held

During oral argument the applicant's counsel had conceded that there was no indication that the magistrate placed any reliance on the evidence pertaining to the disciplinary hearings. The court had relied on admissions made in terms of s 220 admissions, and the totality of the evidence that was laid on each of the counts of theft and fraud, excluding the evidence pertaining to the disciplinary hearings. What was contended to be inadmissible evidence did not have any bearing on her convictions. The applicant had effectively pleaded guilty by admitting all the elements of the offences in question. The argument that the magistrate must have been influenced by the impugned evidence was pure speculation. From the record of proceedings, the High Court could not find any evidence of bias on the part of the magistrate that could have resulted in the applicant's decision to make the formal admissions and that finding was unassailable. The applicant had relied on the remark made by the magistrate during argument prior to conviction, that 'nothing was in dispute' and that the applicant wanted to 'frustrate the system'. The contention, that the evidence about the disciplinary hearings must have influenced the magistrate to have made the remark, could not on any reasonable construction be linked to the evidence pertaining to the disciplinary hearing. In the circumstances there was no constitutional issue and leave to appeal had to be refused. (See [39] – [45].)

S v SIYAYA 2024 (2) SACR 282 (KZD)

Murder — Sentence — Deaths arising from reckless driving — Accused driving 55-ton coal truck at excessive speeds, travelling in wrong lane ignoring traffic coming in opposite direction, and ultimately colliding with scholar-transport vehicle, killing 18 young adults — Accused sentenced to 14 years' imprisonment on counts of murder and six years' imprisonment for two contraventions of National Road Traffic Act 93 of 1996, ss 61(1) and 63(1).

The accused was convicted on 18 counts of murder, reckless driving in contravention of s 63(1) of the National Road Traffic Act 93 of 1996 (the Act) and a count of contravening s 61(1) of the Act by failing to report an accident. The offences were committed when the accused, a 30-year-old first offender, drove a coal truck with a total weight of 55 tons for a substantial period at excessive speeds; disregarded a

mandatory stop sign; drove at an excessive speed for the conditions prevailing; disregarded barrier lines; when approaching slow-moving traffic crossed over the double barrier lines, and accelerated; when oncoming traffic approached he made no effort to return to the correct, lane but instead accelerated, never deviating from the lane he was travelling in; and continued for 1,2 kilometres when the road narrowed, and instead of trying to return to the correct lane, in fact accelerated, with numerous near misses not deterring him. He eventually collided with a scholar-transport vehicle, killing the 18 young adults. As regards sentence, the court noted that the murder counts were framed with the provisions of s 51(2) of the Criminal Law Amendment Act 105 of 1997 and, in particular, part 2 of sch 2 to that Act which indicated a minimum sentence of 15 years' imprisonment. It noted that the court was not compelled to impose the minimum sentence, and could impose a lesser sentence if satisfied that substantial and compelling circumstances existed. The fact that there was no direct intention to kill, and that the accused had been in custody for 20 months that substantial and compelling factors were present, warranting a deviation from the prescribed minimum. (See [31] and [36].) The court held, however, that the accused's actions constitute a high degree of blameworthiness or culpability commensurate with the devastating consequences of his actions. It accordingly sentenced the accused to 14 years' imprisonment on the murder counts, taken together as one for purposes of sentencing; to three years' imprisonment in respect of reckless driving; and six years' imprisonment for failing to report the accident. The two offences under the Act were ordered to run concurrently and the effective term of imprisonment was accordingly 20 years' imprisonment. (See [38] – [39] and [45].)

SCHULTZ v MINISTER OF JUSTICE AND CORRECTIONAL SERVICES AND OTHERS 2024 (2) SACR 294 (SCA)

Extradition — Request for extradition to South Africa — Which authority required to authorise extradition — Request initiated by prosecutor — Request then processed through number of channels before arriving at Minister of Justice and Correctional Services who passed it on to Department of International Relations and Cooperation — Such process flawed as conduct implicating foreign relations fell within ambit of Executive and involved principle of reciprocity — Authority to make request residing with Minister — Extradition Act 67 of 1962.

The appellant disputed the validity of the request for his extradition from the United States of America (the US). The request came after it was initiated by the relevant prosecutor and the preparation of a warrant of arrest and a charge-sheet which were referred to the Deputy Director in the DPP's office in charge of extraditions. When he was satisfied that the documentation was correct it was forwarded to the DPP, who signed off on the final document which then went to the NDPP for her perusal. If she were satisfied it was forwarded to the Director General of Justice and Correctional Services who then channelled it to the Department of International Relations and Cooperation, from where it was dispatched to the United States (the US).
The appellant contended before the High Court that the process described by the respondents was unlawful, in that it was the Minister and not the NPA who had the authority to deal with extradition requests to the US. The High Court dismissed that submission and drew a distinction between the treatment of extradition requests to the Republic in the Extradition Act 67 of 1962 and those made by the Republic to a foreign state. While the Minister had a range of express powers in respect of incoming requests, the Extradition Act was silent as regards the Minister's powers in respect of

outgoing requests. The High Court agreed with the respondents that, while the Minister, through the Department, had some role to play in requests for extradition to the Republic, this was a limited administrative function.
Held, that although the Extradition Act was clear on the relevant authority in relation to incoming extradition requests and there were no equivalent provisions in the Act in respect of outgoing requests, this did not mean that the Minister did not have any decision-making powers in respect of outgoing requests. What the respondents' submission overlooked was that extradition operated at the international level, as well as the domestic level. Furthermore, one of the essential elements of extradition was that it involved an act of sovereignty between two states and, as such, it necessarily implicated foreign relations, in respect of which powers were bestowed on the executive. (See [23] – [25].)
Held, further, that conduct implicating foreign relations fell within the ambit of the executive authority and was consistent with customary international law which recognised that foreign functions of state were conducted by the executive. It was presumed in international law that where the state acted, it did so through its executive officials. This was so because, when an official made undertakings on behalf of the state or performed such acts, he or she had to have authority to do so as such acts had binding consequences for the state. (See [29].)
Held, further, that the executive power to make an outgoing request was also to be implied from the principle of reciprocity, which lay at the very heart of extradition. (See [34].)
Held, further, that the process described by the respondents did not satisfy the principle of legality, which required the identification of the source of power and the functionary responsible for the exercise of that power. As things currently stood, there was no identified functionary, even within the National Prosecuting Authority, who exercised the decision-making power to make the extradition request. Was it the prosecutor, the DPP, or a functionary within the NDPP's office, or the NDPP herself who did so? The respondents did not explain that to the court and neither did the National Prosecuting Authority Act 32 of 1988 provide the answer. It was clear that the Minister was central to the administration and implementation of the Extradition Act, and the finding by the High Court that the extradition request was incidental to the functions of the NPA could not be sustained. The appeal accordingly had to be upheld. (See [44] and [48] – [49].)

S v QINA 2024 (2) SACR 310 (ECMk)

Housebreaking — Housebreaking with intent to steal — Verdict — Accused apprehended before he could steal anything — Conviction of housebreaking with intent to steal competent conviction and not necessary to add on 'and attempted theft'. **Trial** — Delay in completion of — — Unreasonable delay — Delay caused by legal representatives and lack of control by presiding officer — Matter to be reported to Legal Aid South Africa and Director of Public Prosecutions — Criminal Procedure Act 51 of 1977, s 304.

The accused appeared before a magistrate, facing a charge of housebreaking with the intent to steal. The accused, represented by an attorney from the Legal Aid Board pleaded guilty and handed in a statement in terms of s 112(2) of the Criminal Procedure Act 51 of 1977, and the magistrate entered a conviction for 'housebreaking with the intent to steal'. The magistrate stated that after convicting the accused it was

brought to her attention that the charge upon which the accused had been convicted was defective, and that she had erroneously convicted the accused on a defective charge. She stated that the accused should have been found guilty of the offence of housebreaking with intent to steal and attempted theft. She requested the court to set aside the conviction and to refer the matter back for the accused to be convicted afresh.
Held, that the proposition by the magistrate, that the accused be convicted of and punished for housebreaking with intent to steal and attempted theft, was wrong. It lacked appreciation of the facts of the case and substantive law regarding specific offences. It was a long-standing practice that an accused who broke in and entered premises, at which she committed an offence, would be charged with one composite offence of housebreaking with intent to commit such an offence and of committing the specific offence concerned. However, the offence of housebreaking with intent to commit an offence, whether under common law or statute, was a separate offence. The offence with which the accused was charged was complete as it stood, and the conviction had to be confirmed. (See [14] – [21].)
Held, further, that the accused was represented by a Legal Aid attorney, who on many occasions sought postponements, abandoned the launch of bail and, on each occasion, promised that the accused would plead to the charge over a period of almost three months. There was no doubt that the Legal Aid attorney had conducted the case carelessly and in an extremely casual manner. This had resulted in the accused languishing in jail in circumstances where both the prosecutor and the legal representative were the cause of the delay. All those circumstances had seriously prejudiced him and the postponements had simply been granted without any formal enquiry by the presiding magistrate. The matter deserved the attention of Legal Aid South Africa and the DPP in the Eastern Cape for investigation into the causes of the delays in the trial and the failure of justice in the matter. (See [23] – [27].) The conviction was confirmed, and the matter remitted to the court a quo for sentencing.

S v JOHANNES 2024 (2) SACR 318 (WCC)

Bail — Appeal against refusal of — Factors to be taken into account — Approach of court indicating that accused already guilty of having committed offences for which he was to be tried — Despite appellant's indication that he did not wish to testify about merits of charges, prosecutor nonetheless allowed to cross-examine him — Magistrate exercised discretion wrongly in refusing bail — Appeal allowed — Criminal Procedure Act 51 of 1977, s 60(4)*(a)* and *(c)*, schs 1 and 5.

The appellant appealed against the refusal of bail by a magistrate in a case where he was charged with three counts of fraud, one of theft and one of attempted murder. The attempted-murder charge arose from an incident in which the appellant had allegedly raced away from a filling station without paying and was chased by the police who shot at the tyres of his vehicle. He was alleged to have then 'bumped' a police official with his car, but the policeman suffered no injuries. The appellant had been a member of SAPS until his discharge in March 2023. He knew the complainant on the attempted-murder charge as a fellow policeman, although they worked on different shifts. The offences of fraud were committed in September 2022 and August 2023 and the theft charge in August 2023 when the attempted-murder was allegedly committed. In opposing bail, the state confirmed that it was opposed in terms of s 60(4)*(a)* of the Criminal Procedure Act 51 of 1977 and argued that the offences occurred over a

period, in the same area, and after the appellant had already been released on bail on other counts. It was also submitted that he had the propensity to commit offences while released on bail, that he posed danger to the public as he displayed a disregard for the law, and that he would have attempted to influence or intimidate witnesses and based her reliance on s 60(4)*(c)* on the grounds that the appellant was familiar with the complainant in the attempted murder count.

The magistrate found that the appellant was a danger to the public, had attacked police officers and, because he knew the complainant, he was aware and familiar with the witnesses in the case and might even know the other witnesses. The magistrate therefore found that there was a likelihood that the appellant would undermine or jeopardise the objectives or proper functioning of the criminal justice system, and that the interests of justice did not warrant granting him bail. The parties agreed that the matter fell to be decided under sch 5 of the CPA.

On appeal, the court noted misdirections by the magistrate and pointed to the fact that the investigating officer never based his reasons for opposing bail on s 60(4)*(c).* The magistrate had adopted the view of the prosecutor that the appellant's confirmation under oath, that he would not interfere with witnesses, was untrue, because he knew the complainant and that three of the offences were committed whilst the appellant was a police officer. It was, however, not established that the appellant had attempted to influence or interfere with his former colleague, or any of the other witnesses. (See [26] – [29].) It was furthermore disconcerting that, despite the appellant's indication that he did not wish to testify about the merits of the charges, the prosecutor nonetheless was allowed to cross-examine him. (See [32].) The court considered the language use and choice of words in the magistrate's judgment unfortunate and indicated that his fate was determined as if he were already guilty of the charges, and that permeated most of the findings in weighing up the interest of liberty versus the interests of society that bail not be granted. The magistrate had set the bar higher for the appellant on the grounds that he was a police officer who he had committed the offences, whereas the latter offences occurred after he had already left SAPS. (See [38] – [39].) Even accepting that the appellant was out on bail in the regional-court matter when he was arrested on the subsequent five charges, the question was whether it was established on a balance of probabilities that he had any disposition to commit sch 1 offences. There were no previous convictions and no evidence that he had previously committed a sch 1 offence, thus one could safely conclude that he had no criminal career at the time he applied for bail. As to his future conduct, which the magistrate was correct to assess, the difficulty with the rationale in her judgment was that she had approached the s 60(4) issues on the basis that the appellant had indeed committed the offences while out on bail. (See [41] – [43].) The magistrate had exercised her discretion wrongly in refusing bail and the appeal had to succeed. (See [49].) Bail in the amount of R3000 was granted.

CAR v Central Authority of the Republic of South Africa and another [2024] 3 All SA 653 (SCA)

Family Law and Persons – International child abduction – Removal of child from habitual residence by one parent without acquiescence of other parent – Defence of grave risk of harm – Whether or not allegations made by mother established, as envisaged in article 13(b) of the Hague Convention on the Civil Aspects of International Child Abduction, that there was a grave risk that child's return would expose him to physical or psychological harm or otherwise place him in an intolerable situation – Where burden of proof resting on parent resisting return of child is not discharged, return is ordered.

The appellant ("CAR") and the second respondent ("YR") were married in 2011 when they were South African citizens living and working in South Africa. In 2014, they relocated to Canada, where they became citizens in 2021. In the meantime, they had a child ("CJ"). On a visit to South Africa in 2022, YR informed CAR that she did not intend to return to Canada and that she intended to keep CJ with her in South Africa. CAR returned to Canada, and approached the Central Authority of Canada and initiated proceedings for the return of CJ in terms of the Hague Convention on the Civil Aspects of International Child Abduction. The High Court's dismissal of the application led to the present appeal. The Court's decision was based on its finding that although CJ's habitual residence at the time of his retention was Canada, his medical history would expose him to a grave risk of physical or psychological harm or intolerable situation, as Canadian doctors had not picked up any of the developmental issues that were subsequently diagnosed by three experts in South Africa. YR also alleged that CJ was exposed to CAR physically, verbally and emotionally abusing YR in Canada. She further alleged that CAR had abused and neglected CJ by enforcing a traumatic parenting style which created a toxic environment and caused CJ to develop a skin irritation. Those allegations were denied by CAR.

Held – On appeal the central issue for determination was whether or not the allegations made by YR established, as envisaged in article 13(b) of the Hague Convention, that there was a grave risk that CJ's return to Canada would expose him to physical or psychological harm or otherwise place him in an intolerable situation.

With limited exceptions, the Hague Convention provides for the prompt return of an abducted child to their home country, which is considered internationally to be the correct forum to deal with custody and related disputes. Article 13(b) of the Convention sets out the defences available to the abducting parent who is opposed to the return of the child.

Regarding article 13(b), what constitutes the risk of harm will be determined by the facts of each case and the nature of the projected harm. The burden of proof lies with the individual who opposes the return. YR had not shown, on a balance of probabilities, that such harm would eventuate should a return order be granted. In determining whether the child in question would be placed under physical or psychological harm, or an intolerable situation, the court must consider the possibility of alleviating or extinguishing the circumstances causing the grave risk by way of imposing conditions or protective measures that would apply upon the child's return to their rightful jurisdiction. The High Court had erred in its approach to the application of article 13(b). It dealt wrongly with the onus which rested on YR and the evidence she led to

discharge that onus. The High Court also did not attach adequate weight to CAR's undertaking to ensure that CJ would have access to relevant medical experts in Canada, who would constantly monitor, review and evaluate his developmental milestones. Further, the High Court failed to balance both the interests of the child and the general purposes of the Hague Convention, which it was obliged to do.

The appeal was upheld and a return order was made.

Director of Public Prosecutions Eastern Cape, Makhanda v Coko (Women's Legal Centre Trust and others as *amici curiae*) [2024] 3 All SA 674 (SCA)

Criminal Law and Procedure – Rape – Appeal against conviction – Crucial elements of statutory crime of rape for State to secure a conviction on a rape charge are an act of sexual penetration without consent, in the sense defined in the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 and intent (mens rea) – Defence of consent requires such consent to be given consciously and voluntarily, either expressly or tacitly by persons who have the mental capacity to appreciate the nature of the act consented to – Consent must be given to the specific act of penetration.

The present appeal was brought against the High Court's upholding of the respondent's appeal against his conviction for contravening section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 read with section 51(2)(b), (3) and (6) of the Criminal Law Amendment Act 105 of 1997, and the resultant sentence of seven years' imprisonment. At the time material to the charge, section 51(3)(a) of the latter Act prescribed that in the absence of substantial and compelling circumstances justifying a lesser sentence than that ordained in Part III of Schedule 2, a first offender convicted of such offence was liable to imprisonment for a minimum period of 10 years' imprisonment. The respondent had pleaded not guilty to the charge, asserting that the sexual intercourse with the complainant was consensual. The Court found that the complainant was an active participant because she did not object to a number of activities performed by the respondent before the actual act of penetration. It further found that neither force nor coercion was used. The question on appeal was whether the State had succeeded in proving its case against the respondent, and in particular whether the admitted sexual intercourse had occurred without the complainant's consent.

Held – Rape gratuitously violates the fundamental value of human dignity and related rights. The proper test to be applied to the evaluation of evidence adduced in a criminal trial is that whilst it is permissible for a trial court to have regard to the inherent probabilities in the accused's version, such version can only be rejected on the basis of inherent improbabilities if it can be said to be so improbable that it cannot be reasonably true. The criminal standard of proof beyond reasonable doubt does not equate to proof beyond all shadow of doubt or absolute certainty as to the guilt of the accused. Secondly, in every appeal against conviction where the factual findings of the trial court are impugned, an appellate court should be guided by the well-settled principle that its powers to interfere with such findings are circumscribed. Thus, it is not at large to interfere unless it is satisfied that the trial court had committed material misdirections or a demonstrable error in evaluating the evidence.

The two crucial elements of the statutory crime of rape that the State must establish to secure a conviction on a rape charge are an act of sexual penetration without consent, in the sense defined in the Criminal Law (Sexual Offences and Related Matters) Amendment Act and intent (*mens rea*).

The Court examined the concept of consent, concluding that consent must be given consciously and voluntarily, either expressly or tacitly by persons who have the mental capacity to appreciate the nature of the act consented to. Further, as rape entails an "act of sexual penetration", consent had to be given to that specific act. In this case, the complainant had not given consent, and the respondent was found to have had the required *mens rea* in respect of the offence.

The trial court's findings on conviction were reinstated and the matter was remitted to the High Court to determine the appeal against sentence. However, the Court subsequently received correspondence from the Director of Public Prosecutions, advising that the latter order could not be implemented as there was no appeal against sentence pending before the High Court, since the respondent had previously been refused leave to appeal on petition to that court. What was before the High Court on appeal from the regional court was the appeal against conviction only. The present court consequently rectified its earlier order by deleting parts of the order relating to remittal of the issue of sentence to the High Court. The respondent was instead directed to present himself to the relevant correctional centre, within 7 days of the date of the order, to serve his sentence.

Nyhonyha NO v National Director of Public Prosecutions and related matters [2024] 3 All SA 706 (SCA)

Criminal Law and Procedure – Forfeiture order in terms of Prevention of Organised Crime Act 121 of 1998 – Whether appellants were holding property for and on behalf of some of the defendants in a restraint application brought by the National Director of Public Prosecutions in terms of sections 25 and 26 of Act – Circumstances in which a restraint order under sections 25 and 26 may be made in respect of property owned by a person other than a defendant – Concept of "holding" immovable property having wide meaning and can encompass ownership, possession, occupation, or holding as a nominee – When a person stands in a particular relationship to property, such that they have an "interest" in it, they will be considered to be holding it for the purposes of the Act, even if they were not the registered owners.

The National Director of Public Prosecutions ("NDPP") alleged that the appellants were holding property for and on behalf of some of the defendants in a restraint application brought by the NDPP in terms of sections 25 and 26 of the Prevention of Organised Crime Act 121 of 1998 ("POCA"). The said defendants were directors of companies in a group of companies (the "Regiment Group") which had provided services to State-owned entities. The restraint order flowed from alleged corrupt activities involving those entities, and which formed part of the State Capture project through which the defendants had been enriched. The defendants had consequently been indicted on various charges relating to corruption, money laundering and fraud. The present appeal was against the finding of the Full Court that the appellants' property should be included in the restraint order in terms of section 14(1) of POCA. The appellants were granted special leave to appeal only on the issue of whether they held realisable property within the meaning of section 14(1) on behalf of two of the Regiments directors. They relied largely on the existence of their respective family

trusts for the submission that their property was beyond the reach of the restraint order, as the trusts were separate and distinct juristic entities.

Held – The appeal concerned the circumstances in which a restraint order under sections 25 and 26 of POCA may be made in respect of property owned by a person other than a defendant, and had to be determined in the context of the legal framework put in place in Chapter 5 of POCA. The material question was not who formally owned the property, but who controlled it or had its use and benefit. The purpose of a restraint order is to preserve assets pending the final determination of criminal proceedings. Assets are preserved to cater for the possibility that the criminal proceedings may culminate in a confiscation order. Section 12(3) of POCA provides that a person will have benefited from unlawful activities if he has received or retained any proceeds of unlawful activities. Regarding the restraining of property in the hands of third parties, case law establishes that the concept of "holding" immovable property has been given a wide meaning and can encompass ownership, possession, occupation, or holding as a nominee. A restraint order merely preserves the *status quo* pending the final determination of the criminal proceedings against the defendants, and is therefore essentially an interdict *pendente lite*. In an application for a restraint order, the NDPP need only to make out a *prima facie* case for granting of such an order. It was not necessary in a matter such as the present one, where the question was whether the defendant held the property in terms of section 14(1), to demonstrate that a notional corporate veil should be lifted, or to show that there had been an abuse. It was sufficient to show that the defendant was, in substance, the person who controlled or enjoyed the property. The full court was correct in finding that the appellants' property should be included in the restraint order, as they were holding the property on behalf of the Regiments directors. When a person stands in a particular relationship to property, such that they have an "interest" in it, they will be considered to be holding it for the purposes of POCA, even if they were not the registered owners.

The appeals were consequently dismissed.

AV and another v DC and others (Thaldar and another as *amici curiae*)
[2024] 3 All SA 724 (GJ)

Family Law and Persons – Parent and child – Artificial fertilisation – Implementation of section 40(3) of Children's Act 38 of 2005, which provided that no rights or obligation arise between a child born of a woman as a result of artificial fertilisation and any person whose gametes have been used for artificial fertilisation – Gamete donor unable to claim parental rights, but in particular circumstances of case, best interests of child justifying order granting rights of contact while confirming that child was to be regarded as child of mother and partner.

The applicants were a same-sex couple who required a sperm donor so that the first applicant ("A") could have a child. A found the respondent ("D") on a social media platform which connected persons who wished to either become co-parents or to find or become a sperm donor, and the parties entered into an agreement. D contended that the agreement granted him co-parenting rights, while the applicants disputed that.

The fertilisation process was conducted at A's home, without the intervention of an independent health care professional in contravention of Regulation 7 of the Regulations: Artificial fertilisation of persons GNR, 175 of March 2012, promulgated in

terms of the National Health Act 61 of 2003. After the birth of the child ("Z"), D played an active role and contributed financially to various expenses. However, whereas he insisted on full parenting rights and obligations, and requested a parenting plan, the applicants contended that it was always intended that he have only limited contact with the child. They approached the court for an order confirming that D was a sperm donor as envisaged in section 40 of the Children's Act 38 of 2005, removing his surname as that of Z on her birth certificate, and declaring D's limited rights and responsibilities in respect of Z.

Held – The Minister of Health made the regulations referred to above, concerning the artificial fertilisation of a person. The regulations envisaged a firmly regulated scheme for artificial fertilisation. The fertilisation that took place in this case was supposed to have been undertaken in compliance with the precepts set out in the regulations, but was not. The flouting of the legal framework resulted in the complications which arose in this matter.

Essentially, the applicants sought an implementation of section 40(3) of the Act, the relevant part of which provided that, "no right, responsibility, duty or obligation arises between a child born of a woman as a result of artificial fertilisation and any person whose gamete has or gametes have been used for such artificial fertilisation or the blood relations of that person". Should the relief be granted, D would have no further dealings with Z. Aggrieved thereby, he sought counter-relief in the form of parental rights and responsibilities as set out in section 18 of the Act, alleging that that was what A, with the knowledge and consent of the second applicant ("N"), had agreed to. The applicants' version of their agreement with D failed to explain a number of facts relating to D's involvement that took place with their knowledge, consent, co-operation and encouragement during the pregnancy and during the childbirth. The terms which were common to both parties' versions showed that DC was not merely a sperm donor. At the same time, D's claim that a co-parenting agreement had been concluded with AV was not borne out by the evidence. Explaining what a co-parenting agreement entailed, the court found that no co-parenting agreement had been concluded. D was clearly the biological father as contemplated in section 21 of the Act, but was not a parent in terms of section 1. To allow him to claim rights of a parent in terms of section 21 would effectively negate his non-qualification as a parent in terms of section 1. It would be re-writing the definition of a parent and would remove the disqualification imposed upon him by section 40(3) in that being only a gamete donor constitutes a legal disqualification from acquiring parental rights and responsibilities in terms of the Act.

Considering the best interests of Z, an order was made setting out D's rights of contact while confirming that Z was to be regarded as the child of the applicants.

Bezuidenhout and others v Minister of Agriculture, Land Reform and Rural Development and others [2024] 3 All SA 744 (WCC)

Civil Procedure – Contempt of court – Applicant required to show that respondent was served with or otherwise informed of an existing court order granted against him; and had either ignored or disobeyed it – Once contempt requirements are proved, onus shifts to respondents to rebut presumption of wilfulness and mala fides.

Civil Procedure – Joinder – Consolidation of actions as provided in rule 11 of the Uniform Rules of Court – Paramount test is convenience of the parties, the witnesses

and the court – Inclusion of parties against whom spoliatory relief was sought in contempt of court application in line with applicable legal principles.

According to the applicants, the fourth applicant ("Nuveld"), together with the first to third respondents, had been in peaceful and undisturbed possession of several farms which were owned by the Department of Agriculture, Land Reform and Rural Development. The first, second and third applicants had been successfully farming the farms as Nuveld with the permission of the Department, pending the outcome of a land reform allocation application process. They were all beneficiaries of a government land distribution project on the farms. In January and February 2024, the fifth and sixth respondents proceeded to move on to two of the farms ("Dassiesfontein" and "Dassies 2"). The applicants consequently brought an application for a *mandament van spolie* against the first to sixth respondents. In March 2024, an order was made in terms of which the applicants' possession of Dassiesfontein and Dassies 2 was declared to be restored with immediate effect. The first to fourth respondent (the "departmental respondents") were prevented from allocating any portion of the farms to any person pending the finalisation of an application to review the second and fourth respondents' rejection of the recommendation by the National Land Acquisition and Allocation Control Committee that Nuveld be given a 30-year lease over the farms.

In the present proceedings, the applicants alleged that the March 2024 order had not been complied with and that the departmental respondents were thus in contempt of the order. Subsequent to the granting of the March order, the seventh and eighth respondents (the "Morries") moved onto another of the farms ("Willemskraal"). The applicants contended that the Morries had unlawfully dispossessed them of their peaceful and undisturbed possession of Willemskraal, and they sought a *mandement van spolie* order against the Morries. Raising a preliminary issue, the Morries objected to their being cited in the present proceedings, contending that since the relief sought against them was completely different to the relief sought against the first to sixth respondents, the applicants should have brought a separate application against them.

Held – Rule 11 of the Uniform Rules of Court deals with consolidation of actions. The paramount test in that regard is convenience of the parties, the witnesses and the court. Consolidation of actions will generally be ordered in order to avoid multiplicity of actions and attendant costs, and will not be ordered if there is a possibility of prejudice being suffered by any party. The inclusion of the Morries in the present contempt of court application where separate relief was sought against them was in line with applicable legal principles. Other preliminary objections, relating to jurisdiction and an allegation that the Morries had exercised co-possession of Willemskraal, were dismissed as without merit.

The remaining question was whether the departmental respondents and the fifth and sixth respondents were in contempt for failing to comply with the March court order compelling them to restore the peaceful and undisturbed possession of Dassiesfontein and Dassies 2 to the applicant with immediate effect. The main issue to determine was whether the first to sixth respondents' failure to comply with the order was wilful or *mala fides*. An applicant in such an application had to show that the respondent was served with or otherwise informed of an existing court order granted against him; and had either ignored or disobeyed it. Once the applicants had proved the order, service or notice, and non-compliance, the respondents bore an evidential burden in relation to wilfulness and *mala fides*. Wilfulness and *mala fides* are presumed and the

respondents bear an evidentiary burden to establish reasonable doubt. Should they fail to discharge that burden, contempt will have been established.

The applicants successfully established the requirements for an order of contempt against the respondents. The first to sixth respondents were ordered to comply with the March order, failing which the relevant respondents would be committed to prison for a period of thirty days. The seventh and eighth respondents were to restore the applicants' possession of Willemskraal.

Burger NO v Nel and others [2024] 3 All SA 780 (NWM)

Civil Procedure – Requirements for urgent interim interdict – Whether it was established that there was good cause for the time periods prescribed by the Uniform Rules of Court not having been complied with; and that substantial redress would not be afforded at a hearing in due course – To obtain interim interdict, applicant required to prove a prima facie right; a well-grounded apprehension of irreparable harm if the relief is not granted; that the balance of convenience favours the granting of an interim interdict; and the absence of another satisfactory remedy – Interdictory relief refused where two of the requirements were not established.

Pending the outcome and determination of an action instituted against by the applicant ("Burger") against the respondents, the applicant urgently sought an interim interdict to prevent the first to fourth respondents taking any further steps in effecting transfer of ownership of certain immovable properties forming part of individually registered portions of a farm to the first respondent.

Burger was the executor of a deceased estate. In November 2008, the first respondent ("Nel") had entered into a lease contract with the deceased ("Mr and Mrs De Beer") who owned multiple agricultural properties. In terms of the agreement, Nel leased a farm which formed part of the De Beers' properties, for a three-year period. The contract stipulated that Nel had a right of pre-emption to purchase the properties.

Unbeknownst to Nel, the De Beers concluded a sale agreement in July 2009 with Nel's brother ("MN") in terms of which separate portions of the properties (including the properties rented by Nel) were sold to two trusts in respect of which MN acted as the representative. After the sale, but prior to the lease agreement with Nel terminating by effluxion of time, the De Beers entered into another lease agreement with him for another three years. A right of pre-emption was again included, with the lease to terminate in September 2014. In November 2011, Nel gave the De Beers notice of his intention to exercise his right of pre-emption. Negotiations failed and Nel approached the High Court for declaratory relief. His claim was dismissed but on appeal, the Supreme Court of Appeal ("SCA") ordered that Nel submit an offer to the De Beers, who were ordered to sign the offer for a sale to be concluded. However, all offers submitted by Nel were rejected. Whether the offers were in compliance with the SCA order, and whether they were duly rejected, was the subject of the main claim. In the present application, Burger sought an interdict preventing the property from being transferred to Nel, pending the outcome of the main claim. Burger claimed that Nel had waived his pre-emptive right, while Nel claimed that he had lawfully enforced his pre-emptive right to purchase the properties.

Held – The issues for determination were whether Burger had proven that there was good cause for the time periods prescribed by the Uniform Rules of Court not having

been complied with; and that substantial redress would not be afforded at a hearing in due course.

Despite Nel's submission that there had been undue delay in bringing the application, the facts satisfied the court that urgency had been established.

As established in case law, the requirements for an interim interdict are a *prima facie* right; a well-grounded apprehension of irreparable harm if the relief is not granted; that the balance of convenience favours the granting of an interim interdict; and the absence of another satisfactory remedy. Two of those requirements were not established by Burger. Even if all four requirements had been met, the court had a judicial discretion in deciding whether or not to grant the interim interdict. Burger's argument that the relevant clauses in the agreement established a right of reciprocity was without merit if regard was had to the express finding of the SCA. The application was dismissed with costs.

Cooper NO and others v Blue Label Distribution (Pty) Ltd
[2024] 3 All SA 800 (GJ)

Insolvency – Voidable dispositions – Payments by insolvent company – Section 341(2) of the Companies Act 61 of 1973 provides that every disposition of its property by any company being wound-up and unable to pay its debts made after the commencement of the winding-up, shall be void unless the court otherwise orders – What constitutes "disposition" – Where an insolvent company pays a creditor by cheque drawn on an account in credit between the date of a petition and the winding-up order, there is a disposition of the company's property in favour of the creditor – Section 341(2) will operate only the party who benefits from the proceeds of the cheque.

The first and second applicants were the joint liquidators of the third applicant ("CBP"), which was an insolvent company. They contended that eight payments made by CBP after the date of its provisional winding-up constituted void dispositions, as envisaged in section 341(2) of the Companies Act 61 of 1973. They therefore sought an order declaring each of the eight payments (totaling R347 531,81) made by CBP to the respondent ("Blue Label") to be such dispositions in terms of section 341(2); monetary orders for the repayment of the various amounts so paid, together with interest thereon; and an order for costs.

Blue Label resisted the relief sought on the basis that the relevant payments did not constitute dispositions as envisaged in section 341(2) or, if they were considered to be dispositions as contemplated in the Act, that they were not dispositions to Blue Label, but rather to the true beneficiaries of the funds, namely, the end suppliers of the products that were sold to end consumers by CBP. Blue Label was a distributor of prepaid e-tokens of value. It did not sell its own products. Instead, it facilitated the sale of various third-party suppliers' products. To that end, it concluded agreements with certain retailers, like CBP, which sold the products to end consumers in return for a commission. Blue Label contended that it was not the true beneficiary of the relevant transactions, but was merely an agent on behalf of the third-party suppliers. It also denied that the payments constituted dispositions as contemplated by the insolvency legislation as CBP's asset value was never diminished at any point in the transaction, nor did it ever dispose of any rights to the money. Instead, its asset value was said to have been enhanced by the relevant commissions.

Held – A court has no discretionary power to validate dispositions of property by a company after the company has been provisionally liquidated. Section 341(2) of the Act provides that every disposition of its property by any company being wound-up and unable to pay its debts made after the commencement of the winding-up, shall be void unless the court otherwise orders.

In determining whether a disposition is made, the enquiry is directed at determining who the true disponee is, as a disposition, purposively interpreted, does not include payments to an intermediary ie one who acts merely as a conduit for onward transmission of the payment to a named recipient and who therefore does not benefit from the payment. Where an insolvent company pays a creditor by cheque drawn on an account in credit between the date of a petition and the winding-up order, there is a disposition of the company's property in favour of the creditor. In making payment, the company disposes of its property. Section 341(2) will operate only the party who benefits from the proceeds of the cheque (the "payee" or "disponee"). On the facts, the respondent received the payments into its general bank account and not a dedicated account. There was no privity of contract between the insolvent company and the respondent's end supplier and no debt was owed to the end supplier by the insolvent company. The payments stood to the general funds available for use by the respondent to pay any creditor it chose. Thus, the respondent benefited from the disputed payments made by the insolvent company for products sold by it and supplied to it by the respondent. The respondent obtained an unfair advantage over all the other creditors of the insolvent company and was paid in disregard of the *concursus creditorum*. It was concluded that the liquidators had succeeded in establishing an entitlement to repayment of the amounts claimed, which were found to constitute void dispositions.

Dlamini v Ntuli and others [2024] 3 All SA 826 (KZD)

Personal Injury/Delict – Claim for damages arising out of unlawful arrest, detention and malicious prosecution – Arrest without warrant – In terms of section 40(1) of the Criminal Procedure Act 51 of 1977, the jurisdictional requirements for a police officer effecting an arrest without being in possession of a warrant of arrest require the officer to have entertained a suspicion based on reasonable grounds that the suspect had committed a Schedule 1 offence – Detention of arrested person is a separate consideration that must be reasonably justifiable – A claim for malicious prosecution requires a plaintiff to establish that the defendant set the law in motion by instigating proceedings, acted without reasonable and probable cause and with malice or animo injuriandi, and that the prosecution failed.

The plaintiff claimed damages against the defendants arising out of her arrest, detention and prosecution for the murder of her husband (the "deceased"). Having made an order of separation of liability from quantum at the commencement of the trial, the court was required to only consider the issue of liability.

According to the plaintiff, she returned to her home one morning to find the deceased threatening to shoot himself with a firearm. She went in search of help and managed to get someone ("N") to go back to her home to speak to the deceased. N stated in an affidavit to the police that the deceased had denied that he intended shooting himself and, on the arrival of the plaintiff at the house, the deceased had left the room in which he had been talking to N. N then heard two gunshots and found the deceased mortally wounded near the front door to the matrimonial home. He did not see who fired the shots, but as he entered the room where he found the deceased, he heard the plaintiff

exclaim that the deceased had shot himself. After the police arrived at the scene, the plaintiff was arrested. Although specimens of gunshot residue were taken from the plaintiff, the deceased, and N for testing, the test results were not presented at the plaintiff's criminal trial. Contrary to what the trial court had been informed, an analysis had, in fact, been performed on the specimen taken from the deceased's right hand revealing that there was gunshot residue on that hand. The test result existed approximately six months before the plaintiff had been found guilty at her criminal trial, but she only became aware thereof as she awaited her appeal. The objective evidence being that only the deceased had discharged a firearm on the day that he died, just as the plaintiff had said from the outset, the conviction and sentence were set aside. By then the plaintiff had served five years of her sentence, leading to her claim damages.

Held – The constitutional protection of individual liberty meant that depriving a person of his liberty by an arrest is *prima facie* wrongful, and the person who purports to do so must, therefore, justify an arrest. In terms of section 40(1) of the Criminal Procedure Act 51 of 1977, the jurisdictional requirements for a police officer effecting an arrest without being in possession of a warrant of arrest require the officer to have entertained a suspicion based on reasonable grounds that the suspect had committed a Schedule 1 offence. The test being objective, a court is required to consider the matter from the point of view of the arresting officer and to take cognisance of the information he had at his disposal at the time that the decision to effect the arrest was taken. The arresting officer could not have harboured a reasonable suspicion that the plaintiff had murdered the deceased, and her arrest, in the circumstances, was unlawful. The detention of an arrested person is a separate consideration that must be reasonably justifiable. A person may only be detained lawfully if he or she was lawfully arrested.

To succeed in a claim for malicious prosecution, a plaintiff had establish that the defendant set the law in motion by instigating proceedings, acted without reasonable and probable cause and with malice or *animo injuriandi*, and that the prosecution failed. Those requirements were established and the plaintiff had to succeed in her claim for malicious prosecution.

Liability having been established, the issue of *quantum* was adjourned *sine die*.

JRM v VVC and others (Pretoria Attorneys Association as *amicus curiae*)
[2024] 3 All SA 853 (GP)

Family Law and Persons – Marriage – Matrimonial property regimes – Change of regime – Validity of purported antenuptial contract which enabled parties to enter into a civil marriage out of community of property years after concluding their customary marriage in community of property – Recognition of Customary Marriage Act 120 of 1998, section 10(2) – Constitutionality – Invalidity of post-nuptial contract changing matrimonial property system from community of property to one out of community of property with application of accrual system, concluded without leave of court.

The first defendant and the plaintiff entered into a customary marriage in August 2011 without concluding an antenuptial agreement, making the default matrimonial property regime of community of property applicable to their marriage. In February 2019, they signed a purported antenuptial contract which provided that the civil marriage they had agreed to enter into would be out of community of property subject to the accrual system.

The issues for determination in the present proceedings were whether the purported antenuptial contract entered into, which enabled the parties to enter into a civil marriage out of community of property years after concluding their customary marriage in community of property, was valid; if the agreement was valid, whether section 10(2) of the Recognition of Customary Marriage Act 120 of 1998 (the "Recognition Act") was unconstitutional in so far as it allowed for spouses in a monogamous customary marriage to change their matrimonial property regime from in community of property to out of community of property when they later decided to enter into a civil marriage with each other without judicial oversight, to the prejudice of the economically weaker spouse; and whether the agreement signed in February 2019 after concluding a customary marriage that sought to regulate the future matrimonial property system amounted to an antenuptial contract or a post-nuptial contract that required judicial intervention. The Court was also required to determine whether an agreement to conclude a civil marriage out of community of property after a valid customary marriage was entered into, where a default system of community of property was applicable, had the effect of depriving a financially weaker spouse of her ownership in undivided shares of the assets that constituted part of her joint estate created by the customary marriage.

The first defendant contended that should the purported antenuptial contract be found to be valid, then section 10(2) of the Recognition of Customary Marriage Act was unconstitutional for allowing for the matrimonial property regime applicable to a customary marriage to be changed from community of property to out of community of property by written agreement between the parties. She questioned the lack of judicial involvement in the changing of the applicable matrimonial property regime.

Held – All monogamous customary marriages are regulated by section 7(2) of the Recognition Act, and are in community of property unless the parties execute an antenuptial contract before they conclude them, where they specifically exclude community of property. There was no judicial clarity on the status of an agreement that parties to an existing customary marriage in community of property signed to provide for the proprietary consequences of the civil marriage that they contemplated concluding out of community of property.

It could not be found that the legislature intended that section 10 of the Act should be interpreted as allowing for the dissolution of monogamous customary marriages by civil marriages between the same parties. There was no reason why the words used in section 10 should not be given their ordinary grammatical meaning, which was that spouses in monogamous customary marriages were legally entitled to enter into a civil marriage with each other if none of them was married to another person in terms of customary law. The Court dispelled the notion of dual marriages coming about.

The February 2019 agreement was not an antenuptial contract but a postnuptial contract that changed the parties' matrimonial property system from that of community of property to one out of community of property with the application of the accrual system, which was concluded without leave of the court as contemplated in section 21 of the Matrimonial Property Act. That rendered the contract invalid. To the extent that the matrimonial property regime could be changed from community of property to out of community of property without judicial oversight, to the prejudice of economically weaker spouses, section 10(2) was invalid and unconstitutional. The declaration of invalidity was suspended for 12 months to allow the Legislature to correct the defect.

NK obo UK v Member of the Executive Council for Department of Health, Eastern Cape [2024] 3 All SA 882 (ECB)

Civil Procedure – Factual findings – Where there has been no misdirection on fact by a trial court, the presumption is that its conclusions are correct – Appeal court will only reverse such conclusions where it is convinced that they are wrong.

Personal Injury/Delict – Medical negligence claim – Whether negligence on the part of hospital staff caused or materially contributed to injury to baby's brain where that could have been prevented by exercising reasonable care and skill during birth – Neither negligence nor causation established on facts, particularly where probable medical reason for injury was linked to events occurring before delivery.

In a medical negligence action, the appellant had instituted action against the respondent, claiming damages arising from the alleged negligence of the medical staff at a public hospital during the birth of her son ("U"). She stated that she had endured five days of prolonged labour before giving birth to U, who suffered from cerebral palsy, mental retardation, and epilepsy. She alleged that the defendant's medical staff had been negligent in their care, and that they had failed to, *inter alia*, properly assess and examine her upon her admission, appropriately monitor her labour and the well-being of the foetus, and prevent U from sustaining brain damage at birth, when that could have been avoided by exercising reasonable skill and diligence. As a result of the above negligence, U had endured pain, suffering, discomfort, the loss of amenities of life, and total and permanent disability. The appellant, in her personal capacity, pleaded that she had experienced psychological shock and trauma, limitations on her freedom, and the loss of the joys of parenthood. She claimed damages in relation to U's future medical treatment, loss of earning capacity, and both special and general damages.

The Trial Court dismissed the claim but granted leave to appeal against its findings that the plaintiff had failed to prove that the damage done to U's brain had been caused by the negligence of the medical staff prior to and after the onset of labour; and the plaintiff was liable for the defendant's costs. On appeal, the appellant took issue with the trial court's failing to find that the negligence of the medical staff in managing the intrapartum and second stage of labour had caused the injury to U's brain.

Held – Where there has been no misdirection on fact by a trial court, the presumption is that its conclusions are correct. The Appeal Court will only reverse such conclusions where it is convinced that they are wrong. Furthermore, where an appeal court is required to decide a case purely on the record, the discharge of the onus of proof becomes all-important. The test to be applied, as set out in case law, involved the following questions: what factually was the cause of the ultimate condition of appellant's harm; whether negligence on the part of the respondent caused or materially contributed to the condition in the sense that the respondent by the exercise of reasonable care and skill could have prevented it from developing; and if liability on the part of respondent was established, what amount should be awarded to appellant by way of damages.

As the views of the experts involved in the present matter played a decisive role in the determination of the medical reasons for the injury, the functions of expert witnesses were considered. Opinion evidence is admissible when an expert can provide appreciable help to the court on a particular issue. The existence of objective

facts in the present matter determined the weight that the trial court ought to have attached to the inferences made by the various experts involved.

On an evaluation of the evidence, the Court was not persuaded that any negligence on the part of the staff caused or materially contributed to the injury to U's brain where that could have been prevented by exercising reasonable care and skill. The probable medical reason for the injury was linked to events occurring before the delivery. As the plaintiff had not proved that, but for the negligence of the medical staff, U would not have suffered harm, there was no causal link.

The appeal was dismissed.

Road Accident Fund v Auditor-General of SA and others
[2024] 3 All SA 914 (GP)

Constitutional and Administrative Law – Auditor-General of South Africa – Issuing of disclaimer concerning change of accounting methodology by Road Accident Fund – Application for review based on principle of legality – Review application – Whether there was a rational connection between the disclaimer and the purpose of the legislation that required the Auditor-General to render his opinion, which was to inform and guide relevant stakeholders responsible for control and financing of the RAF – Auditor-General not acting ultra vires but rationally and lawfully.

The applicant ("RAF" or the "Fund") decided on adoption of a change in accounting methodology which resulted in its liabilities suddenly plunging from the R327 billion reflected in the 2019/2020 financial year, to R34 billion reflected in the 2020/2021 financial year. The first respondent (the "AGSA") took issue with the RAF's decision and issued a disclaimer opinion in respect of the RAF's annual financial statements for the year ending 2020/2021. The disclaimer resulted in the present application in which the Fund challenged the factual and legal findings in the disclaimer and sought its review and setting aside. The parties agreed that the matter involved a legality review.

Held – AGSA exercised a public power in executing its functions, which involved acting as the supreme audit institution of South Africa and providing oversight and accountability in the public sector. Given that the present review application impugned an exercise of the statutory powers of the AGSA, the application was founded on the principles of legality. The constitutional principles of legality require that a decision maker exercises powers conferred on him lawfully, rationally and in good faith. In the present matter, the scope of the enquiry was therefore limited to questions of whether the AGSA had acted lawfully or rationally in expressing the audit opinion decision set out in the disclaimer and the broad review grounds available under the Promotion of Administrative of Justice Act 3 of 2000 were not available to the RAF. The issue to be determined was whether there was a rational connection between the disclaimer and the purpose of the legislation that required the AGSA to render his opinion, which was to inform and guide relevant stakeholders responsible for the control and financing of the RAF.

In keeping with the principle of judicial deference, the Court expressly disavowed any expertise in the accounting field and directed itself primarily to the legal questions raised.

The RAF's explanation in defence of its change in accounting methodology and its claim to be entitled to do so did not protect it from scrutiny. Even in the presence of a changed policy, the AGSA was still legally obliged to perform an audit, express an opinion after the audit and make a report. More importantly, the AGSA was accountable only to the National Assembly. In ignoring any alleged legal effect of the RAF's decision, the AGSA did not act *ultra vires* in any way. The AGSA had no reason to approach a court of law to review a decision, be it executive or administrative, that does not adversely affect its rights, in particular auditing rights, and, simply had to be satisfied that the financial records had been recorded appropriately.

It was concluded that the AGSA had acted rationally and lawfully, and that there was a rational connection between the disclaimer issued and the reasons for issuing it.

The application for review was dismissed.

END-FOR NOW