LEGAL NOTES VOL 10/2024

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SOUTH AFRICAN LAW REPORTS OCTOBER 2024

DB v CB 2024 (5) SA 335 (CC)

Marriage — Divorce — Proprietary consequences — Validity of 'prenuptial agreement' where prior valid and enforceable antenuptial contract concluded and registered — As pleaded, prenuptial agreement amounting to unspecified donation, not changing anything stante matrimonio — Two agreements compatible and may be read together — Divorce Act 70 of 1979, ss 7(1), 7(2).

In anticipation of their marriage, the applicant, Mr DB, and the respondent, Mrs CB, concluded an antenuptial contract, registered on 22 January 2015, which declared their marriage to be out of community of property, with the exclusion of the accrual system. On 20 February 2015 the parties concluded a further 'prenuptial agreement', which provided inter alia that upon the dissolution of their marriage, by either divorce or death, the applicant would make certain donations to the respondent and pay her lifelong spousal maintenance (see [3]). The parties were married on 19 May 2015, and on 8 August 2018 Mr DB instituted divorce proceedings against Mrs CB in the regional court.

In defending the action, Mrs CB filed a counterclaim in which she sought enforcement of the terms of the prenuptial agreement, pleaded as specific performance of the donation (see [23]). The attack on its enforceability was simply that it was incompatible with the prior antenuptial contract (see [7], [28]). In his plea to the counterclaim, Mr CB denied that its terms were enforceable, given the existence of the antenuptial contract,

[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!**

and that the parties had abandoned the prenuptial agreement when their antenuptial contract was registered (the abandonment defence).

At the request of the parties, the regional court separately adjudicated the issue of whether the prenuptial agreement was enforceable. Relying on the principles of *pacta sunt servanda* and freedom of contract, it held that it was, and that it should be read together with the antenuptial contract (see [8]).

Mr DB next successfully appealed to the High Court, which set aside the regional court's decision. It accepted Mr DB's contention — raised for the first time in his amended notice of appeal to the High Court — that if the prenuptial agreement were enforceable, the applicant would end up paying lifelong maintenance, couched as a donation, where no agreement existed in terms of s 7(1) of the Divorce Act 70 of 1979, and that this would oust the discretion of the court under s 7(2) (the ousting defence). (See [32] – [32].)

Next, Mrs CB successfully appealed to the Supreme Court of Appeal. It held, inter alia, that the two legal instruments could co-exist because the antenuptial contract regulated the matrimonial regime of the parties *stante matrimonio* (while the marriage was in force), whereas the prenuptial agreement had no bearing at all on the nature of the matrimonial regime and the respective estates of the parties. And as to the ousting defence, it held that the s 7(2) discretion only arose when a claim was made under that section, which was not the case because Mrs CB was not claiming maintenance under s 7(2) but simply requesting the divorce court to enforce the terms of the prenuptial agreement. (See [9], [11], [15], [18], [36].)

The present application concerned Mr DB's application for leave to appeal to the Constitutional Court, which was satisfied that its jurisdiction was engaged by the question raised, ie whether a prenuptial agreement purporting to regulate the patrimonial consequences of divorce, including maintenance, was contrary to public policy and unenforceable for the reason that it impermissibly ousted the jurisdiction conferred on the divorce court in terms of s 7(2) of the Divorce Act 70 of 1979 (see [21]; s 7 quoted at n1).

In the CC the majority judgment identified the main issues for consideration as whether the enforceability of the prenuptial agreement in relation to s 7(1) and (2) of the Divorce Act was properly before the High Court and the SCA; and if so, whether the conclusion reached by the SCA, that the prenuptial agreement was enforceable, was correct.

Held

Majority judgment

The regional court, in concluding that the prenuptial agreement was enforceable, did not decide anything more than that the subsequent registration of the antenuptial contract did not render the prenuptial agreement unenforceable. On appeal, the High Court was not entitled to decide the ousting issue, a dispute that was raised for the first time on appeal. The issue before the regional court was whether the prenuptial agreement was enforceable vis-à-vis the antenuptial contract. This then morphed into questions about s 7 of the Divorce Act and public policy before the High Court, the SCA and in oral argument before this court. The failure by both the High Court and the SCA to exercise their discretion in order to determine whether, despite the issue being raised for the first time on appeal, it was appropriate to consider the point, was fatal. The High Court and the SCA failed to recognise that, on the pleadings, they were called upon to consider an unspecified donation, which did not fall within the ambit of, and therefore did not trigger, s 7. The ousting issue was therefore not properly before this court. (See [31], [42], [50], [52] – [57], [61].)

The SCA was correct in finding that the two agreements could co-exist and be read together, as the donation did not change anything *stante matrimonio* and did not change the matrimonial regime but merely the value of the estates after divorce or death. All this court could decide, and would decide, was that the incompatibility issue was correctly decided by the regional court. The appeal would accordingly be dismissed. (See [57] – [59], [62] – [63].)

Minority judgment

The prenuptial agreement purportedly determined the entirety of the respondent's spousal maintenance upon dissolution of the marriage by divorce, contrary to s 7. The parties could not, by private agreement, subvert a court's power under s 7(1) to vet a settlement agreement providing for spousal maintenance. Neither could they subvert its power to make an order for spousal maintenance in terms of s 7(2), in the absence of a settlement agreement. This court could not ignore an agreement that violated the law, even less on the ground that it was not pleaded. Thus, it mattered not that the point of law — the unenforceability of the agreement because it ousted a court's power under s 7 of the Divorce Act — was not squarely raised in the applicant's plea to the counterclaim. Courts were required to raise a violation of the legality principle of its own motion, even if the parties had not raised it. (See [64], [68], [74], [77], [80].)

The prenuptial contract was not a donation; it was nothing more than an undertaking to provide spousal maintenance when the marriage came to an end by divorce or death. The fact that the agreement was styled a 'donation', and that the respondent admitted this in the pleadings, did not render it enforceable, as a matter of law. The *pacta sunt servanda* principle was accordingly inapposite: the agreement the respondent sought to enforce was not a binding donation, subject merely to remedies in contract law. The SCA accordingly erred in holding the prenuptial agreement was 'a contractual claim based on donations' to which ss 7(1) and 7(2) did not apply. The prenuptial agreement was contrary to public policy and violated s 7. The appeal would accordingly be allowed (see [83] – [114]).

CITY OF CAPE TOWN v SA HUMAN RIGHTS COMMISSION AND OTHERS 2024 (5) SA 368 (SCA)

Spoliation — Counter-spoliation — Requirements — Whether City having right to counter-spoliate when homeless people invade its unoccupied land.

Constitutional law — Human rights — Right to housing — Duty of local authority when evicting persons — Right not to be evicted or having home demolished without court order — Actions taken must not be disrespectful and demeaning, but protective of unfortunate and vulnerable people's rights to dignity and privacy — Constitution, ss 10, 14*(c)* and 26(3).

Between April and July 2020 the City of Cape Town (the City) removed many homeless people who had invaded several pieces of its unoccupied land. The City's Anti-Land Invasion Unit (the ALIU), acting on behalf and on instructions of the City, demolished their homes, structures and/or dwellings, consisting of corrugated iron, plastic sheets, cardboard boxes and wooden pallets. Some people were injured in the process, while others were treated in an undignified and humiliating manner.

In July 2020 the South African Human Rights Commission (the Commission) approached the High Court for urgent interlocutory relief on behalf of the homeless people, pending part B of the application for final relief. The City sought to justify its conduct with reliance on the common-law remedy of counter-spoliation, which, in certain circumstances, may permit a party, *instanter*, to follow up and retrieve possession of that which it has been despoiled of, without having to resort to one of the common-law remedies. In the High Court, as to the final relief, the issue had been narrowed down to whether the City satisfied the requirements of counter-spoliation in

the circumstances. The High Court found that the City had not done so (see [6], [7]). This was again the main issue in the present case, the City's appeal to the Supreme Court of Appeal.

Held

A local sphere of government might be able to successfully counter-spoliate when homeless people invaded its unoccupied land, where doing so would be justified without resorting to one of the available remedies under our law (ie, the mandament van spolie or an interdict or under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998). Counter-spoliation was not unconstitutional; it remained part of our law until determined otherwise. However, it must be done *instanter* within a narrow window period, during which counter-spoliation was legally permissible. The window closed and the recovery was no longer *instanter* when the despoiler's possession of the land was perfected. Thereafter, the City must not breach the right to privacy enshrined in s 14*(c)* of the Constitution, 'which included the right of persons not to have their possessions seized without due process'. (See [38].) By the City's own admission, there were structures already erected on the City's land upon the AILU's arrival on the land to demolish them. This meant the possessory element was already completed. Photographic evidence left no doubt that the City did not act *instanter* in the circumstances; the occupants of the structures were removed from already erected structures. The City's housing backlog could not justify it not satisfying the requirements of counter-spoliation if it wanted to invoke same. In the event of the City not of acting *instanter*, as in this instance, it should approach the courts to obtain remedies legally available to it. The appeal would accordingly be dismissed. (See [31], [34], [37], [43].)

The conduct of the City's ALIU and relevant personnel (including the members of the South African Police and/or the National Defence Force under the instructions of the City) must also not be disrespectful and demeaning, but protective of the unfortunate and vulnerable people's rights to dignity (s 10), which must accord with the spirit, purport and objects of the Bill of Rights. Section 26(3) of the Constitution expressly granted everyone the right not to be evicted from their home, or have their home demolished, without an order of court made, after considering the relevant circumstances. (See [38].)

GOEDVERWACHTING FARM (PTY) LTD v ROUX AND OTHERS 2024 (5) SA 384 (SCA)

Land — Unlawful occupation — Eviction — Statutory eviction — Occupier — Whether parties residing on land were engaged in 'commercial farming', thus excluding them from definition of 'occupier' — Extension of Security of Tenure Act 62 of 1997, s 1.

The applicant, relying on the Extension of Security of Tenure Act 62 of 1997, applied to the Land Claims Court for the eviction of the respondents. The respondents in their defence claimed they had title to the land. The court's finding was that the respondents had been engaged in 'commercial farming', so excluding them from the definition of 'occupier' in s 1 of the Act, and its jurisdiction (see [1], [4]).

Section 1 provides that —

'"occupier' means a person residing on land which belongs to another person, and who on 4 February 1997 or thereafter, had consent or another right in law to do so, but excluding . . . a person using or intending to use the land in question mainly for industrial, mining, commercial or *commercial farming* purposes, but including a person who works the land himself or herself and does not employ any person who is not a member of his or her family; . . .'.

Accordingly, the Land Claims Court dismissed the application, but granted leave to appeal to the Supreme Court of Appeal. There, the issue was whether the respondents had been engaged in 'commercial farming' (See [1] – [3].)

Held, that they had not been (see [22]):

• Respondents had not alleged in their affidavits that they had been engaged in such activity or who had worked on the land, and indeed it had not been respondents' defence that they had been farming commercially (see [12]).

• The Land Claims Court based its finding of commercial farming solely on a probation officer's report, but in doing so had misdirected itself: the report could not usurp the court's discretion to order eviction; it was not made under oath; and it was factually inaccurate. Moreover, some of its facts were inconsistent with the Land Claims Court's finding, others unsupportive of it altogether. And, the report did not suggest that a commercial-farming venture was extant (see [15], [19] – [20]).

• Lastly, applicant's evidence — aerial photographs — reflected no commercial activity (see [20]).

Held, accordingly, that the court had impermissibly taken upon itself to find on an issue the parties had not asked it to adjudicate, and on that issue had erred in its determination (see [24]).

Appeal upheld, and the order of the Land Claims Court set aside and substituted with an order evicting the respondents (see [25]).

TRUSTCO GROUP HOLDINGS LTD v FINANCIAL SERVICES TRIBUNAL AND ANOTHER 2024 (5) SA 394 (SCA)

Stock exchange — Johannesburg Stock Exchange — Powers — Wide powers, enjoyed under para 8.65 of listing requirements and FM Act, included power to direct restatement of listed company's financial statements — Financial Markets Act 19 of 2012, ss 10(2)*(m)* and 11(1)*(g)*(v).

Financial institution — Financial Services Tribunal — Appointment to panel of — Not requiring person with experience or expert knowledge of financial services or financial system — Financial Sector Regulation Act 9 of 2017, ss 220(2)*(a)*, 224(4), 225(2)*(a)*(i).

Aggrieved by a directive of the Johannesburg Stock Exchange (the JSE) that it had to restate its financial statements, Trustco Group Holdings Ltd (Trustco), a listed entity, applied for reconsideration of the JSE's decision to the Financial Services Tribunal (the Tribunal), established in terms of s 219 of the Financial Sector Regulation Act 9 of 2017 (the FSR Act). The Tribunal having dismissed its reconsideration application, Trustco launched a High Court application to review the Tribunal's determination. Also unsuccessful in the High Court, Trustco appealed to the Supreme Court of Appeal (the SCA), where it persisted with the following grounds:

- The FSR Act, properly interpreted, required that in cases involving only accounting issues, the panel must include persons with financial expertise and experience (see [30]).
- Paragraph 8.65 of the JSE's listing requirements did not empower the JSE to issue directives for listed companies to restate financial statements, but only to direct a 'reissue' of financial statements, which required of the JSE to take other ancillary steps.

The SCA, in rejecting these grounds and dismissing the appeal —

Held

Section 220 of the FSR Act provided that the Tribunal members must include, 'at least two persons who are retired judges, or are persons who have suitable expertise and

experience in law', and 'at least two other persons with experience or expert knowledge of financial products, financial services, financial instruments, market infrastructures or the financial system'. In terms of s 224(4), panels must consist of 'a person to preside over the panel, who must be a person referred to in s 220(2)*(a)* or 225(2)*(a)*(i)', namely a retired judge or person with legal experience or expertise, and 'two or more persons who are Tribunal members or persons on the panel list'. These sections did not contain any express or implied requirement for a panel constituted under s 220 to include a person with knowledge of accounting practices or international financial reporting standards. The interpretation contended for by Trustco simply did not find any support in the express and unequivocal language of these provisions. (See [30] – [31].)

The argument that the JSE did not have the power to direct listed entities to restate financial statements was equally unsustainable: Paragraph 8.65 of the listing requirements conferred on the JSE wide permissive powers to instruct listed entities, in its sole discretion, to 'publish or reissue any information it deems appropriate'. These wide powers were underpinned by ss 10(2)*(m)* and 11(1)*(g)*(v) of the Financial Markets Act 19 of 2012 which, respectively, empowered the JSE to do 'all other things that are necessary for, or incidental or conducive to the proper operation of an exchange and that are not inconsistent with this Act', and empowered the JSE to impose any penalty that is 'appropriate in the circumstances'. (See [32].)

CITY OF CAPE TOWN v VARIOUS OCCUPIERS 2024 (5) SA 407 (WCC)

Land — Unlawful occupation — Eviction — Statutory eviction — Inner-city homeless — Unsustainability, meaningful engagement and provision of alternative accommodation — Suitability of 'safe spaces' — Eviction order granted subject to court supervision — Ancillary interdict prohibiting reoccupation of sites by listed evictees granted — Broader interdict that would permit city to evict without due process refused — Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, s 6.

Land — Unlawful occupation — Eviction — Procedure — Eviction-plus-interdict application — City seeking to evict inner-city homeless and ancillary interdict to prevent future occupation — Court granting eviction order and interdict prohibiting

reoccupation of sites by listed persons, but refusing interdict that would permit city to evict without due process.

Local authority — Powers and duties — Power to evict and keep homeless from inner-city pavements — Eviction-plus-interdict application — Court granting eviction order and ancillary interdict prohibiting reoccupation by named persons, but refusing interdict that would allow city to evict without due process.

State — Duties — Provision of alternative accommodation to evictees — Suitability of 'safe spaces' provided by evicting city — Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, s 6(3)*(b)*.

In December 2022 the applicant (the City) applied to the Western Cape High Court for —

- an *eviction* order under s 6 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE s 6) for the removal of about 200 persons (the occupiers) from their makeshift shelters on inner-city sidewalks (the pavement sites); and
- an *interdict* preventing named occupiers from (i) reoccupying the pavement sites (the narrow interdict); or (ii) occupying any other City-owned property (the broad interdict). The City argued that without a broad interdict, evicted occupiers would simply move to other City-owned sites not subject to the eviction order.

To mitigate the effects of eviction and comply with the alternative-accommodation requirement in PIE s 6(3)*(b)*, the City offered the occupiers accommodation in two NGO-run 'safe spaces' in the CBD that offered showers, food, blankets, clothing and access to social services. The City contended that the public-interest requirement in PIE s 6(1)*(b)* was satisfied because the occupiers' living conditions were hazardous to them and others; because they obstructed pedestrian and vehicular traffic; because their fires damaged City infrastructure; and because their presence had an adverse impact on people living and working in the City. To bolster the latter allegation, the City referred the court to public complaints about obstruction, litter, vandalism, drug and alcohol abuse, property depreciation, and business flight from the CBD. The City contended, moreover, that it had meaningfully engaged with the occupiers both before and after the application.

The occupiers, while acknowledging that they had no right to occupy the pavements indefinitely, argued that the City did not meaningfully engage with them about the

proposed relocation to the safe spaces, having engaged instead in a yes-or-no box-checking exercise.

The occupiers had divergent attitudes to the safe spaces: some were completely opposed due to their perceived unsuitability, others were in favour, and yet others willing to relocate if the rules were changed. The occupiers were, however, solidly opposed to the broad interdict, contending that it would unlawfully authorise evictions without court orders and remove them from the protection of PIE and the Constitution.

The court had to decide four principal issues: (i) whether the City had *meaningfully engaged* with the occupiers; (ii) whether the suggested safe spaces were *suitable alternative accommodation* to the pavement sites; (iii) whether eviction was *just and equitable*; and, if eviction were to be granted, (iv) whether the *interdict*, in particular the broad interdict, should also be granted.

Held

While the City's concerns justified its decision to seek eviction, not much weight could be attached to the *public complaints*. Homelessness was a fact beyond the City's control, and it would persist, notwithstanding eviction orders, for as long as people had nowhere to live and gravitated to the City CBD to make a living. (See [25] – [28].)

The City had met its obligation to hold meaningful discussions with the occupiers, both pre- and post-application, particularly regarding the safe-place rules. The purpose of *meaningful engagement* was to identify alternatives to eviction, not to elicit agreement. An eviction order could therefore be granted, even if the occupiers were dissatisfied with the alternatives. While the City's engagement was not perfect, it was good enough — it had listened to the occupiers and explored plausible alternatives to eviction. (See [104.1], [118] – [129], [196].)

The safe spaces were *reasonable alternative accommodation* to the pavement sites. What was reasonable would vary with the circumstances. In the present case, the accommodation at the safe spaces, while rudimentary, qualified as adequate *temporary* (ie emergency) accommodation, given that the occupiers were homeless and living in public in deplorable conditions. Nor did the rules disqualify the safe spaces from being adequate accommodation. (See [3], [142] – [148], [156], [161], [165], [168], [186] – [189], [198].)

The eviction was *just and equitable.* The occupation was not only unlawful, but also *unsustainable*: the occupiers were obstructing pavements and roads, endangering infrastructure, and living in unacceptable and hazardous conditions. And

the City had a legitimate interest in ensuring that pavements and roads could be used for their intended purpose. Since the occupiers were refusing to vacate the pavement sites, the City was entitled to an eviction order, but subject to conditions to ensure that it did not impact unduly harshly on the occupiers. (See [193] – [201] and [203] – [229] as to the conditions.)

The *broad interdict* sought by the City could, however, not be granted. This attempt to capture as many homeless as possible in a net of interdicts was a bid to legislate through the courts. While the narrow interdict prohibiting named occupiers from reoccupying property from which they had been evicted would be granted, the City was not entitled to the broad interdict, which was unconstitutional, in that it would allow the City to evict occupiers from any City property without a court order. (See [239] – [258].)

Eviction order and narrow interdict granted, but broad interdict refused (see [265]).

DEMOCRATIC ALLIANCE v MINISTER OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS AND OTHERS 2024 (5) SA 463 (SCA)

Constitutional law — Legislation — Validity — Disaster Management Act 57 of 2002, s 27 — Section providing for declaration of state of emergency and granting Minister extensive powers to make regulations in order to manage disaster — Whether section unconstitutional on ground of impermissibly delegating plenary legislative powers to executive — Whether section unconstitutional on basis that declaration of state of disaster in effect de facto state of emergency, but without attendant safeguards — Whether section unconstitutional for failing to provide for appropriate parliamentary oversight of executive during state of disaster — Section 27 constitutional — Powers of Minister suitably circumscribed in Act — State of disaster could not be equated with state of emergency — Appropriate provision made for parliamentary oversight in existing laws.

Section 27 of the Disaster Management Act 57 of 2002 (the DMA) allows for the Minister of Co-operative Governance and Traditional Affairs to declare a state of disaster, and make regulations concerning a wide range of issues relevant to its management. Acting under such provisions, the Minister declared a state of disaster for South Africa on 15 March 2020, in response to the global outbreak of Covid-19; and soon after, on 18 March 2020, made regulations embodying a national public-

health response. Through subsequent amendments to the regulations, a series of 'national lockdowns', of varying degrees of severity, were implemented, restricting movement and economic activity. During the course of one of these lockdowns, the political party, the Democratic Alliance, applied to the High Court for an order declaring s 27 of the DMA to be unconstitutional and invalid. All the cited respondents, namely the Minister of Co-Operative Governance and Traditional Affairs, the Speaker of the National Assembly, the Chairperson of the National Council of Provinces and the President of the Republic of South Africa — respectively the first to fourth respondents — opposed the relief. The full court constituted to hear the matter dismissed the application. The DA was subsequently granted leave by the full court to appeal to the Supreme Court of Appeal.

The DA's complaints that s 27 of the DMA was unconstitutional were mainly based on three grounds:

- One, it constituted an impermissible delegation of plenary legislative power by Parliament to the executive.
- Two, it permitted the creation of a situation akin to a state of emergency declared under 37 of the Constitution — during which all but the most important constitutional rights were suspended — but without the constitutional safeguards attendant upon a state of emergency, namely parliamentary supervision of the original declaration, as well as subsequent extensions.
- Three, in breach of the separation of powers, it failed to provide for an appropriate level of parliamentary oversight required by ss 42(3) and 55(2) of the Constitution.

Majority

As to (1): The SCA first restated the applicable legal principles. That was that Parliament may indeed delegate to the executive the power to make regulations in certain circumstances. Whether such delegation was permissible was dependent on the consideration of a number of factors, including the constitutional provision in question, the power that provision conferred on the legislature, the nature and degree of the purported delegation, the subject-matter to which it related and, perhaps most importantly, the impact of the delegation on the fundamental principles on which the Constitution was based. (See [15].) A delegation in terms of which the discretion conferred was so broad or vague that the executive was unable to determine the nature and scope of its powers, would not be allowed; relevant considerations, in

addition to the above, would be the extent to which the legislature had provided clear criteria for the exercise of the discretionary power in question. (See [16].)

The court considered s 27 of the DMA in the context of the whole Act, having regard to its overarching purpose (see [41]). It held that the general architecture of the DMA was such as to guide and circumscribe the exercise of the Minister's delegated regulation-making powers. (See [42], [44], [47] and [57].) It referred, in this regard, to, inter alia, s 26(3), which enjoined the Minister to act in collaboration with other spheres of government in devising and implementing a rapid and effective response to disasters, thereby encouraging co-operative governance (see [27], [42] and [57]); to s 27(1), in terms of which the Minister may only declare a national state of disaster if 'existing legislation and contingency arrangements did not adequately provide for the national executive to deal effectively with the disaster' or if there were other special circumstances that warranted such declaration (see [44]); to s 27(2), in terms of which the Minister, before making regulations, had to consult the responsible Cabinet member (see [45]); and to s 27(3), in terms of which the Minister's power under s 27(2), to make regulations could only be exercised for specified purposes, namely to assist and protect the public, to provide relief to the public, to protect property, to prevent or combat disruption, and to deal with the destructive effects of the disaster (see [47]).

The court concluded on this point that s 27 of the DMA, properly interpreted in the context of the rest of the statute, and having regard to the applicable legal principles, did not amount to the impermissible delegation to the executive of overly broad or plenary powers. (See [41] and [58].)

As to (2): The court rejected the argument that s 27 was unconstitutional because it in effect allowed the creation of a state of emergency but with none of the safeguards. The premise of the argument, the court explained, was wrong. The necessity of safeguards in the case of a state of emergency had to be understood in a particular context, that was that during a state of emergency, all constitutional rights — except for a few considered to be non-derogable — were suspended, such that an individual whose rights were limited could not even approach the courts for the purposes of determining whether the limitation was justifiable under s 36 of the Constitution. The DMA, however, did not in any way permit any deviation from the normal constitutional order: in particular, the competence of the courts to rule on the validity of regulations remained intact; and any limitation of fundamental rights arising from the regulations that had been passed might still be challenged in court. (See [60] – [63].)

As to 3: The court dismissed the DA's claims of the unconstitutionality of the DMA on the basis of its failure to provide for parliamentary oversight (see [86] – [87]). The court held that, during a state of disaster, the executive would be held accountable, and Parliament's oversight role maintained, in terms of existing law which the DMA had in no way ousted (see [68], [71], [81], [82], [86], [87] and [90]). The court explained that parliamentary oversight was constitutionally ordained in ss 42(3) and 55(2)*(b)* of the Constitution (see [71]): in terms of the former, one of the roles of the National Assembly was 'scrutinizing and overseeing executive action'; and in terms of the latter, the National Assembly had to provide for mechanisms to ensure that all executive organs of state in the national sphere of government were accountable to it, and to maintain oversight of the national executive authority. (See [71] – [72].) The court noted that various mechanisms had in fact been put in place by Parliament to secure proper parliamentary oversight, for instance, portfolio and parliamentary committees to which the executive had to account, all of which would remain operative during a state of disaster, the inadequacy of which had not been proved by the DA (see [76], [78] and [82] – [90]).

The court concluded that s 27 of the DMA passed constitutional muster, and that the appeal had to fail. (See [93].)

The minority

The minority held, agreeing with the DA, that the DMA permitted the Minister, through the powers granted to her in terms of s 27(2), to severely limit fundamental rights to the same extent that was allowed *under a state of emergency* (see [150], [152], [159] and [165]). That this was so, was demonstrated by the government response to the Covid-19 pandemic: a curfew was imposed; citizens were confined to their homes; businesses were precluded from operating; some citizens were arrested, and some killed, for violating the state of disaster regulations. (See [153], [154] and [158].) However, whilst a state of disaster could bring about a situation akin to a state of emergency, it came with none of the safeguards that were attendant upon a state of emergency as set out in the State of Emergency Act 64 of 1997 (SOEA.) (See [152] and [165].) The lack of express provision for parliamentary oversight offended the very essence of a democratic state such as ours, based on the principles of transparency, accountability and responsiveness, among others. It was unconstitutional. (See [159] and [165].) The court stressed that the fact that oversight and accountability provisions of the Constitution, such as ss 42(3), 55(2)*(b)*(i) and 92(2), remained extant during a

state of emergency, did not answer the constitutional challenge on this score. The powers conferred on the executive by s 27 of the DMA, and their far-reaching effect, removed the provision from the category of ordinary legislation and placed it squarely in the category of extraordinary legislation, much the same as the SOEA. Because of this, Parliament's role had to be provided for, and spelt out, as it was in the SOEA. (See [146], [147].)

SAP SE v SYSTEMS APPLICATIONS CONSULTANTS (PTY) LTD AND ANOTHER 2024 (5) SA 514 (SCA)

Recusal — On grounds of reasonable apprehension of bias — Judge, angered by counsel's cross-examination of witness, standing up, directing cross-examination to continue in his absence, leaving hearing, and returning three minutes later.

Respondent (SAC) had, on its version, concluded an agreement with a third party (SAPSI) in terms of which SAPSI would promote and distribute appellant SAP's Securinfo product to SAP's customers. SAC contended that SAP had obtained a controlling stake in SAPSI and, using its influence, caused SAPSI to distribute and promote a rival product, VIRSA.

SAC brought an action for damages against SAP for its alleged unlawful interference in SAC's contract with SAPSI. SAP's defence was that no agreement had been concluded between SAC and SAPSI. The hearing proceeded and, since it was during the Covid period, by Zoom, although all the formalities of a court hearing were observed, mutatis mutandis.

On the 20th day of the trial, and during cross-examination by SAP's counsel of SAC's witness, which was aimed at establishing whether the agreement was concluded, the presiding judge, apparently angered by the line of questioning, got up, directed counsel to continue in his absence, and left the hearing. He returned three minutes later.

SAP, on the basis of the incident, applied to the judge for his recusal, which he refused. Ultimately, months later, he found on the merits for SAC. SAC then applied to the judge for his leave to appeal the dismissal of the recusal application and his finding on the merits, both of which applications he refused.

Here, SAC applied to the Supreme Court of Appeal for its leave to appeal the judge's finding on the merits and in the recusal application. The issue was whether the incident created a reasonable apprehension of bias on the judge's part. (See [11] – [13].)

Held, that it did: a reasonable, objective and informed person in SAP's position would apprehend that a presiding judge who (1) prevented its counsel from cross-examining a witness in response to a challenge from the witness to be shown why his credibility was being impugned; (2) then 'írritatedly' abstracted himself from the hearing without first adjourning it; while at the same time (3) directing that the hearing continue in his absence until counsel had 'finished', had shown himself to have closed his mind to the evidence and the submissions of counsel (see [30]).

The result of the judge having continued to sit after he ought to have recused himself, was that all of the subsequent proceedings were a nullity. These included his judgment on the merits (see [30]).

Application for leave to appeal granted; the appeal upheld; the court a quo's orders in respect of the recusal application and the merits set aside; and replaced with an order granting the application for recusal (see [31]).

LE v LA 2024 (5) SA 539 (GJ)

Marriage — Divorce — Proprietary consequences — Proprietary consequences of marriage governed by husband's domicile at time of marriage (ie matrimonial domicile) — Matrimonial Property Act forming part of South African law and not applying to foreign marriages unless expressly provided for by way of antenuptial contract, as South African law was not lex causae of such marriages — Matrimonial Property Act 88 of 1984.

The applicant, Ms LE, and the respondent, Mr LA, were parties to a pending divorce action instituted by the applicant in the Johannesburg High Court. They had been married in 2002 in Bucharest, Romania. Presently, before the Johannesburg High Court, were, inter alia, an 'immediate division' application brought by the applicant, complemented by an application for leave to amend. The applicant, in terms of the notice of motion *in its original form*, sought the immediate division of what she referred to as the joint estate in terms of s 20 of the Matrimonial Property Act 88 of 1984 (the MPA) and for the appointment of a liquidator and receiver to determine the value. In terms of the proposed amendment, the applicant would seek, inter alia, an order declaring that the Turkish laws ('alternatively Romanian law') were applicable to the parties' marriage, and directing the immediate division of the assets acquired during the subsistence of the marriage *in accordance with Turkish, alternatively Romanian,*

law. In her founding papers, the applicant had alleged that the parties had been married in terms of Romanian law in terms of which it could be accepted that they were married in community of property. The respondent in his answering papers denied this, claiming that no joint estate existed between the parties, because their proprietary rights were governed by either Turkish or Romanian law, and the MPA was of no relevance. That response prompted the applicant to seek leave to amend the notice of motion, in the manner described above, whilst in her replying affidavit asserting that the respondent agreed that the proprietary consequence of a marriage in accordance with Turkish or Romanian law was a division of assets acquired during the marriage, and attaching expert opinions on the patrimonial consequences of Turkish and Romanian law. Importantly, the amendment of the notice of motion was sought on the founding papers as they currently stood; the applicant chose not to supplement them.

The respondent for his part opposed the proposed amendment, contending that it sought to introduce an entirely new action, to the respondent's prejudice. He also filed a rule 30 notice, which was also the subject of the present matter, in which he objected to the replying affidavit on the basis that the relief sought constituted an entirely new cause of action.

Held, that the rule 30 application had merit and should be granted (see [34]): It was trite that the necessary allegations had to appear in the founding affidavit, and that the court would not, save in exceptional circumstances, allow the applicant to make or supplement a case in a replying affidavit, and would order any matter appearing in it that should have been in the founding affidavits, to be struck out. (See [29].) Whilst it may be that the averments in the replying papers were necessitated by the respondent's denial, in his answering papers that the parties were married in community of property, the applicant ought then to have applied for leave to supplement her papers, whereafter the respondent would have been able to answer to the averments and expert evidence. (See [30].) In any case, the expert evidence was not properly before court, the applicant having failed to comply with the rules regarding the leading of expert evidence, in terms of which the opposing party had to be given notice, an expert report had to be filed, and the expert was qualified as such. (See [32].) Finally, the declaration of whether the proprietary consequences of the parties' marriage was in terms of Turkish or Romanian law was a pending issue in the

divorce action, which was the correct forum within which these issues should be ventilated with the benefit of viva voce evidence. (See [33].)

Held, further, that, even if the above were not correct, it did not detract from the fundamental difficulty that the applicant's founding papers did not make out a case for the relief that the applicant sought in her proposed amendment to the notice of motion, and for this reason the proposed amendment to the notice of motion had to be refused. (See [35].)

Held, accordingly, that the case before the court was premised on the original notice of motion and the applicant's reliance on s 20 of the MPA. (See [36].)

Held, that the common rule remained that the proprietary consequences of a marriage were governed by the husband's domicile at the time of the marriage (ie the 'matrimonial domicile'). This was especially so where there was no antenuptial contract.

Held, that the MPA formed part of South African law and did not apply to foreign marriages, unless expressly provided for by way of antenuptial contract, as South African law was not the lex causae of such marriages.

Held, accordingly, that the applicant's 'immediate division' application in terms of s 20 of the MPA had to fail. (See [46].)

NDUDANE AND OTHERS v FINANCIAL INTELLIGENCE CENTRE 2024 (5) SA 549 (WCC)

Financial institution — Compliance — Money-laundering, financing of terrorist and related activities — Compliance and enforcement — Access to information held by Financial Intelligence Centre — Applicants, whose bank accounts with various banks were terminated on purported grounds of business and reputational risk, seeking delivery of reports made to Centre concerning alleged suspicious and unusual transactions in respect of applicants, as well as risk management and compliance programmes of banks — Whether applicants had proved right to have access to such information — Information material to determination of claim made in Equality Court proceedings launched against banks, that applicants treated in unfair and discriminatory manner — Information sought by applicants necessary for achievement of equality — Court granting relief sought — Financial Intelligence Centre Act 38 of 2001, ss 40 and 41.

The applicants, a combination of natural and juristic persons, had been joined as complainants in an application brought in the Equality Court (Western Cape) by Sekunjalo Investment Holdings (Pty) Ltd and associated entities (the Sekunjalo Group) against various banks — including among them Absa Bank Ltd, FirstRand Bank Ltd, Investec Bank Ltd, Nedbank Ltd and Standard Bank of South Africa Ltd (the banks). What triggered that main application were the decisions of the banks to terminate the banking services they had provided to the complainants, on the grounds of reputational and business risk. The complainants' case in the Equality Court was that the banks, in taking such decisions, whilst purportedly acting in accordance with the duties imposed on them by the Financial Intelligence Centre Act 38 of 2001 (FICA) and other laws to prevent, inter alia, money-laundering by its clients, meant to, and did in fact, subject them to unfair discrimination, unfair treatment and persecution on the grounds of their race and political alliance. This, the complainants claimed, was apparent from the fact that the banks had not taken similar actions against other predominantly White companies alleged to have been involved in corrupt and fraudulent activities — such as EOH Holdings and its subsidiaries, KPMG Services (Pty) Ltd South Africa, Steinhoff International Holdings NV and Tongaat Hulett Development. In the present interlocutory application to that main application, the applicants sought from the Financial Intelligence Centre (the FIC) a range of confidential information which, they claimed, would enable the Equality Court to determine their claim, namely the banks' risk management and compliance programmes, which the banks as 'accountable institutions' had to develop and implement in accordance with their duties under FICA; and all reports of suspicious and unusual transactions made to the FIC in respect of the applicants, as well as the Sekunjalo Group and EOH, KPMG, Steinhoff and Tongaat. The applicants, aside from relying on their constitutional right to access to information in terms of s 32 of the Constitution, sought the relief they did in terms of:

- s 40(1)*(e)* of FICA, which provided that the FIC had to make available information reported to it to persons entitled to such information in terms of an order of court;
- s 41 of FICA, which entitled persons to otherwise confidential information held by or obtained by the FIC, if such information was required for the purpose of legal proceedings, or if such persons were allowed such information in terms of an order of court;

• s 21(5) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA), which granted the Equality Court all ancillary powers necessary or reasonably incidental to the performance of its functions and the exercise of its powers, including the power to grant interlocutory orders or interdicts.

The FIC opposed the interlocutory relief sought on various grounds. Amongst others, they argued that no nexus was demonstrated between the information sought and the cause of action in the applicants' claim against the banks. In this regard, they argued that no allegation was made that the termination of the banking relationship between any of the applicants and any of the respondent banks was the result of reports filed with the FIC. The FIC asserted further that, given that the information was for the purpose of litigation, and sought after the commencement of that litigation, the Uniform Rules governed access to information. The FIC argued further that, to the extent that the applicants relied on the constitutional rights of access to information, the principle of subsidiarity prevented them from that, without complying with the provisions of the Promotion of Access to Information Act of 2000, which the applicants had not done. The FIC also claimed that the banks, and other affected entities whose documents were sought, ought to have been joined.

The court rejected the FIC's arguments based on the principle of subsidiarity and the failure of the applicants to seek the information under the Uniform Rules of Court: It held that the Equality Court could deal with the present applications in the exercise of its ancillary powers necessary or incidental to the performance of its functions and the exercise of its powers. Further, it held that the applicants were entitled to rely directly on the provisions of s 40(1)*(e)* read with s 41*(d)* and *(e)* of FICA to access the information they sought, which was otherwise protected from disclosure by statute. (See [10] – [12].)

The key question, the court held, was whether the applicants had proven a legal right to have the information in possession of the FIC. (See [12].)

The court held that the constitutionally entrenched right to equality would be emaciated and hollow if constitutional institutions, upon request, may not supply information on any measures relating to the achievement of equality, including, where appropriate, compliance with legislation, codes of practice and programmes within their jurisdiction, in instances where such access did not threaten state security or destabilise, in this instance, the nation's financial system. In this case the disclosure would help enhance the legitimacy and maintain the integrity of the financial system of SA, as it may

demonstrate whether voluntary compliance and self-regulation were a cover at the expense of the Black majority, in that it was exploited to maintain protection based on race and superiority based on political ideology and allegiance. Non-disclosure, on the other hand, would allow the foul smell of racism and White superiority to linger around major banks in the Republic. The FIC disclosure would be in line with its duty and responsibility to promote equality. This was so, particularly for complainants who were disadvantaged by the lack of access to relevant information on how risk was attended to for both Black and White business. The constitutional institutions had a responsibility to assist disadvantaged complainants, and if racism existed in SA's financial sector, it needed the FIC to disclose, and not hide, what it obtained and held. (See [18].)

The court rejected the FIC argument that no nexus was demonstrated between the applicants' cause of action in the main application, and the information which they sought to compel the FIC to divulge: the information directly related to the main reasons for termination of their banking relationship, to wit, reputational and business risk, as well as legal and regulatory obligations applicable to anti-bribery laws. The information constituted vital evidence on the manner in which the applicants were treated, whether in favour of or against the applicants. (See [19].)

As for the arguments based on non-joinder, the court held that the subject-matter of litigation was reported information submitted by accountable institutions for the purposes of assessment and analysis by a regulatory body, the FIC. The court expressed itself to be in agreement with the argument of the applicants that it was not necessary to join every name that appeared in the reports. The FIC prayer for non-joinder could not be sustained.

The court held in conclusion that the applicants had established their right to the information sought. Fairness and equity, and SA's constitutional values of openness and transparency, favoured that the applicants be granted access to it, its being part of the portfolio of evidence that was material to determination of issues in the main application, namely whether the applicants were unfairly discriminated against. (See [21].)

SOLIDARITY v MINISTER OF HEALTH AND OTHERS 2024 (5) SA 563 (GP)

Constitutional law — Legislation — Executive powers — Lawful exercise — When Bill served before Parliament but not yet enacted into law — National Health Insurance Bill — Steps taken by executive towards planning and capacity creation within department in anticipation of proposed legislation becoming law — Such lawful — To be distinguished from actual implementation of Bill before law, which is impermissible — Constitution, s 85; Public Service Act 103 of 1994, s 7(3).

In this application brought to the Pretoria High Court, the applicant trade union, Solidarity, acting in the public interest, sought to review, set aside and declare unconstitutional a number of decisions taken by the executive constituted by the respondents to bring into operation the National Health Insurance Fund (the NHI Fund), a key element of the National Health Insurance Bill that at the time served before Parliament. [It has since been enacted.] Those decisions included, inter alia, a decision taken by the second respondent, the Director General of the Department of Health (the DG), to advertise and fill 44 vacancies for the 'recruitment of competent technical specialists to assist with the preparation of the NHI Fund'; the decision of the first respondent, the Minister of Health, and the DG to establish five chief directorates in the National Health Insurance Branch (the NHI Branch) of the Department of Health; the decision of the Health Minister and the DG to establish the NHI Branch; and the decision by, inter alia, the DG and the Health Minister to establish a transitional functional organisation. The asserted grounds of review were:

(1) The executive constituted by the respondents could not, as they sought to do, lawfully take decisions to implement a bill before it had been enacted into law by Parliament. The respondents, in taking the decisions they did, assumed a power that the executive did not have, because the Bill was not law, and hence did not confer any power to act. They accordingly acted ultra vires.

(2) The decisions in question were taken in non-compliance with reg 25(2)*(a)*(i) of the Public Service Regulations promulgated in terms of s 41 of the Public Service Act 103 of 1994 (the PSA), in terms of which the Health Minister, as the executive authority in respect of the Health Department, had to consult with the PSA Minister and Treasury, in determining the Department of Health's organisational structure. In this case, however, the Health Minister, in correspondence with the PSA Minister, had claimed that the Treasury had approved the allocation of funds for the establishment of the NHI Branch, when it had not. This was a material misrepresentation, which was relied upon

by the PSA Minister in giving his concurrence. As a result, his concurrence was vitiated by a material error. Hence, there was not the required lawful consultation.

Were the decisions taken ultra vires?

In terms of s 85*(e)* of the Constitution, the members of the Cabinet exercised the executive authority by performing executive functions provided for in the Constitution or in national legislation. One such item of legislation was s 3(7) of the PSA, which in para *(a)* conferred on the Health Minister the powers and duties necessary for the internal organisation of the Department of Health. (See [15].) The limits of such broad powers were determined by the demarcation of the lawful functions of the Department of Health. The question arose in this case, what these functions were when a Minister had introduced proposed legislation into Parliament, and awaited the legislation that Parliament enacted (or failed to enact). (See [16].)

Solidarity's contention, that the *implementation* of a Bill, not yet law, could not be lawful, because a department of state could not do what Parliament had yet to pass into law, was correct. But it had to be properly understood. There was a distinction between creating organisational capacity within a department, in anticipation of proposed legislation becoming law, and taking administrative actions that assumed a power that did not (yet) have a basis in law: It was lawful for a department of state to enjoy a functional competence to plan, prepare and create dedicated capacity in anticipation of a significant change to the law. This was a necessary incident of s 3(7) of the PSA because the very matters there referenced by way of internal organisation postulated a forward-looking and anticipatory vantage point. (See [18] and [19].) Furthermore, it was essential to the functioning of a democracy; public administration had to be ready to effectively implement the legislative programme initiated by the executive. (See [19] – [21] and [28].)

The decisions in question — having regard to the Bill, as well as the 'Organisational Change Document' explaining the need for changes to the organisational structure of the Department of Health — were taken to create capacity, develop policies, build systems, and recruit technical expertise that would be used by the NHI Fund, on the assumption that the NHI Fund will come into being. They did not in any way propose actions that constituted, or commenced the operation of, the NHI Fund itself. They accordingly constituted the permissible creation of capacity for the NHI when it was constituted, as opposed to implementation of the Bill. Accordingly, Solidarity's vires

challenge had to fail. And in consequence the decisions did not want for constitutional validity, nor were they irrational. (See [23] – [29].)

The misrepresentation challenge

The representation on which Solidarity relied did not amount to an operative misrepresentation. Firstly, it was not a misrepresentation. This was because funding approval was in fact given by the Treasury shortly after the erroneous representation. A representation of fact that may yet be true was not a misrepresentation. Secondly, it could not vitiate the concurrence given, because the PSA Minister's concurrence was not based on any competence of the Minister to approve funding. In such circumstances, the representation could not serve to render the concurrence mistaken or otherwise invalid. The misrepresentation challenge had to fail. (See [30] – [32].)

Accordingly, the application had to be dismissed. (See [33] – [34].)

AFGRI ANIMAL FEEDS v NUMSA AND OTHERS 2024 (5) SA 576 (CC)

Labour law — Trade union — Locus standi — Representation of employees or employers — Trade union constitution definitive of powers — Admission of members outside registered scope ultra vires and invalid — Labour Relations Act 66 of 1995, ss 161 and 200.

AFGRI Animal Feeds (a Division of PhilAfrica Foods (Pty) Ltd) (AFGRI) dismissed a number of its employees who had embarked on an unprotected strike following AFGRI's refusal to grant the National Union of Metalworkers (Numsa), a registered trade union, organisational rights. Numsa, on their behalf, referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA), and when the dispute remained unresolved, referred it to the Labour Court (the LC). There, AFGRI raised a preliminary point based on s 161(1)*(c)* of the Labour Relations Act 66 of 1995 (the LRA), which provides that a party to proceedings in the Labour Court may appear in person or be represented only by a member, office-bearer or official of that party's registered trade union. AFGRI contended Numsa was precluded from representing the dismissed employees because, in terms of its constitution, membership of Numsa was restricted to workers in the metal and related industries, while the dismissed workers were formerly employed in the animal feed industry.

The LC upheld the preliminary point, concluding that the dismissed employees' membership of Numsa had been invalid and void from the outset, that Numsa lacked

legal standing, and that its referral of the matter was invalid (see [7] – [10], [20]). The Labour Appeal Court (the LAC) overturned the Labour Court's decision, holding that Numsa was a party to the LC proceedings in terms of s 200(1)*(b)* of the LRA because it was acting both on behalf of its members and in their interests, as envisaged in s 200(1)*(c).* (Section 200 determines a trade union's legal standing: it may act in its own right or interest (s 200(1)*(a)*); it is entitled to act on behalf of any of its members (s 200(1)*(b)*); and it may act in the interests of any of its members (s 200(1)*(c)*) — see [35], [40].) On the question whether Numsa could represent the dismissed employees when they worked in an industry which fell outside its constitution, the LAC drew a distinction between a trade union's exercise of organisational rights, on the one hand, and its representation of employees in an unfair dismissal dispute, on the other (see [14] and [35]).

The present case concerned AFGRI's appeal against to the Constitutional Court (the CC). AFGRI's main complaint was that the LAC erred in holding that Numsa was authorised in terms of s 200 of the LRA to represent the dismissed employees in the LC proceedings, contending that Numsa had to demonstrate legal standing under s 161(1)*(c)* of the LRA. On the preliminary issues, the court agreed that the application engaged its jurisdiction and that it was in the interests of justice that leave to appeal be granted (see [31] – [33]). As to the substantive issue — whether Numsa had the authority to represent the dismissed employees and thus establish legal standing in the Labour Court proceedings —

Held

While the LAC was correct that Numsa's legal standing was governed by s 200(1)*(b)* and *(c)*, and not s 161(1) of the LRA (see [41]), a trade union was not permitted to operate outside its registered scope. And, since Numsa's constitution restricted its registered scope to workers in the metal and related industries, and the dismissed employees were working in the animal-feed industry when they applied for membership of the union, they were not eligible for membership, for the simple reason that they were employed outside Numsa's registered scope — their admission was and remained an act that was beyond Numsa's powers as defined in its constitution (see [48]). Numsa had no authority to represent the dismissed employees in the LC because they were precluded from becoming members of the union; and Numsa therefore had no legal standing in the LC proceedings. Its act of admitting them as

members of the trade union, contrary to its constitution, was ultra vires and invalid. The appeal would accordingly succeed. (See [53], [58], [61].)

REGENESYS MANAGEMENT (PTY) LTD v ILUNGA AND OTHERS 2024 (5) SA 593 (CC)

Labour law — Dismissal — Dismissal for operational requirements — Whether s 189A(18) ousting jurisdiction of Labour Court to hear dispute about procedural fairness of dismissal for operational requirements — Labour Relations Act 66 of 1995, ss 189A(13), 189A(18) and 191(5)*(b)*(ii).

Labour law — Dismissal — Dismissal for operational requirements — Employer not complying with fair procedure — Remedies in s 189A(13)*(a)* – *(d)* — Whether one of *(a)* – *(d)* may be claimed alone — Whether two of remedies in *(a)* – *(d)* may be granted together — When order *(d)* (compensation) may be granted — Labour Relations Act 66 of 1995, s 189A(13).

Regenesys Management (Pty) Ltd, an employer of more than 50 employees, dismissed employees by reason of its operational requirements. Certain employees then brought an application to the Labour Court under s 189A(13) of the Labour Relations Act 66 of 1995, claiming that the dismissal process had been procedurally unfair. They sought reinstatement pending compliance with a fair procedure, or alternatively, compensation. The latter under ss (13)*(d)*. Other employees brought an application challenging the substantive fairness of the dismissals, doing so under s 191(5)*(b)*(ii) (see [15], [17], [221]).

The applications were heard together, with the Labour Court upholding the substantive-unfairness claims and ordering reinstatement of those claimants. Regarding the employees claiming procedural but not substantive unfairness, the court found the dismissal process to have been procedurally unfair, and ordered Regenesys to pay the affected employees compensation. Regenesys appealed to the Labour Appeal Court (LAC), challenging both findings. (See [18] – [21], [23].)

The court dismissed the challenge to the substantive-unfairness finding, but upheld the challenge to the procedural-unfairness finding. It did so on the basis that, properly interpreted, ss 189A(18) ousted the jurisdiction of the Labour Court to hear a dispute about the procedural fairness of a dismissal on the operational-requirements ground,

whether brought before the Labour Court under s 189A(13) or s 191(5)*(b)*(ii) (see [23], [25] – [26], [28], [31]).

The LAC set aside the Labour Court's order that Regenesys pay compensation. Regenesys then appealed the LAC's substantive-fairness finding to the Constitutional Court; and the employees claiming procedural unfairness cross-appealed on the jurisdictional point. (See [19].)

The issues were the following.

First, the Labour Court's substantive-unfairness finding (and the LAC's upholding of the Labour Court's finding). *Held*, Regenesys' appeal on this point should be dismissed (see [36], [53]).

Second, the proper interpretation of s 189A(13) (see [72]). *Held*, that:

- No two of the orders in ss (13)*(a)* – *(d)* could be granted together (see [78]).
- An order of compensation (ss *(d)*) could only be granted when it was no longer appropriate to grant an order of *(a)* or *(b)* or *(c)* (see [78] – [79], [140]).
- Each of orders *(a)* – *(d)* could be claimed alone (see [89] – [90]).

Third, whether the Labour Court has jurisdiction to hear disputes as to the procedural fairness of a dismissal on the operational-requirements ground. *Held*, that it has (see [56], [141]):

- In a situation where a company with more than 50 employees — (ie a company to which s 189A applies; s 189A applying only to companies of more than 50 employees) — dismisses the employees, the employees need bring their procedural-fairness dispute to the Labour Court by way of s 189A(13). (The Labour Court only has the power to hear the dispute if it is referred under s 189A(13). It cannot, if it is referred under s 191. Subsection 189A(18) precludes this.) (See [146], [148].)
- In the situation of a company with less than 50 employees, the court has the power to hear a procedural-fairness dispute, if it is brought before it under s 191(5)*(b)*(ii). Section 189A — including s 189A(18) — does not apply to companies of less than 50 employees (see [217] – [219]).

Leave to appeal and to cross-appeal granted. Appeal dismissed, cross-appeal upheld. The declaration of the LAC that the Labour Court had no jurisdiction to adjudicate disputes about the procedural fairness of dismissals for operational requirements set aside (see [242]).

Rogers J, agreeing with the first judgment's disposition of the case, but disagreeing in other respects (see [243]), noted the following:

• There might be circumstances where a standalone claim for compensation (ss 189A(13)*(d)*) would be permissible. (This the judge noted was an obiter view — the question not arising on the facts.) (See [247].)

• In the case of a company employing more than 50 employees, the Labour Court only has the power to hear a procedural-fairness dispute if it is brought before it using ss 189A(13). Subsection (18) provides that the Labour Court has no power to hear the dispute if the employees bring it under s 191(5)*(b)*(ii) (see [257]).

• The cases referenced in the first judgment do not reflect that ss (18) ousts the Labour Court's jurisdiction to hear procedural-fairness disputes coming to it from companies of less than 50 employees (see [258]).

• The cases do not say that, in the instance of a company of more than 50 employees (a company in s 189A's ambit), that the Labour Court cannot adjudicate a procedural-fairness claim brought under ss 189A(13) (see [261]).

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NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS v MDHLOVU 2024 (2) SACR 331 (SCA)

Prosecution — Malicious prosecution — Proof of — Requirement of malice or animus iniuriandi — Requires egregious conduct, not just flawed reasoning.

The appellant appealed a decision in the High Court which had upheld the respondent's claim for damages for malicious prosecution. The respondent was a prosecutor employed by the National Prosecuting Authority, who had reneged on an undertaking, made to the investigation officer in a matter involving charges of murder, armed robbery and the illegal possession of a firearm, to postpone the matter in order to obtain further ballistics evidence concerning the firearm. The investigating officer complained to his superiors who referred the matter to the Deputy Director of Public Prosecutions (the DDPP) who took the decision to prosecute the respondent on two counts of fraud and an alternative count of defeating the ends of justice. It was alleged that the respondent had falsely stated that an accused person had no link to the charges brought against them in court and that the complainant was unable to identify the property that had been stolen in relation to those charges.

The respondent was discharged in terms of s 174 of the Criminal Procedure Act 51 of 1977 and instituted the action for damages. The High Court held that the DDPP had

acted with animus iniuriandi, in that she subjectively foresaw the possibility that she was acting wrongfully in prosecuting the respondent, but nevertheless continued recklessly as to the consequences. She lacked reasonable and probable cause for the prosecution as she was not in possession of evidence showing a reasonable prospect of a conviction at the time. The High Court found further that the NDPP had failed to apply the correct test at all by focusing only on a prima facie case and had not presented evidence to the court showing that the Director of Public Prosecution's decision was supported by reasonable and probable cause.

Held, that a thorough review of the evidence that was before the NDPP when she decided to prosecute established objective probable cause to prosecute, notwithstanding that the respondent was subsequently discharged at the trial. The DDPP's statement that she believed there was a prima facie case, but not enough evidence for a corruption charge, did not imply that there was no probable cause for the actual charges of fraud and defeating the ends of justice brought forth by the prosecution. The High Court's conclusion that there was no reasonable and probable cause was therefore not properly substantiated by the evidence. (See [23] and [30].)

Held, further, that, to show animus iniuriandi, the respondent had to demonstrate that the DDPP foresaw the possibility that initiating the prosecution was wrongful, in that reasonable grounds for it were lacking, but that she acted recklessly as to that consequence. The High Court's analysis took an unduly narrow view of the evidence. An improper motive alone was insufficient to establish animus iniuriandi for a malicious-prosecution claim. The prosecution must also have been initiated without reasonable and probable cause, which the appellant had established. Moreover, the desire as expressed by the DDPP, to set an example that prosecutors would be held accountable for unjustified decisions, was not in itself an improper motive for a prosecution that was otherwise justified. The DDPP had not acted unilaterally, but after extensive consultation and upon receiving the NDPP's written confirmation that the dockets disclosed a prima facie case justifying prosecution. Proving malicious prosecution required egregious conduct, not just flawed reasoning. The High Court was too quick to impute animus iniuriandi without clear evidence thereof. (See [32] – [35].) The appeal was accordingly upheld.

MALONE v GOVERNMENT OF THE UNITED KINGDOM AND ANOTHER 2024 (2) SACR 341 (KZD)

Extradition — Application for — By foreign state — Withdrawal of — Claim for damages for wrongful arrest and detention arising from withdrawn application — Immunity of foreign state — Foreign States Immunities Act 87 of 1981, ss 2(1) and 6.

The plaintiff was granted leave to reside in the United Kingdom in 2014 as a tier 2 general migrant. In 2017 that right was revoked and he was ordered to leave the country within seven days. He arrived in South Africa and in May 2019 he was arrested in terms of a warrant of arrest issued at the request of the first defendant, pending an extradition application for him to be extradited to the United Kingdom. He was detained for 46 days before being released on bail. His extradition application was set down for hearing on 24 March 2020, on which day the first defendant withdrew the request. He then issued summons seeking damages for wrongful arrest and detention in an amount of R2 898 000, which included an amount for his legal expenses. In an exception to the claim, the first defendant pleaded that it was immune from the jurisdiction of the court in terms of ss 2(1) and 6 of the Foreign States Immunities Act 87 of 1981 (the Act). The plaintiff claimed that a state was not immune in respect of proceedings of, inter alia, personal injury caused by an act or omission in the United Kingdom. Such an action, seeking compensation for deprivation of freedom and discomfort, involved consideration of factors such as the invasion of his personality rights, and his other constitutional rights, and involved a consideration of the trauma, mental anguish and distress suffered by the plaintiff.

Held, in the Act there was no internal limitation imposed on a 'personal injury'. Since the general term was not restricted in the Act, the intention of the legislature must be taken to have been that, unless there were other indications to the contrary, all recoverable loss or damage suffered by reason of a 'personal injury' fell within its jurisdiction. Deprivation of liberty involved a consideration of injury to one's reputation and dignity. That leg of the exception accordingly had to fail.

Held, further, as to the first defendant's reliance on sovereign immunity, extraditing a person, especially a citizen, constituted an invasion of fundamental human rights, and the protection afforded by sovereign immunity therefore could not insulate alleged wrongful conduct which would have resulted in the impairment of a constitutional right. That part of the exception accordingly also had to fail.

Held, further, that the legal costs incurred by the plaintiff included the economic loss suffered as a result of the first defendant's conduct. Such an action fell within the ambit of s 6 of the Act and that leg of the exception accordingly also had to fail.

MINISTER OF JUSTICE, CONSTITUTIONAL DEVELOPMENT AND CONSTITUTIONAL SERVICES AND OTHERS v KRAMER AND ANOTHER 2024 (2) SACR 351 (GJ)

Court — High Court — Jurisdiction — Power of court to suspend decision of Supreme Court of Appeal pending appeal — Only court which had granted order could suspend its operation — Superior Courts Act 10 of 2013, ss 11, 18(1), 18(2) and 42.

The two respondents were inmates of a correctional-services facility, who were studying for degrees through UNISA. They had obtained a judgment in the Supreme Court of Appeal which, inter alia, ordered the Correctional Services authorities to allow them access to their laptop computers (without being connected to a modem) for the purpose of their studies. The appellants noted an appeal to the Constitutional Court against this judgment. On the failure by the appellants to allow the respondents access to their computers, the respondents obtained an order in the High Court, granting them substantially the relief they sought. As a result of the appellants' failure to comply with the order, the respondents sought an order holding them in contempt of the Supreme Court of Appeal. The Minister then filed an appeal against the order of the court a quo on three grounds, including that the court a quo should not have interfered with a judgment of the Supreme Court of Appeal and that it had no jurisdiction to traverse what the Supreme Court of appeal had done.

Held, that the legislature had, in s 11 of the Superior Courts Act 10 of 2013, appeared to have in mind that it was the court which granted the order which had jurisdiction to suspend its order temporarily pending appeal. To hold that a provincial division had jurisdiction to hear the case in question would lead to the possibility of different divisions coming to different conclusions on the enforceability of a particular Supreme Court of Appeal order pending appeal. This would be regrettable in circumstances where the latter court, having jurisdiction, could give one judgment binding on all provincial divisions. The legislature did not intend different outcomes relating to a given Supreme Court of Appeal order. Section 42 of the Superior Courts Act did not include the limiting words 'exceptional circumstances' which appeared in s 18(1) and 18(2), which showed that the two sections dealt with different topics. It would be anomalous on the argument for the respondents that the two sections read together allowed a

provincial division and the Supreme Court of Appeal current jurisdiction, that s 18 allowed suspension of an order only in exceptional circumstances, while s 42 did not contain a similar limitation. (See [16] and [17].) The appeal was upheld.

NYHONYHA NO AND OTHERS v NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS 2024 (2) SACR 358 (SCA)

Prevention of crime — Restraint order — Restraint order in terms of Prevention of Organised Crime Act 121 of 1998 — Use of trust — Whether assets of trusts 'realisable property' in terms of s 14(1) of Act — Evidence making out prima facie case that appellants had control over assets of each of appellants; that they were real beneficiaries of those assets and income generated thereby; and that they had treated them as their own — If did not provide for preservation of assets, key purpose of ch 5 of POCA, to ensure that no person could benefit from his or her wrongdoing, could not be achieved — Trust assets constituting property for purposes of Act.

The appellants appealed against the upholding of an appeal by a full court which confirmed provisional restraint orders granted by the High Court in three separate cases which were consolidated on appeal. The properties restrained were being held by trusts for and on behalf of some of the appellants in the restraint application, on the basis that they fell within the definition of 'realisable property' as envisaged by s 14(1) of the Prevention of Organised Crime Act 121 of 1998 (POCA). These defendants (the Regiments directors) had been indicted on various charges relating to corruption, money-laundering and fraud.

The appellants contended that their family trusts, which held the properties in question, had to have the exclusive use and effective control over the property in question before they could be found to 'hold' the property for the purposes of s 14(1)*(a)*. They contended that what the law required was that the defendant had to meet at least one of four requirements: he or she had to be the sole shareholder member of the respondent; he or she had to have provided the funds for the acquisition of the property; he or she must have control over the assets and treat them as their own; or the defendant must have used the trust form as a substitute for his or her own estate.

Held, precedent did not support the appellants' approach. The evidence did indeed make out a prima facie case that the appellants in the first and second cases had control over the assets of each of the appellants; that they were the real beneficiaries of those assets and the income generated thereby; and that they had treated them as their own. The definition of 'property' in POCA was expansive and included 'any rights,

privileges, claims and securities, and any interest therein and any proceeds thereof'. It was not limited to ownership and included other forms of possessing, holding, enjoying and using. (See [60] and [62].)

Held, further, that in essence, the first and second appellants' argument was that the intercession of their family trusts placed their shareholding in Regiments beyond the reach of the court and that an order restraining the assets of the trust was not permissible. Sophisticated criminals would rarely permit the benefits they obtained to be linked to them directly or hold their realisable assets in their own names. POCA recognised this and cast its net widely to answer the two questions, whether the defendants had benefited and whether the defendants held realisable property. If the legislation did not provide for the preservation of assets, the key purpose of ch 5 of POCA, to ensure that no person could benefit from his or her wrongdoing, could not be achieved. The findings, that the appellants' property was being held on behalf of the first and second appellants, were well founded and the NDPP had met the case she was required to make, namely prima facie showing that the appellants' assets were held by the first and second appellants as envisaged by s 14(1) of POCA. The appeals accordingly had to be dismissed. (See [71] – [72].)

E.SAT (PTY) LTD AND OTHERS v SENIOR PROSECUTOR LUCKEN NO AND OTHERS 2024 (2) SACR 377 (KZD)

Trial — Broadcasting — Television — Justified apprehension that witnesses afraid to testify — Conditions and restrictions on reporting — Court's power in terms of s 173 of Constitution.

The present application arose from a criminal prosecution against the second respondent, a politician, and 21 others on numerous charges of racketeering, fraud, corruption, contraventions of procurement legislation, and money-laundering. The applicants wanted to televise the trial and the court granted an order by consent on 11 November 2022, allowing the televising of proceedings on strict conditions. The matter then proceeded until the first respondent, the prosecutor in the trial, placed on record that the witness, who was to testify on 24 July 2023, had a shot fired into her home on 22 July 2023. Although she was unharmed, she was afraid to testify and have her evidence aired on television or social media. The matter was rolled over to the following day to secure other witnesses, but the prosecutor placed on record that the witnesses were afraid to testify as a consequence of the shooting incident. Counsel

for the accused and the state held a meeting with the court on 28 July 2023 to find the best way forward. The parties unanimously agreed that, in order for the trial to proceed, the ruling set out in a letter of the same day be issued, providing that there would be no televised recordings of the proceedings; the media and television stations should not identify the names and details of the witnesses; only accredited media personnel would be allowed into the court; no cellular phones and recording devices would be allowed into court, but that the current audio recording in court could continue, but could not be shared electronically or aired on any radio or television channel until all the witnesses in that thread of evidence had testified. The prosecutor then indicated that the state would commence with a new thread of evidence, and the trial proceeded. On 17 August 2023 the applicants launched the present application to set aside the letter of 28 July 2023, contending that that ruling effectively rescinded or varied the original November order which had granted the applicants permission to film, record, broadcast and stream the full proceedings. Further, that order could not be varied as it infringed the right to freedom of expression and the open-justice principle; that there was no real evidence of a threat to witnesses and that the *audi alteram partem* rule had not been complied with. The court was also called upon to consider the admissibility of the hearsay evidence of a police colonel concerning witnesses' fears for their safety and their reluctance to testify, and the emails attached to his affidavit.

Held, as to whether the court could amend the order, that it was clear that the July ruling was an interlocutory order, as it did not dispose of the issues in the criminal trial. It was merely a means of ensuring that the trial proceeded, which was in the interests of justice. (See [27[.)

Held, further, that the court's power to restrict access to the media stemmed from s 173 of the Constitution. A court is placed in an invidious position of ensuring the safety of witnesses, while trying to 'balance the rights of open justice and free speech, with legitimate objections from lay witnesses and the need for a fair trial'. The only assurance that the court could provide to the witnesses in the circumstances of this case was to consider their request not to reveal their names or to have the audio recordings of their evidence aired until the specific thread of evidence was completed. The July ruling was as a result of the agreement reached between counsel for the accused and the prosecution team as being the best way forward, failing which, the trial would not have been able to proceed in that session. (See [30] and [33].)

Held, further, that the applicants would always have access to the audio recordings. The only difference was that, in relation to the thread of evidence pertaining to the original tenders and processes, the audio recordings could only be broadcast after the thread of evidence was finalised. The applicants were not permanently prevented from reporting and broadcasting audio recordings. (See [44].)

Held, further, that in this case the open-justice principle had not been violated. The public could still be informed through newspapers, social media and television stations of the evidence in court. The only restrictions imposed were that the identities of the witnesses were not allowed to be disclosed, and that the audio recording of the evidence was not permitted to be aired until the conclusion of the thread of evidence. This was reasonable and in the interests of justice. The public would still be informed of the proceedings in court, and the identities of the witnesses would not be made public. (See [58].)

Held, further, that the threat to the specific witness, and the concerns of the other witnesses in the thread of evidence to which the July ruling applied, cannot be brushed aside as mere speculation. The court had the discretion to decide on the further conduct of the proceedings after all considerations were taken into account. In the circumstances of this case, the ruling was granted in the interest of the matter proceeding. The right to freedom of expression and the open-justice principle had not been infringed. (See [58].)

S v NTANZI AND OTHERS 2024 (2) SACR 403 (KZP)

Criminal procedure — Plea — Plea of guilty — Accused tendering 'guilty in terms of s 112(1)*(a)* of Criminal Procedure Act 51 of 1977, on condition not questioned by magistrate — Prosecutor ought not to have accepted conditional plea and magistrate ought not to have allowed such — Convictions set aside and matter remitted to court a quo.

The accused in five separate cases were charged with a contravention of s 50(1) of the National Land Transport Act 5 of 2009 (the Act) read with ss 1, 90(1)*(a)*, 90(2)*(a)* and 90(3) of the Act. In all of the cases the accused were legally represented and they tendered pleas of 'guilty in terms of s 112(1)*(a)* of the Criminal Procedure Act 51 of 1977' (the CPA). They were convicted on their pleas and were sentenced to fines of R2000 or R3000, with the alternative of imprisonment of three months, or, in one case, three weeks. The matters were all sent on review in terms of s 304 of the CPA.

Held, that the pleas conveyed by the accused's legal representative in the cases came perilously close to what was clearly not permitted, that is to say, a plea tendered on condition that the magistrate did not question the accused. The magistrate should not have let that pass. A plea of guilty which may be regarded as conditional should not be permitted. It was also not appropriate for the prosecutor to state that the plea was accepted in terms of s 112(1)*(a).* (See [29] and [30].)

Held, it was clear from the records in all five cases that the magistrate was dealing with accused persons whose primary goal was getting in and out of court as quickly as possible. Whilst each record revealed that the legal representative had instructions on the personal circumstances of each accused, which might have a bearing on sentence, there was no sign that he had instructions, except perhaps in one case, of the facts of each case as far as the merits of the plea were concerned. (See [33].)

Held, further, that, in terms of s 90(2) of the Act, on conviction of the offence with which each of the accused in those matters was charged, a term of imprisonment not exceeding two years, or a fine not exceeding R100 000 could be imposed. Given the purpose for which the carefully constructed system of operating licences was established under the Act, and the potential consequences of breaches of the system, the magistrate ought not to have entertained an opinion as to the potential sentences with the same level of certainty as she would have done if those were minor shoplifting cases. The less certain the opinion, the more that fact pointed to the exercise of a judicial discretion in favour of questioning the accused, to ensure that an innocent person was not going to be convicted. (See [37].) The convictions and sentences imposed in each of the matters was reviewed and set aside and the matters remitted to the court a quo.

S v MARITZ 2024 (2) SACR 412 (SCA)

Trial — Presiding officer — Recusal of — Inference of bias — What constitutes — In casu, numerous allegations of bias made, but none individually or collectively leading to reasonable apprehension of bias.

The appellant appealed against the refusal by the presiding judge in his criminal trial in the High Court to recuse herself after his conviction on 16 counts of sexual assault and statutory rape. His complaint that the judge was biased was based on her revocation of his bail after he had been granted bail after conviction, and her refusal of leave to appeal against that decision. Bail was subsequently reinstated on appeal

to the full court. The appellant alleged that the judge had irrationally and unilaterally revoked his bail; was a gender-based-violence activist and had a teddy bear in her chambers; had requested a victim-impact report before the revocation of his bail; and, prior to the hearing of the variation of the appellant's bail conditions, the judge had spoken to her colleague about the case before the adjudication of the variation of the bail conditions.

Held, that the judge may have wrongly revoked the appellant's bail, but a mistake in the application of the law, or on the facts, did not by itself mean that she was biased. The relevant connection had to call into question her ability to apply her mind in an impartial manner to the case before her. The allegation of bias had to be rejected as being without any merit and not capable of grounding a reasonable apprehension of bias. (See [16].)

Held, further, that the presence of the teddy bear was explained as having been given to her as a token of appreciation for her participation in talks regarding the protection afforded to abused persons. No reasonable apprehension of bias could be based on this. (See [19] – [20].)

Held, further, that the High Court had correctly dismissed the ground that the presiding judge had requested a victim-impact report as those were usually requested by the prosecutor, and it would have been absurd for the judge to have requested the report from the appellant's legal representative. This ground for recusal was also unfounded and properly rejected by the High Court. (See [24] and [27].)

Held, further, that the presiding judge had sufficiently explained why she spoke to her colleague about the case, who was required to take over the matter as a result of her absence due to a bereavement in her family. That ground of recusal also had to fail. (See [28] – [30].) The appeal was dismissed.

S v PHATE 2024 (2) SACR 421 (GJ)

General principles of liability — Common purpose — Dissociation from common purpose — What constitutes — Accused uttering dire threats to two victims who were suspected by mob of having burgled accused's home — Threats that no one was going to leave the room alive — Accused then leaving before one victim killed and another severely assaulted — For departure from scene to favour accused, more was required than merely going away — Convictions in order.

The appellant appealed against his conviction and sentence for two counts of kidnapping and a count of attempted murder, murder, and defeating the ends of justice. He was sentenced to life imprisonment on the count of murder, and terms of imprisonment for the other counts. The crimes were committed after the appellant's house had been broken into, after which 'mob justice' took over and that two victims were taken into the appellant's house. The state relied on a common purpose, although the appellant was not present when the victims were assaulted, and the deceased killed. It relied on the evidence that the appellant had said 'nobody is going to leave this room alive and further whatever happens, happens'.

It was contended on behalf of the appellant that, by leaving the scene, he had dissociated himself from the crimes, and it was argued that when he left 'the meeting' he had distanced himself from what transpired.

Held, that it was clear that, for a departure from the scene to favour an accused, more was required than merely going away. In the present case he had not dissociated himself from the dire consequences that he himself predicted would befall those present at the interrogation, which led to death. One would expect that if he really withdrew with an intent to dissociate himself, he would have expressed it clearly and forcefully. The 'meeting' was not a friendly meeting of friends to find the culprits who burgled the appellant's home: he had a vested interest in finding the perpetrators, and it would be more appropriate to class the 'interview' as an 'interrogation'. The evidence as to what he said was chilling. By leaving, all he did was to leave the dirty work to his co-accused. He actively foresaw the possibility that someone was going to die, and he reconciled himself to that possibility. In the circumstances, he had been correctly convicted on the basis of a common purpose, and the sentence of life imprisonment was an appropriate sentence. (See [14], [19], [27] and [33].)

SIMBA v MINISTER OF POLICE 2024 (2) SACR 430 (NCK)

Arrest — Without warrant — Validity of — Arrest under Immigration Act 13 of 2002 — Plaintiff, foreign national, arrested close to border without valid passport or visa — Charge withdrawn by prosecutor — Prosecutor having failed to obtain evidence of immigration officer on plaintiff's status — Salutary to remember purpose of Immigration Act, which ensured that security considerations fully satisfied — Arresting officer entitled to arrest.

The plaintiff, a Tanzanian national, instituted action against the defendant in March 2020 for damages for his alleged unlawful arrest and detention. He was arrested very close to the Namibia border when he and another man were spotted attempting to hide in the bushes near the border post. The police accosted them and demanded proof of their passports. The arresting officer testified that they were not in possession of valid travel documents. They were then taken to an immigration office where an immigration officer confirmed that they were illegally in the country. They were then arrested. The immigration officer testified in the damages claim that he had conducted the verification exercise by accessing the movement-control system of the Department of Home Affairs, which indicated that the plaintiff had entered the country from Swaziland in 2016 and obtained a temporary residence visa for 90 days. His passport was valid, but his temporary residence had expired. The police official denied that the plaintiff had produced an emergency travel document issued in Tanzania, as alleged by the plaintiff. There was, however, a copy of the document in the police docket, but this was only valid for a single trip. The plaintiff was charged with a contravention of s 49(1)*(a)* read with s 1(1) of the Immigration Act 13 of 2002, in that he had remained in the Republic without any permit or documentation, and he was detained.

After a number of court appearances, the prosecutor withdrew the charge, the entry on the court record by the magistrate indicating that the state requested the charge be withdrawn due to the fact that the officials had not checked the correct information. The charge was therefore withdrawn. The plaintiff testified that he came to South Africa in 2000 and remained until 2020, but he occasionally visited Tanzania, and he had a fixed address in the Republic. At the beginning of March 2020 when he wanted to leave Tanzania, he was informed that his passport was no longer accepted by the East African countries and he had to apply for a new passport. He says he made an application and was issued an emergency travel document valid for a single trip until 30 May 2020. He said he carried the emergency document and the impugned passport whilst travelling to South Africa. He said that he left Tanzania on 10 March 2020 by bus to Zambia, and took another bus from Zambia to Namibia. After crossing the Namibian border into South Africa, he waited under a bridge next to the road for a truck to get a lift, and whilst waiting he and his companion went into the bushes to relieve themselves, where they were accosted by the police officials. It was contended that the charge appearing on the SAPS form showed the offence as 'suspected illegal immigrant', which did not exist as a charge. However, in the SAPS503 form it was

stated that the crime committed was a 'contravention of the Immigration Act 13 of 2002 (49)'. It was further contended that the offence which he was accused of having committed did not resort under sch 1 of the Criminal Procedure Act 51 of 1977 (the CPA), and that the SAPS members' conduct in failing to explain the provisions of s 50 to the plaintiff rendered the arrest unlawful.

Held, that the argument, that the offence recorded on the SAPS form was incorrect, was technical and unnecessary because the police did not craft the final charges to be levelled against perpetrators, which responsibility resided with the prosecuting authority. The plaintiff was adequately aware of his transgressions and the reason for his apprehension, and it could not be gainsaid that he understood the police and immigration officer. (See [23].)

Held, further, that sch 1 of the CPA included, apart from those specifically mentioned, offences for which a sentence of more than six months' imprisonment could be imposed. Section 49(1)*(a)* of the Act set the penalty to not exceed two years' imprisonment. (See [24].)

Held, further, that what may have sent the public prosecutor to have the criminal charges against the plaintiff withdrawn was his unexplained failure to subpoena the immigration officer to court to explain the contents of the movement-control report and the effect of an expired visa. The plaintiff was in the country illegally and it was common cause that the presiding magistrate had recorded on at least two instances in the discovered court record that the plaintiff intended to plead guilty to the charge. A person did not plead guilty to an offence he had not committed. (See [25].)

Held, further, that failure to observe the provisions of s 50 was not contained in the plaintiff's pleadings, and was argued as a new matter. That notwithstanding, the section made provision for the procedure to be followed where bail had not been granted. It was unclear on the facts before the court whether or not bail had been applied for and refused. However, sight should not be lost of the fact that, when the police arrested the plaintiff on that day he was without the required documentation and therefore illegally in the country, and that should be the end of the enquiry insofar as the police liability was concerned. (See [29].)

Held, further that it was salutary to remind ourselves that the preamble to the Immigration Act provided that the Act aimed at setting in place a new system of immigration control which ensured that security considerations were fully satisfied, and the state retained control of the immigration of foreigners to the Republic, and that the

entry and departure of all persons at ports of entry were efficiently facilitated, administered and managed. (See [30].)

Held, accordingly, that there were reasonable grounds for the arrest of the plaintiff, and the arresting officer had exercised his discretion properly when arresting him. The claim was dismissed with costs. (See [33].)

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CSARS v Tunica Trading 59 (Pty) Ltd [2024] 4 All SA 1 (SCA)

Trade (Customs and Excise) – Customs duty and fuel levy – Refusal of refund – Interpretation of section 64F of the Customs and Excise Act 91 of 1964 which provided that a licensed distributor of fuel was entitled to a refund of duty in respect of fuel obtained at any place in South Africa from stocks of a licensee of a customs and excise manufacturing warehouse – Proper construction of section 64F(1)(b) establishing that a licensed fuel distributor must obtain fuel directly from a licensee's inventory at a customs and excise manufacturing warehouse to qualify for a refund of customs duty and fuel levy, and that the fuel may not be acquired from an intermediary.

The respondent ("Tunica") was a licensed distributor of fuel who had purchased fuel from a company ("Masana") which supplied fuel to small-scale distributors. Masana obtained its fuel from BP Southern Africa (Pty) Ltd ("BP") which was a licensee of a customs and excise manufacturing warehouse within the meaning of section 64F of the Customs and Excise Act 91 of 1964. BP confirmed that it supplied fuel to Masana in terms of a supply agreement with it; that BP was a 45% shareholder in Masana; and that BP granted Masana access to its capabilities and resources. However, when Tunica applied to the appellant ("SARS") for a refund of excise duty and the fuel levy under the Act, in respect of fuel it had bought from Masana, SARS refused the refund on the ground of non-compliance with section 64F(1)(b) of the Act, because Tunica had not acquired the fuel from the licensee of a customs and excise manufacturing warehouse (BP) but from an intermediary.

Tunica delivered a notice of its intention to institute legal proceedings in terms of section 96(1) of the Act, and SARS responded to the notice, confirming its stance that Tunica did not qualify for a refund.

Tunica's application for review was dismissed by the High Court, but its appeal was upheld by the Full Court.

In the present appeal by SARS, the issues were whether the response by SARS to the section 96 notice was a decision which was reviewable under the Promotion of Administrative Justice Act 3 of 2000; the proper construction of section 64F of the Customs and Excise Act which provided that a licensed distributor of fuel was entitled to a refund of duty in respect of fuel obtained at any place in South Africa from stocks of a licensee of a customs and excise manufacturing warehouse; and whether Tunica had complied with the requirements of section 64F(1)(b).

Held – One of the ways in which SARS may respond to a section 96(1) notice is, as in the present case, by informing the litigant that it did not concede the relief sought in the intended proceedings. As SARS' response to the notice was not a decision made under section 77F of the Customs and Excise Act and not administrative action, it was not reviewable. A notice in terms of section 96 fell outside the appeal process contemplated in section 77F.

One of the reasons for SARS' refusal of Tunica's application for a refund was non-compliance with rule 64F.06. It had to be determined whether SARS' interpretation of section 64F(1)(b) was an error of law. In terms of the unitary approach to interpretation, when construing a statute, the point of departure is the language of the provision, understood in the context in which it is used, and having regard to its purpose. Applying that approach, it was concluded that a licensed fuel distributor must obtain fuel directly from a licensee's inventory at a customs and excise manufacturing warehouse to qualify for a refund of customs duty and fuel levy. The fuel may not be acquired from an intermediary.

SARS' interpretation was therefore correct and the Full Court's finding was incorrect. SARS had committed no reviewable irregularity. The appeal was upheld.

Independent Regulatory Board for Auditors and others v East Rand Member District of Chartered Accountants and others [2024] 4 All SA 23 (SCA)

Constitutional and Administrative Law – Independent Regulatory Board for Auditors – Application for review of decisions of Board to prescribe fees and penalties payable by auditors under the Auditing Profession Act 26 of 2005 – Decisions which were found to be beyond Board's powers were reviewable but were matters of policy and

High Court should have remitted issues to the Board – Board required to afford auditors and tax practitioners the right to procedurally fair administrative action.

Constitutional and Administrative Law – Judicial review – Whether review was time-barred – Section 7(1) of the Promotion of Administrative Justice Act 3 of 2000 requiring review proceedings.

The Independent Regulatory Board for Auditors appealed against the review and setting aside of its decisions to prescribe fees and penalties payable by auditors under the Auditing Profession Act 26 of 2005, for the 2020 and 2021 financial years.

In 2019, the Board had prescribed certain fees payable for the 2020 financial year, and also withdrew a fee concession to registered auditors over the age of 65 who previously had received a 50% discount on their annual fees. In terms of the Promotion of Administrative Justice Act 3 of 2000, alternatively, the principle of legality, the first respondent launched an application in the High Court, to review and set aside, alternatively to declare unlawful, the impugned fees and the Board's decision to withdraw the fee concession. A second review application was brought seeking similar relief against the Board's prescribing of fees payable for the 2021 financial year.

Held – The Board's general functions were set out in section 4 of the Act. Under section 8, it was required to prescribe accreditation and registration fees; annual fees; and the date on which any fee was payable. Such fees, and monies received by way of sanctions imposed by the Board, were among the sources of its funds.

There is no universal test to distinguish between executive and administrative action, and the Court has to consider a range of factors in determining whether a power or function is executive or administrative, on a case-by-case basis. The focus is particularly on the nature of the power or function. The powers exercised by the Board were not of an executive but an administrative nature.

Section 7(1) of the Promotion of Administrative Justice Act 3 of 2000 requires review proceedings to be instituted without unreasonable delay and not later than 180 days after internal remedies have been exhausted. The 180-day period may be extended by an application to court under sections 9(1)(b) and 9(2) where the interests of justice so require. No extension had been applied for in this case. The argument that the first

application was time-barred did not withstand scrutiny because the notices on which the Board relied did not constitute administrative action as defined in the Promotion of Administrative Justice Act; the notices were issued by functionaries of the Board who did not have the power to take binding decisions; and the resolutions referred to in the notices were not ripe for review. The first application was launched within 180 days of the publication of the impugned fees and the removal of the fee concession, and on that basis alone, the Board's contention that the review was time-barred had to fail.

Regarding what was referred to as assurance fees, the Board was not empowered to prescribe a percentage-based fee model and had purported to do so in terms of section 8(2)(b) of the Auditing Profession Act, which allowed it to prescribe fees payable for inspections or reviews of the practice of auditors undertaken by the Board under section 47, and to recover those fees from the auditor concerned. The Category C assurance fees bore no relation to the costs of those inspections. Consequently, the Board was ordered to repay or pass credits to the respondent's members in respect of Category C assurance fees for the 2020 and 2021 financial years.

The appeal succeeded in part, with the Court finding that the High Court's order directing the Board to pass credits to all registered auditors regarding amounts paid in respect of tax practitioner fees; annual registration and reinstatement fees; and the fee concession granted to auditors over the age of 65 were matters of policy and should have been remitted to the Board. The Board was required to afford auditors and tax practitioners the right to procedurally fair administrative action, and to consider the relevant issues afresh.

Snyman v De Kooker and others NNO [2024] 4 All SA 47 (SCA)

Wills, Trusts and Estates – Beneficiary of trust – Entitlement to account – Trustees standing in fiduciary relationship to trust income and capital beneficiary bearing duty to account to beneficiary – full and proper account required of trustees.

Wills, Trusts and Estates – Termination of trust – Section 13 of Trust Property Control Act 57 of 1988 provides for variation of trust provisions by a court, and in certain instances, for termination of a trust – Where several provisions in trust deed prejudiced the interests of beneficiary, as envisaged in terms of section 13(c), provisions

of section 13 were established – Appropriate remedy was to terminate trust as soon as possible and create a new one.

The appellant sustained bodily injuries in a motor vehicle accident and obtained compensation from the Road Accident Fund. The curator *ad litem* who was appointed on behalf of the appellant recommended that the capital amount due to the appellant be paid to a trust and be managed by trustees on behalf of the appellant. A trust was created in terms of the Trust Property Control Act 57 of 1988 and the respondents were appointed as trustees, with the appellant as the sole income beneficiary. Shortly after the creation of the trust, the appellant expressed some disquiet to the trustees about several issues relating to its income and expenditure, and the management thereof, including the trustees' duty to account to her. That led an application in the High Court in which the applicant obtained an order directing the trustees to account to her in the manner set out in her attorneys' letter; terminating the trust, and directing that the proceeds of the trust be paid into the trust account of the appellant's attorney's, pending the creation of a new *inter vivos* trust. However, the full court, on appeal, overturned that order and dismissed the appellant's application. That led to the present appeal.

Held – Termination of a trust and the removal of trustees are separate remedies which should not be conflated. The appellant had sought an order for the termination of the trust, alternatively, for the amendment of the trust deed. The removal of trustees did not arise, and therefore, none of the lower courts were without more, entitled to consider it.

Turning to the merits, the Court clarified that a plaintiff is not entitled to an account unless she can show that the defendant stands in a fiduciary relationship to her, or that some statute or contract imposes a duty to render the account. There was no dispute that the trustees stood in a fiduciary relationship to the appellant which was both an income and capital beneficiary. As the appellant had received an account which she averred was insufficient, the Court had to enquire into and determine the issue of sufficiency, to decide whether to order the rendering of a proper account. It was found that the accounting rendered by the trustees fell short of the required standards set out in the authorities. That could only be addressed by the trustees furnishing a full and proper account. What constitutes proper accounting depends on the fact of the case.

Section 13 of the Trust Property Control Act provides for variation of trust provisions by a court, and in certain instances, for termination of a trust. The Court identified several provisions in the trust deed which prejudiced the interests of the appellant, as envisaged in terms of section 13(c). Consequently, the provisions of section 13 were established. The appropriate remedy was to terminate the trust as soon as possible and create a new one. The creation of the new trust had to be preceded by a full, proper accounting by the trustees to the appellant from the date of the establishment of the trust.

South African Human Rights Commission v Agro Data CC and another (Afriforum NPC and others and *amici curiae*) [2024] 4 All SA 66 (SCA)

Constitutional and Administrative Law – South African Human Rights Commission – Powers of Commission – Whether Commission could issue binding directives to those it finds to have violated human rights – Interpretation of section 184(2)(b) of the Constitution read with section 13(3) of the South African Human Rights Commission Act 40 of 2013 – Language used in relevant provisions did not intimate that drafters of the legislation intended that the Commission issue binding directives – Commission could assist occupiers to approach a court or appropriate tribunal, or it could resolve dispute through negotiation and mediation.

The appellant was the South African Human Rights Commission ("SAHRC"), an institution established under Chapter 9 of the Constitution. Each Chapter 9 institution has been given functions and powers to achieve its particular constitutional object. In the present appeal, the powers of the SAHRC came into focus. The question raised was whether it could issue binding directives to those it finds to have violated human rights.

In 2018, the SAHRC received a complaint alleging that the second respondent ("Mr Boshoff") had unilaterally introduced restrictions to the use of water by occupiers on a farm, depriving them of access to borehole water on the farm. The SAHRC undertook an investigation and compiled a report, finding that the respondents had violated the occupiers' rights to access to water, as contemplated by section 6(2)(e) of the Extension of Security of Tenure Act 62 of 1997 ("ESTA") and section 27(1)(b) of the Constitution. It also concluded that the right to dignity of the occupiers (section 10 of the Constitution) was infringed. The respondents did not respond to the report and a

final investigative report, containing directives by the SAHRC was served on all the parties. The directives were not complied with, and the occupiers remained without access to the borehole water. Mr Boshoff insisted that the occupiers could not access the water without paying the amount he set for the purchase thereof. The respondents' disregard of its directives prompted the SAHRC to launch an application in the High Court. The court dismissed the application for declaratory relief but ordered the respondents to make relevant information available to the occupiers for the purpose of meaningful engagement on water management, and ordered the SAHRC to facilitate the engagement. That led to the present appeal.

Held – Access to water is an internationally recognised fundamental right. The right to water and sanitation is a fundamental basic human right guaranteed in section 27(1)(b) of the Constitution of the Republic of South Africa, 1996. Consequently, no one has a right to deprive any person of such a fundamental right.

The functions and powers of the SAHRC are set out in section 184 of the Constitution, while the South African Human Rights Commission Act 40 of 2013 ("SAHRC Act") provides for the composition, powers, functions and functioning of the SAHRC – conferring additional powers and functions to those set out in the Constitution. The Court had to first undertake an interpretation of section 184(2)(b) of the Constitution read with section 13(3) of the SAHRC Act, which was the essence of the parties' submissions. Second, it had to consider whether the SAHRC was endowed with the same powers as the Public Protector, which was assigned remedial powers by the Constitution.

The process of interpretation is a unitary and objective exercise that pays due regard to the text, context, and purpose of the document or instrument being interpreted. The general principle of statutory interpretation is that the words used in a statute should be understood in their normal grammatical sense, unless this would lead to an absurdity. The language used in the relevant provisions did not intimate that the drafters of the legislation intended that the SAHRC issue binding directives. Instead, the SAHRC could assist the occupiers to approach a court or appropriate tribunal, or it could resolve the dispute through negotiation and mediation.

The appeal was dismissed.

Tholo Energy Services CC v Commissioner for the South African Revenue Service [2024] 4 All SA 89 (SCA)

Trade (Customs and Excise) – Refund claim for fuel levy – Determination by Commissioner of the South African Revenue Service under section 47(9)(a) of the Customs and Excise Act 91 of 1964, disallowing refund claims the basis that appellant had not complied with requirements for refunds prescribed by the Act and its Rules – Whether Commissioner was confined to grounds for disallowing refund claims, or whether he was entitled to advance additional grounds for refusing them – An appeal in terms of section 47(9)(e) is an appeal in the wide sense, but remains an appeal against the determination, and a complete rehearing and redetermination of the merits of the matter, with or without additional evidence or information is involved.

The appellant ("Tholo") was a licensed distributor of fuel (LDF). In March 2017, it submitted to the respondent, the Commissioner of the South African Revenue Service, four claims for a refund of fuel and Road Accident Fund ("RAF") levies under the Act, totalling some R4,25 million, in respect of 25 consignments of fuel exported to the Kingdom of Lesotho (the "refund claims"). The Commissioner made a determination under section 47(9)(a) of the Customs and Excise Act 91 of 1964, in terms of which he disallowed the refund claims on the basis that the appellant had not complied with the requirements for refunds prescribed by the Act and the Customs and Excise Act Rules. It was found that the fuel was not obtained from stocks of the licensee of a customs and manufacturing warehouse (a "VM"); that the fuel was not wholly and directly removed from a VM to Lesotho; and that the fuel had been exported without an International Trade Administration Commission ("ITAC") permit, required in terms of the International Trade Administration Act 71 of 2002. The appellant lodged an internal administrative appeal against the determination to an internal appeal committee of the South African Revenue Service ("SARS"). The appeal committee disallowed the appeal and confirmed the determination. The appellant then appealed to the High Court, which dismissed the appeal on the basis that the appellant had not complied with section 64F of the Act and its rules, nor the requirements prescribed in Schedule 6 to the Act. The High Court also found that the appellant had removed the fuel to Lesotho without the requisite permit issued in terms of the International Trade

Administration Act 71 of 2002 (the "ITA Act") by ITAC. The present appeal was brought with the High Court's leave.

Held – The issues involved the nature of an appeal in terms of section 47(9)(e) of the Act, and more specifically, whether the Commissioner was confined to the grounds for disallowing the refund claims, or whether he was entitled to advance additional grounds for correct in dismissing the appeal on the grounds of non-compliance with section 64F(1)(b) of the Act and the appellant's exportation of the fuel without an ITAC permit; and whether the refund claims were rightly refused on additional grounds.

An appeal in terms of section 47(9)(e) is an appeal in the wide sense, but it remained an appeal against the determination. As such, a complete rehearing and redetermination of the merits of the matter, with or without additional evidence or information was involved. The appellant's argument that the Commissioner was not entitled to raise additional grounds for the determination in the section 47(9)(e) appeal had no merit.

As the appellant had obtained the fuel from unlicensed depots and exported the fuel without an ITAC permit, the High Court had correctly dismissed its appeal.

The appeal was dismissed with costs.

Wiese and others v Commissioner for the South African Revenue Service [2024] 4 All SA 108 (SCA)

Tax – Income Tax – Recovery of tax debt from third party –Section 183 of Tax Administration Act 28 of 2011 establishes set of requirements to render a third party jointly and severally liable for the recovery of tax debt due by a taxpayer – Section 183, construed in context, not requiring that taxpayer's liability to pay tax due should have been determined by assessment at the time that dissipation of assets occurred – Transcript of evidence given at tax inquiry is admissible in subsequent litigation between the parties.

The respondent ("SARS") instituted action against the appellants in terms of section 183 of the Tax Administration Act 28 of 2011 (the "TAA") for payment of R216.6 million on the ground that the appellants had caused, or assisted in causing, a company (the "taxpayer") to dissipate its assets in order to obstruct the collection of a tax debt owed by it to SARS. The dissipation was alleged to have occurred by transferring a loan

account claim the taxpayer held in a company as a dividend *in specie* to its holding company.

Pursuant to an agreed separation of issues, the High Court was required to decide whether the transcript of evidence presented by the appellants at an inquiry held in terms of section 50 of the TAA during 2015 and 2016 was admissible in the trial proceedings and, if so, for what purpose; and whether the assessments raised by SARS against the taxpayer for secondary tax on companies ("STC") and capital gains tax ("CGT") constituted "tax debts" for purposes of section 183 of the TAA. The Court answered both questions in the affirmative. The appellants appealed against those findings. They argued that in order to establish liability under section 183, the person concerned must have knowingly assisted in the dissipation of assets "in order to obstruct the collection of a tax debt" which must have necessarily existed at the time of the alleged dissipation and the person concerned must have known of that existence. Stating that the tax debt only arose upon notice of assessment, the appellants argued that the particular assessments to tax in this case did not constitute tax debts as contemplated by section 183.

Held – The questions to be decided on appeal were whether the term "tax debt" as used in section 183 of the TAA envisaged that an assessed tax debt should exist at the time that the dissipation of assets occurred, and whether the transcript of proceedings at an inquiry was admissible upon production in subsequent civil proceedings in terms of section 56 of the TAA.

Section 183 establishes a set of requirements to render a third party jointly and severally liable for the recovery of a tax debt which is due by a taxpayer. The three requirements are that the third party should knowingly assist in the dissipation of a taxpayer's assets; the dissipation should be undertaken in order to obstruct the collection of a tax debt; and the assistance should have rendered the taxpayer unable to discharge the tax debt. The Court emphasised that the separated issue was whether "tax debt" referred to an assessed indebtedness at the time of the dissipation. The language of section 183, construed in context, did not require that the taxpayer's liability to pay tax due to SARS should have been determined by assessment at the time that the dissipation of assets occurred.

The High Court was also correct on the issue of admissibility of the transcript. The text of the relevant sections of the TAA and the approach to comparable statutory provisions, confirmed that the transcript of the evidence given at the section 50 inquiry, is admissible in the litigation between the parties. The evidence thus obtained served a legitimate purpose, which was to enable SARS to execute its statutory duty, inter alia, to recover tax debts due to the fiscus.

The appeal was dismissed.

Barloworld Equipment Southern Africa a Division of Barloworld South Africa v Mekgopaze Nkosi Trading Enterprise (Pty) Ltd [2024] 4 All SA 127 (KZP)

Civil Procedure – Motion proceedings – Rule regarding alleged disputes of fact – Application for final relief must be decided on the facts stated by the respondent, together with those which the applicant states and which the respondent cannot deny, or in relation to which its denials plainly lacked credence and could be rejected outright on the papers.

Property – Owner's rights – Deprivation of possession – Rei vindicatio is remedy through which an owner, deprived of possession, sues to recover possession of his property – Owner in rei vindicatio proceedings is required to allege and prove that he was the owner of the thing; the thing was in the possession of the defendant at the commencement of the action; and the thing so vindicated was still in existence and clearly identifiable.

The applicant ("Barloworld") stated that it was the owner of equipment which would be supplied to its rental division to be rented or leased to potential customers. It alleged that in April 2022, it entered into an agreement with the first respondent ("Mekgopaze"), which resulted in the delivery of equipment to Mekgopaze in October 2022 at the premises of the third respondent ("Malonjeni"). Barloworld stated that in January 2023, Mekgopaze breached the agreement when its trading facility fell into arrears. Despite notice, Mekgopaze failed to remedy the breach. The agreement was cancelled and the machines were remotely disabled from operating. Barloworld then demanded the return of the equipment. Malonjeni was informed that the agreement between Barloworld and Mekgopaze had been cancelled and that Barloworld sought possession of the machines held by Malonjeni. Malonjeni however refused to release the machines. Barloworld brought an application against the respondents mainly seeking an order, in the form of the *rei vindicatio*, that it or its agents be authorised to

take into possession the equipment in the possession of Malonjeni. Only Malonjeni opposed the application.

Held – On the issue of the court's jurisdiction, that the cause of action, the conclusion of the contract, and the breach, all occurred within the court's area of jurisdiction. The matter was thus properly before the court.

It then had to be decided whether a dispute of fact existed. The rule in motion proceedings is that an application for final relief must be decided on the facts stated by the respondent, together with those which the applicant states and which the respondent cannot deny, or in relation to which its denials plainly lack credence and can be rejected outright on the papers. The undisputed facts were that Barloworld was the lawful owner of the equipment rented to Makgopaze. The agreement between Barloworld and Makgopaze was terminated, entitling Barloworld to return of the equipment. Malonjeni did not corroborate its disputing of the lawful termination of the agreement. It was not open to Malonjeni to contest the termination of the agreement as it was not a party to the agreement. There was thus no dispute of fact.

The *rei vindicatio* was the remedy through which an owner, deprived of possession, sued to recover possession of his property. An owner in *rei vindicatio* proceedings is required to allege and prove that he was the owner of the thing; the thing was in the possession of the defendant at the commencement of the action; and the thing so vindicated was still in existence and clearly identifiable. Barloworld had established those requirements, while Malonjeni did not raise any defence to justify possession of the property. Barloworld had made out a case for the grant of the relief based on the remedy provided by *rei vindicatio*. It was entitled to possession of its own property and therefore, possession had to be restored.

Investec Bank Limited v Singh and another [2024] 4 All SA 150 (GP)

Corporate and Commercial – Provision of guarantees in respect of loan agreements – Application for provisional sequestration of joint estate – Whether creditor could whether Investec could rely on guarantees which gave rise to the indebtedness of the joint estate in view of provisions of section 15 of the Matrimonial Property Act 88 of 1984 – Either spouse can bind the joint estate without the consent of the other, in respect of a series of specified transactions, but spousal consent is required under section 15(2) – Section 15(2)(h) does not apply where an act contemplated in

relevant paragraphs was performed by a spouse "in the ordinary course of his profession, trade or business" – Test for determining whether a transaction is in the ordinary course of business under section 15(6) leading to conclusion that joint estate was liable for pleaded debts.

Insolvency – Provisional sequestration order – Even if requirements were established, court retaining a discretion as to whether to grant a sequestration order – The discretion was narrow and was only exercised if special or unusual circumstances were established – Test was whether, on a conspectus of all the affidavits, a case for sequestration was made out on a balance of probabilities.

The respondents were married to each other in community of property. The second respondent ("Killick") maintained that although the couple were still married and resided at the same property, they were estranged and led separate lives. The first respondent ("Singh") had allegedly provided numerous guarantees to the applicant bank ("Investec") for the indebtedness of one of her main business entities ("BIG"). Investec applied to sequestrate the respondents' joint estate, which was alleged to owe the bank debt in excess of R470 million arising from the various guarantees provided by Singh relating primarily to three loan transactions between Investec and BIG. The sequestration application was instituted after Investec was led to suspect the existence of fraud and dishonesty perpetrated by Singh and her brother, surrounding the 2021 BIG transactions. Both respondents opposed the application. In a counter-application, Killick sought the return of nearly R1 million that Investec had retained as set-off for part of the alleged debt. Killick also sought a stay of the present application pending determination of an action he intended to institute against Investec to declare void the guarantees that underpinned the application on the basis that Investec had breached its duty of care to him, alternatively to claim damages from Investec for loss he would suffer if the joint estate was held liable under the guarantees. It became common cause between Investec and Killick, that Killick himself was the victim of fraud and forgery, specifically regarding spousal consents to guarantees which Singh had supplied.

Held – to obtain a provisional sequestration order, Investec had to establish *prima facie* that it had a liquidated claim against the joint estate for not less than R100; the joint estate was insolvent; and there was reason to believe that the sequestration of the joint estate would be to the advantage of creditors. Even if those requirements

were established, the court retained a discretion as to whether to grant a sequestration order. The discretion was narrow and was only exercised if special or unusual circumstances were established. The Court had to be of the opinion that *prima facie*, the necessary facts existed to ground a sequestration order. The test was whether, on a conspectus of all the affidavits, a case for sequestration was made out on a balance of probabilities.

It was clear that Investec had a claim against the joint estate for not less than R100. The next question was whether the joint estate was in fact insolvent. The court accepted Investec's valuation of the joint estate's assets. In assessing the joint estate's liabilities, the Court considered the indebtedness to Investec and found that Investec had satisfactorily established BIG's indebtedness under the agreements relied upon. It then had to be decided whether Investec could rely on the guarantees – which gave rise to the indebtedness of the joint estate – in view of the provisions of section 15 of the Matrimonial Property Act 88 of 1984 ("MPA"). Section 15 strikes a balance between the interests of third parties and the interests of spouses to such marriages. While it accepts that either spouse can bind the joint estate without the consent of the other, in respect of a series of specified transactions, spousal consent is required under section 15(2). Section 15(6), however provides that the provisions of *inter alia* section 15(2)(h) do not apply where an act contemplated in those paragraphs is performed by a spouse "in the ordinary course of his profession, trade or business". Killick argued that in the circumstances of this case, the guarantees could not be regarded as being in the ordinary course of Singh's business as contemplated in section 15(6) and thus required Killick's consent to bind the joint estate, which consent had not been obtained. Applying the test for determining whether a transaction is in the ordinary course of business under section 15(6), the court found in favour of Investec. It further concluded that Investec had established *prima facie* that the joint estate was liable to it for most of the pleaded debts and that, on a proper interpretation of section 15(2)(h) and 15(6) of the MPA, there was no genuine or *bona fide* dispute in respect thereof. The respondents' joint estate was thus placed under provisional sequestration.

MM and another v Member of the Executive Council for Health of the Gauteng Provincial Government [2024] 4 All SA 184 (GP)

Personal Injury/Delict – Medical negligence – Claim for damages – Evaluation of evidence – Whether parties were bound by fact recorded in joint minute prepared by the expert witnesses – Reliance by experts on facts reflected in hospital records and assumed to be correct cannot bind parties or court where those facts were clearly incorrect – Court not bound by what experts may have testified.

The plaintiffs sued the defendant ("MEC") for damages suffered by their minor daughter who suffered a hypoxic ischemic injury to her brain due to the alleged negligence of the defendant's employees who were the nursing staff and doctors who had attended to the birth of the child. In the plea, the MEC put negligence and causation in dispute. It was alleged that there was a lack of available theatre time due to several emergency cases that were already awaiting surgery, which made the delay in performing a caesarean section unavoidable. A one-hour limit was in place in guidelines for tertiary level public hospitals, for the time from decision to perform a caesarean section delivery to delivery of the child.

The defendant attempted to hold the parties to a fact recorded in the joint minute prepared by the expert witnesses, that no theatre was available. Counsel for the plaintiffs argued that facts that were assumed to be correct by the experts and recorded as such in a joint minute cannot bind the parties if the true facts were established to be different.

Held – Contrary to the MEC's plea, it had been placed on record as a formal admission by both parties, in terms of section 15 of the Civil Proceedings Evidence Act 25 of 1965, that a theatre was in fact unoccupied and available at the relevant time. Where an expert relies on facts which appear in the hospital records and assumes that the facts are correct, or where the experts in joint minutes agree that certain facts are recorded in the hospital records and base their agreed opinions on those facts, the experts cannot by apparent agreement on the facts bind the parties or the court where those facts are clearly incorrect. It would lead to an inequitable outcome in the present case if the plaintiffs were held to an assumed fact - that no theatre was available - while the defendant had formally admitted the typed theatre record which indicated that a theatre was indeed available. In any event, the formal admission of the typed

theatre record into the court record amounted to a clear repudiation of the "fact" recorded in the relevant joint minute that no theatre was available.

The defendant also sought to rely on conclusions reached in other cases, regarding whether certain measures would have prevented the injury. Importantly in that regard, expert opinions are part of the factual evidence and in terms of the *stare decisis* principle, a court is bound by the legal principles and *ratio decidendi* expressed in decisions of higher courts, and is not bound by what experts may have testified to in other cases or what higher courts might have determined on that factual testimony.

Turning to discuss the delictual elements of wrongfulness, negligence and causation, the court explained the relevant concepts and the test with regard to each. It found those elements to have been established on the facts. The MEC was thus held liable to compensate the plaintiffs for the injury to their child.

NJK Boerdery CC v Safire Insurance Company Ltd [2024] 4 All SA 218 (NCK)

Insurance – Repudiation of claim – Ordinary rule is that the insured must prove that he fell within the primary risk insured against, whilst the onus is on the insurer to prove the application of an exception – Interpretation of insurance agreement – Integration or parol evidence rule remains part of law applicable to written contracts – Where a written contract is not intended to be the exclusive memorial of the whole agreement but merely to record portion of the agreed transaction, leaving the remainder as an oral agreement, then the integration rule merely prevents the admission of extrinsic evidence to vary the written portion.

In terms of an insurance agreement concluded between the parties, the defendant was obliged to provide insurance cover to the plaintiff and to indemnify the plaintiff against loss and damage to the plaintiff's pecan nut crop on its farm if caused by a hail strike. Two hailstorms which subsequently occurred caused serious and extensive damage to the plaintiff's pecan nut crop. On being notified of the first hailstorm, the defendant appointed assessors to determine the plaintiff's damage. Due to prevailing circumstances, the assessment was not done in terms of the defendant's normal procedure. The eventual assessment quantified the plaintiff's damage as a result of the hailstorm as amounting to R9 626 640. The defendant's refusal to pay the said amount led to the plaintiff instituting action for payment, alleging breach of contract.

The defendant, in its plea, stated that its insurance agreement consisted of the application for insurance, insurance quotation, policy document, schedule of insurance, and its prescribed hail assessment procedure document. It stated that an agreed assessment procedure was a *sine qua non* for an enforceable insurance agreement. It sought the dismissal of the plaintiff's claim on the grounds, *inter alia*, that it had failed to prove the necessary facts to bring its claim within the terms of the insurance agreement in that the procedure advocated by the plaintiff was irreconcilable with the specific cover provided by the insurance agreement; and that the plaintiff had failed to prove that the defendant's hail assessment procedure document did not form part of the insurance agreement.

Held – The issue for determination was whether the hail assessment procedure as pleaded and testified to by the plaintiff and its witnesses, or that as pleaded by the defendant and testified to by its witnesses, formed part of the insurance agreement.

A plaintiff bears the overall onus to prove its case, on a balance of probabilities. The ordinary rule is that the insured must prove that he fell within the primary risk insured against, whilst the onus is on the insurer to prove the application of an exception. Case law referred to by the court regarding the rules applicable to the interpretation of contracts confirmed that the integration (or parol evidence) rule remained part of our law. When a contract has been reduced to writing, the writing is regarded as the exclusive memorial of the transaction and no extrinsic evidence may be given of other utterances or jural acts by the parties which would have the effect of contradicting, altering, adding to or varying the written contract. However, where a written contract is not intended by the parties to be the exclusive memorial of the whole of their agreement but merely to record portion of the agreed transaction, leaving the remainder as an oral agreement, then the integration rule merely prevents the admission of extrinsic evidence to contradict or vary the written portion. In the present matter, the document alone was found not to have been the exclusive memorial of the whole of the insurance agreement. The prescribed assessment procedure was regulated by a supplemented oral agreement, not precluded by the integration rule. The Court was persuaded that the plaintiff had proved that the procedure as pleaded by it and testified to by its witnesses should form part of the insurance agreement, and that the defendant's assessment procedure document did not form part of the agreement. The plea that no enforceable insurance agreement was concluded as an

agreed assessment procedure was a *sine qua non* was rejected. The defendant was ordered to pay to the plaintiff the amount claimed.

SA Broadcasting Corporation (Soc) Ltd and another v Motsoeneng and others [2024] 4 All SA 238 (GJ)

Constitutional and Administrative Law – Unlawful administrative act – Debt arising therefrom – When falling due – Whether claim for payment arising from an unlawful administrative act is a "debt" for the purposes of the Prescription Act 68 of 1969 – A debt to the state arising from an unlawful administrative act falls due when the act is set aside – Once the administrative act is set aside, it ceases to exist as a fact, and the debt that would have been payable but for the administrative act then falls due.

The appellants were the South African Broadcasting Association ("SABC") and the Special Investigating Unit ("SIU"). The SIU investigated the approval of a scheme (the "Mzansi Music Legends scheme") adopted by the SABC, towards paying a once-off gratuity of R50 000 to individuals identified as having achieved "legendary" status, and who had, for reasons of past racially discriminatory practice, not been accorded the kind of financial reward for their work that successful artists could expect today, irrespective of their race. The scheme was only partially implemented when it was abandoned. During the SIU investigation, it emerged that the scheme had been unlawfully adopted and implemented.

The respondents, who were all cited in their personal capacities, were members of the SABC's executive and operating committees at the time the scheme was adopted and implemented. The appellants stated that each of the respondents had a role in adopting and implementing the scheme, and that they were all to some extent responsible for its unlawfulness.

Having concluded that the Mzansi Music Legends scheme had been unlawfully adopted and implemented, the SABC and the SIU applied to the Special Tribunal to review and set the scheme aside. The Tribunal reviewed and set aside the decision to adopt the scheme, but let the payments already made under it stand. The effect of the Special Tribunal decision was that those "legends" who had already been paid under the scheme could not be pursued for repayment, but that no further funds could be paid out under the scheme. The Special Tribunal declined to order the respondents to

make good on the sums already disbursed under the scheme. Exercising their right of appeal under section 8(7) of the Special Investigation Units and Special Tribunals Act 74 of 1996, the SABC and the SIU now challenged the Special Tribunal's order, but only insofar as the Tribunal refused the claim for repayment. The appeal was argued on the basis that a claim for payment arising from an unlawful administrative act is a "debt" for the purposes of the Prescription Act 68 of 1969.

Held – In terms of case authority, a debt arising from an unlawful administrative act only falls due once the administrative act is set aside. So long as the administrative act stands, it exists as a fact, and prevents a debt that would otherwise be claimable from falling due. Once the administrative act is set aside, it ceases to exist as a fact, and the debt that would have been payable but for the administrative act then falls due. The Special Tribunal was therefore wrong to conclude that the unlawfulness of the Mzansi Music Legends scheme was not a "fact" for the purposes of section 12(3) of the Prescription Act, but a mere conclusion of law, of which the appellants were not required to be aware before the repayment claim fell due. Unlawful administrative acts are facts that are treated as having valid legal consequences until they are set aside. It follows that the setting aside of an administrative act is also a "fact" of which a creditor must be aware before a debt that would be payable but for the unlawful act falls due. The knowledge that the SABC had to acquire before the repayment claim in this case fell due under section 12(3) of the Act, was not that the Mzansi Music Legends scheme was unlawful, but that it had been set aside. The Special Tribunal was accordingly mistaken when it held that the SABC's repayment claim had prescribed. The appeal was allowed only to that extent, and was otherwise dismissed.

Solidarity Trade Union and others v Minister of Health and others
[2024] 4 All SA 264 (GP)

Pharmaceutical and Health – Healthcare – Scheme introducing certificate of need requiring healthcare service providers and facilities which offer healthcare services to apply for a certificate of need for the place where they wished to render services – Validity of scheme which imposed restrictions on healthcare facilities and practitioners – Absence of nexus between scheme and its implementation and the purpose for which it was enacted rendering it irrational.

The Certificate of Need ("CON") scheme, introduced in sections 36 to 40 of the National Health Act 61 of 2003, required both healthcare service providers and

facilities which offer healthcare services (by healthcare service providers) to apply for a certificate of need for the place where they wish to render services.

The first, second and third applicants were organisations representing private medical practitioners, and the fourth to eighth applicants were healthcare providers and the owners of healthcare establishments. They challenged the constitutionality of the CON scheme. The first and third respondents were responsible for implementation of the National Health Act and the CON scheme.

A proclamation that sections 36 to 40 were operative as from 1 April 2014 having been set aside by the Constitutional Court, the CON scheme was not yet operative, and required regulations first before it could be promulgated. The respondents consequently contended that the matter was not ripe for hearing as there was nothing to challenge while the scheme remained inchoate. The argument was that it was only after the proclamation of the sections (together with their regulations) that any challenge should be mounted.

Held – Whilst the court could enquire into the constitutionality of the impugned sections notwithstanding that they were not yet operative, it had to determine whether, absent the regulations, any enquiry was fruitless and would be *in vacuo*. If sections 36 to 40 of the National Health Act did not withstand constitutional scrutiny, then the complaint of the applicants was not hypothetical. The respondents' contention that the matter was not ripe for hearing was rejected.

Turning to the CON scheme, the court found it to be procedurally unfair. Although the provisions of the scheme required a private healthcare establishment or healthcare service provider to apply to the Director-General ("DG") for a certificate and required the DG to provide reasons if a certificate was refused or withdrawn, the CON scheme failed to require the DG to consider the rights and interests of private healthcare establishments and healthcare providers before issuing a certificate in terms of section 36(3); to require the DG to follow a fair process which would include the right to be heard, when deciding what conditions would be imposed for the issue or renewal of a certificate; and to make provision for those affected by it to make any substantive representations before a decision was taken by the DG that could lead to the deprivation of their property rights. The CON scheme would, in consequence of the conditions imposed by the DG in terms of section 36(3), in the event that those

conditions were accepted, have an impact on access to those private health establishments and private service providers who presently utilised their services. If the conditions were not accepted and no certificate was issued, private healthcare establishments and private healthcare providers services would no longer be able to operate where they had been. Objectively, the CON scheme was not rational. There was no nexus between the scheme and its implementation and the purpose for which it was enacted.

Sections 36 to 40 were declared invalid and were severed from the Act.

Wares v Additional Magistrate and others [2024] 4 All SA 287 (WCC)

Criminal Law and Procedure – Extradition – Appeal and review of extradition order – Whether offence on which a person is sought by a foreign State is an extraditable offence – Dual criminality principle requiring that alleged crime for which extradition is sought is a crime in both the requested and requesting States – Our law adopts conduct-based (or factual) approach in determining dual criminality, as opposed to focusing on proof of all elements of offences.

Criminal Law and Procedure – Extradition – Extradition Act 67 of 1962, section 10(1) – Constitutionality – Infringement of right to freedom under section 10(1) not a reasonable and justifiable limitation as it did not provide a magistrate who had made a committal.

The appellant, an 84-year-old man who resided in the Cape Peninsula, was a self-confessed paedophile who was sought by the prosecuting authorities in Scotland to stand trial on various counts involving sexual offences perpetrated on teenage boys at elite schools in the Edinburgh area during the 1970s. In September 2018, the High Commissioner for the United Kingdom ("UK") in South Africa requested the authorities to extradite the appellant under the Extradition Act 67 of 1962 (the "Act") to stand trial in Edinburgh on six charges. A warrant of arrest for his extradition was executed by members of the South African Police Services on the appellant at his home and he thereafter appeared before the first respondent (the "Magistrate"). During the actual extradition hearing, the appellant made certain admissions before the Magistrate which were duly recorded, purportedly in terms of section 220 of the Criminal

Procedure Act, 51 of 1977 (the "CPA"). On the strength of the admissions, the Magistrate decided that the appellant was liable to be extradited to Scotland in terms of the Act and he ordered accordingly. The appellant exercised his right under section 11 of the Act and made detailed representations to the Minister requesting him not to order his extradition, saying that it would not be in the interests of justice to do so and that the effect of such an order would be too severe a punishment. Nevertheless, the Minister decided that the appellant should be surrendered to the UK to stand trial. The appellant then sought to appeal the decision of the Magistrate and also brought a legality review against the Magistrate's decision. Additionally, he launched a review of the Minister's decision to surrender him to the UK. The appeal was founded on the contention that the Magistrate had erred in recording the appellant's admissions as falling within the ambit of section 220 of the CPA as the proceedings under the Act did not constitute criminal proceedings; that the issue of dual criminality arose as the Magistrate had erred in holding that the appellant was extraditable on that point; and the contention that the charges in Scotland had prescribed. The basis for the review was that the Minister had erred in ordering the appellant's extradition in circumstances where the Magistrate had failed to commit the appellant to prison under section 10(1) while awaiting the Minister's decision to surrender him to. The issues of dual criminality and prescription were also incorporated into the review.

Held – The only the first four charges were hit by the prescription objection and the extradition was therefore considered only on the remaining counts. Second, it was not irregular for the Magistrate to have regard to the admissions made by the appellant in the course of the enquiry and the admissions should stand.

The dual criminality principle was central to a finding in determining whether an offence on which a person is sought by a foreign State is an extraditable offence. The principle requires that an alleged crime for which extradition is sought is a crime in both the requested and requesting States. Our law adopts the conduct-based (or factual) approach in determining dual criminality, as opposed to focusing on the proof of all the elements of the offences. On that approach, the requirements of dual criminality were satisfied and the appellant was liable to be extradited the UK to face the relevant charges.

However, the Court went on to find that the infringement of the right to freedom under section 10(1) of the Act was not a reasonable and justifiable limitation as it did not provide a magistrate who had made a committal order the power to extend or grant bail pending the Minister's decision in terms of section 11 of the Act. The appellant was released on bail pending a fresh decision by the Minister.

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