LEGAL NOTES VOL 11/2024

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INDEX[1]

SOUTH AFRICAN LAW REPORTS NOVEMBER 2024

SA CRIMINAL LAW REPORTS NOVEMBER 2024

ALL SOUTH AFRICAN LAW REPORTS NOVEMBER 2024

South African Law Reports November 2024

AFRIFORUM v ECONOMIC FREEDOM FIGHTERS AND OTHERS 2024 (6) SA 1 (SCA)

Equality legislation — Hate speech — 'Kill the Boer' — Whether singing of song containing words 'Kill the Boer' at political rally was act of hate speech — Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, s 10.

Recusal — On grounds of bias or appearance of bias — Remarks made to party's counsel in earlier case — Reflecting broad personal view and not indicative of prejudice or inability to act impartially in matter involving party in question — Application for recusal refused.

On several occasions second respondent (Mr Malema), the president of first-respondent political party (the EFF), sang a song at EFF gatherings containing the words, as a repeated refrain, 'Kill the Boer'. This caused applicant (AfriForum), a civil rights organisation, to apply to the Equality Court for a declarator that the song constituted prohibited hate speech as intended in s 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA). AfriForum also sought an interdict prohibiting Malema from singing it again.

Section 10(1) of PEPUDA provides:

[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!**

'Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to be harmful or to incite harm and to promote or propagate hatred.'

The Equality Court dismissed the application, ruling that the words complained of were not based on a prohibited ground or reasonably construable to show a clear intention to incite harm and propagate hatred.

AfriForum appealed to the Supreme Court of Appeal (SCA). The SCA agreed with the Equality Court's conclusion. First, however, it dealt with an application by AfriForum for the recusal of one of the judges hearing the appeal on the ground of allegedly bias-evincing remarks she had made in an exchange with AfriForum's counsel in a previous case (see [16] for the impugned remarks). AfriForum argued that the remarks showed that the judge had formed a pejorative view of AfriForum as an institution that promoted the archaic ideology of a small minority of primarily Afrikaans-speaking Whites. The SCA pointed out that holding a particular view did not, without more, establish a reasonable apprehension of bias. The remarks in question were made in good faith during a robust exchange in open court, and were not, when viewed in context, indicative of an inability on the part of the judge to act impartially in a matter involving AfriForum. Having found no objective grounds for an apprehension of bias, the SCA dismissed the application for the recusal of the judge. (See [26] – [35].)

As to the hate speech issue, the SCA, in dismissing the appeal against the Equality Court's judgment, ruled that a prohibited ground as intended in s 10(1) of PEPUDA was not implicated because the meaning of *bhunu* (Boer) was coloured by the verse it appeared in and the broader context, including the circumstances in which the song was sung. Indeed, 'words cannot always be taken for their plain meaning'. A reasonable person would not conclude that the words complained of were sung with the requisite intent. Such a person would understand that Malema was using a historic struggle song with the intent to garner listeners' support for the EFF and to provocatively advance the EFF's political agenda, as opposed to the incitement of harm or the propagation of hatred. Therefore, the Equality Court correctly concluded that AfriForum had failed to establish hate speech under s 10(1) of PEPUDA. (See [91] – [92], [94], [102] – [104].)

AIG SOUTH AFRICA LTD v 43 AIR SCHOOL HOLDINGS (PTY) LTD AND OTHERS 2024 (6) SA 28 (SCA)

Insurance — Liability of insurer — Interpretation of contract — Multiple insured — Whether policy joint or composite — Where insured's interest in subject-matter of insurance was joint, indicative of policy being joint — Where their interests were different, even though in respect of same subject-matter, policy would be composite, which was intended to insure each of insured separately in respect of their own interests.

The respondents were companies forming part of 'the 43 Air School Group'. The 'main operating entity' was the second respondent, 43 Air School (Pty) Ltd (43 Air School). It *was located in Port Alfred*, where it provided pilot and traffic-control-training services. The third respondent, PTC Aviation (Pty) Ltd (PTC), and the fourth respondent, Jet Orientation Centre (Pty) Ltd (JOC), were both *located in Gqeberha*, where PTC offered pilot-preparation services and JOC provided flight simulators for lease. 43 Air School and PTC shared a common owner in the first respondent, 43 Air School Holdings (Pty) Ltd (Holdings). JOC was owned by both 43 Air School and PTC. In terms of an insurance policy entered into with the appellant, AIG South Africa Ltd (AIG), AIG insured 43 Air School and NAC — the entity from which Holdings acquired its shareholding in PTC — and also their 'subsidiary companies, managed, controlled, member companies, joint venture, sports, social and recreational clubs and societies and any other persons or entities for which they have the authority to insure, jointly or severally, each for their respective rights and interests'. Importantly for present purposes, in terms of the policy, 'the insured' was provided with insurance cover based on 'gross profit' in the specified amount of R66 443 230 in respect of 'business interruption'. This meant interruptions to the business of the insured caused by, inter alia, 'extended defined events', which included outbreaks of an infectious or contagious disease 'within a radius of 25 km of the Premises'.

The present matter concerned the liability of AIG in terms of the policy for claims in respect of business interruption brought about by the outbreak of the Covid-19 pandemic and associated lockdowns in South Africa. They included:

• A first and second claim submitted by 43 Air School in respect of business interruption experienced for the periods 26 April 2020 to 30 April 2020 and for 1 May 2020 to 31 May 2020, triggered by the outbreak of Covid-19 within 25 kilometres of its business premises in Port Alfred in the Eastern Cape.

• A third claim submitted by 43 Air School in respect of business interruption, triggered by the outbreak of Covid-19 within 25 kilometres of the business premises of 43 Air School's subsidiary, 43 Advanced, in Lanseria, and within 25 kilometres of the business premises of PTC and JOC in Gqeberha.

• Claims by PTC and JOC in respect of business interruption relating to outbreaks of Covid-19 within 25 kilometres of their business premises in Gqeberha.

The AIG's rejection of the claims prompted the respondents to bring an application in the Johannesburg High Court for an order declaring AIG liable to compensate them for their respective claims. The High Court granted the respondents the relief they sought. The High Court granted leave to AIG to appeal to the Supreme Court of Appeal (SCA).

A critical question before the SCA was whether the policy, having regard to the fact that it covered more than one insured, was 'joint' — in the sense that, effectively, there was only one policy — or composite — in the sense that there was in fact a bundle of distinct policies contained in one document. The respondents argued that the policy was a joint one, covering all entities in the 43 Air School Group. They relied on this fact in support of 43 Air School's third claim, arguing that the outbreak of Covid-19 *in Gqeberha* on 21 March 2020, and the outbreak at Lanseria on 27 March 2020, constituted the extended defined event as envisaged in the policy, and triggered AIG's liability under the policy for business interruption cover in respect of *all the claimants* within the 43 Air School Group. AIG, by contrast, argued that the policy in question was composite — meaning that 43 Air School Group's third claim was bad in law — because gross profit was the basis of the insurance and the gross profit of each of the entities was separate and distinct. While one entity had an interest in its own gross profit, that same interest was not shared by the other entities. The interest of each entity in that gross profit was, at best, separate and different or diverse.

Another key issue was whether 43 Air School, in respect of its first and second claims, had failed to prove that it ought to be indemnified for its loss, ie to prove that its loss was *causally connected* to the extended defined event as contemplated in the policy. In this regard, AIG argued that 43 Air School had to prove loss due to business interruption *in consequence of an outbreak of Covid-19 within a 25-km radius of the premises insured*. The losses in this case sustained by 43 Air School were as a consequence *of the national lockdowns put in place* in response to the pandemic, *not the local occurrence of the disease*, and was accordingly not covered by the policy.

As to whether the policy was joint or composite

Held, that, where a policy covered more than one insured, it may either be joint or composite. Whether an insurance policy was joint, or composite, was a matter of construction, but if the words used were capable of either meaning they were to be construed according to the nature of the interest concerned. (See [24] and [27].) If the *insured's interest* in the subject-matter of the insurance was joint, in the sense that they were exposed to the same risk and would suffer the same loss on occurrence of the peril insured against, that may be indicative of the policy being joint. However, where their interests were different, even though it was in respect of the same subject-matter, the policy would not be a joint one, but composite, which was intended to insure each of the insured separately in respect of their own interests. (See [31].)

Held, that, in this instance, the subject-matter of the business interruption insurance was the gross profit of the insured entity. The fact that the different entities did not have the same or a common interest in each other's 'gross profit', but had separate or different interests in that regard, meant that the policy in respect of business interruption could not be joint, but was composite. The fact that each of these entities had brought its own claim in respect of its own interest, and that the claim was not a joint one, underscored the conclusion that the business interruption insurance cover, in respect of each of them, was not joint, but composite. The 'breach of conditions' term of the policy appeared to confirm this. (See [33].)

Causation argument

Held, that this was not really a causation issue as AIG would have it, but an interpretation issue. Properly interpreted, and in line with SCA authority, the extended event (or disease) clause covered the government's response to Covid-19 (see [57] – [58] and [60]). However, the insurer's liability was only triggered when the disease broke out within the agreed radius (see [60]). The national response to Covid-19 and the outbreak within the radius of 43 Air School's business premises in Port Alfred was sufficient to satisfy the requirement in the policy. If it had not been for Covid-19 and the government's response, the business of 43 Air School would not have been interrupted and 43 Air School would not have suffered the loss. The losses of 43 Air School as per its first and second claims were exactly the kind of losses it intended to insure itself against under the policy. It had proved that the risk it was insured against had occurred and it has brought those claims within the four corners of the promise made to it. (See [61].)

Conclusion in respect of 43 Air School's claims

Held, that 43 Air School's third claim had to fail because it was based squarely on an incorrect assumption that the policy was a joint one, and also in any case because there had been no compliance with the reporting conditions under the policy in respect of that claim. (See [62].) Accordingly, the appeal in this regard had to succeed. (See [67].) AIG, however, had been shown to be liable for 43 Air School's first and second claims, and the appeal in this respect had to be dismissed (See [66] and [67].)

PTC and JOC's claims

Held, that PTC's claim had to fail because it had not proved that it was an insured under the policy, including for business interruption cover, and because it had not reported the claim as required under the reporting conditions of the policy. The claim of JOC had also to fail because its claim was also not reported as required in terms of the policy. (See [65].) Accordingly, the appeal succeeded in respect of the above claims (see [67]).

FIRM-O-SEAL CC v WYNAND PRINSLOO & VAN EEDEN INC AND ANOTHER 2024 (6) SA 52 (SCA)

Company — Business rescue — Business rescue proceedings — Effect on directors — Summons issued by director without business rescue practitioner's approval, but subsequently ratified by practitioner — Locus standi of directors — Companies Act 71 of 2008, s 137(2)*(b)*.

The directors of the appellant, Firm-O-Seal, a close corporation under business rescue, instituted a High Court action against the first respondent, a firm of attorneys, arising out of professional legal services it had rendered to Firm-O-Seal. Firm-O-Seal's directors had obtained the business rescue practitioner's approval to institute the action — as required by s 137(2)*(b)* of the Companies Act 71 of 2008 — but it later transpired that the approval that was given related to a different matter. However, subsequently and after summons had been issued, the practitioner mandated and authorised the action. The High Court upheld the respondents' special plea that Firm – O-Seal lacked locus standi to bring the action because the directors' instruction to the attorney to issue summons was void for not having been approved by the practitioner, and that their decision was incapable of being ratified ex post facto. The present case concerned Firm-O-Seal's appeal to the Supreme Court of Appeal.

Held The High Court failed to consider whether the claim asserted was indeed in the nature of an 'action' that 'require(d) the approval of the practitioner' as contemplated

by the section. Absent that determination, the special plea could not succeed. This was because, where locus standi was challenged, it had to be dealt with on the assumption that all allegations of fact, relied upon by the party whose locus standi was attacked, were true. It was clear from the common-cause facts that the practitioner had consented to the institution of the action. Once the practitioner became aware that there may have been some confusion, he authorised the institution of the proceedings. Accordingly, the members of Firm-O-Seal had the requisite approval of the practitioner to institute the action against the respondents; and the appeal would be upheld. (See [7], [8], [11].)

GANNET WORKS (PTY) LTD AND OTHERS v MIDDLETON NO AND ANOTHER 2024 (6) SA 57 (SCA)

Fisheries and fishing — Angling — Use of remote-controlled drones or boats — Legality — Marine Living Resources Act 18 of 1998.

First respondent, the Deputy Director-General of Fisheries Management, published a notice prohibiting the use of remote-controlled devices such as drones and boats for angling. First, second, third and fourth appellants were sellers of such devices. They approached the High Court for an order declaring that their use was not prohibited by the Marine Living Resources Act 18 of 1998. The High Court dismissed the application. (See [1] – [5], [11].)

Here, with the Supreme Court of Appeal's leave, the first, second, third and fourth appellants appealed to it. The issue was whether the Act and its regulations prohibited the use of remote-controlled equipment such as drones for angling (see [12], [14]).

Held, that the definition of 'angling' in the Act's regulations implicitly excluded the use of such equipment. ('Angling' is defined as 'recreational fishing by *manually* operating a rod, reel and line . . .' (emphasis added).) (See [19], [21], [23].)

Appeal dismissed (see [27]).

MV NEW ENDEAVOR AND OTHERS v INDIAN OIL CORPORATION LTD 2024 (6) SA 64 (SCA)

Shipping — Admiralty law — Maritime claim — Enforcement — Security arrest — Associated-ship arrest — Proof of association — Family-owned fleet — Claimant attaching reports to founding affidavit certifying that owners of both ships ultimately

controlled by head of family shipping empire — No countervailing evidence — Association established on balance of probabilities — Claimant's ex cautela assertion of alternative sources of power within family irrelevant — Admiralty Jurisdiction Regulation Act 105 of 1983, s 3(7)*(a)*, s 5(3).

In August 2020 the respondent (Indian Oil) chartered the third appellant (Porto, a Liberian shipping company) for the carriage of over 270 000 tonnes of crude oil on Porto's vessel, the Panama-registered *New Diamond*, from Kuwait to India. In September 2020 *New Diamond* caught fire en route, and part of the cargo was lost. Indian Oil suffered damages of over R1,3 billion, which it sought to recoup from Porto by way of arbitration proceedings in India.

To obtain additional security * for its claim, Indian Oil in May 2022 successfully petitioned the Durban High Court ex parte for an associated-ship arrest, under s 3(6) read with s 3(7) of the Admiralty Jurisdiction Regulation Act 105 of 1983 (the Act), of the Panama-registered bulk carrier *New Endeavor*.

As proof for its allegation that *New Endeavour* was an associated ship of *New Diamond*, Indian Oil submitted evidence, in the form of investigative reports (the reports) attached to its founding affidavit, indicating that *New Diamond*, *New Endeavour* and *New Elly*, though registered in the names of separate ship-owning companies, were part of a Greek family shipping empire headed by one A. The reports asserted that ultimate control of all three ships resided in the hands of A, alternatively A 'and his children'. The Durban High Court found, on the evidence in the reports, that *New Endeavor* and *New Diamond* were indeed associated ships. †

When the Durban High Court in December 2022 denied *New Endeavor*'s application for reconsideration of the arrest under rule 6(12)*(c)* of the Uniform Rules of Court, *New Endeavor* launched the present appeal to the Supreme Court of Appeal.

The appellants submitted that, by asserting alternative sources of control, Indian Oil failed to prove a single locus of control and, therefore, to establish association on a balance of probabilities. It was not disputed that Indian Oil had a maritime claim and had, besides association, proved the other requirements for an arrest under s 5(3) (a prima facie case and a genuine and reasonable need for security).

The appellants argued that rule 6(12)*(c)* did not oblige them to file affidavits because they were entitled to argue on the application papers alone, that no case had been made out for any relief.

Held

The primary issue was whether Indian Oil had proved, on a balance of probabilities, that *New Diamond* and *New Endeavour* were associated ships for the purposes of s 3(6) read with s 3(7) of the Act. Association would be established if the companies that owned the ships were controlled by the same person. The level of control required was control over the overall destiny or fate of the company. (See [10] – [17].)

As to whether it failed to establish association because it had asserted *alternative sources of control*, rather than a single one, the Durban High Court's findings were unassailable: the information provided in the reports showed that A was the single repository of common control of both *New Endeavor* and *New Diamond*. In the absence of countervailing evidence from the appellants, this was sufficient to establish association. The extent to which A was assisted by his children was irrelevant: family control, prevalent in shipping, was sufficient to establish association. Indian Oil's alternative manner of pleading arose out of understandable caution. Ultimately, the appellants' failure to controvert Indian Oil's evidence was sufficient to tip the balance in its favour. Appeal dismissed. (See [37] – [39], [44], [50] – [51].)

OLD MUTUAL UNIT TRUST MANAGERS LTD v LIVING HANDS (PTY) LTD AND OTHERS 2024 (6) SA 85 (SCA)

Delict — Specific forms — Pure economic loss — Omission by fund manager — Fund manager managing funds owned by trust — Shares in trustee company bought by third party and third party installing new directors — New directors causing trustee company to instruct fund manager to liquidate trust's investment and pay it over to trustee company — Fund manager doing so and trustee company transferring funds to third party which misappropriated them — Whether fund manager liable for trust's loss on basis of failure to inform regulators of withdrawal and to conduct due diligence on trust company's shareholder.

The entities in this matter were a company (Living Hands, the sole trustee of a trust, and a fund manager (Old Mutual Unit Trust Managers), with which Living Hands had contracted to manage a portfolio of investments owned by the trust. A further involved entity was a company called Fidentia Holdings.

The facts were, in essence, that Fidentia had bought the entire shareholding of Living Hands and installed new directors. These directors caused Living Hands to instruct Old Mutual to liquidate the trust's entire investment and to pay the proceeds (R1 billion) over to Living Hands. This Old Mutual did. The directors then caused Living Hands to pay over these funds to Fidentia, whence they were misappropriated (see [9], [15] – [16], [19] – [20]).

Later Living Hands, acting as trustee on behalf of the trust, brought an action in delict against Old Mutual, claiming compensation for its loss, which it asserted was caused by Old Mutual's negligent omission to notify the regulators (unspecified) of the disinvestment and to conduct a due diligence on Living Hands's shareholder, Fidentia (see [1] – [2], [23], [73], [83]).

The High Court upheld the claim and, on Old Mutual's application, granted it leave to appeal to the Supreme Court of Appeal. There, the first issue was whether Living Hands had established that Old Mutual's omissions were wrongful.

Held, that it had not. Firstly, to allow a claim against an investment manager in Old Mutual's position, who had acted as it was contractually obliged to do, would be contrary to the legal convictions of the community and public policy. Secondly, Living Hands had failed to point to a source (whether statutory or contractual) for the duty Old Mutual allegedly owed to the trust and its beneficiaries (see [54] – [55], [59], [63] – [64], [68] – [70], [76]).

The second issue was negligence: whether Old Mutual's behaviour fell short of that of a reasonable investment manager.

Held, that it had not: there was nothing for Old Mutual to report to the regulatory bodies and it could not have foreseen that the funds would be misappropriated in the way they were (see [79], [84] – [86]).

As to the third issue, causation:

Held, that the factual cause of the loss was the funds' misappropriation by parties associated with Fidentia; and that the loss was too distant from Old Mutual for Old Mutual to be regarded as its legal cause (see [93], [95]).

Old Mutual's appeal upheld, and the High Court's order set aside and replaced with an order dismissing Living Hands's claim (see [99]).

OPTIVEST HEALTH SERVICES (PTY) LTD v COUNCIL FOR MEDICAL SCHEMES AND OTHERS 2024 (6) SA 106 (SCA)

Medicine — Medical aid — Medical scheme — Broker — Whether s 44(4)*(a)* gives Registrar of Council for Medical Schemes power to investigate brokers' affairs — Medical Schemes Act 131 of 1998, s 44(4)*(a)*.
Medicine — Medical aid — Medical scheme — Council for Medical Schemes — Powers — To investigate medical-aid broker's affairs — Medical Schemes Act 131 of 1998, s 44(4)*(a)*.

A third party tipped off the first respondent (the Council for Medical Schemes) about unlawful activity being perpetrated by applicant broker (Optivest) on members of medical schemes. This caused the second respondent (the Registrar of the Council) to appoint an investigator and to order an inspection under s 44(4) of the Medical Schemes Act 131 of 1998 of Optivest's affairs.
Optivest then applied to the High Court to review the Registrar's decision to initiate the investigation. It argued that neither the Medical Schemes Act nor the Financial Sector Regulation Act 9 of 2017 (FSRA) gave the Registrar the power to investigate brokers; that it had been denied audi under s 47; and that the decision was irrational (see [20] – [22]).
The High Court dismissed the application, finding the Registrar had acted within his powers. It granted leave to Optivest to appeal to the Supreme Court of Appeal.
The *first issue* on appeal was whether the words 'any person' and 'any other person' in s 44(4) of the Medical Schemes Act embraced brokers. *Held* (per Weiner JA for the majority), on interpretation of the Act, its regulations, and the FSRA, that it did (see [38], [40], [42]).
The *second issue* was whether the Registrar was required to comply with the procedure in s 47 before initiating an inspection under s 44(4). *Held*, that the Registrar could follow the s 47 procedure after the initiating and conducting of an inspection (see [6], [11], [43] – [44]).
As to the *third issue*, rationality: *Held*, that the decision to investigate was rationally connected to the Act's purpose of protecting medical-scheme beneficiaries (see [6], [21], [45], [49]).
Appeal dismissed (see [50]).

Goosen JA (dissenting) found that s 44 of the Medical Schemes Act did not give the Registrar the power to investigate a broker's affairs. He would have upheld the appeal. (See [51], [77], [85] – [86].)

SNYMAN v DE KOOKER NO AND OTHERS 2024 (6) SA 136 (SCA)

Trust — Termination — Distinction between trust termination and trustee removal — Termination of trust pursuant to s 13 distinct from removal of trustees in terms of s 20 — Provisions not interdependent, but served distinct and unrelated purposes — Trust Property Control Act, ss 13, 20.
Trust — Trustee — Duty of trustees to account — Sufficiency of accounting — What constitutes.

The appellant, Mrs Snyman, sustained bodily injuries in a motor vehicle accident. During the course of her action for compensation against the Road Accident Fund, a *curator ad litem* was appointed on her behalf. When the action became settled, the court on the curator's recommendation ordered that the capital amount due to the appellant be paid to a trust to be created and managed by respondents as trustees on behalf of the appellant. The curator also recommended that the respondents be appointed as its trustees. Shortly after the creation of the trust, Mrs Snyman expressed disquiet to the trustees about several issues relating to its income and expenditure, and its management, including the trustees' duty to account to her. In response to the accounting complaint, the trustees furnished her with bank statements of the trust for the period August 2015 – July 2016, and with the trust's 'Multiple Investment Report'. Mrs Snyman's attorneys replied that these were insufficient to draw any meaningful conclusions from and requested additional information, which the respondents refused.
Shortly thereafter, Mrs Snyman launched an application in the High Court in which she sought an order that, inter alia, the trustees should account to her in the manner set out in her attorneys' letter, and that the trust be terminated and replaced with a new trust with new trustees, alternatively, the amendment of the trust deed (See [1] – [7], [17].)

The High Court concluded that the application was 'necessitated by the [repondents'] negligent conduct', that there was 'a breakdown of trust', and that the respondents' conduct 'imperil[led] the trust property' (see [17]). It ordered the first, second and third respondents, as trustees of a trust, to account to the appellant; that the trust be terminated and for the transfer of the proceeds of the trust to a new trust to be established; that Mrs Snyman was permitted to claim relief consequential on the outcome of accounting to her by the respondents; and that the respondents pay the costs of the application *de bonis propriis* (see [1], [11] – [12]).

The trustees then appealed to the full court, which identified as one of the issues for determination 'the court a quo's termination of the trust and the consequent dismissal/replacement of the [respondents] as trustees'. The full court approached the issue on the footing that, when a court is minded to terminate a trust in terms of s 13 of the Trust Property Control Act 57 of 1988, it was enjoined to also consider whether the trustees should be removed in terms of s 20 of that Act. It upheld their appeal with costs, finding that the trustees had fully accounted to her, and that the termination of the trust would potentially be financially prejudicial to her. And, despite observing that some clauses of the trust deed were better suited to a commercial trust than a trust established to preserve an award in the circumstances of the present case, it declined consequential relief in this regard because Mrs Snyman had not placed a proposed draft of an amended trust deed before it for consideration. Instead, it dismissed the application, but at the same time ordered that the parties' legal representatives draft a proposed amended trust deed and place it before the court within 15 days of the date of delivery of the judgment for its consideration. (See [13], [18], [19], [35].)

The present case concerned Mrs Snyman's appeal to the Supreme Court of Appeal. At issue were —

- the lower courts' approach to the relationship between ss 13 and 20 (see [14]);
- the sufficiency of the trustees' accounting to the appellant (see [27]);
- whether the trust should be terminated, or the trust deed amended (see [25]); and
- the appropriate remedy (see [60]).

Held

The conclusion by the court of first instance was clearly influenced by its conflation of the concepts of termination of trust and removal of trustees. The concepts of 'the breakdown of trust' and 'conduct which imperils the trust property' were both associated with removal of trustees, and were not relevant when termination of a trust

was sought. The appellant sought only relief in terms of s 13 (termination of the trust, or alternatively, the amendment of the trust deed). She never sought the removal of the trustees, or canvassed it in her founding or replying affidavits. The fact that the termination of a trust would result in the loss of office for the trustees did not implicate their removal in terms of s 20. The loss of office by a trustee pursuant to s 13 was a natural consequence of an order terminating a trust. It did not amount to a removal as envisaged in s 20, as suggested by the full court. The termination of a trust in terms of s 13 was premised on the provisions of the trust deed itself, which the founder did not contemplate or foresee. The removal of trustees in terms of s 20, on the other hand, was informed by the conduct of the trustees and their relationship with beneficiaries. The remedies provided for in ss 13 and 20 must not be conflated. They were distinct stand-alone provisions with different requisites and outcomes, which may be asserted in the alternative, but never together. In the present case the removal of trustees simply did not arise, and therefore, none of the lower courts were, without more, at large to consider it. (See [18], [21] – [23].)

In our law, a plaintiff was not entitled to an account unless they could show that the defendant stood in a fiduciary relationship to them, or that some statute or contract imposed a duty to render the account. If it appeared from the pleadings that a plaintiff who was entitled to an account had already received an account which he averred was insufficient, they were entitled to press their claim for a due and proper account. Therefore, this court was entitled to enquire into and determine the issue of sufficiency, to decide whether to order the rendering of a proper account. The full court brushed aside the appellant's concerns, holding that the bank statements and the investment statements constituted adequate accounting. They did not. The statements furnished to Mrs Snyman were without any explanatory notes regarding any of the transactions; she was a layperson in financial matters. Since the creation of the trust in July 2015 until the appellant requested the financial statements of the trust, the trustees had not prepared those statements. The statements were prepared only because the appellant had requested them. This constitutes a period of almost two years during which the trustees did not keep proper accounting records of the trust. Thus, the trustees had failed to fulfil at least two of their obligations, namely, to 'keep regular accounts' of their transactions; and to 'keep accounts up to date'. Mrs Snyman was understandably alarmed, and thus perfectly entitled to launch the application for better and fuller accounting. The accounting rendered by the trustees fell short of the required

standards set out in the authorities. This could only be addressed by the trustees furnishing a full and proper account. What constitutes proper accounting in the circumstances, depends on the fact of the case. On this issue, the appeal would therefore succeed. (See [26] – [27], [30], [32] – [34].)

As to the termination or amendment of the trust, the full court was not competent to have made the order it did. Once it dismissed the application, its jurisdiction in the case was fully exercised and its authority over the subject-matter had ceased. Its order in this regard was a nullity. The appellant was not declared by the court to be incapable of managing her affairs. In fact, a contrary finding was made by a neuropsychologist. Despite this finding, the trust deed treated Mrs Snyman as if she was unable to manage her affairs. It made no provision for the trustees to consult her on any decision of the trust. This was clearly at odds with what was contemplated in the court order which directed that the trust be established. It was unfortunate that the court order did not require the court-appointed founder to lay the trust deed before the courts for its approval prior to its registration. The result was that the provisions of the trust did not reflect the purpose for its creation. For a court to exercise its powers provided in s 13, a trust deed must contain a provision 'which brings about consequences which in the opinion of the court the founder of a trust did not contemplate or foresee', and which hampered the achievement of the objects of the founder, or prejudiced the interests of beneficiaries, or was in conflict with the public interest. The court could not have contemplated or foreseen any of the problematic provisions. Several provisions in the trust deed prejudiced Mrs Snyman's interests as envisaged in s 13*(c)*; created a potential for conflict of interest for the trustees; potentially hampered the administration of the trust as envisaged in s 13*(a)*; and were in conflict with the public interest as envisaged in s 13*(b)*. The provisions of s 13 had been established. The factors in s 13*(a) – (c)* had thus been satisfied. The appeal on this issue would therefore also succeed. (See [36], [37], [40], [59].)

Given the multiplicity of the offending provisions, their materiality and impact (see [43] – [58]), the appropriate remedy would be to terminate the trust as soon as possible and create a new one. It would therefore be ordered that Mrs Snyman place the new proposed trust deed before the court and the Master for approval. (See [60].)

TSHWANE CITY v VRESTHENA (PTY) LTD AND OTHERS 2024 (6) SA 159 (SCA)

Appeal — Appealability — Interim interdict — Test — Confirmation of primacy of interests of justice.

Electricity — Supply — Termination — By local authority — When lawful — Where no payment, municipality entitled to implement credit- and debt-collection control measures against, and disconnect electricity to, consumer.

Local authority — Electricity — Disconnection of electricity supply — When permissible — Municipality entitled to implement credit- and debt-collection control measures against, and disconnect electricity to, consumer, where no payment.

The first appellant, Tshwane City (the City), supplied electricity, via a single supply point, to the sectional-title units of the Zambezi Retail Park Sectional Title Scheme, in terms of an agreement entered into with the second respondent, the Body Corporate of Zambezi Retail Park. As a result of the Body Corporate's continuous failure to pay for its services, the City implemented credit-control measures to collect outstanding revenue, that included the disconnection of electricity. That prompted the first respondent, Vresthena (Pty) Ltd (Vresthena), the owner of a number of units in Zambezi Retail Park, to approach the High Court, seeking various two-part relief: In part A, it sought, on an urgent basis, an interdict compelling the City to accept and reconsider its application for a separate electricity connection for its sections of the Retail Park, as well as restoration of the electricity to the Park; in part B, it sought, on the conditional basis that its application for a separate electricity connection was rejected by the City, an order reviewing such rejection. The High Court found in favour of Vresthena, and granted an order, inter alia, *(a)* giving leave to the parties to apply to the Registrar for a hearing, on an expedited basis, for the determination of the remainder of the relief in part A, as well as part B; *(b)* that, pending such hearing, the City restore electricity to Zambezi Retail Park; *(c)* that Vresthena table a resolution before the Body Corporate as to how electricity payment was to be effected in the future; and *(d)* authorising an electrician to reconnect electricity supply should the City fail to restore it. The City applied for, and was granted, leave to appeal to the Supreme Court of Appeal.

Before the SCA, the main issues included whether *(a)* the High Court's order was appealable; and *(b)* if it was, whether the High Court was correct in granting the relief it did.

As to appealability, *held*, that whether an interim order was appealable or not depended on the consideration of a range of factors. In this regard, the requirements set out in *Zweni* — that for an order to be appealable, the decision had to be final in effect and not susceptible of alteration by the court that granted the order; definitive of the rights of the parties; and have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings — still played an important role in determining appealability in a particular case. However, they were not immutable. The interests of justice continued to play an important role in the enquiry (such that they may even render an interim interdict appealable despite the *Zweni* requirements not having been met). What those interests were involved a finely weighed consideration of relevant factors in each case. (See [8], [10] and [11].)

Held, having regard to the present facts, that the High Court's order was final in effect, and appealable. This was so, having regard to, inter alia, the following: the duration of the order was indefinite, which meant that it would endure until such time that the legal process in part B was completed, leaving the parties in a state of uncertainty; there was no causal link between the order granted by the court in part A and part B of the notice of motion, in the sense that part A directed the City to continue to supply electricity to the entire Park pending the resolution of part B, when the latter was directed only at a possible review of a possible decision by the City to refuse Vresthena's application for a separate electricity supply; no steps had been set out for the regulation of part B of the application; and the City was being forced to provide electricity to the property when no payment was being made, contrary to its constitutional mandate and to prevailing law, having a chilling effect. (See [13] and [16].)

As to the merits, *held*, having regard to the City's constitutional obligations, as well as the prevailing law, that Vresthena and the other owners of the sections had no right, even prima facie, to receive electricity without payment for those services. In circumstances where the Body Corporate, with which the City had contracted to provide electricity, had stopped making payment for electricity, the City had been entitled to implement credit and debt collection measures against the Body Corporate and terminate the supply of electricity to Zambezi Retail Park. Further, Vresthena clearly had other alternative remedies available to it, inter alia, to seek to compel the Body Corporate to comply with its obligation to pay for electricity under the Sectional Titles Act. (See [25] – [32].)

Held, accordingly, that the High Court ought not to have granted the order it did, as Vresthena had not met the requirements for an interdict. Appeal upheld. (See [33] – [34].)

TYTE SECURITY SERVICES CC v WESTERN CAPE PROVINCIAL GOVERNMENT AND OTHERS 2024 (6) SA 175 (SCA)

Appeal — Execution — Application to execute pending appeal — Requirements — Exceptional circumstances — Irreparable harm — Discussion — Superior Courts Act 10 of 2013, s 18.

This was an automatic appeal to the Supreme Court of Appeal, in terms of s 18(4)(ii) of the Superior Courts Act 10 of 2013, against the decision of the Western Cape High Court to grant the application of the fourth respondent, Royal Security CC (Royal), for the immediate implementation, pending appeal, of a previous order handed down by the same court. In that previous order, the court had declined an application by the appellant, Tyte Security Services CC (Tyte), to review and set aside a decision of the first respondent, the Western Cape Provincial Government (the provincial government), to award to Royal a tender for the provision of security services. Further facts relevant to the determination of the appeal were that, before the provincial government had awarded the tender in question to Royal, it had entered into a contract with Tyte for the provision of the same services, but the tender giving rise to the contract had been subsequently reviewed and set aside in proceedings in the High Court. Tyte, however, obtained an order in the High Court permitting it to continue providing services in terms of that first contract, pending the determination of the review that gave rise to the order which Royal presently sought to implement.

Before the SCA, Tyte argued that it was for an applicant for an execution order (in the position of Royal) under s 18 to establish *three separate, distinct and self-standing requirements*: first, the existence of exceptional circumstances; second, that the applicant would suffer irreparable harm if the order were not made; and, third, that the party against whom the order was made (in this case Tyte) would not suffer irreparable harm if the order were made. If any one of such requirements had not been met, the court had to refuse the application. Importantly, Tyte stressed that the second and

third requirements had to be approached as isolated enquiries: there was no question of weighing up the irreparable harm of one as against the other. So, the mere fact of irreparable harm in respect of the respondents, *even if relatively slight or inconsequential, or such that it was significantly outweighed by that of the applicant*, would perforce non-suit the applicant. With this in mind, the High Court, Tyte argued, could not possibly have found that the third requirement was met. Accordingly, the s 18 application had to fail.

Held, that consideration of each of the three requirements was not a hermetically sealed enquiry and could hardly be approached in a compartmentalised fashion. (See [10].)

Held, that the existence of 'exceptional circumstances' was a necessary prerequisite for the exercise of the court's discretion under s 18 (see [11]). As to the second and third requirements, the use of the words 'in addition proves' in s 18(3) ought not to be construed as necessarily enjoining a court to undertake a further or additional enquiry. The overarching enquiry was whether or not exceptional circumstances subsisted. To that end, the presence or absence of irreparable harm, as the case may be, may well be subsumed under the overarching exceptional circumstances enquiry. As long as a court was alive to the duty cast upon it by the legislature to enquire into, and satisfy itself in respect of, exceptional circumstances, as also, irreparable harm, it did not have to do so in a formulaic or hierarchical fashion. (See [14].)

Held, that, to approach the second and third requirements in the manner advocated by Tyte, as enquiries isolated from each other, in terms of which there was no weighing-up of irreparable harm, may well strip a court of any discretion that it may possess, or give rise to a manifestly inequitable conclusion, which could serve to undermine the rule of law. This approach, if it were to be favoured, would disregard entirely the rationality, reasonableness and proportionality yardsticks that had become important touchstones in our jurisprudence. It likely would also, to all intents and purposes, set the bar so high as to render the remedy illusory. (See [18].) The second and third requirements, rather than separate and discrete enquiries, were perhaps more accurately understood as being two sides of the same coin. The same facts and circumstances, which by that stage ought largely to be either common cause or undisputed, would inform both enquiries. As with the exceptional circumstances enquiry, a court considering both the second and third requirements had to have regard to all of the facts and circumstances in any particular case. (See [15].)

On the facts, the SCA concluded that exceptional circumstances existed, having regard to the requirement of irreparable harm, justifying the immediate implementation of the order granted in Royal's favour: In reaching this conclusion, the court, inter alia, had regard to the following: the fact that Tyte had had the full benefit of the entire two-year period of the first contract, notwithstanding the declaration of invalidity and the contract having been set aside, and had in fact continued to reap the benefit of that contract for a further year; that Royal had been denied the benefit of at least one year of its contract, which the High Court had found in the review application to have been lawfully awarded to it; that there was every prospect that, by the time the appeal came to be heard, and irrespective of the outcome, Royal would be left remediless; that the price tendered by Royal was the most favourable to the provincial government, being lower than all the others by a significant margin; and that any success by Tyte in the contemplated appeal would achieve no more than the setting-aside of the award of the second contract to Royal, and would not result in the substitution of Tyte for Royal as the successful tenderer. (See [22] – [28].) Appeal accordingly dismissed. (See [29].)

AECOM SA (PTY) LTD v RUSTENBURG LOCAL MUNICIPALITY 2024 (6) SA 188 (NWM)

Engineering and construction law — Engineer — Professional registration — Meaning of 'registered person' in s 18 of Engineering Profession Act — Properly interpreted, referring only to natural persons — Engineering Profession Act 46 of 2000, s 18.

Aecom SA (Pty) Ltd (Aecom) had instituted an action by way of a simple summons against the respondent (the municipality) for engineering services rendered in terms of a service-level agreement between them. Aecom subsequently delivered a declaration, later amended, in which, cited itself as Aecom SA (Pty) Ltd. The court a quo had upheld the respondent's special plea that, not having alleged that it was a duly registered engineering firm registered in terms of the Engineering Profession Act 46 of 2000 (the Act), Aecom lacked locus standi to sue it. In its replication to the special plea, Aecom had pleaded that it was a registered engineering firm and that it was not necessary to plead this out in the citation.

The present case, Aecom's appeal to the full court, turned on an interpretation of the definition of 'registered person' in s 18 of the Act (quoted at [9]). The thrust of Aecom's heads of argument was that the Act did not define a 'firm' or require that a 'firm' be registered in terms of the Act to attend to certain duties (see [14].) The municipality relied on the definition of a 'person' in s 2 of the Interpretation Act 33 of 1957, which includes 'any company incorporated or registered under any law'. It also relied on *Meredith Woods Johnson & Associates* (cited in the annotations below) which had held that an architect who conducted his business as a trust, and who sued for payment for services rendered in his professional capacity, was obliged to allege that he was registered as a professional architect, failing which his particulars of claim would not disclose a cause of action (see [18]).

Held

Meredith Woods Johnson & Associates was incorrectly decided; it was trite that in legal proceedings by or against a trust the trustees must be cited in their representative capacity and not in their private capacity. No reliance could be placed on it. (See [16], [17].)

And, while a company fell under the definition of the term 'person' in the Interpretation Act, all the categories of persons referred to in s 18 were natural persons in the context of the Act — the wording and language employed spoke only to natural persons. The definition of the term 'person' in s 2 of the Interpretation Act, to include a company, was ousted in this matter.

The appellant company, as a juristic person, was not required to register as an engineer. The appeal would accordingly be upheld. (See [32], [34].)

BOTES AND OTHERS v TARIOMIX (PTY) LTD AND OTHERS 2024 (6) SA 203 (NWM)

Company — Winding-up — Provisional liquidation order granted — Liquidating creditors thereafter withdrawing application — Legal effect on status of company and on applications for intervention by intervening applicants/creditors — Sui generis nature of liquidation proceedings — Just and equitable remedy — Withdrawal application not collapsing liquidation proceedings — Constitution, s 172(1)*(b)*.

The first respondent (Tariomix) was provisionally liquidated on the strength of an application brought by the original applicants, who subsequently elected to withdraw

their application. In the interim, however, there were applications to intervene as applicants by other creditors. This raised issues of whether a notice of withdrawal by the original applicants, delivered *after* a company had been placed under provisional liquidation, ended or terminated the liquidation proceedings without more; and the status of the intervention proceedings by other affected creditors. Tariomix argued that because of the withdrawal by the liquidating creditors, the provisional order must fall as there was no application in law or in fact, and thus the intervening future liquidating creditors could not successfully intervene as there was no application or case to intervene in. (See [34] – [35], [37].)

Held

A provisional order of liquidation not only changed the legal status of the company, but also initiated a comprehensive restructuring of its affairs under the auspices of the court. Liquidation proceedings were concerned with the winding-up of a company's affairs in a manner that was orderly and equitable for all stakeholders involved. Liquidation proceedings were sui generis in that once a party was placed under provisional liquidation, then only a court could set that provisional liquidation aside. Nothing short of the court being satisfied that there were grounds for such a setting-aside would suffice. (See [54] – [58], [69].)

In this case there were clearly constitutional issues. The first one was the rule of law, because if a withdrawal had the effect of collapsing a provisional order of liquidation, then it denuded the court of its obligation to be satisfied that there were grounds to set aside a provisional liquidation order. The second was implications for the right of access to court. Once a provisional order has been granted, all the creditors were affected by this and had a vested interest in the conclusion of the case. In order to safeguard these constitutional imperatives and rights, it was important for a court to forge new tools and provide appropriate relief to ensure that the spirit and object of the law were not undermined. Considering the fundamental tenets of justice and equity, the provisional order must stand. Accordingly, coupled with s 172(1)*(b)* of the Constitution — that a court may make any order that would be just and equitable — it would be ordered that, once a provisional liquidation order was granted, as in this case, the withdrawal by the original applicants did not result in the automatic collapse of the provisional liquidation order or withdrawal of the application proceedings before this court. (See [68] – [79].)

CAWOOD NO v MURRAY NO AND OTHERS 2024 (6) SA 222 (GP)

Company — Business rescue — Business rescue practitioner — Misconduct — Sanction — Forfeiture of fees — Court lacking inherent or statutory power to make such order — Companies Act 71 of 2008, s 140(3).

Company — Business rescue — Business rescue practitioner — Status — Officer of court — Limited meaning to be attributed to designation — Not implying that court having inherent power over practitioners — Companies Act 71 of 2008, s 140(3)*(a)*.

Courts do not have an inherent disciplinary power over business rescue practitioners, and therefore cannot order forfeiture of their fees on ground of misconduct. While s 140(3)*(a)* of the Companies Act 71 of 2008 refers to a business rescue practitioner as an 'officer of the court', a limited meaning should be attributed to that designation. It does not add anything to their duties and responsibilities and does not give the court the same powers over them as it has over legal practitioners, whom it may deprive of fees if those were unlawfully charged. In addition, the structure of the provision suggests a sui generis office, given that practitioners have the responsibilities and duties of a director. Nor can a statutory power to deprive practitioners of their fees be read into the residual power conferred by s 141(3) of the Act, which deals specifically with the situation in which a court decides to convert a business rescue into a liquidation. (See [37] – 59].)

This does not mean that misconduct by practitioners cannot be remedied: they may be held liable for gross negligence under s 140(3)*(c)*(i) of the Act. (See [60].)

A full bench of the Pretoria High Court accordingly held, on appeal from a single judge, that the judge's disallowance of practitioners' fees on the ground of misconduct ranging from negligence to bad faith, fell to be set aside. (See [26] – [29], [54], [71].)

JM v VC AND OTHERS 2024 (6) SA 235 (GP)

Constitutional law — Legislation — Validity — Recognition of Customary Marriages Act 120 of 1998, s 10(2) — Amounting to unfair discrimination and arbitrary deprivation of property — Constitution, ss 9(1), 25(3); Recognition of Customary Marriages Act 120 of 1998, s 10(2).

Customary law — Customary marriage — Proprietary consequences — Validity of purported 'antenuptial contract', concluded by spouses in existing monogamous

customary marriage in community of property, providing that contemplated civil marriage would be out of community of property — Initial customary marriage not terminated by subsequent civil marriage, but changed — Need for judicial oversight to ensure that rights of financially weaker spouses were not prejudiced — Parties must apply to High Court under s 21 of Matrimonial Property Act for leave to change their matrimonial property regime — Recognition of Customary Marriages Act 120 of 1998, s 10(2); Matrimonial Property Act 88 of 1984, s 21.

The parties had concluded a monogamous customary marriage in 2011 without concluding an antenuptial agreement, making the default matrimonial property regime of in community of property applicable to their customary marriage. In 2019 they signed a purported 'antenuptial contract' which provided that the civil marriage they agreed to enter into would be out of community of property subject to the accrual system. In 2021 they entered into the contemplated civil marriage, but their relationship broke down and the plaintiff sued for divorce.

In this special case for adjudication under Uniform Rule 33(1), the following points of law arose and were considered: (1) Whether an agreement to conclude a civil marriage out of community of property after a valid customary marriage was entered into, where a default system of community of property is applicable, was valid; (2) the constitutionality of s 10(2) of the Recognition of Customary Marriages Act 120 of 1998 * (the Recognition Act), insofar as it allowed for spouses in a monogamous customary marriage to change their matrimonial property regime from in community of property to out of community of property — when they later decide to enter into a civil marriage with each other — without judicial oversight, to the prejudice of the economically weaker spouse. (See [3].)

Held

(1) While the contract concluded by the parties may have been intended to be an antenuptial contract, sight could not be lost of the fact that this contract also sought to regulate assets that formed part of the parties' joint estate created by the customary marriage. Once ownership had accrued to such a spouse, should the parties later conclude an antenuptial contract out of community of property, severe prejudice may befall the financially weaker spouse. As a spouse who was now married out of community, the spouse who was prejudiced would not be able to rely on the protections provided in ch III of the Matrimonial Property Act. (See [71] – [73].)

There was nothing in s 10 of the Recognition Act that supported the view that a civil marriage terminated the initial customary marriage and ended the proprietary consequences of the customary marriage in community of property; or suggested that monogamous customary marriages could be terminated by the same spouses entering a civil marriage. A customary marriage was not terminated, but *replaced* by a civil marriage. Once it was accepted that the legislature intended the change not only in terms of marriage type, but also the matrimonial property regimes, it could not follow that an initial customary marriage was terminated by a subsequent civil marriage. (See [77], [81], [85].)

When spouses entered into a contract that sought to adopt a different matrimonial property regime for the contemplated civil marriage to that which applied to their customary marriage, there was a need for judicial oversight to ensure that the rights of financially weaker spouses were not prejudiced. Such parties must apply to the High Court in terms of s 21 of the Matrimonial Property Act 88 of 1984 (the MPA) for leave to change their matrimonial property regime. Such a contract could not be regarded as an antenuptial contract to the extent that it dealt with any of the assets that fell within the joint estate created by the customary marriage. The agreement was not an antenuptial contract, but a postnuptial contract, to change the parties' matrimonial property system from that of in community of property to out of community of property, with the application of the accrual system. That it was concluded without leave of the court as contemplated in s 21 of the MPA, this rendered this contract invalid. (See [88], [91], [93], [94] – [95].)

(2) Spouses in monogamous civil marriages had legislative protection that spouses in monogamous customary marriages did not have, and that amounted to differentiation. The former could apply to the court to have their matrimonial property regime changed before any contract that sought to change and regulate their proprietary consequences could take effect. Section 10(2) of the Recognition Act effectively took that protection away from spouses who were party to monogamous customary marriages. This differentiation amounted to discrimination. Spouses whose matrimonial property regimes were not changed to out of community of property without judicial intervention, were not forced to waive their benefits in this manner. The discrimination was certainly unfair, and accordingly was invalid and inconsistent with the prohibition against unfair discrimination in s 9(1) of the Constitution.

And, insofar as the contract the parties signed after entering a customary marriage, but before concluding their civil marriage, had the effect of allowing the plaintiff to deal with the immovable property (and the retirement benefits when they accrued) as he wished, thus relegating the first defendant's claim to an accrual claim, it amounted to an arbitrary deprivation of property under s 25(1) of the Constitution. This deprivation was unlawfully permitted by s 10(2) of the Recognition Act, a law of general application. (See [102], [107], [109] and [117].)

As to the appropriate remedy, the legislature would be allowed an opportunity to correct the identified defect within 12 months, failing which the words as ordered would automatically be read into the section (see [121]).

LAND AND AGRICULTURAL DEVELOPMENT BANK OF SOUTH AFRICA v LAZERCOR EIGHT (PTY) LTD AND OTHERS 2024 (6) SA 267 (WCC)

Company — Business rescue — Business rescue practitioner — Misconduct — Gross negligence — Legal threshold set out, but no finding made — Companies Act 71 of 2008, s 140(3)*(c)*(ii).

Company — Business rescue — Business rescue practitioner — Misconduct — Sanction — Forfeiture of fees — Semble: Court lacking inherent or statutory power to make such order — Companies Act 71 of 2008, s 140(3).

Company — Proceedings by and against — Wrong done to company — Proper plaintiff rule — Company must itself vindicate wrongs committed against it — Proceedings for forfeiture of business rescue practitioner's fees to be brought by company, not shareholders or creditors.

Practice — Applications and motions — Intervention of third party — Semble: Intervening party may seek relief in terms of notice of motion of another party.

The Land and Agricultural Development Bank of South Africa (the Landbank) was embroiled in protracted litigation in the Cape Town High Court (the court), involving the business rescue of six companies of which it was, in each case, the largest creditor. Unhappy with the conduct of the business rescue practitioner (Bester) and the business rescue plan devised by him, the Landbank in October 2020 sought his removal under s 139 of the Companies Act 71 of 2008 (the Act), and costs against

him *de bonis propriis* for his alleged gross negligence in the execution of his duties (s 140(3)*(c)*(ii) of the Act). On 26 July 2021 the Landbank settled the matter and Bester stayed on as practitioner. From then on, the Landbank was no longer involved. The issues before the present court involved two sets of respondents in the Landbank matter. They arose as follows.

In March 2022 the sole director of the six companies (Smith) and a shareholding trust (the trust) sought leave to intervene in the Landbank application and commence legal proceedings against Bester in the event that the Landbank did not proceed as set out in its application. They sought the same relief the Landbank did, namely the disallowance/repayment of Bester's fees and a costs order *de bonis propriis* against him. Neither Smith nor the trust purported to be acting on behalf of the company. The Cape Town High Court granted them leave to intervene and commence proceedings against Bester.

Bester filed an opposing affidavit, but the order was made in his absence when he absented himself from court on the ground that no order could issue against him because business rescue proceedings had been terminated. In his opposing affidavit, Bester had argued that it was not permissible for an intervening party to seek relief under another party's notice of motion. He argued that neither the trust nor Smith had the required locus standi to sue for the repayment of his fees since the 'proper plaintiff' was the company itself. * He also asked for the rescission of the default judgment made against him.

The court held that, since Smith and the trust had been granted *leave to intervene* by the court, they were entitled to seek the relief they were seeking (see [32]).

On locus standi the court held in favour of Bester, that neither the trust nor Smith had the required standing. This was because —

- the request for forfeiture of the practitioner's fees was not a remedy under the Act;
- under the proper plaintiff rule and the principle of reflective loss, the claim for the disallowance/repayment of Bester's fees lay with the six companies, not with Smith or the trust; and
- the fact that Smith and the trust were persons 'affected' by the business rescue proceedings as intended in s 128(1)*(a)* of the Act † did not entitle them to institute proceedings on behalf of the six companies. (See [43].)

While this finding effectively ended the matter, the court nevertheless proceeded to deal with the question of whether it had the power to make an order for the *forfeiture*

of Bester's fees. The court agreed with the ruling in *Cawood NO v Murray NO and Others* 2024 (6) SA 222 (GP), that the courts lacked an inherent power to order the forfeiture of a practitioner's fees. Nor did s 140(3) of the Act, which made practitioners liable for the consequences of certain acts or omissions, provide a basis for the making of forfeiture orders. And even if it did, the required *gross negligence* on the part of Bester was not established. There being no basis for the making of a forfeiture order, Bester was entitled to his fees. (See [48] – [49], [54] – [55], [68].)

The court further held, as to *costs*, that while Bester's conduct did not comply with the requirements of objectivity and impartiality in the institution of legal proceedings required of business rescue practitioners, and there was thus no reason in principle why he should not be liable for the costs incurred while he was acting as a practitioner, the settlement order of 26 July 2021 had finally settled the issue of costs between the Landbank and Bester, with the result that the present court was barred from granting a costs order *de bonis propriis* against him. (See [56], [59].)

The court dismissed Bester's *rescission* application on the ground that he had deliberately absented himself from court despite being aware that Smith and the trust intended to proceed with their application and that they intended to request a costs order *de bonis propriis* against him (see [64]).

WAGNER NO v GIJSBERS NO AND OTHERS 2024 (6) SA 296 (WCC)

Insolvency — Cross-border insolvency — Recognition of foreign trustee — Application by foreign trustee for recognition in South Africa for purpose of removal to insolvent's foreign estate of surplus in his South African estate — Deficit in foreign estate likely — Court granting recognition application in interests of comity, convenience and equity — Once recognition granted, s 116(1) of Insolvency Act 24 of 1936 (surplus to go back to insolvent) not applicable while there are unpaid foreign creditors.

Insolvency — Trustee — Foreign trustee — Recognition — Discretion of court — Impact of Insolvency Act 24 of 1936, s 116(1).

South African common law allows the recognition, by a South African court, of a foreign trustee. * Such recognition constitutes a declaration of the foreign trustee's entitlement

to deal with the insolvent's SA assets as if they were located in the foreign jurisdiction, subject to the SA court's imposition of conditions for the protection of local creditors, or in recognition of the requirements of SA law. The recognition of a foreign trustee is a matter for the court's discretion and is granted on the grounds of comity and convenience. (See [27].)

The present applicant, Wagner, was appointed under Austrian law as the official receiver (trustee) of the insolvent estate of one Scheer (the third respondent). Scheer also had assets in SA, and his SA estate was finally sequestrated on 14 August 2018. The first and second respondents were appointed as joint trustees of Scheer's SA estate.

Wagner sought an order for the recognition of his appointment in SA to enable him — upon the conclusion of the distribution of Scheer's SA estate — to remove any surplus funds left in the SA estate to his Austrian estate for the benefit of his Austrian creditors. The Austrian bankruptcy code stipulated that the effect of an Austrian bankruptcy order extended to the debtor's foreign assets (which would in Scheer's case include any surplus in his SA estate). Much of this was common cause.

Scheer nevertheless argued that, because most of his assets were in Austria and the process there was at an advanced stage, the principle of convenience dictated that his Austrian estate should be finalised before proceedings pertaining to any surplus in his SA estate were determined. He also argued that, where a foreign insolvent's estate was also sequestrated in SA, a court was blocked from granting a recognition order by s 116(1) of the Insolvency Act 24 of 1936 (the Act), which provided that the master must deposit any surplus in the Guardian's Fund and, after rehabilitation, pay it out to the insolvent at his or her request. The first and second respondents did not oppose the application.

Scheer was domiciled in Austria at the time of the Austrian bankruptcy order (June 2017), and most of his creditors and assets were there. While it was clear that there would be a surplus in Scheer's SA estate, a shortfall in his Austrian estate was, on the evidence tendered by Wagner, a real possibility (see [10], [24], [37] – [38]).

The question for the court was thus whether, based on the considerations of comity, convenience and equity, it should recognise Wagner for the purpose of removing the surplus funds to Austria for the benefit of Scheer's creditors there.

Held

It would, on the facts set out above, be both convenient and equitable to recognise Wagner and grant the ancillary relief claimed (the removal of Scheer's assets). The surplus in Scheer's SA estate could then be used for the benefit of his Austrian creditors, with no prejudice to any of his SA creditors. And even if there were to be no shortfall in Austria, a shortfall in the foreign estate was not a prerequisite for the recognition of a foreign trustee. (See [37].)

As to the impact of s 116 of the Act, the existence of unpaid creditors in Scheer's Austrian estate and Wagner's consequent obligation to recover Scheer's assets wherever they may be found, meant that, strictly speaking, and applying the considerations of fairness and practicality, there was no surplus in Scheer's SA estate. Since common law empowered the court to recognise foreign trustees, s 116 did not preclude it. On a purposive interpretation of s 116, funds remaining after final distribution by the SA trustees did not constitute a 'surplus' as intended in s 116(1): instead, they vested in Wagner as the official receiver of Scheer's Austrian estate. Once a foreign trustee was recognised, there would be no surplus in the SA estate while there were unpaid creditors overseas. (See [43] – [44], [46].)

The court ordered the recognition in SA of Wagner's appointment as the official receiver under Austrian law for purpose of the removal, for the benefit of Scheer's Austrian creditors, of any surplus funds remaining in his SA estate. In view of his unreasonable and vexatious opposition to the application, Scheer was ordered to pay the costs of the application on the attorney and client scale. (See [51] – [54] for Scheer's sanctionable conduct during the litigation; [63] – [65] for the order.)

CORONATION INVESTMENT MANAGEMENT SA (PTY) LTD v COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE 2024 (6) SA 310 (CC)

Revenue — Income tax — Controlled foreign companies — Net income of — Exemption of income attributable to foreign business establishment (FBE) — Requirements for qualifying as FBE — Effect of outsourcing on requirement that FBE must be where 'primary operations of business' based — Meaning of 'primary operations of business' — Whether taxpayer qualified for exemption — Income Tax Act 58 of 1962, ss 9D(1), 9D(2), 9D(9)*(b)*.

The taxpayer, Coronation Investment Management SA (Pty) Ltd (CIMSA), was the holding company for the Coronation Group, registered and tax-resident in South Africa. CIMSA had various subsidiaries, locally and abroad, that operated in the sphere of fund management and investment management. It was the 100% holding company of a company that was tax resident in the Isle of Man, which in turn was the 100% owner of Coronation Global Fund Managers (Ireland) Ltd (CGFM), registered and tax-resident in Ireland (see [14]).

CGFM was established in 1997 as a fund management company in Dublin, Ireland, to provide foreign investment opportunities in Irish collective investment funds for a South African-domiciled collective investment fund. CGFM did not conduct investment trading activities, because it was not licensed to do so. Instead, it contracted with specialist investment managers (licensed under a different licensing regime) to conduct investment trading activities, ie it outsourced these activities (See [15] – [16].)

The South African Revenue Service (Sars) assessed CIMSA's tax liability for the 2012 tax year to include in its income an amount equal to the net income of CGFM. It was common cause that in the tax year of assessment, CGFM was a 'controlled foreign company' as defined in s 9D(1) of the Income Tax Act 58 of 1962, which deals with the taxation of locally resident taxpayers on their income earned abroad, particularly income earned by South African-owned foreign corporate entities. Section 9D(2) provides for the imputation of the net income of a 'controlled foreign company' to a South African resident company holding participation rights in that controlled foreign company (see [6]). This imputation is, however, subject to certain exceptions, one of which — in s 9D(9)*(b)* — relates to the net income that a controlled foreign company derives from a 'foreign business establishment' (FBE) of that controlled foreign company (see [7]).

Section 9D(1) defines an FBE as 'a fixed place of business located in a country other than the Republic that is used or will continue to be used for the carrying on of the business of that controlled foreign company for a period of not less than one year', and where, inter alia, that fixed place of business is suitably staffed with on-site managerial and operational employees of that controlled foreign company, who conduct the primary operations of that business, and which is suitably equipped and has suitable facilities for doing so. (See [8].)

Sars took the view that this exemption did not apply because CGFM did not meet the requirements of an FBE, as the primary functions of its business had been outsourced

(see [4]). Sars' assessment was successfully challenged by CIMSA in the tax court, which held that CGFM had fulfilled the requirements of an FBE, and that CGFM income was attributable to an FBE, entitling it to the s 9D(9)*(b)* exemption. In upholding CIMSA's appeal, the tax court distinguished between fund management and investment management, noting that CGFM's licence authorised it to conduct collective portfolio management, ie fund management. (See [21] – [22].)

Sars' appeal against the tax court decision was upheld by the Supreme Court of Appeal (the SCA). The SCA examined CGFM's licence and concluded from this that 'collective portfolio management', which CGFM had been authorised to conduct, included investment management, administration and marketing (see [69]). It understood the primary operations of CGFM's business to be investment management, and reasoned that if CGFM had outsourced all the primary operations, then the fixed place of business in Ireland lacked the staff and facilities to conduct those operations; that the outsourced operations were central to the business of CGFM, so that CGFM did not conduct its primary operations in Ireland; and that to qualify for the exemption under s 9D, the essential operations of a business must be conducted within the jurisdiction in respect of which exemption was sought. (See [24] – [25], [75].)

The present case concerned CIMSA's application for leave to appeal to the Constitutional Court (the CC). At issue was whether CGFM had met the requirements for constituting a FBE as defined in s 9D(1) (see [3]). CIMSA's case had consistently been that the business operations conducted by CGFM in Ireland had complied with the FBE requirements set out in s 9D(1)*(a)*(i) – (v). CIMSA contended, inter alia, that, contrary to the SCA's finding, CGFM had not been granted a licence to perform investment management trading activities; it was only fund management (without investment management trading activities) that formed part of CGFM's primary operations; and that the business of a controlled foreign company and the primary operations of that business must be determined by having regard to what the company's actual business was and not by what the company could in theory perform (see [27] – [35]).

The CC was satisfied that the matter engaged its jurisdiction, as it raised a legal question that transcended the interests of the parties and was of general public importance; it impacted all South African-resident companies holding controlled foreign companies which relied on the existence of a FBE to avoid being subjected to

tax on an amount equal to the controlled foreign company's net income under s 9D (see [45] – [46]).

The CC's approach was that two elements of the definition of a FBE were central in determining the main issue, ie whether CGFM was a FBE. These were identifying the 'business of that controlled foreign company'; and determining whether the fixed place of business was suitably staffed and equipped for conducting 'the primary operations of that business'.

Held

The rationale behind the enactment of s 9D, as expressed in the relevant Treasury Explanation, was competitiveness abroad for controlled foreign companies, while also requiring that 'the location of the business establishment must additionally contain further economic substance'. The latter must be demonstrated in terms of operations and business purpose (see [49] – [51]). In determining whether CGFM's operations in Ireland had the requisite economic substance to qualify for the tax exemption in s 9D, a distinction must be drawn between fund management and investment management (see [12]).

CGFM was established in Ireland as a fund manager, and not an investment manager. Both Sars and the SCA misconceived the distinction between fund management and investment management. Managing a collective investment fund involved the governance of and ultimate responsibility for all regulatory, legal and other investor-related aspects of a collective investment fund. Investment trading, on the other hand, entailed professionally and expertly allocating the funds invested in a collective investment fund. It was the latter that had been delegated/outsourced, as CGFM was legally entitled to do. To hold, as the SCA did, and Sars contended, that in doing so CGFM had 'outsourced' its core function and was left only with non-core ancillary functions and was thus not conducting the business of a management company, was fallacious. The licence conditions, prudential considerations behind separating the investment management and investment trading, and the uncontested evidence compellingly showed that at all material times CGFM had conducted the business of a fund manager. (See [52] – [56], [59] – [66].)

CGFM employed a delegated business model through which it conducted specified fund management functions, and delegated investment management trading activities (which it was not authorised to do by its licence) to competent third parties, while retaining overall supervision of and responsibility to the regulator for those functions.

Its day-to-day operations from its Dublin office in pursuit of these management functions met the 'economic substance' requirements of the FBE definition. It had a fixed place of business which was suitably staffed and equipped to conduct the primary operations of its business. For these reasons, the tax court was correct in holding that CGFM qualified for a tax exemption and that Sars must issue a reduced tax assessment, excluding in it any amount that was included in CIMSA's income under s 9D of the ITA pertaining to CGFM's income. (See [68].)

The SCA misconceived CGFM's actual business as a fund manager. Instead of determining what CGFM's business actually was, the court examined CGFM's licence and the delegation provisions. It also erred in holding that the regulatory functions were incidental. The ultimate effect of the SCA's erroneous approach was that CGFM's primary business was found to be that which it calculatedly chose not to do, did not apply to do and by law was not able to do, namely investment management trading. Moreover, that approach led to insensible and unbusinesslike results that did not achieve s 9D's objects, nor did it suppress the mischief at which the section was directed. The FBE definition was not an anti-outsourcing enactment, as the SCA appeared to approach it. Instead, it aimed to ensure that an offshore business — regardless of its chosen business model — had economic substance in that foreign country and was not merely an illusory or 'paper' business. The appeal would accordingly succeed. (See [69], [76], [77], [82], [83].)

South African Criminal Law Reports November 2024

S v NTSHONGWANA 2024 (2) SACR 443 (SCA)

Trial — Mental state of accused — Defence of pathological incapacity — Proof of — Accused convicted, inter alia, of four counts of murder — Three psychiatrists testifying for state that appellant's behaviour at relevant time consistent with conscious decision-making, his mental illness had no impact on ability to appreciate wrongfulness of his actions, and that he had criminal capacity at time of commission of offences — Their evidence preferred to that of defence psychiatrist who had little interaction with appellant and not aware of all facts of charges — Accused not discharging onus to show lacked criminal capacity — Criminal Procedure Act 51 of 1977, s 78(1).

The appellant killed four people by attacking his victims walking alone at night, decapitating three of them in the process. He also attempted to kill two more people. Further investigation revealed that he was linked to previous assault with intent to do grievous bodily harm and the kidnapping and rape of a woman on multiple occasions over a period of three days. He was convicted on all nine counts in the High Court and was, inter alia, sentenced to five terms of life imprisonment in respect of the four murders and the rape. The appellant's only defence at the trial was that he lacked criminal capacity in terms of s 78(1) of the Criminal Procedure Act 51 of 1977 (the CPA). He relied largely on the evidence of a psychiatrist who interviewed him on three occasions, for 5 minutes, 30 minutes and slightly less than 30 minutes, respectively. This psychiatrist concluded that the appellant was suffering from a severe mental illness with delusions and hallucinations, accompanied by bizarre behaviour. He stated that the appellant lacked insight and had impaired judgment. He had lost touch with reality and was unable to give a coherent account of himself. Three months later the psychiatrist consulted again with the appellant and concluded that he had a delusional disorder and that he had acted in accordance with such delusions when he committed the offences. The psychiatrist could, however, not explain many aspects of the appellant's behaviour. The three psychiatrists (the panel psychiatrists) who had examined the appellant also produced reports. They described the appellant as coherent and cooperative, with his cognitive functions fully intact. They were of the opinion that the appellant's behaviour at the relevant time was consistent with making conscious decisions, and were considered to have stood up well to cross-examination, and impressed the court as being not only reliable witnesses, but also unbiased in their opinions.

On appeal, the appellant argued that the trial court had committed a material misdirection by focusing solely on s 78(1)*(a)* of the CPA, in relying on evidence that the appellant committed the offences in a 'well-planned, calculated and purpose-driven manner' and that 'he took steps to avoid detection after the commission of the offences'.

Held, that the high-watermark of the appellant's argument was that the undisputed psychiatric history of the appellant, and his bizarre conduct during the commission of the crimes, was sufficient to discharge the onus on him, as it clearly showed that he acted in a severely deluded state when committing the offences and that that compromised his ability to regulate his conduct in accordance with his appreciation of

the wrongfulness of his conduct. However, in circumstances where the appellant's psychiatrist's evidence was subject to some criticism, and there was no reason to reject the evidence of the panel of psychiatrists that the appellant's actions were not affected by his acknowledged mental illness; where the appellant failed to testify; where his allegation that he had amnesia for the whole period during which he committed the offences (extending over four months) was unknown in psychiatry; where persons diagnosed with delusional disorder did not have memory problems, and his amnesia was an afterthought; and other facts, pointed to clear, rational and goal-directed behaviour. (See [46] – [50] and [52].)

Held, further, that on a conspectus of all the evidence, the appellant failed to show any misdirection on the facts or the law. No circumstances had been shown which would entitle the court to interfere with the finding of either the trial court or that of the full court, that the appellant was able to appreciate the wrongfulness of his actions and that he was able to act in accordance with his appreciation of the wrongfulness of his actions during the commission of the offence. (See [53].)

Held, further, that there were no grounds for finding diminished responsibility on the part of the appellant as referred to in s 78(7) of the CPA. (See [54] – [56].)

Held, per Ponnan JA, in a concurring judgment, that, after the finding that the appellant was capable of understanding the proceedings and of mounting a proper defence to the charges (which the appellant never sought to assail), he was forced to the only defence that could possibly avail him, namely the lack of criminal capacity. That defence, however, relied on the evidence of his expert witness, who had only relatively fleetingly interviewed the appellant, and his expert's view was expressed in a vacuum, without having familiarised himself with the details of the offences, the manner in which they were committed or the version of the prosecution witnesses. In the circumstances where the appellant had the wherewithal to go about his daily life; drive to unfamiliar places to seek out his victims, perpetrate the offences and avoid detection; and, on at least two of those occasions, stop when disturbed, demonstrating an awareness of his surroundings, before fleeing the scene, it was inconceivable that over a period of many months the appellant suffered a complete loss of control only at the crucial time when committing each offence. (See [63] – [67].) In the result, the appeal was dismissed. (See [59].)

LABUSCHAGNE v DIRECTOR OF PUBLIC PROSECUTIONS 2024 (2) SACR 463 (FB)

Court — High Court — Jurisdiction of — Bail pending petition for leave to appeal — Where lower court had dismissed application for leave to appeal and no pending proceedings in High Court, it had no power under common law or statute to consider application for bail — Statutory power of lower court had to be adhered to and it was best suited to adjudicate matter — Criminal Procedure Act 51 of 1977, ss 60, 60(1)*(b)* and 309(3).

The applicant, having been convicted and sentenced to a term of imprisonment in a regional court, sought leave to appeal the conviction and sentence, but this application was dismissed. He failed to apply to the court a quo for bail pending a petition in terms of s 309C(2)(iii) of the Criminal Procedure Act 51 of 1977 (the CPA) for leave to appeal to the High Court. He subsequently applied for bail in the High Court pending the reconstruction of the trial record and for leave to appeal against his convictions and sentences. The court struck the application from the roll. It held that there were no pending proceedings in the High Court as the intended application for leave to appeal had not been lodged with the court and therefore the court had no jurisdiction to adjudicate the application. The applicant then applied for bail in the regional court, but the magistrate struck the matter from the roll on the grounds that he did not have legislative authority to consider the bail application pending a petition. He had already dismissed the application for leave to appeal the convictions and sentences, and the court was accordingly functus officio. He then applied for bail to the High Court, but this was dismissed.

Held, that, although everyone had the right to freedom and security of the person as set out in s 12(1) of the Constitution, the applicant's situation was different to other citizens, in that he had been convicted and sentenced to imprisonment. It was of paramount importance that matters of personal freedom be dealt with on an urgent basis. (See [14].)

Held, that, although s 60 of the CPA dealt with bail applications by accused persons, which was not the case in the present matter, it was appropriate to refer to the section: the apparent purpose of the legislature as expressed in s 60(1)*(b)* was to ensure that the magistrates' court retained jurisdiction in respect of bail applications until the

accused person appeared in another court, ie the regional court or the High Court for the first time. (See [16].)

Held, that, in s 309(3) of the CPA, the High Court's powers were restricted to cases involving an automatic right of appeal, or when leave to appeal had been granted. It therefore did not have the power to consider a bail application when the lower court had dismissed the application for leave to appeal and where there were no pending proceedings in the High Court. (See [20].)

Held, that the High Court did not have any common-law power to adjudicate the bail application, and the statutory power of the lower court had to be adhered to. Furthermore, there could also be no doubt that the court a quo was best suited to adjudicate the bail application based on the applicable principles, notwithstanding that court's dismissal of the application for leave to appeal. The application accordingly had to be struck from the roll. (See [25] – [26].)

S v GRIQUA 2024 (2) SACR 475 (NWM)

Trial — Presiding officer — Conduct of — Use of appropriate terminology — Sexual-offence case — Use of crude terminology deprecated.

In an appeal against a sentence of life imprisonment imposed for rape, the court on appeal expressed its disquiet in respect of the language used by the magistrate. It highlighted the use of the word 'rounds' to denote the number of times that the appellant raped the complainant, and, in respect of the appellant, that he took the complainant to his 'slaughterhouse' and used crude terminology to describe the appellant's behaviour. The court held that the decorum of court proceedings and of the language employed by officers of the court was not negotiable. The regional magistrate was not simply an umpire in the proceedings. It was incumbent on him to ensure that the tenets of justice were served by being a conduit for the introduction of admissible and relevant evidence, and actively filtering questions that were posed to the victim of sexual violation. (See [4].) The court commented further that the work of a court and all who appeared before it was serious business. The words that were spoken or written, and the decisions that were made, had far-reaching consequences on all who were intimately involved. Responsibility for ensuring proper access to court, respect for its proceedings, and the legitimacy of its findings rested as much on legal

representatives as on judicial officers. Utterances that had been made to by the magistrate had no place in our courtrooms. They were unfortunate, unacceptable and completely unnecessary. An accused's respect and dignity should never be compromised, notwithstanding the stage of the criminal process. (See [31].) The court held, however, that the magistrate was correct in finding that there were no substantial and compelling circumstances that warranted a deviation from the mandatory sentence of life imprisonment. The appeal was accordingly dismissed. (See [33].)

EXECUTIVE MAYOR, CITY OF CAPE TOWN v DIRECTOR OF PUBLIC PROSECUTIONS, WESTERN CAPE AND ANOTHER 2024 (2) SACR 487 (WCC)

Court — Judicial officer — Conduct of — Court meant to uphold law without playing to public gallery or court of public opinion.
Court — High Court — Powers of — Criminal law — High Court deriving powers from Criminal Procedure Act 51 of 1977 — Section 300 of CPA only provision providing compensation for victims of crime — Court not entitled to award immovable property to minor child whose father had murdered his wife and child's mother.
Court — High Court — Powers of — Criminal law — Court in criminal proceedings not empowered to make order that Mayor set up trust for victim of crime.

At the conclusion of a criminal trial in the High Court, in which the second respondent was the accused in a case where he was charged with having murdered his wife, the court, after sentencing the second respondent, made orders, inter alia, that the patrimonial benefits of the marriage between the accused and the deceased, being the ownership of a property, were to be forfeited by the accused; that the Mayor of the City of Cape Town was required to ensure the establishment of a trust for the benefit of the minor child of the accused and deceased; and directed the Premier of the Eastern Cape to trace the remains of the deceased. The appellant obtained leave from the Supreme Court of Appeal to appeal against those orders, the High Court having refused relief.
Held, that the Constitution made it clear in s 171 that all courts operated in terms of national legislation. When judges adjudicated cases that served before them, they were not performing administrative action, but were exercising public power as an arm

of government. In the present matter, the legislation that gave a judge presiding over a criminal trial the power to do so was primarily the Criminal Procedure Act 51 of 1977 (the CPA). Section 300 of the CPA provided only for a limited form of compensation to persons who had suffered financial loss. In the present case there was no application brought in the court a quo by the prosecution, nor anyone on behalf of any injured person for an order of the kind contemplated in s 300. (See [34], [40] and [55] – [57].)

Held, further, that our common law recognised the maxim '*die bloedige hand erft niet*', namely the bloodied hand does not inherit, which would apply to the accused who could not inherit the deceased's half-share of the property. There was accordingly no need to develop the common law on that aspect. (See [61] and [66].)

Held, further, that it was necessary to remark on the need for judicial officers not to stray into the arena of making comments or statements that had the effect of attracting populist rhetoric. Judges had not only to be independent and impartial, and adjudicate without fear or favour, but also had to be seen and be perceived to be thus, in order to maintain the legitimacy of the judiciary and respect for the rule of law. The judgment of the court a quo was peppered with references to popular protest songs and slogans. Wwhile the history and import of the respective protest slogans and songs were fully understood and appreciated by the court, it was necessary in the exercise of judicial power to remind ourselves that courts were meant to uphold the law, without playing to the public gallery or the court of public opinion. The protest songs and slogans had no place in a judgment unless they formed part of the evidence and facts of the case. (See [68] – [72].)

Held, further, that the order of the forfeiture of benefits of ownership of the property was not based on the principle of legality, was ultra vires and had to be declared null and void. (See [100].)

Held, further, that the court a quo had no jurisdiction to make the order compelling the appellant to ensure that a trust be set up for the benefit of the minor child. (See [114].)

MINISTER OF SAFETY AND SECURITY v AK 2024 (2) SACR 507 (ECGq)

Evidence — Expert evidence — Assessment by expert of psychological and psychiatric damage to victim of crime — Whether person being assessed entitled to legal representation during assessment.

In an action for damages, the defendant had demanded an assessment by its psychologist and psychiatrist as to the quantum of damages suffered by the plaintiff because of a negligent investigation by the defendant of her kidnapping. The plaintiff wanted to have her own legal representative present at the assessment. The defendant refused to give permission on the grounds that the psychiatrist considered the presence of any third party to be unnecessary, undesirable and risky due to the possible impact on the validity of the outcome of the examination. He noted that the presence of a third party could influence an expert's observations by creating an artificial sense of safety. To the extent that a third party was permitted to attend, he maintained that they should do so without any interference whatsoever so as not to influence the outcome of the examination. A registered clinical, counselling and neuropsychologist was of a similar opinion, relying on the recommendations of the Professional Board of Psychology of the Health Professions Council and the American Psychological Association, and drew a distinction between the presence of the legal representative at a forensic medical examination for physical injuries, on the one hand, and a forensic psychological and psychiatric evaluation, on the other.

Held, that the court was not persuaded that the standards and ethical rules relied upon were properly interpreted to exclude the presence of a legal representative during forensic psychological and psychiatric testing. To the extent that the intention behind these documents was to do so, that objective had to be subordinated to protect the established legal entitlement of the person undergoing assessment. A fair approach would be to balance the protection of the rights of the claimant while noting the concern that excessive intervention might adversely affect the extent of assistance that an expert might eventually be able to offer the court. (See [15] – [16].)

The court made an order that the plaintiff's legal representative was entitled to be present and seated behind the plaintiff during the respective interviews, and that the interviews could be simultaneously video- and audio-recorded.

S v NOJIYEZA 2024 (2) SACR 516 (KZP)

Evidence — Expert evidence — Admissibility — Ballistics report — Admission of in terms of s 220 of Criminal Procedure Act 51 of 1977 — Appellant alleging that he had not admitted contents of report which were not read into court record, though no

objection made thereto — Effect of Practice Directive 3.2.8 of Criminal Practice Directives for Regional Courts in South Africa of 2017 regarding pretrial proceedings — Appellant bound by admissions — Criminal Procedure Act 51 of 1977, s 220.

In an appeal from a conviction in a regional magistrates' court for the illegal possession of a firearm, the admissibility of a ballistics report was in issue. It was contended for the appellant that the report had not been admitted in terms of s 220 of the Criminal Procedure Act 51 of 1977, nor was it read into the record. It appeared, however, that at the pretrial hearing the appellant's legal representative had not objected to it, nor had he done so during the trial.

Held, that s 220 did not prescribe the stage at which admissions could be made, and equally did not prescribe that those admissions had to be in writing. In practice, admissions were made at any time, at the pretrial-conference stage or before the delivery of judgment. The ballistics report in question was admitted during the pretrial conferences which were held in terms of Practice Directive 3 of the Criminal Practice Directives for the Regional Courts in South Africa of 2017. While the trial court did not record the admission of the ballistics report in terms of s 220, if one considered Practice Directive 3.2.8, the admission of the ballistics report was clearly an admission in terms of s 220. The effect thereof was that the appellant was bound by those admissions unless he was able to prove that his legal representative was not properly instructed to make those admissions, or that the admissions were made as a result of a bona fide mistake. (See [27] – [29].)

Held, further, as to the question whether the report should have been read into the record in terms of s 150(2)*(b)*, in terms of the proviso to that section where discovery had been effected upon the appellant, it was unnecessary for the report to have been read out. (See [36].) The appeal was dismissed.

S v LENTING AND OTHERS 2024 (2) SACR 525 (WCC)

Bail — Record of application proceedings — Use of in subsequent trial — Where magistrate had neglected to warn accused against self-incrimination, although legally represented — Duty to warn accused resting with court and nobody else — However, not automatically necessitating rejection of bail proceedings as balance had to be struck between question of fairness and interest of administration of justice.

In a criminal trial in the High Court the state applied to introduce bail- proceeding records from the district court in respect of accused 3 and 14 in the matter, and sought to utilise the testimony of the two accused against them in the trial. Their legal representatives objected, contending that, when the bail proceedings were heard before the bail court, that court had failed to warn the accused before they testified that anything they said as evidence in the bail proceedings might be used against them at their trial. Accordingly, a trial-within-a-trial was held. The state contended for the admission of the evidence on grounds that the accused had received legal representation and that their legal-aid attorney must have thoroughly explained their rights in accordance with s 60(11B)*(c)* of the Criminal Procedure Act 51 of 1977.

Held, that that argument was mistaken and the duty to warn an accused person in terms of the section rested with the court and nobody else. It was a judicial function that could not be outsourced or delegated to the legal representative, the reason being that the warning was an important constitutional safeguard that struck at the heart of an accused person's right to a fair hearing. (See [20].)

Held, further, that it was important to note that the failure to inform an accused of his rights prior to testifying did not automatically necessitate the rejection of the bail proceedings. The enquiry on the admissibility of the proceedings did not end there and the trial court had to determine whether the admission of such evidence would render the trial unfair. In other words, the admissibility at trial of evidence given by an accused person in an earlier bail application involved the exercise of discretion by the trial court, with fairness being the guiding principle. (See [22].)

Held, further, that, bearing in mind the balance that had to be struck between the question of fairness and the interest of the administration of justice, the admission of the bail record would not affect the fairness of accused 3's trial, as his gang membership in that trial had already been confirmed or admitted. It would have been a different case if the accused had disputed that he was a member of the particular gang, and the admission or exclusion of the bail-application record would therefore not impact any finding that the accused was a member of the gang. (See [27].)

Held, however, that the situation of accused 14 had to be distinguished as he was a minor at the time the bail proceedings were conducted, being 16 years of age. His bail proceedings therefore had to be conducted in line with the provisions of the Child Justice Act 75 of 2008. Accused 14 was young and vulnerable and the bail court had

evidently not protected his rights as envisaged in s 28(2) of the Constitution read with the relevant provisions of Act 75 of 2008. The fact that the child offender was legally represented did not absolve the bail court of its judicial injunction to explain to the offender his right not to incriminate himself. (See [28] and [31].) The state's application for the admission of the record of accused 3's bail hearing was granted, but dismissed in respect of accused 14.

S v MKHONZA 2024 (2) SACR 535 (MM)

Review — Delay in submission of record of proceedings — Record submitted to judge more than four months after conviction and sentence, despite court directive that to be submitted within two weeks — Conviction for dealing in dagga based on presumption in s 21(1)*(a)*(i) of Drugs Act, since declared unconstitutional — Delay unjustified and inexcusable in circumstances — Conviction and sentence set aside — Judgment to be forwarded to relevant parties for investigation and compilation of report — Drugs and Drug Trafficking Act 140 of 1992, ss 5*(b)* and 21(1)*(a)*(i).

The accused was convicted in a magistrates' court of dealing in dagga in contravention of s 5*(b)* of the Drugs and Drug Trafficking Act 140 of 1992 (the Drugs Act) after a plea of guilty, and sentenced to a fine of R5000 or 24 months' imprisonment. A further three years' imprisonment was imposed, suspended for five years. The review judge returned the record with queries, including a request for an explanation for the conviction, in circumstances where the accused had denied dealing in drugs, and to clarify the section of the Drugs Act which he relied on to presume that the accused was dealing in drugs by virtue of the weight of dagga he carried with him; and whether the same was not declared unconstitutional. She also directed the magistrate to respond to the queries within a fortnight. In his response the magistrate conceded that the relevant provision (s 21(1)*(a)*(i)) was unconstitutional. His response, unfortunately, was provided more than four months after receipt of the query.

The court considering the review remarked that it was inconceivable that, 29 years after the section was declared unconstitutional, thit would still find application in a South African court, to the extent that an accused was convicted and given a sentence of imprisonment, without a fine, albeit, suspended. It therefore held that this had to be corrected through setting aside the conviction and the sentence; however, that this

might provide little comfort for the accused who might have suffered substantial injustice at that stage. In case he could not have afforded the fine, the accused might have served his sentence already. Presenting a case for review after the accused has served the sentence defeats the whole purpose of review. (See [13], [15] and [17].) The court noted further that the one week provided for in s 303 of the Criminal Procedure Act 51 of 1977, within which the record should have been dispatched to the High Court for review, was meant to prevent avoidable injustices that might occur, such as in this case. It was the duty of all the officers involved within the Department of Justice and Constitutional Development and office of the Chief Justice to give effect to the legislative provision and the court directives meant to protect the accused's rights in a review. The delay was unjustified and inexcusable in the circumstances. (See [16].)

The court accordingly ordered that the judgment be brought to the attention of the court managers of the relevant High Court and magistrates' court within 30 days for investigation and the compilation of a report identifying the source of delay after the record was dispatched by the review judge, and should also indicate the remedial steps taken to avoid similar delays in the future. The judgment was also to be brought to the attention of the chief magistrate to help identify areas in need of training and refresher courses for the benefit of the magistrates and to avoid a recurrence of such errors. (See [18].)

S v BUTHELEZI 2024 (2) SACR 542 (KZP)

Sentence — Previous convictions — Accused convicted of theft of items valued at R75 — Accused having three previous convictions for similar offences — Court failing to take into account that accused was primary carer of 11-year-old daughter — Sentence of three years' imprisonment inappropriate, despite previous convictions — Replaced with sentence of 30 days' imprisonment suspended for five years.

Sentence — Previous convictions — Generally — While it may be justifiable to impose escalating sentences on offenders who kept on repeating same offence, there were boundaries to which sentences for petty crimes could be increased — Sentence of three years' imprisonment inappropriate, despite previous convictions.

The accused was arrested on a charge of having stolen two roll-on deodorants worth R75. After spending 11 days in custody, she pleaded guilty to the charge. It appeared that she had three previous convictions for similar offences, that she was an unemployed 27-year-old mother of an 11-year-old daughter for whom she was the primary carer, and that she relied on certain grants for her necessities. She was not sure where her daughter was whilst she was incarcerated. The magistrate took into account the prevalence of the crime and the fact of her three previous convictions. The magistrate was of the opinion that the circumstances justified a sentence of three years' imprisonment. On review,

Held, that, while it may be justifiable up to a point to impose escalating sentences on offenders who kept on repeating the same offence, there were boundaries to which sentences for petty crimes could be increased. The magistrate had misdirected himself when he imposed the sentence of three years' direct imprisonment in a case such as the present, where society did not need to be protected from the accused by removing her altogether. The sentence imposed was unduly harsh and inappropriate in the circumstances. (See [21] – [23].)

Held, further, that the magistrate had not considered the child's best interest when he sentenced the accused, as the child's primary caregiver, to a term of direct imprisonment. There was nothing in the magistrate's reasons reflecting that he properly applied an informed mind to the duties flowing from s 28(2) read with s 28(1)*(b)* of the Constitution. In the circumstances, a term of 30 days' imprisonment suspended for a period of five years was substituted, which, by the time judgment was handed down, the accused would have completed serving that term of imprisonment. (See [25], [30] and [32].)

All South African Law Reports November 2024

Herold Gie and Broadhead Incorporated v Harris NO and others
[2024] 4 All SA 333 (SCA)

Property – Purchaser of housing interest in a retirement scheme – Purchase price entrusted to legal practitioner – Whether purchaser is entitled to refund of purchase price entrusted to legal practitioner who had already made disbursement of funds to

developer prior to developer's insolvency – Section 6(4) of Housing Development Schemes for Retired Persons Act 65 of 1988 providing no basis for claim for refund in such circumstances.

Each of six actions which had been consolidated in the High Court, related to cancellation of a life rights agreement concluded by each of the respondents as purchasers, with the developer (a trust). Each of the six purchasers had bought a "life right" or "housing interest" in respect of a specific suite in a retirement hotel, which had been established by developer as a "development scheme" as envisaged in section 1 of the Housing Development Schemes for Retired Persons Act 65 of 1988 (the "HDSA"). In 2009, the purchasers authorised the appellant ("HGB"), in writing, to pay to the developer all the moneys that had been entrusted to it as the purchase price in respect of the life rights. HGB released the funds to the developer accordingly. In October 2014, the purchasers cancelled their life rights agreements and each demanded a refund of their purchase price. They alleged that they had not been furnished with the certificates of compliance contemplated under section 6(1)(a) of the HDSA and section 14(1)(a) of the National Building Regulations Standards Act 103 of 1977 (the "NRBA"). They alleged that the developer had failed to inform them, prior to the conclusion of the agreement, that use and occupation of the retirement hotel, as contemplated in the agreement, would not be legally possible, despite being aware that the required certificates could not be issued. In March 2016, the developer was placed under final sequestration. The purchasers lodged claims for refund of the purchase price with the trustees of the insolvent estate, and received concurrent dividends. In October 2017, they instituted action proceedings against HGB, claiming a refund of the purchase prices which had been paid into HGB's trust account. The claims for reimbursement of the purchase prices was founded on the provisions of section 6(4) of the HDSA, which entitled a purchaser in a scheme developed in terms of the Act, to a refund of the purchase price held in a legal practitioner's trust account, where the developer of the scheme had become insolvent. Of relevance in the present appeal was HGB's plea that section 6(4) found no application in this case because by the time the trust became insolvent they had paid to the developer all the moneys that had been entrusted to them by the purchasers. There were therefore no moneys "kept in trust" as specified in section 6(4). The High Court held that section 6(4) conferred a right of action on a purchaser who had entrusted purchase price funds

to a practitioner, where such funds were released to the developer prior to compliance with section 6(1). That led to the present appeal.

The issue was whether on insolvency of the developer, the purchasers had a claim in terms of section 6(4) of the HDSA, for repayment of the purchase price by HGB.

Held – The HDSA regulated sales of life rights in housing development schemes built for retired persons. Section 6(4) of the HDSA, on which the purchasers' claims were founded, had to be interpreted within the context of the other provisions of section 6. Section 6(1) restricted the developer's entitlement to receipt of the purchase price until an architect or estate agent furnished a certificate that guaranteed that the housing development scheme had been built substantially in accordance with applicable, approved building plans, the town planning scheme, and the applicable local authority by-laws, and a copy of the certificate was furnished to the purchaser. Under sections 6(3) and (4), it was the developer rather than the purchaser, that was the practitioners' trust creditor. Ordinarily, on sequestration of the developer, the purchase price would become part of the developer's insolvent estate. On a proper interpretation, section 6(4) was limited to instances where a developer became insolvent while the purchase price was still being kept in the practitioner's trust account.

The appeal was upheld.

MEC for Economic Development and another v Vilakazi and others
[2024] 4 All SA 344 (SCA)

Civil Procedure – Appeals – Appealability of order – Traditional requirements for appealability of an order are that the decision should be final in effect and not open to alteration; should be definitive of rights of parties; and should have effect of disposing of at least a substantial portion of relief claimed in main proceedings – Even if an order does not meet traditional test, a matter may be appealable if it is in the interests of justice that it should be regarded as such.

Civil Procedure – Interim interdict – Legal requirements for interim relief – Applicant for an interim interdict must establish a prima facie right, even if open to some doubt;

injury actually committed or reasonably apprehended; balance of convenience; and absence of similar protection by any other remedy.

The respondents were members of the board of directors of the second appellant (the "Gauteng Growth and Development Agency") until 24 March 2023, when the first appellant (the "MEC") terminated their directorships and dissolved the board. The MEC had formed the view that the relationship between her and the board members had irretrievably broken down. The respondents sought review of the MEC's decision in the High Court. The present appeal was against the High Court's finding for the respondents. The appellants contended that the High Court had failed to properly consider whether the respondents had established the legal requirements for interim relief and that it had impermissibly purported to pronounce finally on issues which fell for decision in the review application.

The respondents had been appointed as members of the Agency's board of directors for a period of three years by the MEC's predecessor, who also appointed the first respondent as the Chairperson of the board. In the exercise of his powers, the previous MEC had begun the process for appointment of the Agency's Group Chief Executive Officer. When the current MEC took office, she expressed a preference for a candidate who was not amongst those who had already been interviewed and shortlisted by the board. The respondents' attempts to keep to the candidate selected in terms of the process already embarked upon was seen by the MEC as signifying a breakdown of trust in the relationship between her and the board, and led to her terminating their directorships.

Held – The first issue to be addressed related to the respondents' challenge to the appealability of the High Court's order. Traditionally, the requirements for appealability of an order were that the decision should be final in effect and not open to alteration by the court of first instance; should be definitive of the rights of the parties; and it should have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings. It is, however, now established law that even if an order does not meet that test, a matter may be appealable if it is in the interests of justice that it should be regarded as such. The High Court's order met all the traditional requisites for appealability and it was also in the interest of justice that the appeal be heard.

It then had to be decided whether the appeal had been rendered moot as the respondents' terms of office as board members would expire soon. Mootness is when a matter no longer presents an existing or live controversy. In this case, the judgment of the present court would have a practical effect and the matter was consequently not moot.

Finally, as there was no indication in the judgment that the High Court had given any consideration to whether the respondents had established the legal requirements for interim relief, it fell to the present court to decide whether, on the facts put up by the respondents, they were entitled to the interim interdict. The requirements for an interim interdict were a *prima facie* right, even if open to some doubt; injury actually committed or reasonably apprehended; the balance of convenience; and the absence of similar protection by any other remedy. The respondents were unable to establish those requirements and the High Court should have refused the interim relief.

The appeal was accordingly upheld.

Sand Hawks (Pty) Ltd and another v Labonte 5 (Pty) Ltd and others
[2024] 4 All SA 359 (SCA)

Mining, Minerals and Energy – Mining rights – Review of upholding of internal appeal against revisiting of decision to grant rights – Appeal against granting of review application – Functus officio principle not applicable to initial partial acceptance of application for mining rights as such decision was preliminary and not final – Section 96(1) of Mineral and Petroleum Resources Development Act 28 of 2002 prescribing that lodging of internal appeal had to be done 30 days from becoming aware of relevant administrative decision – Allowing of late internal appeal without proper consideration of circumstances surrounding late appeal and issues relating to condonation rendering decision unlawful and liable to be set aside on basis that it was materially influenced by error of law.

The first and second appellants (jointly referred to as "Sand Hawks") engaged in the exploration for, and the exploitation of, mineral resources in South Africa. The first respondent ("Labonte") operated in the same industry. In July 2010, Labonte lodged an application (the "Labonte application") in terms of section 22 of the Mineral and Petroleum Resources Development Act 28 of 2002 (the "MPRDA") for mining rights in respect of sand over various portions of a number of farms in the Limpopo region. The

Regional Manager ("RM") of the Limpopo, Department of Mineral Resources and Energy accepted the application in part (the "partial acceptance"), but not in respect of certain portions of two farms (the "property") as he wrongly believed that a third party held rights over the property in respect of the same mineral.

In August 2011, Sand Hawks lodged numerous mining permit applications in respect of sand on various properties, including the property in question. On being notified that Sand Hawks' applications had been accepted, Labonte lodged a second application for mining rights in respect of the property. The Deputy Director-General ("DDG") granted Labonte mining rights over the property, leading to Sand Hawks lodging an internal appeal on the ground that the RM was *functus officio* after his initial partial acceptance of Labonte's application. The appeal was upheld and the decision made in Labonte's second application was reversed with the partial acceptance being reinstated. Labonte brought an application in the High Court for review of the DG's decision in terms of the Promotion of Access to Justice Act 3 of 2000. Its ground for review included the lateness of Sand Hawks' internal appeal, and the DG's failure to apply his mind to the issue of condonation. The Court held that the RM's decision was a preliminary one rather than final, with the result that the *functus officio* principle did not apply. It also agreed that the DG had not properly considered the circumstances surrounding the late appeal, and remitted the issue to the RM. Sand Hawks appealed against the order.

Held – Section 96(1) of the MPRDA prescribes that the lodging of an internal appeal had to be done 30 days from becoming aware of the relevant administrative decision. The DG's response to Labonte's query on the issue of Sand Hawks' late appeal merely stated that to grant condonation would be a matter of fairness to both sides. That did not show that the DG had considered all relevant factors. The DG had failed to consider an application for condonation on its own facts, taking into account factors such as the extent and cause of the delay, its effect, the reasonableness of the explanation, the importance of the issues raised, and the prospects of success. He also failed to apply the concepts of unfairness and the issue of travesty of justice which the Department's functionaries had suggested should be the basis for the consideration of Sand Hawks's late appeal. The decision in relation to the internal appeal was therefore declared unlawful and was and set aside on the basis that it was materially influenced by an error of law.

Although that was dispositive of the appeal, the court went on to consider the merits which involved the questions of whether the RM was *functus officio* when he revisited his decision in Labonte's application, and whether the decision of the RM was an administrative decision. The findings on those issues confirmed the High Court's conclusions, and the appeal was dismissed.

Bojosinyane v Maroga and others [2024] 4 All SA 378 (NWM)

Civil Procedure – Appeals – Mootness – Matter is moot when it no longer presents a live dispute between the parties, often due to changes in circumstances that render the issue irrelevant or the relief sought redundant.

Civil Procedure – Appeals – Requirements for prosecution of appeals – Non-compliance with requirements resulting in appeal being deemed to have lapsed in terms of rule 49(6) of Uniform Rules of Court – Appellant whose appeal has lapsed cannot simply proceed with appeal but must approach court of appeal with an application to have appeal reinstated or resurrected.

The appellant appealed against the dismissal of an application in which he had sought to challenge the first respondent's termination of his fixed-term contract of employment.

Held – The case raised the issue of the formal requirements in prosecuting an appeal and the non-compliance therewith in the present appeal. The peremptory procedural steps for prosecuting an appeal were summarised as follows. In terms of rule 49(2) of the Uniform Rules of Court, if leave to appeal to the full court is granted, the notice of appeal shall be delivered to all the parties within twenty days after the date upon which leave was granted, or if good cause is shown within such longer period as might be permitted. In order to prosecute the appeal, the appellant must, within 60 days of delivery of the notice of appeal, make written application to the registrar of the division where the appeal is to be heard for a date for the hearing of the appeal and furnish addresses of all parties to the appeal. Also to be filed with the registrar are a power of attorney complying with rule 7(4), three copies of the record on appeal (plus two copies to the respondents), and a complete index and copies of all papers, material documents and exhibits. Further, good and sufficient security must be provided for the respondents' costs of appeal. If no application comprising the steps as stated above

is made in terms of rule 49(6)(a), the appeal shall be deemed to have lapsed. Rule 49(6)(b) states that the court to which the appeal is made may, on application of the appellant and upon good cause shown reinstate an appeal which has lapsed as contemplated in terms of rule 49(6)(a). An appellant whose appeal has lapsed (or deemed to have lapsed) cannot simply proceed with such an appeal but must approach the court of appeal with an application to have the appeal reinstated or resurrected.

The appellant's non-compliance in this case involved failure to file a power of attorney and to provide and enter security. He had also failed to timeously deliver the appeal record. Accordingly, there was no compliance with rule 49(6)(a) and, as such, the appeal was deemed to have lapsed. The appellant did not proceed to launch an application to reinstate the appeal as contemplated in rule 49(6)(b). There was thus no appeal for the court to adjudicate.

Even if the appeal was capable of being adjudicated, the relief requested by the appellant in the notice of appeal was moot in that the applicant's fixed-term contract of employment had expired. A matter is moot when it no longer presents a live dispute between the parties, often due to changes in circumstances that render the issue irrelevant or the relief sought redundant. There were no interests of justice considerations that warranted overlooking of the mootness.

The appeal was consequently struck from the roll with costs.

Cloete v Passenger Rail Agency of South Africa ("PRASA")
[2024] 4 All SA 391 (WCC)

Personal Injury/Delict – Claim for damages arising from injury from being pushed from moving train – Breach of legal duty by train operator – Train leaving station with open doors constituting negligence in breach of legal duty – Negligent omission by train operator closely connected to harm suffered by passenger as a result of the incident.

Personal Injury/Delict – Claim for damages arising from injury from being pushed from moving train – Defence of contributory negligence – For defence of contributory negligence to succeed, evidence on a balance of probabilities had to be adduced to

establish negligence on the part of the plaintiff, and that such negligence, on a balance of probabilities, was causally connected to the damage suffered.

Evidence – Evaluation of – Diametrically opposing versions – Court's approach – Court must be satisfied upon adequate grounds that the version of the litigant upon whom the onus rested was true and the other false or mistaken.

Evidence – Evaluation of – In determining whether evidence is true or not, court weighs up and tests plaintiff's allegations against general probabilities.

In an action against the defendant, the plaintiff claimed damages arising from injuries he had sustained when he was allegedly pushed from a moving train carriage. The claim was predicated on the assertion that the defendant was under a legal duty to take such steps as were reasonably necessary to ensure the plaintiff's safety. The plaintiff contended that the defendant had wrongfully and negligently caused the plaintiff's injuries and damages by omitting to take preventative steps which it reasonably should have taken. The defendant denied that an accident occurred involving the plaintiff as alleged, or at all.

Held – The onus rested on the plaintiff to establish his case on a balance of probabilities. He had to adduce sufficient evidence to establish a *prima facie* case. In instances where there are two diametrically opposing versions, the court must be satisfied upon adequate grounds that the version of the litigant upon whom the onus rested was true and the other false or mistaken.

The defendant's contention that there were numerous improbabilities and inconsistencies in the plaintiff's evidence was not given much weight as those incongruities which might exist were not material if regard was had to the factual matrix and the issues for determination. In determining whether evidence is true or not, the court weighs up and tests the plaintiff's allegations against the general probabilities. The credibility and reliability of the plaintiff's evidence became a crucial consideration in determining whether the plaintiff had jumped from the train as alleged by the defendant, or whether he had been pushed from the moving train as he alleged. The location at which the plaintiff was found by the paramedic who responded to the incident and the plaintiff's own description favoured the conclusion that the train doors had not closed completely prior to the train departing. The likelihood that the doors had malfunctioned could not be completely ruled out. On a conspectus of the

evidence, the court was satisfied on a balance of probabilities, that the plaintiff was ejected from the train. The plaintiff was a good witness, who gave a clear, logical and chronological account of the incident. The highlighted discrepancies as pleaded by the defendant were not material. The plaintiff's version of what had happened was substantially corroborated by independent sources and witnesses. The issues on which the plaintiff was challenged, did not in any way injure his credibility or reliability, if regard was to be had to the evidence in its entirety. There were sufficient safeguards by way of collateral independent evidence to corroborate his single witness evidence.

In so far as the defendant relied on its reporting system to counter the plaintiff's allegations, that was insufficient due to fallibilities in such system.

The plaintiff argued that had the defendant discharged its legal duty, by taking the necessary steps to ensure passenger safety, the incident would not have occurred and the plaintiff would not have sustained his serious injuries. Although the defendant denied the existence of such duty, the legal duty arose from the existence of the relationship between carrier and passenger, and was also predicated on the defendant's public law obligations. A large body of case law established that a train leaving with open doors constituted negligence in breach of the legal duty, and that it remained the duty of the defendant to ensure that the train did not depart from the station with open doors. The plaintiff succeeded in establishing that the negligent omission by the defendant was closely connected to the harm suffered by the plaintiff as a result of the incident.

For the defendant's defence of contributory negligence to succeed, it had to adduce evidence on a balance of probabilities to establish negligence on the part of the plaintiff, and that such negligence, on a balance of probabilities, was causally connected to the damage suffered. No negligence could be attributed to the plaintiff in this case.

The plaintiff's claim was upheld on the merits.

Cobra Towing CC v Mangaung Metropolitan Municipality and others
[2024] 4 All SA 423 (FB)

Personal Injury/Delict – Fire damage caused to property – Spread of fire due to fire-fighting efforts being thwarted by area-wide water supply interruption – Liability of local

authority for damages – For purposes of law of delict, liability only follows if omission was in fact wrongful – Wrongfulness existing if legal duty rested upon defendant to act positively to prevent harm from occurring, and it failed to comply with that duty – Grounds of justification rendering wrongful action lawful must be pleaded – Proof of wrongfulness, negligence and causation rendering local authority liable for payment of damages.

In November 2018, a fire ignited at the plaintiff's business premises when an employee of the plaintiff was using a grinder. Attempts were made by the plaintiff's employees to extinguish the fire with the plaintiff's fire extinguishers while the fire department was summoned. The fire occurred during an interruption in the water supply in the area. Consequently, when the fire brigade arrived, there was no water supply to which to connect in the fire hydrants. A water tanker had to be called but the water was quickly depleted without the fire being totally extinguished. While the truck left to refill water, the fire re-ignited and spread, causing extensive damage to the plaintiff's premises and the property thereon. The plaintiff sued the municipality and related parties (the defendants) for damages, alleging that the sole cause of the spread and continuation of the fire was the failure by the municipality to supply water to the area. It was alleged that when connected to sufficient water supply and being fully operational, the system designed and installed by the municipality at the premises would have suppressed and extinguished the fire with limited damage. The plaintiff's damages were said to have been suffered as a result of the municipality's negligent and wrongful failure to supply water to the premises.

The defendants disputed the allegations of negligent and wrongful conduct, and appeared to raise the issue of contributory negligence.

Held – Having regard to the evidence adduced by the plaintiff regarding its fire-fighting equipment and the actions of its employees, it could not be found that the plaintiff had been contributorily negligent in any degree.

The Court then turned to the issue of wrongfulness of the defendants' conduct. For purposes of the law of delict, liability only follows if an omission was in fact wrongful. That would be the case only if, in the particular circumstances, a legal duty rested upon a defendant to act positively to prevent harm from occurring, and the defendant failed to comply with that duty. It was not in dispute that there was a water interruption

to the area on the day in question; that the municipality had a duty to ensure, within its means and available resources, a water supply to residents and businesses in the area; and that the municipality had a duty to provide water in terms of the Constitution and section 73 of the Municipal Systems Act. Grounds of justification are special circumstances in which conduct that appears to be wrongful is rendered lawful. If the defendants wished to rely on a ground of justification, such as that it was not within the municipality's means and available resources and that it therefore had the statutory authority not to supply water at the relevant time, they should have pleaded same, in which instance they would have had the onus to prove the pleaded justification. In so far as they attempted to rely on the by-laws as justification, that should also have been pleaded. That was not done, and wrongfulness was therefore established. The plaintiff also discharged its onus in respect of the element of negligence as the municipality should have foreseen the reasonable possibility that the extended interruption of the water could cause damage to property and should have taken reasonable steps to guard against such occurrence.

On a balance of probabilities, it was evident that the wrongful and negligent omission of the municipality was the cause of the plaintiff`s general damages and it was liable for payment to the plaintiff in that regard.

Development Bank of Southern Africa Ltd v Prinsloo and others
[2024] 4 All SA 440 (GP)

Arbitration – Arbitration award – Application to make award an order of court – Counter-application for dismissal of application, alternatively for stay of proceedings until a further claim respondents had instituted in High Court was decided – Res judicata posing obstacle to counter-application as parties to dispute, facts, and cause of action were the same in proceedings before arbitrator and the proceedings before court – Once and for all rule and doctrine of election also posing bar to seeking same relief again.

The applicant sought to have an arbitration award made an order of court. In a counter-application, the respondents sought either the dismissal of the application, alternatively the stay of the proceedings until a further claim the respondents had instituted in the High Court against the applicant had been decided.

In 2009, the applicant agreed to advance funds to a company ("Proline") in terms of a Loan Facility Agreement ("LFA"). All five respondents concluded individual suretyship agreements in favour of the applicant, for a collective total amount of R12,5 million. The LFA provided for private arbitration to resolve any disputes arising out of the agreement. The suretyships did not provide for dispute resolution through private arbitration. Proline defaulted on its payment obligations under the LFA and the applicant issued summons in the High Court. Summons was then also issued against the respondents, as personal sureties for the debt owing by Proline. Proline and the respondents contested the claims brought by the applicant against them. As the defences raised by Proline in its plea would be susceptible to private arbitration under the LFA, the applicant brought an application in the High Court to stay the High Court litigation and to have those disputes decided by a private arbitrator under the LFA. The stay was granted and a formal arbitration agreement was concluded between the applicant, Proline, and the respondents. The respondents' defences to the applicant's claim included a claim for rectification. It was submitted that when the LFA and the suretyships were concluded, certain *bona fide* mistakes were made, resulting in the agreements not reflecting the true intention of the parties. If rectification was granted, as prayed by the respondents, they would be released from their suretyships by virtue of a payment which had been made to the applicant. However, the arbitrator rejected the rectification claim. The respondents refused to pay the sum due to the applicant, leading to the application to make the award an order of court. The respondents now claimed that rectification was not necessary, and that when applying the existing clauses in the LFA and suretyships, the respondents would be released from their suretyships by the payment to the applicant. That was described as a new defence that was not before the arbitrator.

Held – The arbitration award had not been challenged by the respondents on review, and therefore remained valid. The only issue that could possibly stand in the way of the award being made an order of court was the counter-application brought by the respondents against the applicant as referred to above.

The first problem facing the respondents was that they were returning to court to litigate an issue that they had agreed would be submitted to private arbitration for final resolution. The second obstacle was the application of the principle of *res judicata*. A comparison between the proceedings before the arbitrator and the proceedings before

the court, established that the parties to the dispute, the facts, and the cause of action were the same. Further, the application of the "once and for all" rule rendered the respondents' new defence and the claim they sought to raise incompetent. The respondents were instituting further proceedings between the same parties relating to the same cause of action and seeking the same outcome. They could not keep litigating by just changing the grounds of their claim (or defence). In addition, the doctrine of election posed a bar to the respondents' case where they had elected to pursue rectification as a remedy. They could not subsequently pursue a contradictory remedy.

The arbitration award was made an order of court.

Dichabe v Free State Gambling, Liquor and Tourism Authority and others [2024] 4 All SA 466 (FB)

Constitutional and Administrative Law – Public entity – Provincial Gambling, Liquor and Tourism Authority – Authority to discipline Chief Executive Officer – Relevant executive authority responsible for initiating and investigating disciplinary proceedings against board or its members was the Member of the Executive Committee.

The applicant, as the CEO of the Free State Gambling, Liquor and Tourism Authority, was summoned by the respondents to attend a disciplinary enquiry in respect of allegations of misconduct against him. In an urgent application, he obtained an interdict in Part A of the present application, preventing the respondents from proceeding with the disciplinary enquiry against him pending the relief sought in Part B of the notice of motion. In Part B, he sought a declaration that the second respondent (the "Free State Gambling and Liquor Board") did not have the necessary authority to suspend and discipline him; an order that the disciplinary proceedings instituted be declared unlawful and set aside; that his precautionary suspension be declared unlawful and set aside; and that the first respondent (the "Free State Gambling, Liquor and Tourism Authority") should pay the costs of the application on an attorney and client scale.

According to the applicant, the Board did not have the authority to discipline him as he was the Chief Executive Officer ("CEO") of the first respondent and a member of the Board. He contended that he was appointed as CEO of the Board by the fourth respondent (the "MEC") in terms of section 12(1) of the Free State Gambling and

Liquor Act 6 of 2010 (the “Act”), and that only the MEC had the power to suspend, discipline and dismiss him or any of the board members as the MEC was the appointing authority. The Board was said to have unlawfully usurped the power and function of the MEC.

Held – As accountability is a cornerstone that upholds the integrity and effectiveness of an organisation, the question which arose concerned who could hold the CEO accountable. The nature of the functions of the CEO seemed to require a superior person to him to suspend and discipline him.

An interpretation of the relevant sections of the Act showed that the responsible member, namely the MEC, had the power to appoint the CEO. The CEO was a member of the Board and section 10(1) made it clear that the MEC could terminate the term of office of a member. The Court referred to section 141 of the Act which dealt with delegation of power, and noted that there was no delegation of power by the responsible Member, namely the MEC, to suspend the applicant or to charge him with misconduct or call him to appear before the Board to answer any allegations against him.

Every public entity must have a board or controlling body. In this case, the Board was the accounting authority for the Free State Gambling and Liquor Authority. The relevant executive authority was responsible for initiating and investigating disciplinary proceedings against the board or its members. The relevant executive authority could only be the MEC, who was therefore solely responsible for suspending and disciplining the applicant. The MEC was required to initiate an investigation and if the allegations against the applicant were confirmed, to ensure that appropriate disciplinary proceedings were initiated immediately.

Du Toit NO obo Nkuna v Road Accident Fund
[2024] 4 All SA 476 (NCK)

Civil Procedure – Costs – Reconsideration of costs post-judgment on basis of without prejudice settlement offer and Calderbank offer – Refusal to accept offer – Calderbank principle allows party to reserve right to use without prejudice settlement offer to seek indemnity costs – Rule 34(12) providing that if court has given judgment on costs in ignorance of the settlement offer and it is brought to the notice of the registrar, in

writing, within five days after date of judgment, the question of costs shall be considered afresh in light of offer.

In his capacity as *curator ad litem* appointed for a person who had suffered a severe head injury in a motor vehicle accident, the appellant launched an application in the court *a quo* for the reconsideration of costs essentially seeking to recoup his irrecoverable costs (attorney and client costs) with effect from the date on which he had made a "Calderbank offer" to the respondent (the "Fund"). The court's refusal to grant the appellant a special costs order led to the present appeal. The appellant's stance was that the Fund's failure to engage meaningfully in settlement discussions warranted a punitive costs order.

The appellant had issued summons for damages on 30 March 2010, with the Fund conceding liability in 2017. A without prejudice settlement proposal was made in September 2020, followed by a Calderbank offer in October 2020. The trial proceeded in November 2020, resulting in an award slightly exceeding the Calderbank offer, with party and party costs granted.

Held – Reconsideration of costs after judgment on the basis of a secret offer to settle or a Calderbank offer, which the plaintiff would have made to a defendant prior to the judgment being delivered, is a relief fairly new in South African jurisprudence but one akin to that available to a defendant who has made an offer to settle as provided for in rule 34 of the Uniform Rules of Court. Rule 34 is designed to enable a defendant to avoid further litigation or liability for the costs of such litigation. The Rule is there not only to benefit a particular defendant but for the public good generally. The Calderbank principle allows a party to reserve the right to use a without prejudice settlement offer to seek indemnity costs. The use of Calderbank offers by plaintiffs is important in the context of the wider public interest to conserve and not waste public resources on unnecessary litigation. There is no rational basis upon which a plaintiff ought to be denied access to the benefits of a secret tender in a protracted trial. The procedure for the court's reconsideration of costs pursuant to a Calderbank offer at the behest of a plaintiff is not provided for in the rules. However, rule 34(12) provided that if the court has given judgment on the question of costs in ignorance of the offer or tender (by a defendant) and it is brought to the notice of the registrar, in writing, within five days after the date of judgment, the question of costs shall be considered afresh in light of the offer or tender.

The Fund's conduct demonstrated an imprudent refusal to respond to the appellant's reasonable Calderbank offer which had been made at least some six weeks prior to the trial. The unreasonable refusal to accede to a secret offer to settle is, by itself, a proper ground for the award of a special costs on attorney and client scale. The finding of the court below to the contrary was wrong and the appeal was upheld.

Executive Mayor of the City of Cape Town v Director of Public Prosecutions and others [2024] 4 All SA 491 (WCC)

Civil Procedure – Courts – Powers and jurisdiction – Whether court empowered to make order in criminal trial directing mayor to ensure establishment of trust for benefit of minor child of murdered mother – Order for accused's forfeiture of benefit of ownership of matrimonial property not based on principle of legality, and therefore ultra vires – Order affecting mayor incompetent as mayor could only act within confines of powers bestowed on him in terms of national legislation and there was no provision in municipal budget for establishment of trusts for minor children.

The second respondent was convicted of having murdered his wife (the "deceased"). At the end of the sentencing proceedings in the criminal trial, the court made an order regarding the matrimonial property owned by the deceased and second respondent. Part of the order directed the appellant (the "Mayor of the City of Cape Town") to ensure the establishment of a trust for the benefit of the minor child of the deceased and second respondent, and to assist in upholding the rights of the child to freehold ownership of the property. The mayor appealed, contending that the court *a quo*, as a criminal trial court, lacked jurisdiction to grant the order in question. Further grounds of appeal were that the court *a quo* made the orders being appealed against in circumstances where the appellant was not a party to the proceedings before that court; that the court exceeded the powers conferred upon it by the Criminal Procedures Act 51 of 1977, section 28(2) of the Constitution of the Republic of South Africa, the Correctional Services Act and the Prevention and Combatting of Trafficking in Persons Act by ordering that the second respondent forfeit his share of the immovable property and that such share be held in trust for the benefit of the minor child and by making related orders to give effect to those orders; and that the criminal

trial was not “a matter concerning the child” which was a jurisdictional fact for section 28(2) of the Constitution to apply.

Held – Section 171 of the Constitution establishes that all courts operate in terms of national legislation. The court explained the limits on the exercise of judicial powers. The judiciary relies on its legitimacy and society’s respect for the principle of legality and the rule of law for enforcement of its orders. It must therefore itself adhere to those prescripts. Section 165(2) of the Constitution makes the judiciary’s exercise of power subject only to the Constitution and the law.

Section 300 of the Criminal Procedure Act provides for a limited form of compensation to persons who have suffered financial loss. In this case, there was no application brought in the court *a quo* by the prosecution nor anyone on behalf of any injured person for an order of the kind contemplated in section 300. The offences for which the accused was charged in the court *a quo* did not include damage to or loss of, property to some other person. It is a recognised common law principle that someone who intentionally and unlawfully murders another, can’t benefit under the will of the deceased nor in terms of the laws of intestacy. There was accordingly no need to develop the common law to specifically prohibit a person in the position of the accused from inheriting. The order for the accused’s forfeiture of the benefit of ownership of the property was not based on the principle of legality, was *ultra vires* and was declared null and void.

The mayor could only act within the confines of the powers bestowed on him in terms of national legislation. There was no provision in the municipal budget for the establishment of trusts for minor children and if the mayor were to comply with the order, he would have to utilise municipal funds in contravention of the Municipal Finance Management Act 56 of 2003. The court *a quo* therefore had no jurisdiction to make the relevant orders, which were set aside.

Gore v Rand Mutual Assurance Company Ltd [2024] 4 All SA 510 (GJ)

Interpretation – Court’s approach to statutory interpretation – Statutory provisions must be interpreted in a manner that gives effect to the spirit, purport and object of the Bill of Rights – When faced with two interpretations of a provision, both of which are

consistent with the Constitution, the court must prefer the interpretation that best promotes the rights in the Bill of Rights.

Labour and Employment – Occupational injury – Assessment of compensation – Section 51 of Compensation for Occupational Injuries and Diseases Act 130 of 1993 establishing a more favourable basis for compensation for employees under the age of 26 or still undergoing training – Legal fiction is created in that use of a proxy is contemplated to determine the permanently disabled employee's deemed earnings.

Upon sustaining a spinal injury in a motor vehicle collision, the appellant was rendered a quadriplegic who would be wheelchair-bound for the remainder of his life. He was consequently declared totally and permanently disabled.

The respondent was the entity licensed in terms of section 30 of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 ("COIDA"), for purposes of assessing and making payment of claims for compensation in relation to occupational injuries or diseases arising out of employment, *inter alia*, in the mining sector. In 1996, a claim was lodged on behalf of the appellant for compensation in terms of COIDA, pursuant to which an award of compensation was made. In April 2012, the original award was reviewed by the respondent at the instance of the appellant, which led to increased compensation being paid in respect of the appellant's monthly pension (the "revised award"). The appellant queried the computation of the revised award, and was informed in 2014 that the review of the revised award had resulted in a reduced award being made. An objection lodged by the appellant was heard by a tribunal appointed in terms of section 91(2) of COIDA. The central issue for determination at the hearing was whether the respondent had correctly applied section 51 of COIDA to determine the appellant's earnings when it made the reduced award. That in turn implicated the proper interpretation of section 51 of COIDA which dealt with compensation for permanent disablement of employees in training or under 26 years old. Such person's "earnings shall be calculated on the basis of the earnings to which a recently qualified person or a person in the same occupation, trade or profession with five years more experience than the employee would have been entitled at the time of the accident, whichever calculation is more favourable to the employee." The tribunal's dismissal of the appellant's objection led to the present

appeal. Whether or not the tribunal correctly interpreted section, and whether it misinterpreted the law by attributing an onus to the appellant informed the appeal.

Held – Statutory provisions must be interpreted in a manner that gives effect to the spirit, purport and object of the Bill of Rights. Courts must prefer an interpretation that is consistent with the rights in the Bill of Rights over one that is not, provided that such an interpretation can be reasonably ascribed to the section. When faced with two interpretations of a provision, both of which are consistent with the Constitution, the court must prefer the interpretation that best promotes the rights in the Bill of Rights.

Section 51 was ostensibly enacted to obviate a situation where young vulnerable employees (under the age of 26 or still undergoing training at the inception of their careers), who become permanently disabled as a result of work-related accidents at a time when they have not yet had the time to reap the benefits of established careers, are left without adequate social insurance over their lifetime. The section establishes a more favourable basis for compensation which is more beneficial to the relevant categories of employees. The appellant was both under the age of 26 and in training to become a qualified engineer. Section 51 contemplates the use of a proxy to determine the permanently disabled employee's deemed earnings, and in that regard creates a legal fiction. For purposes of determining the appellant's compensation within the context of the mining engineering profession, the earnings of four different proxies, as set out in the judgment, ought to have been considered by the respondent when reviewing the revised award, for purposes of arriving at the reduced award, and the most favourable outcome applied. The tribunal was found to have misinterpreted section 51. The appeal was accordingly upheld and the respondent's revised award was reinstated with retrospective effect.

Kgatlhane v S [2024] 4 All SA 542 (NWM)

Criminal Law and Procedure – Evidence – Convictions based on DNA evidence – Whether DNA evidence as tested and accepted by trial court proved beyond reasonable doubt that appellant was perpetrator of rape offences – Where record showed that DNA evidence taken from appellant was not compared to DNA samples taken from complainants, trial court misdirected itself in accepting that there was DNA evidence which linked appellant to charges in question .

Criminal Law and Procedure – Rape convictions – Appeal against conviction – A court of appeal will not overturn a trial court's findings of fact unless they are shown to be vitiated by material misdirection or are shown by the record to be wrong.

Criminal Law and Procedure – Rape convictions – Appeal against sentence – General sentencing discretion lies with trial court, and court of appeal has limited power to interfere – Whether substantial and compelling circumstances existed to justify departure from prescribed minimum sentence – Personal circumstances of appellant established to be insufficient.

The appellant was convicted on four counts of rape and two counts of robbery with aggravating circumstances, and was sentenced to an effective term of life imprisonment. He appealed against his convictions and sentences.

On five of the counts, the complainants could not identify their attacker and the appellant's conviction was procured based on DNA evidence. The appellant appealed his conviction and sentence *inter alia* on grounds that the DNA sample used to identify him on those charges was not proven to be his DNA.

Held – The court had to consider the evidence presented before the trial court and to consider whether the DNA evidence as tested and accepted by that court did prove, beyond reasonable doubt, that the appellant was the perpetrator in the five counts referred to. If the DNA as tested did not match that taken from the appellant, then there was no other evidence that linked him to those charges and the appeal against the conviction and sentencing on the charges had to succeed. The record showed that the DNA evidence that was taken from the appellant was not compared to the DNA samples taken from the complainants. The trial court accordingly misdirected itself and was wrong when it accepted that there was DNA evidence which linked the appellant to any of the five charges in question. The appeal against conviction and sentence on those counts was upheld.

The remaining count related to a charge of rape. Appealing against the conviction, the appellant contended that the trial court had misdirected itself by finding that the complainant ("EM") was honest, credible and reliable; that the trial court had misdirected itself by failing to apply the cautionary rule when evaluating the evidence of EM as a single witness; and that the sexual intercourse underlying the charge was consensual. In the appeal against sentence, the appellant contended that his personal

circumstances constituted substantial and compelling circumstances justifying departing from the prescribed minimum sentence; he had spent six years in custody awaiting finalisation of the trial; and the complainants' rape did not involve grievous bodily injuries.

A court of appeal will not overturn a trial court's findings of fact unless they are shown to be vitiated by material misdirection or are shown by the record to be wrong. Regarding sentencing, the general discretion lies with the trial court, and the court of appeal has limited power to interfere. Noting the requirements for evidence given by a single witness such as EM, the court was satisfied that her evidence was truthful, clear and satisfactory in every respect.

On the question of the sentence imposed, the grounds given by the appellant in mitigation, which he contended were substantial and compelling, were largely personal circumstances which has been established in case law to be insufficient. The trial court imposed the minimum sentence aware of and notwithstanding the period of incarceration during the trial. There was no striking disparity between the trial court's sentence and that which the present court would have imposed.

The appeal against conviction and sentence was accordingly dismissed

Limbouris and others v Du Toit NO and others [2024] 4 All SA 562 (WCC)

Corporate and Commercial – Company law – Business rescue – Application to commence action for setting aside of business rescue plan – Whether business rescue practitioner should be interdicted from filing a notice of substantial implementation of business rescue plan in terms of section 132(2)(c)(ii) of Companies Act 71 of 2008, pending final determination of proposed action – Whether action for setting aside of business rescue plan was covered by section 133 moratorium against legal proceedings – In absence of substantial implementation of plan, business rescue practitioner not yet permitted to file notice of substantial implementation – Prima facie right to interim interdict was established as a business rescue plan actuated by fraud may be set aside.

The applicants applied in terms of section 133(1)(b) of the Companies Act 71 of 2008 for leave to bring their application and to commence an action in which they

claimed an order setting aside the business rescue plan in respect of the third respondent company. An interim interdict was sought, preventing the business rescue practitioner from implementing the business rescue plan pending their proposed action to set aside the plan.

Held – Central substantive issues were whether the applicants should be granted leave to institute the application and the proposed action in respect of the setting aside of the business rescue plan; and whether the first respondent should be interdicted from filing a notice of substantial implementation of the business rescue plan in terms of section 132(2)(c)(ii) of the Act, pending the final determination of the proposed action. Regarding the interim interdict sought, whether or not a *prima facie* case had been established was the core issue in the application. It involved various legal sub-issues, including whether the relief sought to set aside the business rescue plan was competent in terms of the Act; whether common law remedies to set aside the plan were excluded by the Act; and whether that included a situation in which a business rescue plan was induced by fraud.

Section 133(1)(b) of the Act places a moratorium on legal proceedings against a company in business rescue unless the court's leave was obtained. At most section 133(1)(b) requires that the applicant presents a *prima facie* case. The interpretation and application of section 133(1)(b) also require that recognition be given to the applicants' right of access to court entrenched in section 34 of the Constitution. The question was whether, despite not falling within either of the instances specified in section 133(1), the relief sought in the proposed action for the setting aside of the business rescue plan was nonetheless still covered by the section 133 moratorium. If the proceedings involving the company related to the business rescue itself or aspects thereof, then leave was not required. If the proceedings related to the ordinary affairs, assets or business of the company itself, leave was required. Were leave in terms of section 133 required in this case, which the court believed it was not, it ought to be granted.

The requirements for an interim interdict are a *prima facie* right (established but open to some doubt); a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted; the balance of convenience in favour of granting the interim relief; and the absence of any other satisfactory remedy.

In considering the existence of a *prima facie* right, the court considered the purpose of business rescue. There had not been substantial implementation of the business rescue plan in this case and accordingly, the business rescue practitioner was not permitted to file a notice of the substantial implementation of the business rescue plan yet. It was also confirmed that a business rescue plan actuated by fraud may be set aside. A *prima facie* right to an interim interdict was established as a claim based on fraudulent misrepresentation was actionable on a *prima facie* basis. The remaining requirements for such interdict were also established and interim relief was granted.

Lund and another v Community Schemes Ombud Service and others
[2024] 4 All SA 608 (GJ)

Property – Award by adjudicator of Community Schemes Ombud Service – Application for review of award – Application for extension of time limit prescribed in section 7 of Promotion of Administrative Justice Act 3 of 2000 and for condonation of late institution of review application – Where prospects of success were good, it was in the interests of justice for time limit to be extended and lateness of application to be condoned – Procedural unfairness in adjudication proceedings rendering award reviewable.

The applicants owned a unit in a sectional title scheme. A dispute between the applicants and the third respondent (the body corporate of the scheme) led to the body corporate instituting proceedings against the applicants before the first respondent, who was the Community Schemes Ombud Service ("CSOS"). The second respondent, as an adjudicator of the CSOS, issued an award granting the relief sought by the body corporate and dismissing certain relief which had been sought by the applicants.

In the present application, the applicants sought an order extending the time period referred to in section 7 of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") and condoning any delay in the institution of the application in terms of section 9(1)(b) of the Act; reviewing and setting aside the award; and ordering CSOS to rehear and reconsider the dispute between the applicants and the bargaining council.

Held – It was common cause between the parties that the award constituted administrative action within the meaning of section 1 of PAJA, rendering it susceptible to judicial review under the Act. As the application was instituted approximately seven

and half months late, it was necessary for the applicants to bring an application for the extension of the time limit and for condonation in respect thereof. When assessing an application for an extension of the time limit and condonation in terms of PAJA, the court must consider all relevant factors, including the nature of the relief sought; the extent and cause of the delay; its effects upon the administration of justice and other litigants; the importance of the issues raised and the prospects of success in the intended proceedings. Prejudice and the degree thereof is an important (albeit not necessarily decisive) consideration. The court emphasised the importance of the prospects of success, and added that to the factors listed above. The prospects of success, insofar as they pertained to the present application for the review and setting aside of the award, were found to be good. It was therefore in the interests of justice for the time limit to be extended and the lateness of the application to be condoned.

Turning to the grounds for review, the court referred to a case which was on all fours with the present one, and in which the same adjudicator had been involved. The finding of procedural unfairness in that case applied equally to the present matter. Highlighting the numerous failings on the proceedings, the court concluded that the award should be reviewed and set aside.

Although the applicants sought an order of costs, the protection afforded to the CSOS and the adjudicator by the Act meant that a cost award could only be made against them if it were found that they acted unlawfully, with gross negligence or in bad faith. Although questioning whether such protection should cover gross negligence, the court could not find that the adjudicator was grossly negligent. There were therefore no grounds upon which to order either CSOS or the adjudicator to pay the costs of the review application.

Pika Chemical & Technical (Pty) Ltd t/a Afritech v Nolte and others
[2024] 4 All SA 625 (WCC)

Intellectual Property – Protection of proprietary rights to product – Interim interdict – Applicant proving that formulation of product was confidential to it, was worthy of protection, and had been disclosed to a third party by a former director of the applicant in breach of his ongoing fiduciary duty – Requirements for interdictory relief satisfied.

The applicant, a producer and supplier of chemical compounds, had been founded by its current sole director (“Mr Overberg”) and the first respondent. It sought an interim

interdict restraining the respondents from using its formulation for a fruit drying oil ("FDO") which it claimed it had developed and manufactured. According to the applicant, the formulation of the particular FDO ("Pylene FDO") was proprietary to it and confidential. The first respondent ("Mr Nolte") had developed the FDO whilst a director of the applicant. Mr Nolte was now the sole member of the second respondent ("Baychem"). In 2023, the applicant was informed by the fifth respondent, that it did not require FDO for the following year as it had found another supplier in the form of the third respondent ("SOILL"). Mr Overberg discovered that the fourth respondent ("Chemtoll"), a chemical manufacturer, had been appointed as SOILL's contract manufacturer and packer for SOILL's FDO. Chemtoll performed the same task for the applicant. Mr Overberg contacted Chemtoll, and was told, for the first time, that Mr Nolte was a consultant to SOILL. Mr Overberg concluded that SOILL was using the applicant's FDO formulation to produce its competing product, with the assistance of Mr Nolte and Baychem. That led to the application for interdictory relief. The applicant relied on its claim to own the formulation of the FDO being produced by Chemtoll on behalf of SOILL for the relief sought by it against all the respondents. In relation to Mr Nolte, the applicant also relied on Mr Nolte's breach of his fiduciary duty (as a previous director of the applicant) not to use information confidential to the applicant for his own benefit. The application was opposed by Mr Nolte, Baychem and SOILL.

Held – A fiduciary duty remains with a director after his resignation and is breached if it involves the use of confidential information that is worthy of protection. It was accordingly necessary, in relation to the relief sought against all the respondents, for the court to first enquire whether the applicant's formulation of Pylene FDO was confidential to the applicant and was worthy of protection. The defence common to Mr Nolte, Baychem and SOILL was that the formulation of Pylene FDO was not confidential and, if not freely available, was easy to access; and that the FDO that SOILL used was developed by SOILL itself and was not a copy of the Pylene FDO formulation.

In determining factual disputes in such applications, the court had to consider those facts set out by the applicant together with those set out by the respondents which the applicant could not dispute. Once the facts were established on that basis, it had to determine whether, having regard to the inherent probabilities, the applicant could obtain final relief. If serious doubt was cast on the applicant's case it could not be

granted interim relief. However, if those facts *prima facie* established an entitlement to the relief, the relief may be granted even if open to some doubt.

While SOILL had been in the process of developing an FDO since 2015, it was unable to do so effectively until it engaged the services of Mr Nolte and Baychem. Mr Nolte significantly admitted that he was one of only a handful of people who know the formulation of Pylene FDO. That admission was sufficient to establish, *prima facie,* that the applicant's formulation of Pylene FDO was confidential to the applicant. In considering whether the formulation of the FDO being used by SOILL was produced by it without the assistance of Mr Nolte, the court was satisfied that the applicant had established, *prima facie,* that Mr Nolte had disclosed the applicant's formulation of Pylene FDO to SOILL in breach of his ongoing fiduciary duty not to disclose information confidential to the applicant which was worthy of protection in the hands of the applicant.

All the requirements having been established, the applicant was granted an interim interdict.

END-FOR NOW