LEGAL NOTES VOL 1/2025

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EKURHULENI CITY v ROHLANDT HOLDINGS CC AND OTHERS 2025 (1) SA 1 (CC)

Practice — Judgments and orders — Settlement order — Settlement agreement made order of court — Appeal against refusal of application for rescission of consent order — Consent order not meeting requirements for granting of such order — Not related to lis between parties, inconsistent with Constitution, law and public policy, and holding no practical or legitimate advantage for parties — Attorney lacking authority to consent to such order — Appeal upheld.

The City applied to the Constitutional Court (the CC) for leave to appeal against a High Court order dismissing its application for the rescission of an earlier order granted by consent on 12 February 2020 (the rescission application). The consent order was made in settlement of an application by 16 unlawful occupiers to stay two eviction orders obtained by the City against them (the stay application). Amongst other things, the consent order compelled the City to purchase residential properties housing the occupiers from the owners thereof; provided for the determination of the value of the properties in terms of s 12(1) of the Expropriation Act 63 of 1975 by agreement or, failing that, by the court; and for the write-off of arrear rates and service charges in respect of the properties with effect from when the buildings were first unlawfully occupied. (See [7], [9] – [10].)

In the rescission application, the City averred that the attorney who represented it in the stay application had no authority to bind the City to the consent order; that the

order purported to dispose of disputes about rates and service charges in respect of the properties when those disputes were not before the court; that it introduced the Expropriation Act when it was not relevant; and that it failed to settle the dispute that was before the court, namely the stay application. (See [12].)

In dismissing the rescission application, the High Court held that the City's attorney had implied authority to settle the matter without the City's consent, and that he did so in good faith and in the City's best interests. It further held that the City was estopped from denying his authority; and that the consent order met the three requirements established in *Eke* (see 'Cases cited' below) for a settlement to be made an order of court: it resolved the main disputes, was consistent with the law, and offered a practical or legitimate advantage. (See [14] – [15], [48].) Only the owners participated in the present application, not the other parties cited as respondents (such as the occupiers; see [2]). The present application was brought after the High Court and the Supreme Court of Appeal (the SCA) both refused the City's applications for leave to appeal against the High Court's refusal of rescission, the President of the SCA also having refused a request for reconsideration.

Held, as to the preliminary issues

Jurisdiction, condonation and leave to appeal

The matter raised constitutional issues that engaged the court's jurisdiction, inter alia, because, where a party complained that a consent order was wrongly granted, it was in effect asserting that it had wrongly been deprived of his constitutional right to further pursue the matter in court. Condonation for the late filing of its application for leave to appeal, of the record and the supplementary written submissions would be granted. Given the nature of the relief sought, the importance of the issues raised and public interest, there was much to be said for the airing of the dispute in court. And, given that the matter raised important issues and that the City had a reasonable prospect of success on appeal, leave to appeal would be granted in the interest of justice. (See [16] – [17], [31] – [32], [34] – [36].)

Held, as to substantive issues

Whether the High Court was correct in holding that the consent order complied with Eke, including whether the City's attorney had the requisite authority

As to the first *Eke* requirement, that it did not resolve the main dispute between the parties, namely the unenforced eviction orders and the occupiers' application to stay them. Instead, the effect of the consent order was that the City was simply replaced

as the party entitled to enforce, and responsible for enforcing, the eviction orders, which remained extant (See [50], [55].)

As to the second *Eke* requirement, that it was also not met, given non-compliance by the City with the statutory requirements imposed on it by s 79(24) of the (Transvaal) Local Government Ordinance (LGO) for the acquisition by a municipality of immovable property. There was no evidence that the City complied with these constitutional and statutory requirements before the settlement recorded in the consent order was concluded. The City's failure to comply with s 79(24) of the LGO meant that neither it, nor any agent purportedly mandated by it, could purchase immovable property. In consenting to an order committing the City to the purchase of immovable property in these circumstances, its attorney acted without authority. To hold the City estopped from denying its agent's authority, as the High Court did, would give rise to an illegality. Estoppel therefore could not apply here. (See [70], [80].)

As to the third *Eke* requirement, the stay application remained undecided, and the consent order also did not resolve the owner's counterclaim or disputes regarding arrear levies. If anything, the consent order birthed more litigation than it purported to settle. (See [82] – [85].) Absent compliance with the three *Eke* requirements, the consent order ought never to have been granted (see [86]).

Whether a case was made out for rescission

The City has given a reasonable explanation for the circumstances in which the consent order came to be granted, including the High Court's failure to apply the *Eke* requirements correctly; the attorney's lack of authority; that the application was made in good faith; and that there was a bona fide and sound legal basis, both for the rescission and for the City to defend the 'counter-application' that it would face in the stay proceedings. The City therefore made out a case for compliance with the formal requirements for rescission. (See [99], [100].)

As to the court's residual discretion to grant rescission if justice and equity demanded it, it would not be exercised in favour of the owners. The High Court erred in not granting rescission, and the appeal would accordingly be upheld. The High Court's order would be set aside and replaced with one granting rescission, and the matter remitted to the High Court for adjudication of the stay application. (See [102] – [103].)

SWANEPOEL NO v PROFMED MEDICAL SCHEME 2025 (1) SA 33 (CC)

Medicine — Medical aid — Medical aid scheme — Membership — Cancellation — Non-disclosure of material information — Test for materiality — Common-law requirement that non-disclosure must have induced insurer to contract with member still applicable — Medical Schemes Act 131 of 1998, s 29(2)*(e)*.

Administrative law — Administrative action — Review — Transmissibility of review claim to deceased estate.

This appeal to the Constitutional Court addressed the interpretation of s 29(2)*(e)* of the Medical Schemes Act 131 of 1998 (the MSA), which entitled a medical scheme to cancel a member's membership on the basis of 'the non-disclosure of material information'. It dealt with the appropriate test for determining materiality, and whether an insurer seeking to rely on the provision had to also prove that the non-disclosure induced it to enter into the contract with the member.

It appeared that Profmed, a medical aid scheme, had cancelled the membership of one Ms Steyn (now deceased) under s 29(2)*(e)* on the ground that she had failed to disclose in her application form that she had previously suffered from various ailments and undergone a surgical procedure.

Ms Steyn subsequently lodged a complaint with the Registrar of Medical Schemes, for a ruling that the termination of her membership was unlawful, and that Profmed be ordered to honour its commitments to Ms Steyn (and her dependants) under the policy. Ms Steyn's complaint was dismissed; so too her appeal to the Council for Medical Schemes. The matter reached the Appeal Board, which also decided against Ms Steyn. It found that the failure of Ms Steyn to disclose in the application forms that she had suffered from 'gastritis' and undergone 'a hip arthroscopy' amounted to *material non-disclosures*. The Appeal Board allowed Profmed to rely on the non-disclosure of the hip arthroscopy despite the fact that Profmed *had not initially relied on this* as a ground for cancellation of membership, but had only introduced it *for the first time in oral argument before the Council for Medical Schemes*, after having had sight of annexures to Ms Steyn' affidavit contained an application form to Momentum which did disclose the condition.

Ms Steyn brought an application to the High Court in which she sought, under the Promotion of Administrative Justice Act 3 of 2000 (PAJA), the review and setting-aside

of the appeal bodies' rulings and the substitution of the Appeal Board's ruling with an order (i) declaring Profmed's termination unlawful and setting it aside; and (ii) directing Profmed to honour its contract with Ms Steyn. The High Court granted the application, but a full court reversed its decision on appeal. Following upon unsuccessful applications to the Supreme Court of Appeal for special leave to appeal, and to the President of that court for reconsideration, Ms Steyn approached the Constitutional Court (the CC). The CC held that leave to appeal ought to be granted. The CC determined the key issues requiring consideration as including: *(a)* Whether the hearing before the Appeal Board was procedurally fair; and *(b)* whether there was a duty to disclose the hip arthroscopy and gastritis, and that the non-disclosure was material.

A preliminary issue, however, called for consideration. Ms Steyn passed away shortly after filing her application for leave to appeal to the CC. Consequently, the CC was faced with a substitution application by Mr Swanepoel, in his capacity as executor in Ms Steyn's deceased estate, to be appointed in place of Ms Steyn. (See [35] – [37].) Substitution, the CC stressed, would only be legally tenable were Ms Steyn's PAJA review claim transmissible to her deceased estate (see [44]). The court confirmed that it was. A person's claim for judicial review would be transmissible to their deceased estate where the review relief was not entirely personal to such person, but also had a financial component. Those conditions were met in the case of Ms Steyn, who had not confined her relief to reinstatement to Profmed, but also sought reimbursement of expenses pursuant to a wrongful termination of membership. (See [44] – [50] and [56].) Mr Swanepoel had the necessary standing to be substituted in the review application. (See [57].)

Procedural fairness of the hearing before the Appeal Board

The court held that the Appeal Board was legally duty-bound to ensure that the proceedings before it were conducted in a procedurally fair manner (see [76]). On the facts of the present case, however, the court held, the proceedings before the Appeal Board had been grossly unfair. Ms Steyn had been faced with an unpleaded case, and had been denied her express request to be granted an opportunity to adduce evidence to meet the new unpleaded averments regarding her alleged non-disclosure of hip problems. (See [84] and [88].) The prejudice to Ms Steyn was manifest. Had she been afforded an opportunity to do so, Ms Steyn had insisted in her High Court papers, she

would have led evidence that the hip arthroscopy did not constitute treatment for any ailment and that it was merely a diagnostic tool. (See [81].)

Duty to disclose the hip arthroscopy and gastritis, and whether non-disclosure was material

The court considered the legal principles relevant to determining when an insurer would be entitled under s 29(2)*(e)* of the MSA to cancel a member's membership on the basis of the *non-disclosure of material information*. In doing so, it drew on case authority dealing with a similarly worded provision in the now repealed Short-Term Insurance Act. It held that the test for determining materiality was objective, that is, whether information should have been disclosed was judged, not from the point of view of the insurer, but from that of the notional reasonable and prudent person. The question was thus whether the reasonable person would have considered the fact not disclosed as relevant to the risk and its assessment by an insurer. The onus to prove materiality rested on the insurer. (See [92].) Crucially, the MSA did not dispense with the common-law requirement that an insurer seeking to avoid a policy on grounds of non-disclosure had to prove that the non-disclosure induced it to conclude the contract — the insurer must show that the non-disclosure caused it to issue the policy and assume the risk. (See [92], [95] – [97].)

The court addressed the question of materiality on the facts. It held that a reasonable person in Ms Steyn's position *would not have considered it necessary* to disclose either the hip arthroscopy or the gastritis, the former being merely a diagnostic medical procedure (see [94], [99] and [106]), and the latter being a very common condition that gave rise to no material risk (see [101]). The court rejected the view held by the Appeal Board that, because gastritis did not form part of the prescribed minimum benefits (PMBs), it was to be treated as a material condition: The MSA made no mention of PMBs as the test to be applied regarding materiality. Further, to assess materiality of a condition on the basis of whether it was included in the PMBs would lead to untenable results: it would mean that an insured who applied for medical insurance could circumvent s 29(2)*(e)* by not disclosing any of the plethora of conditions, which were material, listed in the PMBs; conversely, if an insured failed to disclose an immaterial condition not appearing on the list, such as the common cold, the insurer may lawfully repudiate the insurance. (See [102] – [103].)

The court held further that Profmed had failed to adduce any evidence to prove that it had been induced into entering contracts with Ms Steyn by the non-disclosures (see

[96] – [97]). At the very least, the court held, Profmed had to have adduced evidence relating to its membership acceptance practices in respect of applicants who made full disclosures and had similar health histories to that of the member they wanted retrospectively to terminate for non-disclosure. There was none. (See [97].)

In the premises, the CC held that the PAJA review ought to be upheld (see [106]). As to the remedy, the appropriate course would be to substitute the Appeal Board's ruling with one in favour of Ms Steyn (see [107] – [109]). The CC accordingly upheld the appeal and substituted the order of the full court with one dismissing the appeal.

THISTLE TRUST v COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE 2025 (1) SA 70 (CC)

Revenue — Capital gains tax — Taxation of trusts and beneficiaries of trusts — Conduit principle — Capital gains in respect of disposal of vesting trusts' assets to applicant trust as beneficiary, which trust in turn distributed to its beneficiaries in same year of assessment — Paragraph 80(2) of sch 8 applicable, not s 25B as it read at relevant time — Conduit principle not applicable — Income Tax Act 58 of 1962, s 25B, sch 8, para 80(2).

This case concerned the taxation of capital gains distributed to beneficiaries through multiple trusts in a tiered trust structure in the 2014 – 2016 years of assessment, ie before the 2020 amendment to s 25B of the Income Tax Act 58 of 1962 (the ITA), which expressly limited the deeming provision in s 25B by making it clear that it did not apply to capital gains (see n17 at 83J).

Section 25B was introduced by a 1992 amendment to the ITA. Before this amendment, s 25B(1) — enacted before the introduction of capital gains tax — provided that '*any amount* received by or accrued to or in favour of any person . . . in his or her capacity as the trustee of a trust, shall . . . to the extent to which that amount has been derived for the immediate or future benefit of any ascertained beneficiary who has a vested right to that amount during that year, *be deemed* to be an amount which has accrued to that beneficiary'. (See [12], emphasis added.)

The Thistle Trust (Thistle), a registered inter vivos discretionary trust, was a beneficiary of a tier of vesting trusts described as the Zenprop Group, a property developer and owner. In the 2014 – 2016 tax periods the Zenprop Group disposed of certain capital assets and in the same tax periods distributed the capital gains realised

to, inter alia, the Thistle Trust, which distributed it to its beneficiaries. Thistle did not declare the amounts received, acting on advice that the relevant amounts were capital gains which, in terms of the common-law conduit principle and the relevant provisions of the ITA, were taxable in the hands of its beneficiaries. The conduit principle, adopted from English law, treats a trust as a conduit for the transfer of taxable amounts into the hands of beneficiaries, so that amounts distributed from a trust to its beneficiaries are ordinarily taxed in the hands of the true beneficial owner. (See [1], [5] – [6].)

Sars, however, took the position that, on a proper application of the ITA, liability for the capital gains realised by Zenprop had passed from Zenprop to Thistle as the direct beneficiary of Zenprop, but did not pass further from Thistle to its beneficiaries, and assessed it as taxable in the Thistle Trust's hands. Sars also imposed an understatement penalty, with interest, on the assessed liability. Thistle's objections to the additional assessment and understatement penalties were upheld by the tax court. This on the bases that 'any amount' referred to in s 25B included capital gains, and that the conduit principle applied. (See [8], [13].)

The Supreme Court of Appeal upheld Sars' subsequent appeal on the primary liability of Thistle for capital gains tax but dismissed Sars' claim for understatement penalties. It held that the facts of the present case did not present appropriate circumstances for the application of the conduit principle. It also concluded that s 25B was introduced in the ITA in 1991, before the introduction of capital gains tax, so that s 25B was not intended to apply to capital gains, and that the reference to 'any amount' in s 25B did not include taxable capital gains. Flowing from these conclusions, it held that the treatment of Thistle's tax liability was to be determined solely in accordance with para 80(2) of the Eighth Schedule. (See [14] – [18].)

The Eighth Schedule was introduced together with s 26A by way of a 2001 amendment of the ITA. Paragraph 80(2) thereof provides for the manner of attributing a capital gain to a beneficiary; and s 26A for the inclusion in taxable income of the 'capital gain of that person for that year of assessment, as determined in terms of the Eighth Schedule'. Paragraph 80(2) was amended in 2008, changing the introductory wording of the paragraph from 'where a capital gain arises in a trust', to 'where a capital gain is determined in respect of the disposal of an asset by a trust'. At the relevant time it provided that 'where here a capital gain is determined in respect of the disposal of an asset by a trust in a year of assessment during which a trust beneficiary . . . has a vested interest or acquires a vested interest (including an interest caused by the

exercise of a discretion) in that capital gain but not in the asset, the disposal of which gave rise to the capital gain, the whole or the portion of the capital gain so vested . . . must be disregarded for the purpose of calculating the aggregate capital gain or aggregate capital loss of the trust'. (See [4], [50], [54].)

Thistle, in the present case, applied for leave to appeal to the Constitutional Court against the SCA's decision on its liability for capital gains tax; and Sars applied for leave to appeal the SCA's order on understatement penalties. In addition to its earlier contentions, Thistle emphasised the wide meaning of 'determined' in the Eighth Schedule, arguing that the capital gain distributed to it by Zenprop could be said, through the operation of the conduit principle and para 80(2), to have given rise to a capital gain 'determined' in the accounts of Thistle. Accordingly, Thistle could be seen as 'the trust' referred to in subpara *(a)* when it distributed that capital gain to its beneficiaries (see [59]).

Held[*]

As to jurisdiction and leave to appeal

Thistle's application engaged the CCs general jurisdiction in terms of s 167(3)*(b)*(ii) of the Constitution. The application raised arguable points of law of general public importance. The proper interpretation of s 25B and para 80(2) and the application of the common-law conduit principle affected the capital gains tax liability of trusts in tiered trust structures in respect of all tax years up to 2021 (when the amendment of s 25B took effect). It was also in the interests of justice that leave be granted, given the previous competing decisions. As for the (conditional) cross-appeal, it was not in the interests of justice to grant same because the court would have to determine a legal point of public importance, ie the meaning of 'a bona fide inadvertent error' in s 222, in circumstances where it had no reasoned judgment on the issue from the preceding courts. (See [35] – [36], [86].)

As to the main issues

The conduit principle was developed to address two separate issues in the context of tax statutes that did not address these issues directly. The first was the identification of the taxpayer who was liable to taxation, and in this context the conduit principle was used as a mechanism to ensure that income of a particular nature was taxed in the hands of its true beneficial owner. The second was the protection legislative choices in respect of the favourable or prejudicial income tax treatment of particular categories of income. In this context the conduit principle operated to ensure that income of a

particular nature that was earned by a trust and distributed to its beneficiaries did not lose its tax-privileged or tax-prejudicial nature in the process. In the present case, only the first issue arose. Absent a clear indication to the contrary in the ITA, 'robust common sense' militated against the application of the conduit principle to the capital gains distributed by a trust, because the legislature had chosen to tax the capital gains of a trust at twice the rate of those of an individual. (See [42] – [44].)

Common-law relating to the conduit principle may inform questions of interpretation, particularly where the ITA did not expressly regulate the respective tax treatments of trusts and beneficiaries. However, when a taxation statute directly addressed either of these issues that the conduit principle sought to address, it was no longer an exercise in applying the conduit principle but an exercise in giving effect to the direct legislative intention expressed in the statute. There were clear indications in the ITA that the application of the conduit principle to the taxation of capital gains in the hands of trusts and beneficiaries was governed, not by s 25B, but by para 80. The latter provision pertinently addressed the conduit principle and the liability for taxation on capital gains realised by the sale of assets by a trust. Therefore, it was the specific provision that applied. (See [45], [46], [53], [55].)

When para 80(2)*(a*) referred to 'the trust', this could only be the trust that disposed of the asset. Thistle had not realised the capital gain by disposing of an asset; Zenprop had disposed of the asset. Therefore, Thistle could not be 'the trust' referred to in subpara *(a)* of para 80(2); only Zenprop could be that trust. And while Thistle was correct that, given the wide meaning of the word 'determined' in the Eighth Schedule, the effect of para 80(2) was that a capital gain was determined in the accounts of Thistle, para 80(2) was framed so as to identify 'the trust' with reference to the fact that it was the trust that disposed of the asset, and not with reference to the fact that it was a trust in whose accounts the capital gain was determined. Thistle's strained interpretation was also to be avoided because it was inconsistent with the apparent purpose of the 2008 Amendment to para 80(2), namely to prevent the conduit principle from operating in relation to capital gains beyond the first beneficiary trust in a multi-tiered trust structure. Prior to the 2008 amendment, para 80(2) provided for the conduit principle to apply through multi-tiered trusts all the way to the ultimate beneficiaries; following the 2008 Amendment, para 80(2) prevented the conduit principle from operating beyond the first beneficiary trust in a multi-tiered trust structure. (See [58], [60] – [63].) In sum, the wording of para 80(2) showed that it applied the conduit

principle only to the first beneficiary trust in a multi-tiered trust structure. It was not reasonably possible to interpret para 80(2) as allowing the conduit principle to run through a multi-tiered trust structure so as to attribute liability for capital gains tax in respect of the disposal of an asset to a beneficiary beyond the first beneficiary of the trust that realised the capital gain by disposing of that asset. The legislative history of para 80(2) and the 2008 memorandum both confirm that para 80(2) was amended into its present form for the purpose of preventing the conduit principle operating through multiple discretionary trusts in a tiered trust structure. Paragraph 80(2) must be interpreted accordingly. There was no ambiguity in the meaning of para 80(2) of the sort that would allow recourse to the contra fiscum rule. The appeal would accordingly fail. (See [69], [74], [81].)

IRD GLOBAL LTD v THE GLOBAL FUND TO FIGHT AIDS, TUBERCULOSIS AND MALARIA 2025 (1) SA 117 (SCA)

Court — High Court — Jurisdiction — Alleged defamation on Internet — Both parties foreign peregrini — Interim interdict sought — Mere fact that website accessed in South Africa insufficient to establish jurisdiction — Internet publication, with its global reach, to be contained, otherwise multiple actions may follow in jurisdictions with no real connection to parties or issue in dispute, other than publication — High Court correctly found that it lacked jurisdiction to grant interim interdict.

Defamation — Jurisdiction — Alleged defamatory statement published on Internet accessed in South Africa — Both parties foreign peregrini of court — Interim interdict sought — Fact that website accessed in South Africa insufficient to establish jurisdiction — Internet publication, with its global reach, to be contained, otherwise multiple actions may follow in jurisdictions with no real connection to parties or issue in dispute, other than publication — High Court correctly found that it lacked jurisdiction to grant interim interdict.

Interactive Research & Development (IRD), a global health-delivery and research organisation founded in Pakistan and registered in Singapore, launched an urgent application for an order to have an investigative report published on the website of The Global Fund to Fight Aids, Tuberculosis and Malaria (TGF) taken down and for a retraction and an apology, pending an action for defamation that IRD intended instituting against TGF. The report found that IRD had compromised a TGF tuberculosis grant at a Pakistani hospital. The present case concerned IRD's appeal

(to the Supreme Court of Appeal) against the High Court dismissal of its application, which was ultimately heard in the ordinary course (the application having earlier been struck off the roll for lack of urgency). The High Court had held that it did not have jurisdiction to entertain the application; that South Africa was not a forum of convenience. IRD also appealed against the High Court's order that it furnish additional security.

Both IRD and TGF (established in Switzerland) were peregrini of the court and owned no immoveable property in South Africa. TGF did not submit to the court's jurisdiction. IRD sought to overcome the jurisdiction issue on the basis that it had an affiliate in South Africa and that the report was accessed in Johannesburg. (IRD was alleged to have an established project profile in 17 countries and affiliates in 9 countries, including in South Africa; IRD's attorney, acting on instructions, had accessed the report from TGF's website and downloaded it in Johannesburg.)

Held

Neither party had any real connection to South Africa. The process was not served in South Africa and the TGF did not have a place of business locally. There was further no connection between the High Court's jurisdiction and the dispute. The cause of action arose in Pakistan, where IRD was alleged to have compromised the tuberculosis grant. Therefore, the background facts, convenience and the law governing the relevant transaction were outside the court's area of jurisdiction. The only connection to the High Court's jurisdiction was that the attorney accessed the report in its jurisdiction. That was insufficient. Internet publication, with its global reach, for practical purposes must be contained, otherwise multiple actions may follow in jurisdictions with no real connection to the parties or the issue in dispute, other than publication. Adequate connecting factors for jurisdiction were absent, and the court would be unable to give effect to its judgment. (See [17] – [18].)

While this finding was dispositive of the appeal, IRD did also not establish a prima facie right, even one open to doubt, that would entitle it to interdictory relief (see [20] – [21]). And, as to the retraction and apology it sought, IRD was not entitled to claim it on motion; it required the institution of an action (see [24].) The appeal against the security order would also fail; there was no indication that the High Court exercised its discretion incorrectly (see [27]).

WIESE AND OTHERS v COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE 2025 (1) SA 127 (SCA)

Revenue — Tax administration — Tax debt — Meaning of in s 183 of TAA — Whether assessed tax debt should exist at time that dissipation of assets occurred — Tax Administration Act 28 of 2011, ss 50 and 183.

Revenue — Tax administration — Evidence at tax enquiry — Admissibility of transcript of tax enquiry in proceedings under s 183 of TAA — Tax Administration Act 28 of 2011, ss 50 and 183.

Section 183 of the Tax Administration Act 28 of 2011 (the TAA) provides that —

'(i)f a person knowingly assists in dissipating a taxpayer's assets in order to obstruct the collection of *a tax debt* of the taxpayer, the person is jointly and severally liable with the taxpayer for the *tax debt* to the extent that the person's assistance reduces the assets available to pay the taxpayer's debt'.

This case concerned an appeal to the Supreme Court of Appeal, against the High Court's order on two separated issues:

(1) whether by the term 'tax debt' in s 183 it was contemplated an existing liability for tax, though not yet assessed, at the time that the dissipation occurs; and (2), whether the transcript of a tax enquiry held in terms of s 50 of the TAA was admissible in proceedings under s 183 of the TAA (see [3], [14]). The High Court answered both issues in the affirmative, and, as to the second issue, further held that the purposes for which such evidence could be used was to be determined by the trial court.

The background was as follows: The taxpayer, Energy Africa, had formed part of the Tullow Group which was restructured in 2007. In terms of the restructuring, Energy Africa had sold its claims in Energy Africa Holdings (Pty) Ltd to Tullow Overseas Holdings BV. On 16 November 2012 Sars delivered a notice to Energy Africa in terms of s 80J(1) of the TAA, notifying it that Sars intended making certain adjustments to its 2007 income tax assessment to include capital gains tax (CGT) on the disposal of a subsidiary, and also secondary tax on companies (STC). The taxpayer disputed the Sars audit findings on 15 April 2014. The impugned dissipation occurred on 19 April 2013 — by the taxpayer transferring its sole asset, a loan account it held in Titan Share Dealers Proprietary Ltd (TSD), as a dividend in specie to Energy Africa's holding company, Elandspad Investments Proprietary Ltd. On 21 August 2013 Sars

communicated its finalisation of the audit and issued an additional assessment for CGT in the amount of R453 126 518, together with understatement penalties of 150% (the CGT assessment); and R488 282 886, together with interest and understatement penalties of 150% (the STC assessment), respectively. On 1 November 2013 Energy Africa filed its objections to both the STC and CGT assessments, and on 20 March 2014 to the understatement penalties levied. Sars reduced the understatement penalties but dismissed the rest of the objections. On 29 May 2014 Sars was informed that Energy Africa would not appeal the disallowance of the objections, following which it issued a final demand in respect of both the STC and CGT assessments. On 24 October 2014 Sars was informed that Energy Africa was dormant. Sars next launched an enquiry (on 10 July 2015) in terms of part C of ch 5 of the TAA. The enquiry was subsequently conducted and the appellants testified. On 25 October 2016 notices of personal liability were sent by Sars to the appellants in terms of s 183 of the TAA, which notices stated that first and second appellants had knowingly assisted the taxpayer in dissipating its only asset of value to obstruct the collection of a tax debt. In written representations subsequently made by the appellants, they maintained that, because the dissipation of Energy Africa's assets occurred prior to the raising of the STC and the CGT assessments, there existed no tax debt as defined in the TAA at the time. Sars wished to rely upon the evidence obtained during this inquiry at the trial (See [7] – [11], [50].)

Held

(1) The determination of the amount of tax due to Sars occurs by way of assessment. An assessment, however, does not establish or impose liability. The liability existed, by operation of law, whether or not there had been an assessment. The definition of the terms 'tax debt' and 'assessment' (in s 169) bore this out. An 'assessment' meant 'a determination of a tax debt' which a taxpayer was obliged to pay to Sars. The tax debt existed, with or without an assessment. An assessment merely determined it and rendered it recoverable in accordance with the recovery mechanisms provided by the TAA. An indebtedness to Sars for the payment of tax was not dependent upon an assessment to tax. The term 'tax debt' in s 183 also encompassed the amount of tax a taxpayer was liable to pay to Sars. If a taxpayer was chargeable to tax, the taxpayer was indebted, notwithstanding that the amount of the indebtedness had not yet been determined. A tax debt existed, irrespective of the absence of an assessment of the tax debt. The language of s 183, construed within its context, did not require that the

taxpayer's liability to pay tax due to Sars should have been determined by assessment at the time that the dissipation of assets occurred. To hold that the section required that, at the time of the dissipation, the taxpayer's obligation to pay tax due to Sars should be liquidated and immediately claimable by action, would defeat the purpose of the section. It would also give rise to absurdity, in that a culpable third party who intentionally assisted a taxpayer to dissipate assets so that payment of a yet to be assessed tax debt cannot be made, would escape liability, despite culpable conduct to evade tax, simply on the basis that an anticipated assessment had not yet been issued. (See [29], [33], [44] – [46].)

(2) The purpose of the chapter was to facilitate the execution of Sars' statutory mandate to collect tax. The TAA recognised the fact that Sars stood as a stranger to transactions between taxpayers. For this reason there was a need to enable Sars to obtain information it would otherwise not be able to acquire, in order to perform its statutory function. If Sars were constrained to only use information obtained during an inquiry in subsequent proceedings under the TAA, the purpose of an inquiry would be frustrated. Such an interpretation would render these sections nugatory. In light of the text of the relevant sections of the TAA and the approach to comparable provisions in the Companies Act and the Insolvency Act, the transcript of the evidence given at the s 50 inquiry was admissible in the litigation between the parties. It was the primary responsibility of a trial court to ensure the fairness of a trial. It did so by careful consideration of the circumstances in which evidence sought to be admitted was obtained, and the purpose for which it was to be admitted. As to the purposes for which such evidence could be used, the High Court was correct to find that the trial court was best placed to determine the latter question, and the probative value and weight that should be given to the evidence, if any. (See [56], [59], [64], [66].)

In the result, the appeal would be dismissed (see [67]).

ASHU AND ANOTHER v BODY CORPORATE, LONDON PLACE AND OTHERS 2025 (1) SA 147 (WCC)

Prescription — Extinctive prescription — Delay in completion — Where creditor is juristic person and debtor is member of its governing body — Whether 'member of governing body' including owner of sectional title unit who is not trustee of body corporate — Prescription Act 68 of 1969, ss 13(1)*(e)* and 13(1)*(i)*.

First applicant was part-owner of a unit in a sectional title scheme and had bought the share of his co-owner who was second applicant. First applicant was wanting to take transfer of his share, but the body corporate was refusing to issue a levy clearance certificate until arrear levies accrued between 2011 and 2016 were paid to it.

Ultimately, first applicant applied to the High Court for an order that the body corporate issue the certificate on the basis that the claims had prescribed and that there was consequently no ground on which the body corporate could withhold it under s 15B(3)*(a)*(i)*(aa)* of the Sectional Titles Act 95 of 1986.

The body corporate's contention, premised on s 13(1)*(e)* and *(i)* of the Prescription Act 68 of 1969, was that prescription had been delayed: applicants' presence on the 'governing body' of the scheme was an 'impediment' which delayed the completion of prescription. (Prescription would only complete a year after the applicants had ceased to be members of the governing body.) (See [9].)

The issue was whether a sectional title unit owner who was *not* a trustee was a 'member of the governing body' of the scheme (see [8]).

Held, on interpretation of the Sectional Title Schemes Management Act 8 of 2011 and case law, that the 'governing body' of a sectional title scheme was the trustees. Accordingly, s 13(1)*(e)* of the Prescription Act was of no avail; prescription had not been delayed; and the body corporate's claims had prescribed, leaving it no ground to rely on s 15B(3)*(a)*(i)*(aa)* of the Sectional Titles Act to withhold the certificate (see [15] – [16], [18], [20]).

Declared that the arrear levies (the debt) had prescribed; and the body corporate was precluded from relying on s 15B(3)*(a)*(i)*(aa)* to withhold the certificate (see [23]).

ATWARU v HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA AND OTHERS 2025 (1) SA 156 (WCC)

Administrative law — Administrative action — What constitutes — Preliminary inquiry in disciplinary proceedings undertaken by professional body against member — Decisions taken in inquiry, even though preliminary in nature, may still qualify as administrative action.

Medicine — Disciplinary proceedings — Medical and Dental Professional Board of Health Professions Council — Preliminary inquiry into complaint of unprofessional conduct — Decision of preliminary committee of inquiry to find practitioner guilty of

unprofessional conduct in form of minor transgression and to impose fine — Whether constituting administrative action where practitioner had choice whether to accept or reject penalty — Committee's finding final in effect where penalty accepted by practitioner — Constituting administrative action in light of direct and immediate effect on practitioner's rights — Health Professions Act 56 of 1974, s 42(1); Health Professions Act 56 of 1974, Regulations Relating to the Conduct of Inquiries into Alleged Unprofessional Conduct under the Health Professions Act, reg 4(9).

Medicine — Disciplinary proceedings — Medical and Dental Professional Board of Health Professions Council — Preliminary inquiry into complaint of unprofessional conduct — Decision of preliminary committee of inquiry to find practitioner guilty of unprofessional conduct in form of minor transgression and to impose fine — Whether procedural fairness requirements of PAJA applicable — Even though no express requirement in empowering Act to afford practitioner any form of prior hearing before preliminary committee of inquiry made determination in terms of s 42(1), that did not mean that procedural-fairness requirements of PAJA may simply be ignored — Health Professions Act 56 of 1974, s 42(1); Health Professions Act 56 of 1974, Regulations Relating to the Conduct of Inquiries into Alleged Unprofessional Conduct under the Health Professions Act, reg 4(9).

Medicine — Medical practitioner — Disciplinary proceedings — Unprofessional conduct — Findings and penalties — Duplication of findings and penalties not permitted — Health Professions Act 56 of 1974, s 42(1).

The present matter concerned the applicability of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) to preliminary inquiries forming part of a disciplinary process undertaken by a professional body against a member, stemming from a complaint of unprofessional conduct. The applicant, Dr Atwaru, was a specialist orthopaedic surgeon in private practice. He was the subject of a complaint of unprofessional conduct by a patient concerning a surgery he had performed on her, lodged with the first respondent, the Health Professions Council of South Africa — with which he was registered. The complaint served before the third respondent, the Third Preliminary Committee of Inquiry of the Medical and Dental Professional Board (the 'Committee'), to which the second respondent, the Medical and Dental Professional Board, had delegated the power to undertake a preliminary inquiry into complaints of unprofessional conduct and to impose a suitable penalty. The Committee, having considered the complaint, found the applicant guilty of unprofessional conduct that

constituted a 'minor transgression', as contemplated in reg 4(9) of the Regulations Relating to the Conduct of Inquiries into Alleged Unprofessional Conduct under the Health Professions Act 56 of 1974, and imposed a fine totalling R140 000 on the applicant. The applicant subsequently approached the Western Cape High Court to review and set aside the Committee's decision to find him guilty of unprofessional conduct (albeit a minor transgression) and to impose the fines on him (the impugned decision). The application was brought, in the first instance, on the basis that the impugned decision constituted administrative action within the meaning of s 1 of PAJA. Alternatively, the applicant relied on the principle of legality, on the basis that the Committee's functions involved the exercise of public power.

A key issue in this matter concerned whether the Committee's decision constituted administrative action for the purposed of PAJA. The respondents argued that it did not, in that, *(a)* it did not adversely affect the applicant's rights; and *(b)* it had no direct, external legal effect. In support of both points, the respondents asserted that the nature of the impugned decision was *preliminary* and not final, in that, as provided for in reg 4(9), it was open to the applicant to reject the proposed penalty — in which event the complaint would be referred for a professional conduct inquiry, and the Committee's (preliminary) determination and proposed penalty would fall away.

Administrative action

Held, that there was ample authority that, in cases of multi-staged decision-making, even decisions of a preliminary nature may qualify as administrative action which was susceptible to review under PAJA. This was so particularly, but not exclusively, in cases where the preliminary step was a prerequisite to further steps in the decision-making process. This flowed from the recognition that preliminary decisions may have self-standing, serious consequences for individuals. In such cases affected parties did not have to wait until every stage of a decision-making process had been completed before instituting a review application. It had been held that even non-binding recommendations made by an investigating committee might, in a proper case, have attracted an obligation to adhere to a fair procedure. (See [18].)

Held, further, that in the present matter the powers exercised by the Committee went beyond merely making recommendations regarding the holding of a further inquiry. Under reg 4(9) the Committee was required to make positive determinations, based on the material before it, *(a)* as to whether the respondent acted unprofessionally; *(b)* if so, whether the unprofessional conduct constituted only a minor transgression;

and *(c)* if so, a suitable penalty to be imposed on the respondent (which was subject to his or her acceptance or rejection). (See [19].) If the respondent accepted the penalty 'imposed' by the Committee in this fashion, that was the end of the matter. It amounted to a final decision. As such, the decision of the Committee — at the very least — had the capacity to directly and immediately affect the respondent's rights. (See [20].)

Held, accordingly, that the functions and powers exercised by a preliminary committee of inquiry in terms of reg 4(9) constituted administrative action. As such, the impugned decision was in principle susceptible to review on the grounds set out in s 6 of PAJA. (See [22].)

Grounds of review — Duplication of findings and penalties

Held, that s 42(1) of the Act stipulated that a registered person, against whom an adverse determination was made by a preliminary committee of inquiry on minor transgressions, shall be liable to one or more listed penalties, including a prescribed fine. (See [24].) The applicable regulations [the Regulations Relating to Fines which may be Imposed by a Committee of Enquiry Against Practitioners Found Guilty of Improper or Disgraceful Conduct under the Act] set out a range of minimum and maximum fines for a number of different categories of improper or disgraceful conduct. (See [25].) The Committee fined the applicant R20 000 for exposing a patient to danger or harm, R50 000 for incompetence and R70 000 for negligence (see [6]). It was clear that the finding of negligence, and the additional R70 000 fine, was based on the same facts and considerations that underpinned the incompetence finding. It amounted to a duplication of findings and fines, which was not permitted under the Act or regulations. As such, the impugned decision was both unlawful and unfair. It fell to be set aside on these grounds alone. (See [30].)

Grounds of review — Absence of procedural unfairness

Held, that the fact that there was no express requirement in the Act to afford a healthcare practitioner any form of prior hearing before a preliminary committee of inquiry made a determination in terms of s 42(1), did not mean that the procedural fairness requirements of PAJA may simply be ignored. (See [32].) The law was that all administrative decisions had to be consistent with PAJA, unless the empowering statute excluded it (see [33] – [37]). In the present case there were no grounds for concluding that the legislature intended to exclude PAJA's procedural fairness requirements from the Act, read with the Regulations. (See [38].)

Held, further, that the process followed by the Committee prior to making the impugned decision fell short of the requirements of a fair procedure: This, where the Committee questioned the applicant on, and made adverse findings on, issues not foreshadowed in the written complaint, and of which the applicant was not notified before the hearing. (See [38].) The impugned decision fell to be reviewed and set aside on this ground too (see [40]).

Ordered, that the impugned decision be set aside, and the complaint lodged against the applicant be remitted to the first and second respondents for reconsideration by a differently constituted preliminary committee of inquiry. (See [40] – [41].)

DEMOCRATIC ALLIANCE v HLOPHE AND OTHERS, AND SIMILAR MATTERS 2025 (1) SA 169 (WCC)

Constitutional law — Administration of justice — Judicial Service Commission — Composition — Designation of person by National Assembly from amongst its members — Former judge impeached for gross misconduct — Designation prima facie reviewable under PAJA — National Assembly mistakenly believing it exercised no discretion to decline to designate nominated member — Incompatibility of decision with Assembly's obligation under s 165(4) of Constitution to ensure independence, impartiality, dignity, accessibility and effectiveness of courts — Unreasonableness and irrationality of decision — Interim interdict prohibiting member's participation in Judicial Service Commission granted — Constitution, s 178(1)*(h)*.

In terms of s 178(1)*(h)* of the Constitution, the Judicial Service Commission '[consists] of six persons designated by the National Assembly from among its members, at least three of whom must be members of opposition parties represented in the Assembly'. This matter concerned three urgent High Court applications impugning a motion, passed on 9 July 2024 by the National Assembly (the NA), designating Dr Hlophe to the Judicial Service Commission (the JSC). He had been nominated by the uMkhonto weSizwe (MK) political party, of which he was parliamentary leader. Dr Hlophe had previously been a High Court judge, serving as Judge President of the Western Cape High Court for many years. He, however, became the subject of a disciplinary process by the JSC stemming from complaints against him by justices of the Constitutional Court. This culminated in a report by the JSC finding him to have been guilty of gross misconduct as envisaged in s 177(1)*(a)* of the Constitution, in attempting to improperly influence Constitutional Court Justices Nkabinde and Jafta to decide matters that were

pending before the Constitutional Court in favour of particular litigants. On 21 February 2024 the NA, based on the recommendations of its Portfolio Committee on Justice and Correctional Services, resolved, in terms of s 177 of the Constitution, to call on the President to remove Dr Hlophe from the office of judge for gross misconduct. On 6 March 2024 the President did so.

In the present matter the political party, the Democratic Alliance, and the non-profit company, Corruption Watch, brought separate applications *seeking interim relief* in the form of interdicts restraining Dr Hlophe from participating in the process of the JSC, pending the determination of, whichever came first, either part B of their applications, or direct-access applications brought to the Constitutional Court, for the review and setting-aside under PAJA of the NA's decision to designate Dr Hlophe as one of their representatives to the JSC. The applications were brought on an urgent basis, given that the JSC was shortly to conduct interviews for several vacant judicial posts in various High Courts, as well as the SCA. A third application was brought by the non-profit company Freedom Under Law, seeking *final relief* in the form of a review; that application was, however, postponed to be heard simultaneously with the aforementioned pending reviews. In all applications, Dr Hlophe, the Speaker of the NA, and the JSC were cited as respondents, and in the DA matter also MK. The Speaker and the JSC elected to abide the court's decision.

The matter turned on whether the applicants had proven the requirements for the granting of an interim interdict. The court held that indeed the applicants had done so. The court held that the applicants had established a prima facie right on the basis that the review of the decision to designate Dr Hlophe had sufficient prospects of success, having regard to, inter alia, the following grounds of review raised:

- That the NA had committed an error of law in misconstruing its powers under s 178(1)*(h)* of the Constitution, believing wrongly that it did not have the power to vote against MK's nomination of Dr Hlophe, and therefore did not exercise a discretionary power. (See [58] and [59].) To the extent that the respondents had relied on existing parliamentary practices or conventions, in terms of which the NA would simply accept without question the nomination of member for designation to the JSC, the court held that such could not trump the Constitution, the rule of law, rationality and legality. (See [58] and [59].)
- That the designation of Dr Hlophe was incompatible with the NA's obligations under s 165(4) of the Constitution. The court held that s 165(4) of the Constitution obliged all

organs of state to assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness. The authority of courts and obedience to their orders were the very foundation of a constitutional order founded on the rule of law. It depended on public trust and respect for the courts. (See [61].) The appointment of Dr Hlophe to the JSC would inevitably undermine the independence, dignity and effectiveness of our courts (see [61]).

- That the NA's decision was unreasonable and irrational, in designating Dr Hlophe whilst he had been impeached for serious misconduct because he grossly breached his judicial oath of office, and accordingly was in no position to assess the fitness and propriety of judicial candidates. (See [62].)

The court rejected the respondents' arguments that s 178(1)*(h)* of the Constitution prescribed only two requirements, and no more: ie that a person designated had to be a member of the Assembly; and that half of the persons so designated had to be drawn from the opposition benches. The court explained that the overarching purpose of the JSC's composition was to safeguard judicial independence and to ensure public confidence in the appointment process of judges. (See [63].)

The court further rejected as untenable the respondents' claims that Dr Hlophe's removal from the office of a judge did not prevent the NA from designating him, and that no collateral consequences followed upon his removal from the office as a judge (see [64]).

The court held further, in evaluating the balance of convenience, that this was one of the clearest of cases to grant a restraining order and that it was also constitutionally appropriate to grant the required interim interdicts. In granting same, Dr Hlophe would not be prevented from carring out his obligations as MP. He may miss one or perhaps two sittings of the JSC prior to the hearing of part B of the applications. Further, the JSC would function in his absence, but, if required, the NA may always designate another MP, nominated by the opposition parties, to take his place. Irreparable harm befell neither Dr Hlophe nor the MK. (See [65].) The court held, finally, that there was no satisfactory remedy available to the applicants, given the imminent JSC interviews (see [66]).

The court accordingly granted the applicants the interdictory relief they sought (see [68]).

HARBOUR TERRACE BODY CORPORATE v MINISTER OF PUBLIC WORKS AND OTHERS 2025 (1) SA 191 (WCC)

Sectional title — Buildings — Destruction — Whether body corporate may resolve, or court declare, that section deemed destroyed — Sectional Titles Act 95 of 1986, s 48(1).

A company (SD) established a sectional title scheme and retained ownership of its section 57. SD's ownership was reflected in the deeds registry. SD's intention was that when the scheme was complete, it would transfer the section to the scheme's body corporate so that it would become part of the common property. However, before SD could transfer the section, it was deregistered by CIPRO. The register nevertheless continued to reflect SD as the owner of section 57.

An erstwhile director of SD was then located and asked by the body corporate's attorneys whether he would consider reregistering the company and causing it to transfer section 57 to the body corporate. The director, however, did not cooperate.

Then at the annual general meeting, the body corporate moved for a unanimous resolution under s 48(1) of the Sectional Titles Act 95 of 1986, deeming the section destroyed and authorising the body corporate to approach the High Court for an order effecting this resolution. However, a unanimous resolution could not be obtained at the AGM or at a subsequent special general meeting.

The body corporate then resolved to approach the High Court for orders under s 48(1) Accordingly, the body corporate asked the High Court for three declarators:

(1) That the body corporate be deemed to have unanimously resolved that section 57 or the entire building was, per s 48(1)*(b)*, deemed destroyed, and that the building, excluding section 57, be reinstated.

(2) That section 57 or the entire building be deemed destroyed and the building, excluding section 57, be reinstated.

(3) That section 57 be declared an undivided share of the common property.

The issues were:

(1) May the body corporate under s 48(1) unanimously resolve that a section is deemed destroyed? *Held*, that it could not (see [38], [46]).

(2) May the High Court under s 48(1) declare that a section is deemed destroyed? *Held*, that it could not (see [38], [46]).

(3) What became of SD's property when it was deregistered? *Held*, that on SD's deregistration, section 57 became ownerless property, and vested in the state (see [54] – [55]).

(4) What were the body corporate's options? *Held*, that notionally the state could sell or donate the section to the body corporate. Or the body corporate could apply to CIPRO for reregistration of SD, and if it was successful, and SD reregistered, it would result in SD reacquiring its rights in its property; and the body corporate could then attempt to procure the section's transfer from SD. Or the body corporate could ask the High Court for an order under s 83(4) of the Companies Act 71 of 2008. (Section 83(4) provides that a person with the requisite interest can apply for an order that is just and equitable, in respect of a deregistered company.) (See [69], [73] – [74].)

Application dismissed (see [75]).

INVESTEC BANK LTD v NS AND ANOTHER 2025 (1) SA 210 (GP)

Insolvency — Compulsory sequestration — Joint matrimonial estate — Application by creditor — Reliance on fraudulent transactions (guarantees) concluded by spouse — Application opposed on ground that fraud excluded guarantees from 'ordinary course' business transactions of spouse, so that joint estate not bound by them — Court ruling that fraud not per se excluding guarantees from ambit of ordinary-course transactions envisaged by MPA s 15(6) — Joint estate bound by guarantees despite fraud — Matrimonial Property Act 88 of 1984, s 15(2)*(h)* read with s 15(6).

Words and phrases — 'Ordinary course of profession, trade or business' — Meaning of in s 15(6) of Matrimonial Property Act 88 of 1984 — Fraud not per se removing transaction from ambit of ordinary course of business.

Section 15 of the Matrimonial Property Act 88 of 1984 (the MPA) regulates the powers of spouses married in community of property to perform juristic acts that bind the joint estate. Generally, the consent of the other spouse is not required, but s 15(2) sets out a list of transactions that do require spousal consent, including standing surety (s 15(2)*(h)*). Section 15(6) then provides that some of those transactions, including standing surety, *do not* require consent if they are 'performed in the ordinary course of [the spouse's] profession, trade or business' (ie as part of the spouse's ordinary business). Case law holds that s 15(6) also applies where a spouse conducts his or her business through a juristic entity. (See [64] – [65].)

In February 2023 applicant (Investec) applied in the Pretoria High Court (the court) for the provisional sequestration of the joint estate of the respondents, NS and SK. NS had provided several guarantees to Investec in respect of the indebtedness of one of her businesses, BIG. Investec alleged that the joint estate owed it over R470 million arising from the guarantees NS had provided in relation to three loan transactions concluded between Investec and BIG. Investec applied for provisional sequestration of the joint estate after it found out that the transactions were tainted by fraud perpetrated by NS and her brother, RS, the directors of and 50% shareholders in BIG. Investec also pleaded by way of a supplementary affidavit that NS's fraudulent conduct rendered her — and thus the joint estate — liable to it in delict. Both NS and SK opposed the sequestration application.

SK launched a counter-application in which he sought the return of nearly R1 million that Investec had retained as set-off for part of the alleged debt. He also sought a stay of the sequestration pending determination of a delictual action he intended to institute against Investec on the basis of breach of duty of care to him.

The question for the court was whether Investec had made its case for the provisional sequestration of NS and SK's joint estate. It was common cause between Investec and SK that SK had himself been a victim of fraud because his signatures on the spousal-consent forms in respect of the guarantees had been forged.

The court, having found that Investec had established BIG's indebtedness to it; that there was at least one default that entitled Investec to accelerate all the debts; and that NS had guaranteed their payment by way of the guarantees — moved on the question whether the joint estate was, in light of the provisions of s 15(2)*(h)* and 15(6) of the MPA, bound by the guarantees to the extent that Investec could rely on them to prove insolvency (see [52], [63]).

The parties were ad idem that, but for the peculiarities of the case, the guarantees were by their nature guarantees supplied in the ordinary course of SK's business as contemplated by s 15(6). SK submitted, however, that s 15(6) did not avail Investec because of the fraudulent nature of the guarantees and Investec's own negligence and absence of due diligence. The contention, in effect, was that a joint estate could avoid the ordinary-course-of-business provision in s 15(6) where a third party failed to conduct itself with due diligence or care when procuring a surety.

Crucially, SK did not plead or contend that the guarantees were invalid or susceptible to rescission as a result of any fraud or forgery, but only that the guarantees could not

be regarded as having been in the ordinary course of NS's business as contemplated by s 15(6), and thus required SK's consent to bind the joint estate, which had not in fact been obtained. (See [62] – [67].)

Held

While there was nothing 'ordinary' about the fraud and forgery committed by NS, that did not mean that the suretyships were beyond the 'ordinary course' of her 'business' as intended in s 15(6). There were far-reaching remedies for fraud, but an interpretation of s 15(6) that focused on whether the transaction was tainted by fraud would deprive the enquiry of its objective nature and place an undue burden on third parties, for whom the consequences would be destructive instead of protective. Such an interpretation would unnecessarily impede or restrict the ordinary course of trade and business — for which the provision of suretyships was often the lifeblood — and inject uncertainty into normal commerce. It would also create the absurd scenario that a third party who wished to bind a joint estate, but was aware that a transaction might be tainted by fraud, could do so by ensuring that a spousal consent was obtained. This would defeat the purpose and ignore the broader context of s 15. Precedent holding that a fraudulent disposition or set-off was never in the ordinary course could not be transposed to s 15(6). (See [71], [73] – [74], [77].)

As to SK's argument that Investec was precluded from relying on s 15(6) because of its own negligent failure to conduct the due diligence that would have exposed the forgeries, that this interpretation, too, would generate undue uncertainty in business transactions and undermine their efficacy. It would defeat the protective purposes of s 15(6) for third parties and, importantly, denude the enquiry of its objective nature. This did not mean, however, that where a creditor or third party failed to conduct its due diligence, there would be no legal consequence or that its conduct may not, in an appropriate case, give rise to delictual liability to an aggrieved party like SK. (See [80].)

It followed that Investec prima facie established the indebtedness of the joint estate (and thus also standing), and that, on a proper interpretation of s 15(2)*(h)* and 15(6), there was no genuine or bona fide dispute in respect thereof. Since factual insolvency was established, it was not necessary for the court to determine whether Investec had established a delictual claim against SK. (See [82] – [83].)

LIMBOURIS AND OTHERS v DU TOIT NO AND OTHERS 2025 (1) SA 247 (WCC)

Company — Business rescue — Moratorium on legal proceedings against company — Leave to institute proceedings — Guiding principle — Leave in terms of s 133 not required if relief sought related to business rescue itself or aspects thereof — Leave required when relief related to aspects of ordinary affairs, business or assets of company — Companies Act 71 of 2008, s 133(1)*(b)*.

Company — Business rescue — Business rescue plan — Setting-aside of — On common-law grounds — Common-law remedies not excluded by Companies Act — Interpretation of s 152(4) of Companies Act — Companies Act 71 of 2008, s 152(4).

Company — Business rescue — Business rescue practitioner — Duties — Representations in business rescue plan — Discussion.

The first to fourth applicants — A Limbouris, K Jansen van Rensburg, S Uppink and O Dawber — were all judgment creditors of the third respondent, Cambridge Services (Pty) Ltd (the company). The company was placed in business rescue in November 2019 in terms of a resolution by its sole director — the fifth respondent, G Shayne. A business rescue plan (BR plan) was published in March 2020 by the company's sole business rescue practitioner — the first respondent, J du Toit (the BRP). The BR plan was adopted later that month by the company's creditors. In the present matter, brought before the Western Cape High Court, the applicants sought an interim interdict restraining the BRP from filing, in terms of s 132(2)*(c)*(ii) of the Companies Act 71 of 2008 (the Act), a notice of substantial implementation of the BR plan pending the final determination of an action to be launched by the applicants in the High Court (the 'Proposed Action'). In respect of the interim relief sought, the applicants claimed a prima facie right on the basis, inter alia, that they could show that they were prima facie entitled to the relief sought in the Proposed Action. In the latter, the applicants would seek the setting-aside of the BR plan — and its adoption — on the ground of fraud. They would claim that the vote in favour of the BR plan was actuated by fraudulent misrepresentation: they alleged that the BRP, aided and abetted by the fifth respondent, incorporated representations in the BR plan as to the company's projected income and profit, in circumstances in which he, along with the fifth respondent, could not have held an honest belief in the achievability of such outcomes; and presented such representations to the applicants, who voted in support of the BR plan on the strength thereof. In the present matter the applicants also sought, as they

believed they were required to do in terms of s 133(1)*(b)* of the Act, leave from the court to institute the interdict relief sought in this matter, as well as the Proposed Action.

Among the key issues to be determined were the following:

(a) Whether the applicants required leave of the court in terms of s 133(1)*(b)* of the Act to launch this application and/or the Proposed Action.

(b) Whether a prima facie right was established for the purposes of the interim interdict. This would in turn depend on whether a prima facie case had been made out for the relief sought in the Proposed Action. This involved the consideration of the following issues.

(i) Whether fraud was a basis competent in law for the setting aside of a BR plan.

(ii) The obligations of a BRP in regard to investigations preceding the publishing of a BR plan and in regard to the income and profit projections and representations therein, bearing in mind the statutory structure of BR plans in the Act and the central part played therein by representations.

(iii) Whether a claim based on fraudulent misrepresentation to set aside the BR plan was actionable on a prima facie basis in this case.

As to *(a)*, whether leave of court required

Held, that the general guiding principle was that leave in terms of s 133(1)*(b)* was not required if the relief sought related to the business rescue itself or aspects thereof, as opposed to aspects of the ordinary affairs, business or assets of the company in question, in which case leave was required. This fed into the purpose of the moratorium, which was to provide 'breathing space' to a company in business rescue to enable it to restructure its affairs. On the other hand, an invalid BR plan, for example, should not be provided breathing space and, on the contrary, should rather be set aside. (See [47] and [50] – [51].) On the facts, what was relevant for the purposes of the leave in terms of s 133 was the setting-aside of the BR plan. This did not require the leave of the court in terms of the section. (See [55].)

As to *(b)*, whether a prima facie right was established

Held, as to (i), that the respondents had sought to argue that the applicants could not succeed with their claim based on fraud because the Companies Act did not permit reliance on the common law as a basis to set aside a BR plan: that was apparent, they argued, from s 152(4), which provided that once a BR plan was adopted at a meeting, it bound all creditors, even if they voted against the adoption. (See arguments at [86]

– [88].) However, the respondents went a step too far in suggesting that a BR plan was immune from being set aside on the basis of fraud because the Act provided it was binding (see [89.2] – [89.3]). The correct approach to the interpretation of s 152 of the Companies Act was not, as the respondents would have it, whether it by necessary implication *included* a remedy based on fraud; but whether it *excluded* a remedy on fraud (see [89.4]). It did not (see [89.2.2]). To interpret s 152(4) of the Act as the respondents would have it, that, once a BR plan had been adopted, it became immune to any and all challenges, even where such challenges were on the basis of fraud in respect of the propriety of the process whereby adoption of the BR plan was secured, would be tantamount to providing a licence to the unscrupulous to trap creditors and subvert their interests. This could not be correct. (See [89.8].) Accordingly, a BR plan actuated by fraud may be set aside (see [90]).

Held, as to (ii), that the core and prominent role played by representations made by a business rescue practitioner and as contained in a BR plan was that of gatekeeper for whether business rescue should be recommended to proceed, with the gatekeeper in chief being the business rescue practitioner: It was his/her representations that provided affected persons with their main source of information in deciding how to cast their votes. (See [93.1] – [93.2].) With this in mind, the business rescue practitioner could only make representations to whose reliability and accuracy they could *independently attest*, and they had to conduct meaningful, thorough and sufficiently in-depth investigation into the affairs of the company to place them in the position to do so. (See [93].) It was not enough for a practitioner to simply repeat what someone else in the company had told them, especially a person with vested interests. (See [93].)

Held, as to (iii), accepting the submissions of the applicants, that it was a triable issue whether the BRP had incorporated into the BR plan projections as to the earnings and profitability of the company in circumstances in which he did not honestly believe in their achievability by the company. This, having regard to, inter alia, the following —

• the BRP knew that the company had experienced vast losses for the years preceding the institution of business rescue proceedings; and

• the BRP, in arriving at the projections, did not conduct his own thorough investigations, or consult independent experts for advice, but relied exclusively on the recommendations of the fifth respondent;

• in circumstances in which he knew that the fifth respondent, to whom vast sums had been loaned by the company (R68 726 725), had a vested interest in pushing for the adoption of the BR plan, including as it did terms extremely favourable to the fifth respondent, and meaning that the fifth respondent could escape exposure to the risk at the time of creditors taking steps to liquidate the company and recover moneys lent and disbursed to him. (See [103], [106] and [107].)

Held, accordingly, that a claim based on fraudulent misrepresentation to set aside the BR plan was actionable on a prima facie basis (see [113].)

The court, after finding that the further requirements for the granting of an interim interdict had been met (see [114] – [124]), granted the relief as set out in [132].

PATHWAYS HOLDINGS (PTY) LTD AND ANOTHER v RIBEIRO AND ANOTHER 2025 (1) SA 298 (GJ)

Discovery and inspection — Anton Piller orders — Cross-undertaking in damages — Nature and effect — Judgment on exception — Court ruling that undertaking constituting condition imposed by court that did not give rise to independent cause of action — Court's discretion to enforce undertaking distinct from its discretion to set aside order — Issue of scope of damages not yet settled law and incapable of determination on exception.

It is standard procedure for courts to require, as a precondition for the granting of an *Anton Piller* order, an undertaking to compensate for damages. It is a condition imposed *by the court* to ameliorate the potential harm of an order wrongly granted. Like its imposition, its enforcement is in the court's discretion, and it does not give rise to an independent action in substantive law. Moreover, a court's discretion in respect of the setting-aside of an *Anton Piller* order is distinct from its discretion in respect of the enforcement of the damages undertaking, though it may be desirable that the court doing the setting-aside at the same time consider the enforcement of the damages undertaking. The issues of causation and scope of damages arising from an undertaking are not yet settled law. (See [15], [18], [21], [24] – [27], [34], [39], [47] – [48].)

In the present case the first defendant obtained an *Anton Piller* order (the order) on an urgent and ex parte basis. The order, which was in the form of a rule nisi, contained the usual undertaking (the undertaking) to compensate the respondents (the plaintiffs) 'for any damage caused . . . by reason of the execution of this order should [it] subsequently be set aside'. The order was set aside and the rule nisi discharged, but

the issue of the undertaking was neither raised by the parties nor considered by the court. When the plaintiffs subsequently sued the defendants for, inter alia, breach-of-privacy damages under the undertaking, the defendants raised exceptions contending (i) that the undertaking did not found an independent cause of action; and (ii) that claims for non-patrimonial damages were not permitted under the undertaking.

The court, in dismissing the first exception, ruled that it could not be said that the court had exercised its discretion in terms of the undertaking in circumstances where it was neither asked to consider its enforcement nor to determine damages. The discretion was a generic one and the court's omission did not preclude another court from exercising it at a later stage. The court also dismissed the second exception, pointing out that the scope of the damages claim arising from an undertaking was not yet settled law and that it was not appropriate for the court to determine it on exception. (See [35], [39], [48] – [49].)

REISCOR TWO (PTY) LTD (IN BUSINESS RESCUE) v ANHEUSER-BUSCH INBEV AFRICA (PTY) LTD AND OTHERS 2025 (1) SA 315 (GJ)

Company — Business rescue — Business rescue plan — Vote — Rejection — Application to set aside rejection vote as 'inappropriate' under s 153(1)*(a)*(ii) of Companies Act, 2008 — Appropriateness to be viewed objectively — Considerations not taken into account at time of vote could and should be considered — Companies Act 71 of 2008, ss 153(1)*(a)*(ii), 153(7).

Company — Business rescue — Business rescue plan — Vote — Rejection — Grounds — Commercial insolvency and need for further investigation into company's affairs — Not valid grounds — Purpose of plan was to obtain better result for creditors and shareholders than liquidation — Business rescue proceedings not affording creditors rights to information which they did not have prior to business rescue — Companies Act 71 of 2008, ss 153(1)*(a)*(ii), 153(7).

Insolvency — Unlawful alienations and preferences — Voidable sale of business — Not applicable to disposal of business by company under business rescue and trading in terms of approved business rescue plan — Insolvency Act 24 of 1936, s 34.

During July 2021 the first to fourth respondents, the major creditors of Reiscor Two (Pty) Ltd (in business rescue) — after consultation with its business rescue practitioners (BRPs) — indicated their support for selling the applicant company's

business as a going concern, together with the property it owned. The sale took place in October 2021, and a meeting was scheduled for 12 November 2021 to consider the business rescue plan. Two days before this meeting, the major creditors' attorneys of record requested a postponement, and that the BRPs consent to and cooperate with a proposed due-diligence investigation by an independent auditor. The BRPs denied this request but indicated that they were prepared to discuss potential amendments to the business rescue plan.

At the meeting, the major creditors' attorney declined an invitation to discuss such amendments, and (according to the BRPs) to elaborate on their basis for rejecting the plan. Instead, they repeated their request for a due-diligence audit and expressed the view that they had no information on which to base a decision to vote in favour of the plan. In the result, they voted against the business rescue plan, which, in turn, led to its rejection.

This was despite the fact that the tabled business rescue plan provided a comparison between a liquidation scenario and a business-plan scenario, showing that the latter would obtain a better return for the company's creditors or shareholders. It was also common cause that the company could not continue in existence beyond the implementation of the business rescue plan as its employees had left its employ and its assets had already been sold. The BRPs advised the meeting that the applicant would apply to set aside the result of the vote because it was 'inappropriate', as contemplated in s 153(1)*(a)*(ii) of the Companies Act 71 of 2008 (quoted at [3]). Subsequently, one of the major creditors (Distell Ltd) also applied for the applicant's liquidation (see [20]).

The present case concerned both these applications, considered together. (Given the conclusion the court reached in the s 153 application, the court refused the liquidation application — see [109].) In their answering affidavit in the s 153 application, the respondents complained that the BRPs had refused to furnish the sale agreement, refused an investigation of the company's accounts and provided no valuation of the property (see [38]).

The main issue was whether it would be 'reasonable and just' (under s 157) to set aside the vote as 'inappropriate' — a single enquiry since these two sections had to be read together. The complaints raised against the business rescue plan, and parties' competing contentions, raised a number of specific issues, including:

• Whether the timing of the raising of the complaints, ie only after the meeting (as set out in the respondents' answering affidavits), had a bearing on whether the decision was inappropriate (see [40]).
• The merits of the major creditors' complaints, particularly that there was a need for further investigation of the applicant's affairs.
• Whether s 34 of the Insolvency Act, which required publication of the intended transfer of a business, applied to the disposal of a business by a company which was trading in terms of an approved business rescue plan (see [76]). In this regard, the proposed business rescue plan contained a clause in terms of which the creditors agreed not 'to take any legal steps or commence proceedings against the company including to wind up the company for a period of 7 months after the effective date of the [disposal]'. The major creditors contended that this clause impermissibly allowed the parties to contract out of s 34 (see [75]).
• Whether, as contended by the major creditors during the hearing, the business rescue plan or its implementation would be contrary to public policy because the company, post-business rescue, would still be commercially insolvent and lack any assets, so that it should not be permitted to participate in commerce (the commercial morality issue) (see [86] – [89]).

Held

As to the timing of the complaints, that appropriateness must be viewed objectively. Considerations not taken into account at the time of the vote, could and should be considered by the court. Factors which became known after the date of the meeting, or only considered after the date of the meeting, should, if relevant, weigh on the evaluation of whether the decision to reject the plan was appropriate. Courts should look at all the interests and all the facts as they existed at the time of adjudication by the court, including commercial morality (See [40], [42].)

As to the complaints, that the failure by the major creditors to have postponed the meeting and their failure to have suggested amendments to the plan to deal with their concerns, all contributed to the conclusion that voting against the implementation of the plan was inappropriate. Their concerns could and should have been dealt with by postponing the meeting — which they had the right to do without the BRP's permission — and by making constructive suggestions to address their concerns. It was difficult not to agree with the BRP's suggestion that the major creditors did not postpone the meeting because they had no intention of coming up with solutions that would address

their concerns, but were intent on putting the company into liquidation. The creditors had extensive dealings with the business rescue practitioners and were invited to provide their input and any suggested modifications to the plan. Had the major creditors genuinely entertained concerns about the soundness of the plan on the basis now alleged, they could have raised these concerns with the business rescue practitioners either before or at the meeting when the plan was presented, and it could have been attended to by amending the plan or by voting to adjourn the meeting to prepare a revised plan. (See [44], [55] – [57].)

As to the complaint about the need for further information, that there was no obligation on a BRP to accede to a request by a creditor to enable the creditor to undertake its own investigation. Business rescue proceedings did not afford creditors of a company rights to information which they did not have prior to the company being placed in business rescue. Conceptually, it could not be the law that a need for investigation of the company affairs into possible mismanagement, unlawfulness or voidable dispositions could validly scupper a plan which was otherwise sound, given the significant time constraints contained in the Companies Act 71 of 2008. (See [67] – [68], [73].)

As to s 34 of the Insolvency Act, that it did not pose an obstacle to the acceptance of the plan because contracting out of the consequences of s 34 was competent where the necessary element of publicity required by s 34 was achieved via notice to affected parties; and because, on a proper construction of the applicable legislation, s 34 did not apply to a company in business rescue (see [85]).

As to the plan's commercial morality, that its purpose was to allow the applicant to recommence trading after the business rescue. As a matter of law, the business rescue plan was one precisely as contemplated by the legislative regime governing business rescue proceedings, the second objective being to extract a superior outcome through business rescue rather than liquidation. (See [91].)

The BRPs have made out a case of inappropriateness sufficient to justify the rejection of the major creditors' views, to overturn their rejection of the business plan and to approve it as the court was empowered to do by s 153. Accordingly, it was reasonable and just that the vote rejecting the plan be set aside on the grounds that it was inappropriate. (See [107] – [108].)

POLOVIN v DIRECTOR OF PUBLIC PROSECUTIONS, WESTERN CAPE AND OTHERS 2025 (1) SACR 1 (SCA)

Prosecution — Private prosecution — Locus standi of private prosecutor — Private prosecutor had her credit records unlawfully accessed by accused in private prosecution — Private prosecutor having substantial and peculiar interest arising from actual injury — Private prosecutor having locus standi.

Prosecution — Private prosecution — Nolle prosequi certificate in terms of s 7(1) of Criminal Procedure Act 51 of 1977 — Review of — Decisions to prosecute and not to prosecute excluded by s 1*(b)*(ff) of Promotion of Administrative Justice Act 3 of 2000 — Subject to judicial review, however, on grounds of legality and rationality.

Prosecution — Private prosecution — Nolle prosequi certificate in terms of s 7(1) of Criminal Procedure Act 51 of 1977 — Reissue of — Director of Public Prosecutions entitled to reissue certificate which had lapsed.

Prosecution — Private prosecution — Nolle prosequi certificate in terms of s 7(1) of Criminal Procedure Act 51 of 1977 — Addition of further charges in reissued certificate — Director of Public Prosecutions entitled to add further charges.

Prosecution — Private prosecution — Nolle prosequi certificate in terms of s 7(1) of Criminal Procedure Act 51 of 1977 — Status and effect of in administrative law.

The applicant applied for leave to appeal from a decision in the High Court which had dismissed his application for a frontal challenge to the institution of a private prosecution by the second respondent and refused to grant leave to appeal. He then petitioned the Supreme Court of Appeal which referred the matter for oral argument on the application, as well as, if necessary, argument on the merits. The second respondent had obtained a nolle prosequi certificate in terms of s 7(2)*(a)* of the Criminal Procedure Act 51 of 1977 (the CPA) from the Director of Public Prosecutions (the DPP) reflecting that the DPP had declined to prosecute the appellant on a charge of one count of a contravention of s 86(1) read with ss 1, 3 and 89 of the Electronic Communications and Transactions Act 25 of 2002 (ECTA). This related to the unauthorised access to, interception of or interference with data. The certificate expired after a period of three months because of a delay in the obtaining of the police docket. The second respondent then obtained a further certificate to which the DPP had added additional charges at the request of the second respondent, namely fraud for the act of accessing the information on the credit bureau, on the basis of misrepresentations; a count of defeating or obstructing the administration of justice,

due to the appellant's responses to the credit bureau's investigators; and three counts of contravening the ECTA for accessing private information without permission, unlawfully overcoming security measures and unauthorised use of data. The dispute between the parties arose from a spat between neighbours, during which the appellant unlawfully accessed the credit records of the second respondent under a false identity. The appellant contended that the DPP's issuing of the certificate stood to be reviewed and set aside, as the private prosecutor had no locus standi and had no substantial and peculiar interest arising from an actual injury individually suffered. He also contended that the DPP was not entitled to issue a new certificate and that it was improper that the additional charges had been added to the original certificate. He contended further that the second respondent's private prosecution was vexatious.

The court first examined the question of whether leave to appeal should be granted: it held that in circumstances where there were conflicting judgments on the jurisdictional requirements of s 7 of the CPA, leave to appeal ought be granted as the decision to be appealed involved a question of law of importance, in terms of which a decision of the Supreme Court of Appeal was required to resolve differences of opinion. (See [12].)

As to the merits, that the definition of administrative action in terms of s 1 of Promotion of Administrative Justice Act 3 of 2000 (PAJA) excluded the decision not to prosecute or to discontinue a prosecution. It begged the question therefore whether the decision not to prosecute may be subject to review. The court held that decisions to prosecute and not to prosecute were of the same genus and, although on a purely textual interpretation, the exclusion of decisions to institute or continue a prosecution in s 1*(b)(ff)* of PAJA was limited to the former, it had to be understood to incorporate the latter as well. Although decisions not to prosecute were, in the same way as decisions to prosecute, subject to judicial review, this did not extend to a review on the wider basis of PAJA, but was linked to grounds of legality and rationality. In the present case, the certificate was nothing more than a document that certified that the DPP had seen the statements or affidavits on which the charge was based and that he/she declined to prosecute at the instance of the state. The certificate did not confer authority on anyone to do anything. Having regard to its content, it was a document of a formal nature which could be produced as evidence of a decision that the DPP declined to prosecute. Therefore, a distinction had to be drawn between a decision not to prosecute, which was reviewable on the principle of legality or rationality, and a

document evidencing that decision, which itself was not a decision and therefore not reviewable. (See [18] and [20].)

As to whether the jurisdictional requirements for the issue of a certificate were met, in terms of a proper construction of s 7(1)*(a)* of the CPA, it was a factual enquiry whether a complainant met the threshold of the jurisdictional prerequisites of the provision. In this instance the question was whether the second respondent had locus standi and a substantial and peculiar interest arising from an actual injury individually suffered. Such substantiation was found in the statement of the complainant and those of witnesses which indicated that the act had caused the second respondent harm, and her actions were justified, lawful and required to correct a wrong done not only to her, but also to the credit bureau and the state. She stated that no reasonable person would feel safe if a person displayed the type of enmity that the appellant did in accessing her confidential records in the covert and unauthorised manner in which he did. There was no merit in the appellant's attack on the second respondent's lack of compliance with the jurisdictional requirements of the section. (See [27] – [29].)

As to the reissue of the certificate, there was no merit in the argument of the appellant that the DPP was functus officio and had no authority to reissue the certificate. The appellant conflated the right to institute private prosecution and the lapse of the certificate. The certificate lapsed three months from the date of its issue, but the right to institute private prosecution in respect of an offence only lapsed or prescribed 20 years from the time the offence was committed. The DPP could therefore reissue the certificate, even in instances where the private prosecutor requested to include additional charges from the same statements and affidavits in the docket which the state had initially not contemplated. Furthermore, s 22(2)*(c)*, read with s 23, of the National Prosecuting Authority Act 32 of 1998, empowered the Acting DPP to review a decision to prosecute or not to prosecute, and therefore the DPP, even during a private prosecution, retained the authority to intervene. There was further no authority that provided that it was impermissible for the DPP to include additional charges in the reissued certificate. (See [34] – [35].)

The court held further that the private prosecution was not malicious or vexatious as suggested by the appellant and he had, by his conduct, issued a provocative challenge which it appeared the second respondent had accepted. The appellant, as an attorney, should have known better than to conduct himself in such manner and he had failed

to demonstrate that his rights were in any way facing imminent threat or were being assailed. (See [39].) In the result, the appeal therefore had to be dismissed. (See [46].)

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS v SMITH AND ANOTHER 2025 (1) SACR 21 (NCK)

Prevention of crime — Forfeiture order — Prevention of Organised Crime Act 121 of 1998 — Application for order of civil forfeiture — Father's vehicle and rifle used by adult son in poaching of wild game — Whether instrumentality of offence — Innocent-owner defence as envisaged by s 52(2A) of Act — Discharge of onus — Father respondent not providing sufficient evidence that justified inference that he was unaware that his son was using his vehicle and rifle for illegal hunting.

The applicant applied for a forfeiture order in terms of the Prevention of Organised Crime Act 121 of 1998 (POCA) to have a Ford Ranger motor vehicle and a .222-calibre rifle belonging to the second respondent declared forfeit. The first respondent was the second respondent's adult son. It appeared that farmers in the district became aware of poaching of wild game on their farms, and the second respondent's neighbour, in November 2018, photographed a kudu, two warthogs and a blesbuck on the back of the vehicle. The first respondent and another person were arrested and charged with three counts of contraventions of the Northern Cape Nature Conservation Act 9 of 2009 in respect of an incident on 29 November 2018 when a witness discovered the carcasses of two female kudus with gunshot wounds to the head, and their throats cut open, and the rifle in a rifle bag behind a dam. The witness searched the vehicle and found two .222-calibre cartridges in it. The first respondent pleaded guilty to the charges and admitted that the vehicle and the rifle had been used during the commission of the offences. He received a sentence of a fine of R12 000 or 12 months' imprisonment, and an additional two years' imprisonment suspended for a period of five years. The National Director of Public Prosecutions obtained a final preservation order on 22 May 2020. The second respondent opposed the forfeiture order and contended that the vehicle and rifle were not instrumentalities of the offence; that he was the innocent owner of the vehicle and rifle as envisaged by s 52(2A) of POCA; and that the forfeiture was disproportionate to the offences.

Held, that a sufficiently close link between the property and the offences committed had been established to warrant a finding that the vehicle and the rifle were instrumentalities of the offences. (See [17].)

Held, as to the innocent-owner defence, the second respondent alleged that he was not aware that the first respondent was involved in any illegal activities and that he had not authorised him to use the property for illegal purposes. This was confirmed by the version of the first respondent in his plea explanation in the criminal proceedings, that he had taken the vehicle and rifle without the second respondent's permission. The second respondent, however, did not dispute the communication that he had had with a neighbour a week before the events of 29 November 2018 in which he was informed that the first respondent was involved in the poaching of game and was using his vehicle for this purpose. He, however, did not unequivocally deny the possibility that there was truth to the allegations that his son had been involved in illegal poaching activities prior to his arrest, nor did he assert that he did not have reason to believe the truth of the allegations. His attitude was seemingly that his son was an adult and he would need to address the possible illegalities. (See [25].)

Held, that in the circumstances of the matter, to have discharged the onus, one would have expected of the second respondent to have done more than merely give the first respondent a stern talking-to. The law expected of the second respondent to at least have investigated the allegations and, at the very least, to have restricted his son's access to the means by which potential further offences could be committed. In the circumstances, the second respondent could not avail himself of the innocent-owner defence. (See [28].)

Held, as to proportionality, the value of the vehicle was an amount of R124 000 at the time of the seizure of the vehicle in 2020 and would have depreciated significantly by the time of judgment; the second-hand value of the rifle was R13 000; and the value of the kudus was approximately R8000. It was more probable than not, however, that the events of 29 November were not a one-off occurrence, and the second respondent's estimates therefore did not consider the other losses probably suffered by all the affected farmers in the loss of game, damage to property, and time and money spent in bringing the first respondent and his accomplice to book. Taking these considerations into account, the court was not persuaded that the forfeiture of the property would be disproportionate, and that such order would serve the broader societal purpose of deterrence and advance the ends of justice. (See [30] and [33].) The application was accordingly upheld.

EMBRACE PROJECT NPC AND OTHERS v MINISTER OF JUSTICE AND CORRECTIONAL SERVICES AND OTHERS 2025 (1) SACR 36 (GP)

Rape — Defences — Consent — Sections 3, 4, 5, 6,7, 8, 9 and 11A read with s 1(2) of Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 permitting acquittal of accused where perpetrator wrongly and unreasonably believed that complainant had consented — Constitutionality of — Provisions violating constitutional rights of victims and declared unconstitutional — Provision to be read into Act to effect that not valid defence for accused person to rely on subjective belief unless accused took objectively reasonable steps to ascertain that complainant had consented to sexual conduct in question.

The applicant, a non-profit company, brought an application in this matter in three capacities, in its interest as an organisation dedicated to combating gender-based violence and femicide (GBVF) through advocacy, awareness-raising, and participation in the development and amendment of legislation, national policy, and strategies impacting GBVF, pursuant to s 38*(a)* of the Constitution; in the interest of victims and survivors of all forms of sexual violence; and in the public interest. The second applicant was a victim of rape and was the complainant in a case in a regional court in which the accused was acquitted as a result of the current legal position of the subjective-belief test regarding the requirement of consent in rape cases.

In the application the first applicant challenged the constitutional validity of ss 3, 4, 5, 6 ,7, 8, 9 and 11A read with s 1(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Act). The absence of consent is constituent in this matter, to the extent that the Act does not criminalise sexual violence where the perpetrator wrongly and unreasonably believed that the complainant consented to the conduct in question, therefore enabling the accused to successfully avoid conviction on the grounds of the subjective belief that consent was given. The third applicant, the Centre for Applied Legal Studies (CALS), was admitted as an intervening party. The relief deviated from that sought in the main application, it seeking to remove the definition of consent as an element of sexual offences in terms of common law and the Act. It submitted that the inclusion of consent as a definitional element was an unreasonable limitation of rights of the individual (predominantly women, gender-diverse individuals and children) to equality before the law, as well as limitations on their intersecting rights to dignity and to be free from all forms of violence. The respondents contended that to ensure that the guilty were punished and the innocent protected, the assessment of the defendant's culpability relied on a comprehensive examination of all relevant evidence to have accurate and reliable fact-findings. In

doing this, the criminal justice system aimed to strike a balance between the pursuit of truth and the protection of individual liability. They also contended that the proposed amendment to the provision would reverse the onus and shift the burden of proof from the prosecution regarding the crucial element of the offence. Two amici curiae were also admitted as such.

Held, that in terms of our law the conduct of the accused in a rape case was unlawful if it was committed without the consent of the complainant. But it also had to be intentional. In South African criminal law concerning mens rea, the intention had not only to be to commit the conduct which was unlawful, but also to do so knowing (or recklessly disregarding the risk) that it was unlawful. In the context of rape, this meant that the accused not only had to have intended to commit an act of sexual penetration, but he must also have intended to do so unlawfully and knowing (or recklessly disregarding the risk) that the complainant was not consenting. In other words, if it was at all reasonably possibly true that the accused subjectively believed the complainant was consenting, even if that belief was unreasonable, that approach favoured the perpetrator rather than the victim. This created an almost insurmountable barrier to the conviction of the accused persons who have been found, by the courts, to have committed acts of sexual penetration without the consent of the complainant. By enabling a defence of unreasonable belief in consent, the Act violated the rights of victims and survivors, to equality, dignity, privacy, bodily and psychological integrity, and freedom and security of the person which included the right to be free from all forms of violence and the right not to be treated in a cruel, inhumane or degrading way. (See [39] – [40].)

Held, as to the respondents' contention, that the proposed amendment would reverse the onus and shift the burden of proof from the prosecution, the correct position was that there was no reverse onus. The onus remained where it belonged, namely on the state to prove its case beyond reasonable doubt. All that the suggested amendment to the law sought to suggest was a test that would require a perpetrator to explain the objective steps he took to establish the presence or absence of consent prior to the alleged rape. The fundamental principle of our justice system, that every person was presumed innocent until found guilty, was not challenged at all by the suggested amendment. (See [50] – [51].)

Held, further, that, as to the applicants' contention that the state had failed to take the necessary and effective measures to respect, protect, promote and fulfil the

fundamental rights of women, the respondents had contended for a holistic approach and that legislation alone could not solve the problem, and pointed to various actions of the state to combat the scourge of gender-based violence. Whilst that was commendable, the respondents were merely expanding on the manner in which the state was fulfilling its duties in terms of s 7(2). That did not mean that where the Act fell short, it ought not be corrected. (See [54] – [56].)

Held, further, that the respondents had failed to make out a case that the impact of the impugned sections was justified in terms of s 36 of the Constitution. (See [58].)

Held, further, taking into account the approaches in other countries, South Africa would not be alone in adopting the objective test and requiring the accused to take reasonable steps to ensure and prove that consent was attained. (See [69].)

Held, accordingly, that ss 3, 4, 5, 6 ,7, 8, 9 and 11A read with s 1(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 were unconstitutional and that the relief sought by the third applicant should not be granted because of its inconsistence with the doctrine of the separation of powers. The court therefore ordered that words had to be inserted into the Act at s 56(1A) that an accused under any of the sections could not rely on a subjective belief that the complainant was consenting to the conduct in question. (See [78].)

SM v MINISTER OF JUSTICE AND CORRECTIONAL SERVICES AND OTHERS 2025 (1) SACR 65 (ECM)

Domestic violence — Protection orders — Final order — Validity of — Magistrate making final order in course of proceedings in criminal court concerning charge of assault — Interim order not served on accused and he had had no opportunity of reading it or application for order — Magistrate committing irregularity — Final protection order reviewed and set aside, and matter remitted for further determination by another magistrate.

The applicant brought an application for reviewing and setting aside a final protection order granted by the second respondent, a magistrate, in terms of the Domestic Violence Act 116 of 1998. The order was that the applicant was not to enter the marital home where he lived with the third respondent, who was his wife, and his minor child. He was also ordered not to commit certain acts of domestic violence, including assaulting his wife. On 22 March 2023 the applicant had been arrested on allegations that he had assaulted his wife. Following his arrest he had appeared in the magistrates' court where he was legally represented. While waiting for his case to be called on that

day it was brought to his attention that his wife was preparing a statement withdrawing the assault charge against him. Despite this fact being brought to the attention of the court, he was nonetheless remanded in custody until 31 March 2023. On that day he intended to apply for his release on bail and anticipated that the charges against him would be withdrawn. He went on to state that shortly before the court started on 31 March, he was instead served with an application for a protection order and an interim protection order granted on 24 March 2023. He had no knowledge of that order prior to his appearance in court. The prosecutor's application that the charge of assault be withdrawn was not acceded to by the magistrate, who instead instantaneously dealt with his domestic violence case and allowed him to be released on bail of R1000. The magistrate summarily issued a final protection order. At that stage the applicant had not had an opportunity to read the contents of the application or the interim protection order that was served upon him, or to prepare his defence. The magistrate merely asked questions regarding his marriage to the third respondent after which she issued a final protection order.

In his review application the applicant contended that the magistrate had committed an irregularity in arbitrarily granting the final protection order in circumstances where he was not afforded an opportunity to show cause why a full final order could not be made, and the interim order was granted without notice being given to him.

Held, that the Criminal Procedure Act 51 of 1977 (the CPA) had recently been amended to bring it into line with the protections afforded to victims of domestic violence. The relevant amending Act was the Criminal Law and Related Matters Amendment Act 12 of 2021 which came into effect on 5 August 2022 and amended ss 59 and 60 of the CPA. The amending Act provided for a more stringent procedure in securing the release of an accused who was charged with an offence involving domestic violence, and also imposed a duty on the court to ensure that when an accused charged with such an offence was released on bail, there was in place a protection order to ensure the safety of the victim of domestic violence. On the other hand, the news 60(12) of the CPA introduced a dispensation in terms of which the court ought to determine the release on bail of an accused person charged with an offence committed against a person in a domestic relationship. (See [45] – [47].)

Held, further, that, upon a reading of the provisions of s 60(12)*(b)* of the CPA, it became clear that those provisions applied only where there was no interim protection order in place. Had the legislature intended to include a situation where an interim

protection order was in place at the time of the determination of an accused's release where he faced a charge of an offence involving a domestic relationship, it would have expressly provided so. To the extent that, in subjecting the applicant to an instant hearing, the magistrate may have thought that she was bound to issue a final protection, she had committed an irregularity. The contention made by the applicant, that the second respondent improperly conflated proceedings in his criminal case of assault and the domestic-violence case, had in the circumstances to be sustained. (See [48], [53] and [55].) The final protection order was reviewed and set aside, and the matter remitted to the court a quo for the determination of the matter in terms of s 6(2) of the Domestic Violence Act.

GADIAH AND ANOTHER v NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND OTHERS 2025 (1) SACR 81 (KZD)

Prevention of crime — Restraint order — Restraint order in terms of Prevention of Organised Crime Act 121 of 1998 — Variation of — Application for — Applicants having invested in unlawful multiplication scheme and wanting to have initial investments released from frozen bank accounts of originator of scheme — Question arising of knowledge of unlawfulness of their participation — Such dispute constituting dispute of fact which could not be resolved on papers.

Three sets of applicants approach the court for the variation of restraint orders granted against them in terms of s 53 of the Prevention of Organised Crime Act 121 of 1998 (POCA) over the bank accounts of a business which had allegedly run an illegal Ponzi scheme. They contended that the property was of lawful origin and reflected their personal savings and money; that they were not criminals and there were no charges pending against them; that they were in fact complainants who had made statements to the authorities about the scheme and were victims of the crime committed by the perpetrators; and that they had had no reasonable grounds to suspect that they were investing and participating in an illegal multiplication scheme. It was not contested that the applicants had made the complaints and the statements, but the respondent argued that, in law, it was of no consequence that they had never been charged for their complicity in the scheme. The respondent argued that schemes of that nature were unlawful and the applicants in all likelihood knew or ought to have known that this was an illegal multiplication scheme, considering the return of investment promised, of 1000%, which was impossible to attain lawfully. At the very least they

ought to have reasonably known that the scheme was prohibited by s 43(2) of the Consumer Protection Act 68 of 2008.

Held, that the issue in dispute was whether the applicants had been able to show that they did not know that the scheme was unlawful. However, motion proceedings were ill-equipped to deal with cases where probabilities were involved, and it was generally accepted that a dispute concerning the knowledge of unlawfulness by a party to litigation constituted a dispute of fact. That dispute could not be resolved on the papers and in that case the application had to fail, there having been no application to refer the matter for oral evidence. (See [39] – [42].)

Held, further, that it was not necessary that the applicants be criminally charged, as forfeiture was not founded on the basis of a conviction or even of a charge having been preferred in a criminal trial. It sufficed that the funds were an instrumentality of the crime. There were in the circumstances no considerations that warranted a variation of the restraint order. (See [46].)

BRITTON v MINISTER OF JUSTICE AND CORRECTIONAL SERVICES AND OTHERS 2025 (1) SACR 95 (SCA)

Extradition — Warrant of arrest — Section 5(1)*(a)* of Extradition Act 67 of 1962 — Finding of constitutional invalidity — Effect of — Constitutional Court's order prospective in effect.

The appellant faced various counts of theft and tax evasion in the US, where she formerly practised as an attorney, and a warrant was issued for her arrest. She fled to Cape Town where she had been living since approximately October 2002. The US sought her extradition. The first attempt was unsuccessful. In a second attempt the Minister of Justice and Correctional Services (the Minister) issued a notice for her extradition and the magistrate issued a warrant for her arrest in terms of s 5(1)*(a)* of the Extradition Act 67 of 1962 (the Act). She was arrested on 12 October 2017 and immediately released on bail.

The appellant launched proceedings for relief in the High Court, seeking to have the notice and arrest declared inconsistent with the Constitution and invalid. By the time the matter was heard in the High Court the Constitutional Court in Smit * had found s 5(1)*(a)* of the Act unconstitutional and invalid. Without giving reasons therefor, it ordered that the declaration of invalidity 'takes effect from the date of this order'. The date was 18 December 2020, three years after the warrant for the appellant's arrest

had been issued and executed, although the extradition was still pending. The High Court dismissed her application, but granted leave to appeal to the present court.

The essential issue was whether the *Smit* order of invalidity made by the Constitutional Court on 18 December 2020 applied to the arrest of the appellant, although her arrest was three years prior to that date.

Held

The supremacy clause in the Constitution automatically rendered any unconstitutional law a nullity ab initio, and the default position in all declarations of constitutional invalidity was thus retrospectivity. Section 172(1)*(b)*(i) nevertheless permitted a court, in the interests of justice and equity, to limit the retrospective effects of an order of invalidity. This was done by balancing the disruptive effects of the retrospectivity against the need to grant effective relief to an applicant and others in a similar situation. However, while there were sound reasons of policy not to make an order of invalidity applicable to cases that have been determined under an invalid law, the same was not ordinarily so in respect of pending cases. There did not seem to be a reason to resolve these cases on the basis of a law that had finally been declared invalid: that was usually what the interests of justice required, and it was what the Constitutional Court had ordered in a number of its decisions. It did not do so, however, in *Smit*. While it provided no reasons for its order of prospectivity, the order it gave was explicit, and it was not open to the present court to speculate as to some implicit reservation of retrospectivity that the Constitutional Court left unexpressed in *Smit.* The appellant might well have been deserving of the benefit of the declaration of invalidity given by the Constitutional Court, but since that court had rendered such invalidity prospective, the warrant of arrest, issued in terms of s 5(1)*(a)* in respect of the appellant, was to be treated as valid. Any different order was beyond the remit of revision by this court. (See [23] and [29].) In the result, the appeal was dismissed.

S v SIDUNA AND OTHERS 2025 (1) SACR 108 (NWM)

Sentence — Fine — Adjustment of Fines Act 101 of 1991 — Effect of — Act providing tool for determining maximum fine allowable when such fine not stipulated in penalty clauses, but could not be used to determine alternative period of imprisonment when amount of fine stipulated in penalty clause.

Six matters were placed before the court for review resulting from a judicial quality-assurance assessment at a magistrates' court. In each case the magistrate had convicted the accused based on their pleas of guilty in terms of s 112(1)*(a)* of the

Criminal Procedure Act 51 of 1977 and imposed sentences as follows: in cases 1 and 2 for contraventions of s 49(1)*(a)* of the Immigration Act 13 of 2002, three months' imprisonment coupled with an order that the accused be declared unfit to possess a firearm; in case 3, for assault, six months' imprisonment wholly suspended for a period of three years, and the accused was also declared unfit to possess a firearm; in case 4, for assault, the accused was sentenced to three months' imprisonment wholly suspended for two years, and declared unfit to possess a firearm; in case 5 the accused was charged with driving a motor vehicle on a public road without a valid driver's licence,, in contravention of s 12 of the National Road Traffic Act 93 of 1996 — the accused was sentenced to a fine of R6000 or six months' imprisonment suspended for three years; and in case 6 the accused was charged with theft of items valued at R60 — the accused was sentenced to three months' imprisonment wholly suspended for three years.

Held, that the Adjustment of Fines Act 101 of 1991 (the AFA) provided a tool for determining the maximum fine allowable when such fine was not stipulated in penalty clauses, but where the penalty clause did specify a maximum term of imprisonment. Otherwise stated, the AFA could not be employed to determine the alternative period of imprisonment when the amount of a fine had been stipulated in a penalty clause. The AFA did not apply to s 112(1)*(a)* of the CPA. When s 112(1)*(a)* of the CPA was invoked, the presiding officer was constrained to impose a maximum fine of R5000. (See [22] – [23].)

Held, accordingly, that the sentences imposed in matters 1, 2, 3, 4 and 6 were incompetent and had to be reviewed and set aside. The sentence in matter 5 had to be reviewed and set aside with a competent sentence to be imposed in its place, in accordance with the provisions of s 112(1)*(a).* (See [28] – [29].)

All South African Law Reports January 2025

Chithi and others v Minister of Rural Development and Land Reform and others
[2025] 1 All SA 1 (SCA)

Property – Land – Restitution of land rights claim – Correctness of Land Claims Court's dismissal of community claim on ground that community claimants did not constitute a community – Where members of community did not derive their possession and use of land from common rules, definition of "community" in section 1 of Restitution of Land Rights Act 22 of 1994 not complied with.

Three consolidated appeals before the court concerned a claim that was lodged by the Mavundulu Community for the restitution of rights in land of which they were allegedly dispossessed in terms of the Restitution of Land Rights Act 22 of 1994. The Regional Land Claims Commissioner: KwaZulu-Natal accepted and investigated the claim as a community claim, and the claim was accepted in terms of section 11 of the Act by publication in the *Government Gazettes* of 29 November 1996 and 1 August 2001. In October 2017, the Community claimants, whilst the determination of the community claim was underway, added individual claims as an alternative to the community claim. On 31 March 2020, the Land Claims Court ("LCC") dismissed the individual claims on the basis that they were not lodged by 31 December 1998 and were not supported by evidence. The dismissal of the alternative claims was correct as an individual claim cannot be introduced by way of amendment. What remained was the community claim which had been duly accepted, published and investigated. During the hearing in the LCC in March 2020, at the close of the community claimants' case and that of the State respondents, a separation of issues was ordered in terms of rule 57(1)(c) of the Land Claims Court Rules and the issue of whether the Mavundulu was a community, as envisaged in the Act was to be determined separately before any other issues. The Court found that the community claimants had failed to prove the existence of a community as defined in section 1(iv) of the Act. That led to the present appeal.

Held – The first question was whether the LCC was correct to decide the "community issue" separately in terms of rule 57(1)(c). The community claimants were not prejudiced through the invocation of rule 57(1), as the LCC was vested with inquisitorial powers in terms of section 32(3)(b) of the Act to conduct any part of any of its proceedings on an informal or inquisitorial basis and to identify issues to be determined separately, which power could be invoked at any stage of the proceedings by the presiding judge.

The next question was whether the finding of the LCC that the community claimants did not constitute a community, was correct. Section 2(1)(d) of the Act provides that a "person shall be entitled to restitution of a right in land if it is a community or part of a community dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices". The claim for such restitution must have been lodged with one of the offices of the Land Claims Commission, by not later than 31

December 1998. A “community” is defined in section 1 of the Act as “any group of persons whose rights in land are derived from shared rules determining access to land held in common by such group and includes part of any such group”. The question was whether the members of the Mavundulu community derived their possession and use of the land from common rules. The evidence established that, although the claimants’ forebears might have existed as a community before the arrival of white settlers, that community had disintegrated before June 1913. The community members then continued to occupy the land as labour tenants who were subject to the rules and policies of the white landowners. Therefore, the rights which the community members enjoyed as labour tenants, and later, as farm workers were not derived from shared rules which determined access to land held in common by a group and the community claimants failed to prove that they constituted a community as envisaged in the Act.

The only appeal upheld was that against the LCC order disallowing the fees of the first to third appellants and directing them to repay the fees they had already received from the State.

Coughlan NO v Health Professions Council of South Africa and others
[2025] 1 All SA 20 (SCA)

Personal Injury/Delict – Compensation claim against Road Accident Fund – Assessment by tribunal of Health Professions Council to determine seriousness of injury – Powers of tribunal – Whether tribunal was entitled to consider cause of injury – Tribunal’s role is narrowly circumscribed to assessing the seriousness of injuries, and it is not tasked with determining the cause of the injury, which is a matter reserved for judicial determination.

As curator acting on behalf of a person (“Mr Daniels”) who had sustained injury in a motor vehicle accident, the appellant instituted a claim for damages against the third respondent (the “RAF”). In the course of the action, the appellant filed an interlocutory application for the review and setting aside of a decision by the fourth to seventh respondents acting under the auspices of the first respondent (the “HPCSA”), of which they were members due to their professional registration. The present appeal was directed at the order granted by the High Court, which was unclear and unfavourable to the appellant.

Mr Daniels had been hit by a vehicle in a hit-and-run accident. The appellant claimed that the bodily injuries sustained by Mr Daniels entitled him to compensation from the RAF in terms of section 17(1)(b) of the Road Accident Fund Act 56 of 1996. The appellant's claim on behalf of Mr Daniels included compensation for non-pecuniary loss ("general damages"). For the claim to be successful, the injuries had to qualify as serious in terms of section 17 of the Road Accident Fund Act. That required an assessment by a medical practitioner registered in terms of the Health Professions Act 56 of 1974, and a whole person impairment ("WPI") rating of above 30% before applying the applicable test. Although a psychiatrist who assessed Mr Daniels recorded a WPI of 35%, the RAF consulted a neurosurgeon who found that Mr Daniels had not suffered a brain injury from the collision but experienced severe psychotic episodes due to substance abuse involving cannabis and methamphetamine. The appellant disputed that assessment, arguing that it was based on a neurosurgeon's report rather than that of a psychiatrist. He lodged a dispute with the HPCSA and obtained a medico-legal report from a clinical psychologist, who concluded that Mr Daniels' pre-accident drug use did not trigger psychotic symptoms and that it was the accident that marked the sudden onset of a psychotic disorder. The appellant was unhappy with the decision of the tribunal constituted to hear the complaint, and approached the High Court for review. One of its main complaints was that the tribunal had considered the issue of causality in respect of the injury instead of focusing on whether the effects of the injury were serious. The High Court dismissed the review application, finding that the tribunal did not exceed its authority by addressing the issue of causality , and that the tribunal's decision was based on the available evidence and that there were no valid grounds for review. The Court, however, did not decide whether in addressing the issue of causality, the tribunal had exceeded its authority.

Held – Tribunal's role is narrowly circumscribed to assessing the seriousness of injuries. It is not tasked with determining the cause of the injury, which is a matter reserved for judicial determination. Although two experts in psychiatry had assessed Mr Daniels as having sustained a serious injury with a WPI exceeding 30%, the tribunal relied on the assessment of a neurosurgeon, whose expertise in psychiatric matters was contested by the appellant. The constitution of the tribunal had been agreed upon and prescribed by a court order, but had not complied therewith. It was logical that experts in the relevant field of psychiatry should have been appointed. Importantly, the

tribunal relied on the neurosurgeon's report which focused heavily on causality, an issue beyond the tribunal's authority. In fulfilling its duty to determine the seriousness of the injury, the tribunal had to consider relevant factors and not exceed its authority. Its decision appeared to stem from a misapprehension of its powers, resulting in it enquiring into the causal link between the accident and Mr Daniels' psychosis. In so doing, it exceeded its powers.

The High Court was called upon to determine whether to review, correct, or set aside the decision of the tribunal, which classified Mr Daniels' injury as non-serious under the applicable test. However, it did not determine that issue, despite repeatedly mentioning it in its reasoning. It accordingly failed to resolve all the issues which were placed before it for determination.

As the tribunal had exceeded its powers and reached an erroneous conclusion which was *ultra vires* and not sustainable, the appeal was upheld.

Minister of International Relations and Co-operation NO and another v Neo Thando/Elliot Mobility (Pty) Ltd and another [2025] 1 All SA 31 (SCA)

Arbitration – Referral of matter to arbitration – Whether contracting party could unilaterally effect a referral to arbitration – A difference or dispute must have existed when the matter was referred for arbitration to be arbitrable in terms of the Arbitration Act 42 of 1965 – Arbitration clause could not be read as allowing the one party to the agreement to force the other party to submit to arbitration would be unbusinesslike.

In August 2015, the Department of International Relations and Co-operation ("DIRCO") invited tenders for the removal, packing, storage (in South Africa) and insurance of household goods and vehicles of transferred officials, to and from missions abroad. The tender was awarded to the first respondent ("Neo Thando"). The parties signed a Service Level Agreement ("SLA") which recorded their respective obligations, one of which was that Neo Thando would be responsible for the packing of a transferred official's furniture and equipment. Based on the SLA, Neo Thando concluded a written lease agreement with a property company, on whose premises such goods were to be stored. The goods were currently being stored by a company ("AGS Frasers") with which DIRCO had entered into an agreement. AGS Frasers refused to hand the goods over to Neo Thando. Correspondence was exchanged between DIRCO, AGS Frasers and Neo Thando without any solution until the parties

reached a deadlock. DIRCO did not respond to a request by Neo Thando for its intervention. Neo Thando wrote a letter of demand and gave notice of its intention to refer the matter to arbitration. DIRCO eventually responded, saying that Neo Thando had not clarified what the dispute was, that it did not believe that there was any dispute to arbitrate and accordingly did not agree to arbitration. In challenging the jurisdiction of the arbitrator, DIRCO contended that contrary to the SLA, Neo Thando had referred the dispute to arbitration unilaterally; had not alleged the existence of a dispute that it wished to be referred to arbitration; and had failed to give written notice identifying the "difference or dispute" to be arbitrated. The arbitrator found that DIRCO had a contractual obligation to procure the goods stored with AGS Fraser and have them transferred by AGS Fraser to Neo Thando. DIRCO unsuccessfully sought review in the High Court, while Neo Thando obtained confirmation of the arbitration award.

On appeal, the central issue for determination was whether the arbitrator had jurisdiction to arbitrate the dispute referred by Neo Thando, and whether the dispute that was referred was an arbitrable dispute as contemplated in the Arbitration Act 42 of 1965.

Held – The words "difference or dispute" were not defined anywhere in the SLA. Applying the established unitary approach to interpretation of the relevant clauses in the SLA, the point of departure was the language used in light of the ordinary rules of grammar and syntax. The language and syntax of the relevant clause indicated that the parties had to agree that they were in disagreement over something; that they both wished to have that difference or dispute arbitrated; and that they submitted the dispute to arbitration. DIRCO had consistently contended that there was no arbitrable dispute to be referred for arbitration and that it did not consent to the referral. Neo Thando did not allow DIRCO any time to deal with what it believed was "a difference or dispute" between the parties, and instead forced DIRCO to arbitration. To be arbitrable in terms of the Arbitration Act, a difference or dispute must have existed when the matter was referred for arbitration. On the facts of the matter, it was clear that there was no difference or dispute identified at the time Neo Thando referred the matter to arbitration. Contrary to the clear terms of the SLA, Neo Thando unilaterally referred the matter for arbitration without DIRCO's consent. Arbitration by its very nature is voluntary. To read the arbitration clause as allowing one party to the

agreement to force the other party to submit to arbitration would be unbusinesslike. The appeal was therefore upheld with costs.

Minister of Police v Nontsele [2025] 1 All SA 44 (SCA)

Civil Procedure – Appeal – Whether a cross-appeal can be entertained in the absence of leave to appeal having been granted – In terms of sections 16(1) and 17(2)(a) of the Superior Courts Act 10 of 2013, an application for leave to appeal is anticipated prior to an appeal being brought – Without application for leave, court lacking jurisdiction to entertain cross-appeal.

Personal Injury/Delict – Claim for damages arising from alleged unlawful arrest and detention – Allegation that opposition to granting of bail was malicious and resulted from conspiracy between police and prosecutor – Claimant failing to prove that police and prosecutor had colluded when opposing application for bail, that they opposed bail without reasonable and probable cause, and with animo iniuriandi.

At trial, the respondent was acquitted on a charge of rape, with the State conceding that there was no *prima facie* evidence against him after the evidence of the State witnesses was led. He had been arrested on 8 December 2013 and detained for a period of 527 days. That led to him suing the appellant (the "Minister") and the National Director of Public Prosecutions ("NDPP") for wrongful arrest, detention and malicious prosecution. The High Court partially upheld the claim, finding that the respondent had failed to prove both claims of unlawful arrest or malicious prosecution. However, the court found the detention to have been unlawful from the date of refusal of bail to date of release. It awarded damages in the amount of R1,6 million.

The Minister applied for leave to appeal, which was refused by the High Court but granted by the present court on petition to it. The respondent did not seek leave to cross-appeal, but proceeded to file a notice of cross-appeal on 27 August 2022. The purported cross-appeal was against the High Court's findings that neither unlawful arrest nor malicious prosecution had been proven by the respondent.

Held – The questions before the present court were whether a cross-appeal could be entertained in the absence of leave to appeal having been granted; and whether the High Court was correct in finding that the respondent had been wrongfully detained from the date of the refusal of bail to the date of his release.

In terms of sections 16(1) and 17(2)(a) of the Superior Courts Act 10 of 2013, an application for leave to appeal is anticipated prior to an appeal being brought. Without such application, the court did not have the jurisdiction to entertain the cross-appeal.

The only remaining issue to be determined was whether the respondent's detention was unlawful and, if it was, from which date. While the court agreed on the principles relating to wrongful and unlawful detention, the majority view differed from that of the minority, finding that those principles were not applicable in this case. It was pointed out in the majority judgment that the respondent's case was not that the extended detention was unlawful for breach of a legal duty owed to him, but that the opposition to the granting of bail (which resulted in his extended detention) was malicious in that it was driven by improper motive and/or was without reasonable and probable cause, and resulted from a conspiracy between the police and the prosecutor. Malicious deprivation of liberty occurs when lawful restraint is inflicted upon a person's liberty by means of an act of law, unjustifiably, with an intention to injure, and with improper motive. Consequently, the test of breach of a legal duty, or wrongful conduct, on the part of the police played no part in the inquiry into allegations of malicious and collusive detention. The respondent had to prove that the police and the prosecutor had colluded when opposing his application for bail, that they opposed bail without reasonable and probable cause, and with *animo iniuriandi*. No evidence in that regard was adduced.

As a result, the cross-appeal was struck from the roll with costs, and the appeal was upheld.

Minmetals Logistics Zhejiang Co Ltd v Owners and Underwriters of the Mv "Smart" and another [2025] 1 All SA 60 (SCA)

Shipping – Joinder of party to application to compel – Joinder warranted where party's legal rights would be affected by order for disclosure – High Court having jurisdiction to direct the joinder of a third party which was a foreign entity in terms of section 5(1) of the Admiralty Jurisdiction Regulation Act 105 of 1983 – Appealability of order – Test for appealability has become more flexible in accordance with the interest of justice which is the paramount consideration.

In August 2013, a ship time-chartered by the appellant ("Minmetals"), ran aground near the Richard Bay harbour entrance when departing from the port, causing it to break

up and sink. In 2022, the High Court granted an order joining Minmetals, a *peregrinus*, as a party to an application to compel brought by the second respondent, the National Ports Authority, a division of Transnet (SOC) Ltd, against the first respondent, the owners and underwriters of the vessel, in respect of an action pending between them. In that action, the owners sued Transnet in delict based on an alleged breach of various legal and statutory duties owed to them. In the present appeal against the granting of the joinder order, the questions were whether the High Court had jurisdiction to grant such order, and if so, whether its decision to grant the order, was appealable.

Minmetals' joinder occurred because the ship owners had resisted producing documents sought by Transnet as they were subject to an implied contractual undertaking of confidentiality between them and Minmetals. They stated that they could not unilaterally waive confidentiality without the concurrence of Minmetals.

Held – The joinder of Minmetals as a party to the application to compel, was a necessary interlocutory procedure to achieve a proper ventilation of an issue relating to the action and the application to compel. If the court hearing the application to compel was to order disclosure of the documents, its order would affect the legal rights of Minmetals, and whether disclosure of the documents should be ordered in the pending action would be binding on Minmetals. Accepting that Minmetals should be joined, the next enquiry was how that could be achieved. In the ordinary course, it would not be competent for a South African court to join a foreign entity over which it did not have jurisdiction, to local proceedings. In admiralty matters, joinder can be achieved in terms of the common law and Rule 10, and in terms of section 5(1) of the Admiralty Jurisdiction Regulation Act 105 of 1983. The High Court based its order on section 5(1). As Minmetals maintained that section 5(1) did not permit its joinder, the preliminary issue was whether the High Court had the jurisdiction, in principle, to direct the joinder of a third party like Minmetals in terms of section 5(1). The section provides extended powers, in the interests of justice and convenience, that would otherwise not be available to a High Court when not exercising its admiralty jurisdiction, to join peregrini not otherwise amenable to the jurisdiction of the court by reason of the absence of attachment of his property or otherwise. It is a power which can only be exercised provided the requirements of the provision are satisfied. One of those requirements refers to where a person in respect of whom any question or issue

in the proceedings is substantially the same as a question or issue which has arisen or will arise between the party and the person to be joined. On that basis, the High Court had authority to join Minmetals.

Whether such joinder was warranted had to be addressed after determining whether the order was appealable. For a court order to be appealable, the order should be final in effect and not susceptible to alteration by the court of first instance; it should be definitive of the rights of the parties; and, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings. The test for appealability has now become more flexible in accordance with the interest of justice which is the paramount consideration. The order in question did not meet that test and was thus not appealable. The appeal was struck from the roll.

Prudential Authority v Dlamini and another [2025] 1 All SA 76 (SCA)

Insolvency – Appeal against dismissal of application for provisional sequestration order – Requirements for granting of sequestration order – Non-compliance with directive by Prudential Authority for repayment of money unlawfully obtained by carrying on the business of a bank in contravention of the Banks Act 94 of 1990 – Section 83(3)(b) of the Banks Act providing that a person who fails to comply with a repayment directive shall be deemed not to be able to pay his debts or to have committed an act of insolvency, and the Authority shall be competent to apply for his sequestration.

The appellant, the Prudential Authority (the “Authority”), fulfilled the role of the Registrar of Banks with the powers and obligations to act in accordance with the provisions of the Banks Act 94 of 1990. The respondents had participated in a scheme that marketed the sale of travel vouchers which purportedly provided the recipient with significant discounts for international travel and accommodation. The respondents opened various bank accounts into which they deposited money they received from the investors. The same bank accounts were used to make payments to the investors. The Governor of the Reserve Bank found that the respondents were conducting the business of a bank without being registered or authorised to do so, and directed the Authority to conduct an investigation. The Authority confirmed the finding against the respondents and instructed them to repay the amount unlawfully obtained by them. The respondents’ failure to comply led to the Authority applying for their provisional

sequestration on two grounds. The first was that they had committed an act of insolvency by failing to comply with the directive to repay money they had obtained by carrying on the business of a bank in contravention of the Banks Act. The second was that, in terms of section 84(1A)(a), the respondents were factually insolvent. The High Court dismissed the application on the basis that the Authority had failed to show that the respondents were *prima facie* insolvent and relied further upon the exercise of its discretion. The Authority appealed against that order.

Held – The issues were whether sections 83 and 84 of the Banks Act require proof of factual insolvency for the sequestration of a person under those sections, or whether mere proof of non-compliance with a directive issued under section 83 is a sufficient ground for sequestration; and whether the present court may interfere with the High Court's discretion to refuse the application. Section 83(3)(b) provides that a person who fails to comply with a repayment directive shall be deemed not to be able to pay his debts or to have committed an act of insolvency, and the Authority shall be competent to apply for his sequestration. Under section 84, if the report filed by the repayment administrator appointed by the Authority concluded that the person concerned was insolvent, the Authority may apply to a competent court for the sequestration of the person concerned.

While, in the ordinary course, sequestration proceedings are not to be used to enforce payment of a debt that is disputed on *bona fide* and reasonable grounds, where the respondent's indebtedness has, *prima facie*, been established, the onus is on the respondent to show that such indebtedness is indeed disputed on *bona fide* and reasonable grounds. Even if the creditor is able to establish all the elements of the case for sequestration, the court still has a discretion as to whether or not to grant the provisional sequestration order.

In this matter, the High Court erred in dismissing the application. The Authority's application was founded on sections 83 and 84 of the Banks Act. The respondents had failed to repay the amount within the period stipulated in the repayment directive. They also did not challenge the directive by way of review despite being entitled to do so. They were therefore, in terms of section 83, deemed to have committed an act of insolvency, and section 83(3)(b) provided a lawful basis for the application by the

Authority. The court was also satisfied that there was reason to believe that the respondents' sequestration would be to the advantage of creditors.

The appeal was upheld with costs.

In a dissenting judgment, the views held by the High Court were endorsed, and it was held that the insolvency of the respondents had not been established.

Börner v Brand and another [2025] 1 All SA 102 (WCC)

Wills, Trusts and Estates – Administration of estates – Application for removal of executor –Section 54 of the Administration of Estates Act 66 of 1965 permits a court or the Master to remove an executor under certain conditions – The test for removal of an executor is whether the continuance of an executor in office will prejudicially affect the future welfare of the estate placed in his care – An executor may be removed from office if his private interests conflict with those of the estate, and he should not derive any personal benefits from how he conducts the business or manages the estate's assets.

The applicant instituted divorce proceedings against her husband (the "deceased") on 24 January 2014. The divorce was not finalised when the deceased died in January 2024. The first respondent (the "respondent") was the executor of the estate, and in the present application, the applicant sought to remove him as executor in terms of section 54(1)(a)(v) of the Administration of Estates Act 66 of 1965 (the "Act"). An order was also sought that the respondent was precluded from receiving any remuneration for services rendered whilst he was executor, that the second respondent appoint a new executor, and costs on an attorney-client scale.

At the time of his marriage in 2006, the deceased owned several properties in Germany and South Africa. He and the applicant were married in community of property. In terms of the deceased's will, the respondent was instructed to resist any of the applicant's claims against his assets by all means necessary and to all extent possible.

In her application for the respondent's removal, the applicant accused the respondent of alienating property belonging to the joint estate without her consent, and displaying bias against her. As the respondent was a beneficiary in the estate, the

applicant contended that he should be disqualified from being the executor of the estate. The respondent, on the other hand, denied any conflict of interest.

Held – Each spouse's assets before entering into a marriage in community of property, as well as those accumulated during the marriage, form part of an indivisible joint estate. Upon the death of a spouse married in community of property, the whole joint estate falls under the administration of the deceased's executor. Section 15(2) of the Matrimonial Property Act 88 of 1984 prohibited the alienation of any real right in immovable property and artworks and jewellery held as investments which formed part of the joint estate without the other spouse's written consent.

An executor is legally vested with the administration of the estate. He is not free to deal with the assets of an estate in any manner he pleases. His position is fiduciary, and he must act legally and in good faith. As the surviving spouse was an automatic heir to half of the joint estate once its debts had been liquidated, even if she was not an heir or beneficiary of the deceased's spouse's will, the executor had a fiduciary duty towards her.

Section 54 of the Act permits a court or the Master to remove an executor under certain conditions. Removing an executor is a drastic step that a court will not grant lightly. The test for removal of an executor is whether the continuance of an executor in office will prejudicially affect the future welfare of the estate placed in his care. An executor may be removed from office if his private interests conflict with those of the estate. An executor cannot remain impartial if he has to entertain his claim as a creditor against the estate he has to defend. An executor should not derive any personal benefits from how he conducts the business or manages the estate's assets.

The removal of the respondent was justified in this case, and the court limited the remuneration to which he was entitled.

Boysa v Minister of Police [2025] 1 All SA 140 (NWM)

Personal Injury/Delict – Unlawful arrest and detention – Claim for general damages – Section 10 of Constitution guarantees right to human dignity, section 12 guarantees freedom and security of person, and section 35(2)(e) further entrenches the right of detained persons to human dignity – Damages awarded to plaintiff based on infringement of constitutional rights.

The plaintiff had been arrested on 20 July 2020 and detained at a police station by the South African Police Service ("SAPS"). In the present action, he sued the Minister of Police for damages arising from his unlawful arrest and detention. By agreement between the parties, an order was granted confirming that the defendant was 100% liable for all agreed and/or proven damages as a result of the plaintiff's unlawful arrest and subsequent detention for the relevant period. The only issue for the court to adjudicate was that of the plaintiff's general damages.

Held – Section 10 of the Constitution guarantees the right to human dignity, and section 12 guarantees freedom and security of person. Section 35(2)(e) of the Constitution further entrenches the right of detained persons to human dignity. The facts surrounding the accused's arrest involved his being arrested on suspicion of arson, in respect of which he had no knowledge. His requests for information were ignored by the arresting police officers. The arrest was conducted in the presence of his family, friends and neighbours. The first 5 hours and 30 minutes of his detention was spent in a small holding cell with no beds or chairs to sit on, nor a toilet, causing the detainees to urinate on the floor. The plaintiff was forced to stand for the duration of his detention in that cell. He was then moved to a main detention cell, which was approximately 6m x 8m in size. There were approximately 30 detainees congested in the cell, making any attempts to lie down impossible. There was a shortage of blankets and the plaintiff could not cover himself in the cold. He could not contact a legal representative, as the police officials informed the detainees that they would only be able to contact their legal representatives at their first appearance in court. The plaintiff was never taken to court, and was simply released. Moreover, as a result of his unlawful detention, he missed the birth of his son.

The court was satisfied that the plaintiff was entitled to damages and had regard to similar cases to decide on quantum. It was determined that a just, fair and equitable award for the plaintiff's unlawful arrest and detention, would be R95 000 plus interest. The defendant was also ordered to pay the plaintiff's costs.

Breede Valley Onhafhanklik v Speaker of the Breede Valley Municipality and others [2025] 1 All SA 148 (WCC)

Local Government – Powers of municipal council – Establishment of committees falling under section 80 of the Local Government: Municipal Structures Act 117 of

1998 – Municipal council's authority to unilaterally appoint councillors of political party to section 80 committee – Decision falling under executive action – Assessment of legality of executive action involves considering whether functionary that performed the action did so within powers conferred on it, and whether exercise of power was rationally related to the purpose for which the power was given and not arbitrary.

In December 2021, the Breede Valley Municipal Council unanimously adopted a resolution, establishing various committees falling under section 80 of the Local Government: Municipal Structures Act 117 of 1998, each with designated chairpersons. The resolution required each political party represented on the Council to nominate one councillor to serve on the various committees by 10 December 2021. The applicant ("BVO") did not adhere to the deadline and did not nominate any of its members to serve on the section 80 committees. Instead, three months after the deadline, it sent a letter to the executive mayor questioning the necessity and powers of the section 80 committees. The mayor advised that the delegation of powers and duties to section 80 committees was discretionary, and that no powers had been delegated to the committees. After the committees were established, BVO's members did not participate, causing the Speaker of the Council to send a written reminder of the Code of Conduct for councillors, the members' obligation to attend committee meetings, and the potential sanctions for non-attendance. BVO's continued non-compliance led to the council adopting a resolution for the municipal council to nominate and appoint the BVO councillors to the various section 80 committees. Although the adoption of the resolution and the appointment of BVO's members to the committees were communicated to it, its members still did not attend committee meetings. It then brought the present application to review and set aside the decision of the municipal council to unilaterally appoint BVO members to serve on the council's section 80 committees.

BVO asserted that neither section 79(1) nor section 80(1) of the Local Government: Municipal Structures Act granted a municipal council the authority to unilaterally appoint councillors to the committees. On the other hand, the municipality contended that the power to appoint councillors to the committees expressly flowed from those sections.

Held – It had to be determined whether the council's decision to appoint the members of BVO, who were all elected councillors, to serve on the section 80 committees was

administrative or executive action. Depending on the nature of the decision, it then had to be subjected to scrutiny either in terms of the provisions of the Promotion of Administrative Justice Act 3 of 2000 or the principle of legality. The decision which BVO sought to review did not qualify as administrative action. The source and nature of the power to constitute section 80 committees and appoint councillors to serve on them had an executive character to it, and the committees were intended to assist the executive committee in executing its tasks. Furthermore, the creation of the committees and appointment of councillors to them had no direct external legal effect as it only affected the councillors of BVO. Having regard to the nature of the action, its purpose and objective, its scrutiny had to be based on the principle of legality.

Under the doctrine of legality, in assessing the legality of executive action, the first consideration is whether the functionary that performed the action did so within the powers conferred on it, and the second is whether the exercise of power was rationally related to the purpose for which the power was given and not arbitrary. The decision in this case survived scrutiny as the decision to appoint BVO councillors to the section 80 committees was rational and the means used justified the objective. The application was therefore dismissed.

Cape Cash and Carry (Pty) Ltd and others v Xtreme Works (Pty) Ltd and others [2025] 1 All SA 163 (WCC)

Civil Procedure – Security for costs – Whether a party is entitled to receive security from a plaintiff or applicant that is an incola of South Africa is a question of law – Mere inability by an incola to satisfy a potential costs order is insufficient to justify an order for security – Courts should only order furnishing of security for such costs by an incola company if satisfied that the contemplated main action (or application) is vexatious or reckless or otherwise amounts to an abuse.

The applicants were a company in liquidation and its three appointed liquidators, who launched motion proceedings against the respondents, claiming relief in terms of section 341(2) of the Companies Act 61 of 1973 arising from alleged dispositions of property by the first applicant to the first to third respondents after the commencement of the winding-up. As against the fourth respondent, they claimed relief in terms of section 29 of the Insolvency Act 24 of 1936 (read with section 339 of the Companies Act 61 of 1973) arising from alleged dispositions of property by the first applicant to the fourth respondent within six months prior to the commencement of the

winding-up. The fourth respondent demanded payment by the applicants of R1,500,000 as security for his costs in the application. The applicants' refusal to provide security led to the fourth respondent launching the present application for security..

Held – Rule 47 merely provides the procedural framework for a party to demand security for costs from the other. Whether a party is entitled to receive security from a plaintiff or applicant that is an *incola* of South Africa (such as the applicants in this case) is a question of law. Under the Companies Act 71 of 2008, applications for security for costs against *incola* companies must be determined in the same manner as under the common law in relation to *incola* natural persons. A decision as to whether to order the provision of security involves the exercise of a judicial discretion. The basis of any consideration of security for costs is the possibility that the applicant or plaintiff may be unable to satisfy a costs order in favour of the respondent or defendant if its claim fails. Accordingly, in each case the court will have regard to the nature of the claim; the financial position of the company at the stage of the application for security; and its probable financial position should it lose the action. Financial considerations are not dispositive of the right to security, particularly where the claimant is an *incola*. Courts are anxious not to close their doors to *incola* claimants merely on the grounds of impecuniosity, as that would limit access to justice based on wealth. Consequently, mere inability by an *incola* to satisfy a potential costs order is insufficient to justify an order for security. Case law establishes that courts should only order the furnishing of security for such costs by an *incola* company if satisfied that the contemplated main action (or application) is vexatious or reckless or otherwise amounts to an abuse. The underlying rationale for a court's power to order security is the prevention of abuse of its own process. Mere incorrect, ill-advised or even negligent procedural steps in pursuit of litigation relief will not be treated as vexatious, reckless or an abuse of process, such as to warrant an order to furnish security for costs.

The facts in this matter did not point to no (or even poor) prospects of a costs order being satisfied. An examination of the merits also showed that the applicants had *prima facie* established the preliminary requirements of section 29 against the fourth respondent. It could not be said that the claim was vexatious or reckless.

Concluding that none of the bases on which the fourth respondent relied justified ordering security. The application was dismissed.

Cooper NO and others v Vab Sales and Distribution (Pty) Ltd
[2025] 1 All SA 178 (WCC)

Insolvency – Winding up of company – Payments by company after date of its provisional winding-up – Claim by liquidators for repayment on ground that payments constituted void dispositions, as envisaged in section 341(2) of the Companies Act 61 of 1973 – Section 341(2) of the Companies Act stating that disposition of its property by any company being wound-up and unable to pay its debts made after the commencement of the winding-up, shall be void unless the court otherwise orders.

As joint liquidators of the third applicant ("CBP"), the first and second applicants contended that three payments made to the respondent ("VAB Sales") by CBP after the date of its provisional winding-up and one payment made on the date CBP was liquidated constituted void dispositions, as envisaged in section 341(2) of the Companies Act 61 of 1973. The liquidators accordingly sought orders declaring the payments to be void dispositions in terms of section 341(2), and for the repayment of the amounts, together with interest.

After the application resulting in CBP's liquidation had been made, the directors of CBP continued to trade under their trading name ("Savers Lane") and made payments to the detriment of creditors. VAB Sales was one such creditor. It contended that that the relevant payments did not constitute dispositions as envisaged in section 341(2), alternatively if the court were to find otherwise, it should find that the first payment was made before the provisional order of liquidation was granted and therefore in exercising its discretion, the court should validate the payment in terms of section 341(2). Furthermore, VAB Sales disputed that any of the payments received, constituted dispositions from CBP on the basis that they were effectively payments from Savers Lane to VAB Sales for services already rendered. It was claimed that there had never been any dealings between VAB Sales and CBP.

Held – A court has no discretionary power to validate dispositions of its property by a company after the company has been previously liquidated. Section 341(2) of the Companies Act states that "Every disposition of its property (including rights of action) by any company being wound-up and unable to pay its debts made after the

commencement of the winding-up, shall be void unless the Court otherwise orders." The object is to prevent the dissipation of the company's assets while the winding-up application is pending and to ensure that its creditors are paid *pari passu*. Accordingly, the section applies as much to *bona fide* business transactions as to preferences. Regarding payments made between the bringing of the winding-up application and the grant of the provisional order, the onus is on the person seeking to uphold the transaction to establish circumstances justifying the making of a validating order. If that onus is not discharged, there is no basis for the exercise of the discretion in section 342(1).

Savers Lane was established through the available documents to be the same entity as CBP. The Court had to decide whether it could validate the three payments made to VAB Sales after the date of CBP's provisional winding-up, *in lieu* of a historical debt from trade relations between CBP and VAB Sales. The Companies Act decrees that payments made after the commencement of a winding-up are void. The Court therefore did not have to exercise its discretion with regard to the three payments as they were void. The court had limited discretion to validate the void payments if made during the period between the launching of the liquidation application and the date of granting of the provisional liquidation order.

The remaining payment was made on the same date the provisional liquidation order was granted. The Court noted that CBP was aware of the application and considered the time of the granting of the order and the making of the impugned payment, the court. Further, the payment was not made in the ordinary course of CBP's affairs, and instead CBP was improperly alienating funds by settling a historical debt owed to VAB Sales. The effect was to ensure that VAB Sales had an advantage over other creditors in the winding-up, which it would otherwise not have enjoyed. It was therefore ordered to repay the amounts in question.

Former Cash Crusaders Franchisees v Cash Crusaders Franchising (Pty) Ltd [2025] 1 All SA 190 (WCC)

Civil Procedure – Application to suspend operation and execution of order granting interdict – Court's power to suspend execution and operation of its orders arose from its inherent powers, now entrenched in section 173 of the Constitution – Suspension of execution of order refused where applicants failed to point to rights that were

threatened, and where their assertions about the interest of justice were not compelling – Concerns of applicants had to be weighed against ongoing harm suffered by respondent which had been deprived of benefits it should have received under the interdict order.

The respondent ("CCF") was a franchisor of a chain of outlets specialising in the sale of new and pre-owned goods and appliances under the trading name of "Cash Crusaders". The applicants were an affiliation of entities that entered into franchise agreements with CCF, and operated Cash Crusaders outlets in locations throughout the country. They sought an order suspending the operation and execution of an order interdicting them against cancelling the franchise agreements pending the final determination of an application which had been brought or of arbitration proceedings. The dispute between the parties arose from the management of what was called suspensive security buy ("SSB") transactions, which allowed franchisees to grant loans using movable property as collateral. The applicants disputed the lawfulness of CCF's SSB system.

The application was framed as falling under Uniform Rule 45A of the Uniform Rules of Court, which codified an element of the court's inherent power to protect and regulate its own process, taking into account the interests of justice. As the suspension sought by the applicants was for the very same period that the interdict order applied, CCF contended that the relief sought by the applicants did not merely seek to suspend the execution of the interdict for a defined period but sought to completely neutralise the interdict or to revisit its terms in a stealth appeal process.

Held – As the applicants were justified in refusing to comply with the interdict order while their applications for leave to appeal continued, the focus in this case had to be less about respect for court orders and judicial precedent, and more on the powers of the court to suspend the interdict order. The court's power to suspend the execution and operation of its orders arose from its inherent powers, now entrenched in section 173 of the Constitution. Flowing from the distinction between the substantive legal and factual findings made by a court in resolving a dispute, and the discretionary power it exercises to regulate the operation and execution of its resulting orders, the findings of law and fact in the interdict judgment remained undisturbed, and the power to regulate the implementation of the interdict order could not be transformed into a stealth appeal process. In addition, measures introduced to regulate the

implementation of the interdict order still had to ensure that CCF obtained the benefit of effective relief. The applicants failed to point to rights that were threatened, and their assertions about the interest of justice were not compelling. The relief they sought was thus unsustainable.

Criticisms of the interdict order by the applicants could not be entertained by the court where all appeal attempts had been unsuccessful, and such criticisms were in any event without merit. The Court also rejected the applicants' submission that the interdict order would be impossible to fulfil. Finally, the concerns of the applicants had to be weighed against the ongoing harm suffered by CCF. The Court declined to continue protecting the applicants from any inconvenience, while CCF was deprived of the benefits it should have received under the interdict order.

The application was dismissed.

Kalipershad v Kalipershad [2025] 1 All SA 226 (GJ)

Family Law and Persons – Pending divorce action – Parenting of minor child – Role of parenting co-ordinator – A parenting coordinator is obliged to act in the best interests of the child and, in so doing, cannot be constrained to succumb to the direct or indirect pressure of parents – Parties unhappy with a particular parenting coordinator may approach the court for the parenting coordinator's removal and must provide a cogent factual basis for such removal – Total breakdown in relationship between parent and parenting coordinator warranting replacement of coordinator.

The parties in this matter were engaged in ongoing divorce litigation, and numerous applications had been brought, largely concerning their five-year-old child. In an application brought in terms of rule 43(6), the applicant contended that the parenting coordinator had impermissibly reduced his contact to the child; had allowed two of her directives to lapse; failed to produce a new directive or report despite promises to do so since 31 May 2024; and had failed in her duties and not fulfilled her role as parenting coordinator. He contended that the services of a parenting coordinator were no longer necessary. The applicant averred that it was urgently required that the child's contact to him be regulated by an earlier directive of the parenting coordinator, in terms of which the minor child would spend equal time with each parent.

Held – The thread that ran through the evidence was that when experts, parenting coordinators, therapists and the like took steps, expressed opinions, made

recommendations or issued directives that were contrary to the applicant's own views or his desire to implement shared residence of the minor child at any cost, he adopted a hostile and combative approach in an effort to remove the person standing in the way of him achieving his objective. The function of a parenting coordinator is an extremely important one and although they are limited in the extent to which they may issue recommendations or directives - and are governed by *inter alia* the agreements reached between parties and the parenting coordinator, court orders and established case law - parenting coordinators cannot be subjected to the negative consequences that flow from a party who does not agree with them or who is disgruntled. A parenting coordinator is obliged to act in the best interests of the child and, in so doing, cannot be constrained to succumb to the direct or indirect pressure of parents. If parties are unhappy with a particular parenting coordinator, they are at liberty to approach the court for the parenting coordinator's removal and in that regard, must provide a cogent basis in fact for such removal. Disagreement on its own does not constitute sufficient ground for a parenting coordinator's removal.

In light of the breakdown in the relationship between the applicant and the parenting coordinator in the present case, the parties reached agreement on the identity of an alternative parenting coordinator. The court issued an order putting into place checks and balances to ensure that the parenting coordinator was able to perform her duties unhindered by threats of reporting, intimidation and interference. The order also covered ancillary matters while the divorce action was pending.

Kgalema v Department of Home Affairs and others [2025] 1 All SA 234 (GP)

Family Law and Persons – Marriage – Customary marriage – Late registration – Section 4(5) of the Recognition of Customary Marriages Act 120 of 1998 – Failure to first apply to registering officer for late registration of marriage not fatal to application to court for such relief – Relief granted where it had been conclusively proved that a valid customary marriage had been entered into.

Relying on his alleged customary marriage to the third respondent's daughter (the "deceased"), the applicant sought condonation of the late registration of such marriage; an order directing the first and second respondents to register the said customary marriage between the applicant and the deceased, in terms of section 4(7)(a) of the Recognition of Customary Marriages Act 120 of 1998; the issue of a marriage certificate; and an order that the applicant be vested with the responsibility

to provide primary care and residence in respect of the minor children born between him and the deceased. The third respondent opposed the relief sought and averred that no customary marriage had been concluded. She also challenged the application on the basis of prematurity, contending that the applicant had launched the present application before exhausting or utilising the internal remedy provided for in section 4(5)(a) read with regulation 2(1) of the Regulations framed under the Act. In that regard, it was contended that an application to the registering officer for the late registration of a customary marriage was a compulsory or obligatory step or condition precedent to launching an application to court for such relief.

Held – The recognition, requirements, and registration of customary marriages are regulated by the Act, which came into operation on 15 November 2000. In terms of section 4(9), a failure to register a customary marriage does not affect the validity of that marriage.

The plain reading of section 4(5)(a) established that where a customary marriage was not registered, any person who could prove or demonstrate that he/she had a sufficient interest in the matter, was permitted to make an application to the registering officer in the prescribed manner to enquire into the existence of such a marriage. A proper construction of section 4(5)(a) showed that it did not expressly preclude or impose a moratorium on the institution of legal proceedings by any person with a sufficient interest, for the late registration of the customary marriage, where such interested person did not first initiate the application contemplated in section 4(5)(a) to the registering officer. There was also no provision to the effect that non-compliance with the provisions of section 4(5)(a) would render defective or invalid, the institution of legal proceedings for the registration or late registration of a customary marriage, for failure to initiate or utilise the internal remedy or procedure so contemplated in section 4(5)(a). Therefore, the failure by the applicant to make such application to the registering officer was not fatal to the launching of the present application.

In so far as the second preliminary point relied on by the third respondent concerned the existence of the customary marriage, that engaged the merits and required the court to embark on a factual enquiry or investigation of the facts and circumstances placed before it. The so-called point *in limine* was thus dismissed.

Based on the third respondent's denials of the applicant's allegations, it was submitted that there existed a material dispute of fact resulting in the court having to either dismiss the application or refer the dispute to trial or the hearing of oral evidence. In terms of the *Plascon-Evans* principle, in motion proceedings, an applicant seeking final relief must, in the event of the existence of a dispute of fact, accept the version set up by his opponent unless such version was, in the opinion of the court, not such as to raise a genuine or *bona fide* dispute of fact or is so remote, far-fetched or clearly untenable that the court seized with the matter is justified in rejecting them merely on the papers as they stand. The court was satisfied that no such factual dispute arose, and that it had been conclusively proved that the applicant and the deceased had entered into a valid customary marriage. The relief sought was granted.

Municipal Workers Retirement Fund v Groot Kei Municipality and others [2025] 1 All SA 258 (ECG)

Civil Procedure – Court order – Non-compliance – Contempt of court – Applicant must prove the requisites of contempt, being the order, service of the order, knowledge of the order, and non-compliance with the order and wilfulness and mala fides.

The applicant pension fund had brought an application against the first respondent municipality for an order compelling the municipality to furnish information from January 2007 within ten days of the order. An order to compel was handed down, requiring the municipality to furnish the name and identity of the fund in respect of which pension fund contributions were payable and the name and address of the employer, or the pay-point which made a deduction, together with the responsible person to contact at the employer. Despite service of the order on the relevant officials of the municipality, nothing was done by the municipality and an application for contempt was then brought. An order as sought was granted, but was also ignored by the municipality and the municipal manager. When the municipality refused to furnish the necessary minimum information required, a personal liability order was handed down in which the municipality and its officials were required to furnish the relevant information, and it was ordered that costs were payable on an attorney and client basis. None of the information was furnished to the fund, and the present enforcement application was therefore brought.

Held – A litigant who has obtained a court order requiring an opponent to do something, is permitted to approach the court again in the event of non-compliance,

for a further order declaring the non-compliant party in contempt of court and imposing a sanction. The essence of a contempt offence lies in violating the dignity, the repute or authority of the court. The rule of law requires that the dignity and authority of the courts, as well as their capacity to carry out their functions, should also be maintained. An applicant must prove the requisites of contempt, being the order, service of the order, knowledge of the order, and non-compliance with the order and wilfulness and *mala fides*.

It was clear from the papers, and the various orders, that the prescribed information required was not extensive, or difficult to obtain. It was not shown that the respondents had even attempted to comply with the court order, and to furnish the fund with the required information. Municipalities, and municipal managers, are responsible for providing an essential service to the public. Adhering to court orders is part of good governance and accountability. Non-compliance with a High Court order had to result in a finding of contempt of court, and especially in circumstances where there was *mala fides*, as in the present application.

The respondents were declared to be in contempt of court and the second and third respondents were committed to imprisonment for a period of 30 days, suspended for a period of 30 court days on condition that the order was complied with.

PB VZ v L VZ and related matters [2025] 1 All SA 265 (GP)

Family Law and Persons – Divorce – Co-parenting – Shared residency arrangements – Shared or co-parenting not requiring that each parent must have equal time with the minor child, and shared residency is not automatically the default position when both parties are vested with full parental rights and responsibilities – Section 6 of Divorce Act 70 of 1979 compels court, before granting a decree of divorce, to ensure that the best interests of the child is served by the parents' agreement regarding the minor child's residency, exercise of contact and payment of maintenance.

In three unopposed divorce matters before the court, the issue of joint or shared residency arose, with the court being required to make orders regarding the arrangements agreed upon by the parties.

Held – The Children's Act 38 of 2005 does not require joint decision-making in respect of decisions in respect of a child except in very specific circumstances. Section 30 of the Act provides that co-holders of parental rights and responsibilities may act without

the consent of the other co-holder except where the Act, any other law or a court order provides otherwise. In amplification, section 31 only requires that due consideration be given to the views and wishes expressed by the other co-holder of parental rights and responsibilities and the child before a major decision is taken that affects the child or has an adverse effect on the exercise of parental responsibilities of rights by the other co-holder. Section 31 does not provide for joint decision-making. Shared, or co-parenting does not require that each parent must have equal time with the minor child, and there was no basis for the assumption that shared residency is automatically the default position when both parties are vested with full parental rights and responsibilities. There is also no presumption that a shared residency agreement - or any agreement relating to primary residency, contact and maintenance - is in a child's best interest simply because the parents agreed thereto and have implemented it for a period.

The particulars of claim in the three matters simply contained the averment that the parties had entered into a settlement agreement and that the settlement agreement was wattached to the summons. No facts were pleaded to substantiate the relief sought. The evidence affidavits filed in accordance with the Practice Directive for the hearing of unopposed divorces in the Gauteng Division, either lacked sufficient detail regarding the arrangements in respect of the child and/or were inconsistent with the oral evidence provided to the court, and/or the information the Family Advocate obtained from the parties, the minor children, and/or the children's schools.

Section 6 of the Divorce Act 70 of 1979 compels a court, before granting a decree of divorce, to satisfy itself that the best interests of a minor child, or major dependent child in respect of maintenance, is served by the agreement reached between the parents as far as it relates to the minor child's residency, the exercise of contact and the payment of maintenance. Where the interests of minor children are concerned, each matter must be decided on its own merits and the court does not function as a rubberstamp merely because parents have reached an agreement. In the three matters, the evidence affidavits provided the barest of detail to satisfy the requirements of section 6 of the Divorce Act and the Practice Directive.

The Court granted a decree of divorce and a maintenance order in respect of one of the matters but postponed the other two for further investigation to establish the children's best interests.

END-FOR NOW