LEGAL NOTES VOL 2/2025[1]

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SOUTH AFRICAN LAW REPORTS FEBRUARY 2025

BOTHA NO AND OTHERS NNO v JONKER AND OTHERS 2025 (1) SA 345 (SCA)

Close corporation — Winding-up — Liquidator — Duties — To summon meeting of creditors within one month of granting of final liquidation order — Requirement, where liquidator failed to summon meeting within one-month period, that liquidator obtain Master's consent to do so — If liquidator summonses meeting and only thereafter seeks Master's consent, then Master has power to grant it — If liquidator seeks consent after meeting of creditors has been held, then Master has no power to grant it — Close Corporations Act 69 of 1984, s 78(1).

In this matter a creditor obtained a provisional winding-up order of a close corporation, liquidators (the appellants) were appointed, and a final winding-up order was later granted. Nearly six months later, the liquidators, without obtaining the consent of the Master, summoned a first meeting of creditors. Relevant in this regard was s 78(1) of the Close Corporations Act 69 of 1984, which provides that:

'A liquidator shall . . . except with the consent of the Master, not later than one month after a final winding-up order has been made . . . *(a)* summon a meeting of the creditors . . . .' (See [27].)

At the meeting resolutions adverse to the respondents were adopted. This caused the respondents to apply to the High Court for a declarator that, owing to the absence of consent, the meeting was invalid, and the resolutions adopted there should be set

[1] Summaries for revision purposes

aside. The High Court granted the application. Here, with the High Court's leave, the liquidators appealed to the Supreme Court of Appeal.

The issue was, does the Master only have the power to grant consent before the meeting is summoned? Or does s 78 permit the Master to grant consent after the liquidator has summoned the meeting but before it has been held?

Or is the Master empowered to grant consent after the meeting has been summoned and held? (See [14], [33].)

Held, that the section permits the Master to grant consent after the meeting has been summoned, but before it has been held. The section does not give the Master the power to consent after the meeting has been held (see [35], [39]).

Appeal dismissed (see [41]).

Dissenting, Petse DP would have found that the section grants the power to consent even after the meeting has been held (see [62]).

PRUDENTIAL AUTHORITY v DLAMINI AND ANOTHER 2025 (1) SA 365 (SCA)

Insolvency-Banking — Unlawful conduct of business of bank — Moneys so obtained — Repayment directive — Failure to comply — Deemed an act of insolvency by BA s 83(3)*(b)* — Whether BA s 83(3)*(b)* on its own giving Prudential Authority power to apply for sequestration of person subject to directive, or whether, in addition, criterion in BA s 84(1A)*(c)* (reporting of person's insolvency) need be fulfilled before Prudential Authority may apply — Banks Act 94 of 1990, ss 83(3)*(b)* and 84(1A)*(c)*.

First and second respondent (the Dlaminis) were a couple married in community of property who were found by the Prudential Authority * to have been carrying on the business of a bank without being registered as such. The Authority then, using the power given to it by s 83(1) of the Banks Act 94 of 1990, directed the Dlaminis to repay all the moneys they had obtained in carrying on the business. They failed to comply. A repayment administrator appointed by the Authority reported that the Dlaminis' estate was insolvent (its liabilities exceeded its assets). The Authority thereupon applied to the High Court for the Dlaminis' provisional sequestration on the basis of ss 83(3)*(b)* and 84(1A)*(c)* of the Act (see [9], [15]).

Section 83(3)*(b)* provides:

'Any person who . . . fails to comply with a [repayment] direction . . . shall . . . be deemed . . . to have committed an act of insolvency . . . and the [Prudential] Authority shall . . . be competent to apply . . . for the sequestration of the estate of such a person . . . .'

Section 84(1A)*(c)* provides:

'If the [repayment administrator's] report . . . concludes that the person subject to the directive is insolvent, the Authority may . . . apply . . . for . . . the sequestration in terms of the Insolvency Act . . . of the person subject to the directive . . . .'

The High Court analysed the repayment administrator's report and rejected its conclusion of insolvency, which was a prerequisite for the bringing of the insolvency application under s 84(1A)*(c)* (see [21] – [22]).

Here, with the High Court's leave, the Authority appealed to the Supreme Court of Appeal (SCA). The issues before the SCA were as follows:

(1) Need there be both *(a)* failure to repay (s 83(3)*(b)) and (b)* a finding of insolvency (s 84(1A)*(c)*) in order for the Authority to apply for the affected person's sequestration? *Held*, that both were not required. The mere presence of *(a)* alone would allow the Authority to apply, as would the existence of *(b)* alone. (See [26], [28], [30] – [31]).

(2) Should the High Court have ordered the Dlaminis' estate's provisional sequestration? *Held*, that it should have (see [42]).

Appeal upheld, the High Court's order set aside, and replaced with an order, inter alia, that the Dlaminis' joint estate was provisionally sequestrated (see [43]).

Mbatha JA and Kgoele JA, dissenting, would have dismissed the appeal. An affected person's failure to comply with a repayment directive did not, on its own, empower the Authority to apply for the person's sequestration. This criterion (non-compliance with the directive) *and* the one in s 84(1A)*(c)* (a reporting of insolvency) had to be satisfied for the Authority to have the power to bring the application. Here, the second criterion was not satisfied: the repayment administrator incorrectly concluded and reported that the Dlaminis were insolvent. (See [54] – [57], [64], [71], [81].)

MV *SMART***: MINMETALS LOGISTICS ZHEJIANG CO LTD v OWNERS AND UNDERWRITERS OF MV** *SMART* **AND ANOTHER 2025 (1) SA 392 (SCA)**

Shipping — Admiralty proceedings — Practice — Joinder — Of foreign peregrinus to application to compel — Peregrinus, asserting privilege, resisting disclosure, joinder — Court a quo correctly treating individual provisions of s 5(1) as disjunctive and ruling that it conferred power to join peregrinus — Court's joinder order interlocutory and not appealable — Supreme Court of Appeal striking appeal from roll — Admiralty Jurisdiction Regulation Act 105 of 1983, s 5(1).

In August 2013 the bulk-carrier *Smart*, under time charter by Minmetals, a Chinese company, sank shortly after departing from the Port of Richards Bay, which was controlled by Transnet. The incident gave rise to arbitration proceedings initiated by *Smart*'s owners against Minmetals in London, on the ground of breach of a safe-port warranty, and actions for damages by the owners and Minmetals against Transnet in South Africa, on the ground of failure to provide a safe port. The tribunal in the London arbitration ruled that, although there were shortcomings in Transnet's running of the port, it was the negligence of *Smart*'s master and crew that caused it to sink. Minmetals then withdrew its action against Transnet.

The owners' action against Transnet was heard in the Durban High Court (the Durban court). An issue of privilege arose in respect of a request by Transnet for the discovery of documents that had featured in the London arbitration. The owners refused to disclose them, citing an implied privilege arising from an implied undertaking of confidentiality between them and Minmetals. Faced with an application to compel, the owners successfully invoked s 5(1) of the Admiralty Jurisdiction Regulation Act 105 of 1983 (ARJA) for the joinder of Minmetals. The owners' rationale for the joinder was that an order for discovery made in the absence of Minmetals would be prejudicial if an English court were to conclude that the documents were, in fact, privileged. Minmetals, concerned that joinder would expose it to claims by the owners or Transnet, appealed the Durban court's joinder order to the Supreme Court of Appeal (SCA). Transnet was cited as the second respondent in the appeal.

The SCA framed the issue before it as being one of joinder, not disclosure, which would be decided in due course. The first question on joinder was whether the Durban court had jurisdiction, in principle, to direct the joinder of a third party like Minmetals under ARJA s 5(1); the second was whether the Durban court had been correct in making the order for the joinder of Minmetals; and the third was whether the Durban court's order, being interlocutory, was even appealable. On appealability, the only issue was whether the Durban court's order complied with the requirement that it disposed of at least a substantial portion of the relief claimed in the main action. *

ARJA s 5(1) gives High Courts exercising their admiralty jurisdiction a wide power, to be exercised in the interests of justice and convenience, to join persons falling into three categories, separated by the word 'or': *(a)* someone against whom a party to the proceedings has a claim; or *(b)* someone from whom a party to the proceedings can claim a contribution or indemnification; or *(c)* someone in respect of whom any

question or issue in the proceedings is substantially the same as a question or issue that arose or would arise between the party and that person. According to precedent, the object of s 5(1) is to 'permit all parties to a dispute to be joined to the action [in order to avoid] . . . the undesirable situation of *courts in different countries having to adjudicate on the same or substantially the same issues arising out of the same incident or set of facts*'. † Whether Minmetals was amenable to the Durban court's jurisdiction depended, therefore, on a correct interpretation of s 5(1). Minmetals argued on appeal that the English courts had jurisdiction over the disclosure issue and that the three parts of s 5(1), read conjunctively as they should be, thus did not permit its joinder.

Held

Minmetals, whose rights would be affected by a disclosure order in the application to compel, had a direct and substantial interest in the subject-matter of that litigation, and therefore had to be joined to it. In admiralty matters this could be achieved by using ARJA s 5(1), as the Durban court did. The issue was whether it had jurisdiction, in principle, to direct the joinder of Minmertals in terms of s 5(1). (See [15] – [16].)

The owners were seeking to achieve the very object of s 5(1), which was to avoid different hearings in different countries on the same issues arising out of the same incident. Section 5(1), which was intended to broaden the scope of joinder in maritime matters beyond that provided for by the court rules and common law, had to be read disjunctively, as indicated by the legislature's choice of the word 'or' instead of 'and' between its constituent parts. So understood, part *(c)* on its own conferred the necessary authority on the Durban court to join Minmentals. (See [25] – [27], [40].)

As to whether the Durban court's joinder order was appealable, that the 'relief claimed' required to be disposed of was the substantive relief in the application to compel. Since the joinder of Minmetals did not finally dispose of it, but simply facilitated the proper ventilation of the relevant issues, the Durban court's order was not appealable on this basis. Minmetals' fear that its joinder could expose it to relief sought against it by the owners or Transnet was, moreover, misplaced: Transnet was not pursuing a claim against it, and the owners' claim against it was dismissed in the

London application. And any further potential claims arising out of the sinking of the *Smart* would have prescribed. (See [35], [39].)

As to whether the Durban court's order was nevertheless appealable in the interests of justice, that the facts pointed in the opposite direction: allowing an appeal would not

contribute to achieving finality but instead cause further delay in the litigation involving the demise of *Smart*. In addition, the joinder application was interlocutory, and appeals in respect of interlocutory applications, specifically if interlocutory (to join) to another interlocutory application (to compel), had to be discouraged. As the relief granted by the Durban court was not appealable, the appeal would be struck from the roll. The Durban court, in coming to the opposite conclusion, conflated the issues of whether *could* order the joinder of a *peregrinus* like Minmetals under s 5(1) with whether it *should have* ordered its joinder. (See [28], [37], [40].)

ARENDS OBO NM AND ANOTHER v MEC, DEPARTMENT OF HEALTH NORTHERN CAPE 2025 (1) SA 410 (NCK)

Costs — Reconsideration by court of its own costs order — After consent order inclusive of costs — Reconsideration sought by plaintiff on strength of rejection by defendant of its early settlement offer made 'without prejudice save as to costs' (*Calderbank* offer) — Settlement agreement terminating all pre-existing entitlements and effectively concluded litigation — Impermissible for plaintiff to now invoke *Calderbank* offer to seek special costs order.

Costs — Liability for — Punitive costs after rejection of offer of settlement 'without prejudice save as to costs' (*Calderbank* offer) — Reconsideration by court of its own costs order — After consent order inclusive of costs — Reconsideration sought by plaintiff on strength of rejection by defendant of its early settlement offer made 'without prejudice save as to costs' — Settlement agreement terminating all pre-existing entitlements and effectively concluded litigation — Impermissible for plaintiff to now invoke *Calderbank* offer to seek special costs order.

The first plaintiff, Ms Arends, acting in a representative capacity, sued the defendant, the MEC for Health, Northern Cape, for damages flowing from the hypoxic-ischaemic brain injury suffered by one NM, a minor child, at birth. The defendant conceded liability, and the parties entered into negotiations on quantum. During the negotiations, the plaintiff made a secret 'without prejudice' offer to the defendant, inviting him to settle the matter through payment of *R18,95 million*, alternatively to make a counterproposal of his own. In the offer, the plaintiff expressly notified the defendant that she would disclose the offer to the court after judgment for the purposes of reconsideration of any costs order made, and would seek costs on an attorney and client basis if it appeared that the defendant should have accepted the offer, or should have engaged the plaintiff on reasonable alternative settlement negotiations, but failed

to do so. The defendant declined the offer, and there followed a series of offers and counteroffers from both parties. The matter then proceeded to trial. The parties were, however, able to reach a settlement which recorded their agreement that the defendant would pay the plaintiff's claim for damages in the amount of *R20 million*, as well as plaintiff's *costs on a party and party scale*. The settlement agreement was made an order of court. In the present application to the High Court, the applicant sought a *reconsideration of costs*. She sought, pursuant to her secret offer, that the defendant should bear costs on the attorney and client scale from the date of such offer, having acted unreasonably in declining it.

The court, applying *AD and Another v MEC for Health and Social Development, Western Cape* 2017 (5) SA 134 (WCC), affirmed a plaintiff's right under the common law to make, * in an action for money, a secret offer 'without prejudice save as to costs' — a so-called *Calderbank* offer — to a defendant and to later, after judgment, and should the court have made an award in excess of that tendered, rely on such offer to claim costs not ordinarily recoverable against such a defendant. (See [4].) The two conditions necessary for a plaintiff to do so were that, (1) the letter was admissible in relation to costs, ie it explicitly stated that it was made without prejudice 'except in relation to costs'; and (2) that the defendant behaved unreasonably, and thus put the plaintiff to unnecessary expense, by not accepting the offer or making a reasonable counter-offer. (See [4].) In the present case, the court had no issue with finding the first secret offer to have been admissible (see [26]).

The key question on the facts of the present case was the impact of the parties' settlement agreement (see [28]). Was Ms Arends entitled to invoke reconsideration of the costs where her claim, *as well as costs*, was settled by agreement?

Held, that litigants had to be afforded the opportunity to negotiate in good faith and be encouraged to settle their disputes whenever it was possible. To ripen into a contract, it was necessary that the offer be accepted by the offeree. Here, the defendant unequivocally accepted the offer that resulted in the consent order. The principle applicable in the context of rule 34 offers applied equally to the present case: acceptance of an offer encompassing both the claim and costs terminated all pre-existing entitlements and effectively concluded the litigation. In the court's view, it was impermissible for the plaintiff to now invoke a *Calderbank* offer to seek a special costs order after the grant of a consent order inclusive of costs. (See [36].)

Held, further, that the plaintiff in any event failed to discharge the onus resting on her to show that the rejection of the secret offer was unreasonable (see [41]). On the facts, it could hardly be argued that the defendant had failed to engage with, or did not respond constructively to, the plaintiff's proposals or moved at a glacial pace that was to be frowned upon. The court was unpersuaded that the defendant had throughout the negotiation phase displayed unreasonable conduct in its independent estimate of the value of the case or assessment of the risk as to costs should the litigation ensue to finality. In the end, the back-and-forth negotiations yielded positive results and stymied what could have been a protracted and arduous trial. On the aforegoing exposition, the application for reconsideration of costs had to fail. (See [42].)

HC v CC 2025 (1) SA 426 (GP)

Marriage — Divorce — Proprietary rights — Redistribution order — Marriage out of community of property with exclusion of accrual system — Relevant considerations guiding court's discretion — Divorce Act 70 of 1979, s 7(3).

Marriage — Divorce — Proprietary rights — Redistribution order — Requirements — Contribution to the maintenance or increase of estate of other — Contribution equivalent to that of female spouse in traditional marriage — Enough to seek redistribution order — Not required that they make contribution in excess of ordinary duties in traditional marriage to seek relief — Divorce Act 70 of 1979, s 7(3).

Until recently, the right of divorcing parties married out of community of property to approach a court to seek, in terms of s 7(3) of the Divorce Act 70 of 1979, a redistribution order — that the assets of one spouse be transferred to another — was available only to those *who had concluded their marriage at a time (before 1984 when the Matrimonial Property Act was introduced) when the accrual system was unavailable to them; it was not available to those marrying when the accrual system was available but who had expressly decided to exclude it from their marital dispensation.* The Constitutional Court however in *EB v ER NO and Others and a Similar Matter* 2024 (2) SA 1 (CC) ([2023] ZACC 32 ruled this distinction to be unconstitutional. The present matter concerned the type of considerations a court ought to take into account, in light of *EB*, when considering an application for a redistribution order in the context of a marriage out of community of with the exclusion of the accrual system. In this action for divorce, the plaintiff, HC, and the defendant, CC, had entered into such a marriage, on 17 February 2007. One child, a minor, was born of the marriage. It was common cause that the parties' relationship had

disintegrated to such an extent that there were no reasonable prospects for the restoration of a normal marriage relationship, and that defendant should have primary residence of the child. Key issues requiring determination included *(a)* whether the defendant was entitled to a 'redistribution order' under s 7(3) of the Divorce Act 70 of 1979 (having regard to whether, in terms of s 7(4), it was just and equitable to grant such an order 'by reason of the fact that [the defendant had] contributed directly or indirectly to the maintenance or increase of the estate of [the plaintiff] during the subsistence of the marriage, either by the rendering of services, or the saving of expenses which would otherwise have been incurred, or in any other manner'); and *(b)* whether the defendant was entitled to an order for spousal maintenance.

The defendant submitted that the parties had agreed before marriage that she would resign from her employment, and that, pursuant to the marriage, she would remain at home to take care of the household and the children born from their marriage. The defendant did indeed resign from her job and the arrangement agreed upon held true throughout the parties' marriage. The defendant argued that the arrangement was advantageous to the plaintiff, to the extent that it enabled him to fulfil his responsibilities as a manager, a job entailing very long working hours. This was sufficient to meet the requirements of s 7(4) of the Divorce Act, and entitled the defendant to the relief she sought. In support of her claim for full-time spousal maintenance, the defendant relief on inter alia her complete financial reliance on the plaintiff throughout the parties' marriage; the respective means of the parties, with only the plaintiff working, and the defendant 'slacking in any tangible assets; the defendant's poor employment prospects, having regard to her age, her lack of qualifications and experience, and her extensive absence from the labour market; and her need to reestablish herself in labour market, and to start a new household from scratch, which the defendant could not achieve without substantial financial contribution from the plaintiff.

The plaintiff, for his part, argued that, to the extent that the defendant relied on s 7(3) of the Divorce Act, the redistribution remedy should be seen as extraordinary. This was so, especially in circumstances in which the party seeking it had had the option when getting married to elect that the accrual system should apply to their marriage, as was the case with the defendant. (The plaintiff reminded the court that courts should exercise restraint when considering to decline to enforce an agreement.) A s 7(3) claim was not merely there for the asking. The claimant spouse had to prove a substantial contribution during the subsistence of the marriage. The defendant had not done so,

the plaintiff argued. To the extent that the defendant had taken care of their child, there was not need for the plaintiff to do so full-time. Further, that was not the agreement reached between the parties: contrary to the defendant's claims, the intention was only that the defendant stay at home full-time until the child was 2-years old, after which she would return to full-time employment. As to the claim for spousal maintenance, the plaintiff argued that it was not supported by the facts. He claimed he could not afford it given his means, and further that there was nothing stopping the defendant from re-entering the labour market.

The court held, having regard to the evidence, that the defendant's contribution to the marriage could be equated to that of a female spouse in a traditional marriage, of performing unpaid domestic work, running the household and caring for the children, while the male partner fulfilled the role of sole breadwinner (see [69] and [75] and [77]). * Proof by a claimant spouse of such a contribution was sufficient for the purposes of relying on s 7(3). It was not required that they make a contribution in excess of their ordinary duties in a traditional marriage. (See [77].) † The plaintiff's submissions that the s 7(3) claim was an extraordinary remedy had to be rejected (see [77]).

The court held, further, that, in the context of a s 7(3) claim, contractual freedom did not reign supreme. That the parties concluded an antenuptial agreement excluding accrual was at best one factor to be considered. The overriding aim of s 7(3) was to equitably address the plight of the stay-at-home spouse after divorce and to prevent gender inequality. If contractual freedom was to be given primacy in a s 7(3) claim, it would nullify the remedial purpose of this section. Further, the defendant's failure to provide any evidence as to why the accrual regime was excluded from their marriage was not fatal to her s 7(3) claim. (See [78].)

In arriving at appropriate relief under s 7(3), as well as an order for spousal maintenance, the court considered inter alia, the following (see [79] – [85]):

- That the plaintiff presently owned three properties, two of which were unencumbered;
- That he had limited means;
- That the defendant had poor employment prospects, having regard to her age, her long absence form the labour market, her limited work experience and qualifications;
- That she needed financial assistance to establish a home for herself and the child;

• That the child, given that she was not young anymore and was at school for the largest part of the day, did not require the defendant's permanent present, so the defendant could at least work part-days.

The court granted an order, inter alia, directing the transfer in ownership of one of the plaintiff's properties to the defendant; and the payment of spousal maintenance in the amount of R10 000 per month until August 2025. (See [87].)

LEGAL PRACTICE COUNCIL v LOUW AND OTHERS 2025 (1) SA 447 (GJ)

Legal practitioner — Attorney — Misconduct — Removal from the roll — Disciplinary enquiry — When required before approach to court — Where material facts underlying allegations of misconduct that may lead to striking-off were contested or obscure, would be considered necessary to first conduct disciplinary enquiry before approaching court for striking-off order — Nevertheless, no absolute requirement that disciplinary hearing must be held in every case of misconduct that might require court sanction before court may be approached — Legal Practice Act 28 of 2014, s 44(1).

Legal practitioner — Legal Practice Council — Disciplinary enquiry — When required before approach to court for order removing attorney from roll — Where material facts underlying allegations of misconduct that may lead to striking-off were contested or obscure, would be considered necessary to first conduct disciplinary enquiry before approaching court for striking-off order — Nevertheless, no absolute requirement that disciplinary hearing must be held in every case of misconduct that might require court sanction before court may be approached — Legal Practice Act 28 of 2014, s 44(1).

This was an application by the South African Legal Practice Council (the LPC) to the Johannesburg High Court for an order striking, from the roll of legal practitioners, the first to fourth respondents — all attorneys of the fifth respondent, Nhlabathi Gys Louw. In its papers the LPC alleged a range of misconduct by the firm, but brought the application chiefly on the basis of a scheme conceived of and executed by the first respondent, Mr Louw, that involved the understatement of fee income with the goal of the firm's avoiding onerous Broad Based Black Economic Empowerment requirements. An initial investigation into the firm's affairs had been conducted by the LPC's investigating committee. That committee, after satisfying itself that there was prima facie evidence of misconduct, had recommended to the LPC that a disciplinary enquiry be undertaken. The LPC declined to follow that advice, electing instead to

approach the courts directly. The key question requiring consideration was whether the LPC was correct in doing so.

Held, that ch 4 of the Legal Practice Act 28 of 2014 provided the LPC with a full suite of statutory powers to investigate and discipline legal practitioners, and to determine the extent of their culpability. In the event that the material facts underlying any allegation of misconduct that may lead to striking-off were contested or obscure, the exercise of these powers would normally be a necessary step before approaching the court for a striking off order. (See [12].)

Held, nevertheless, that the Legal Practice Act did not lay down an absolute requirement that a disciplinary hearing must be held in every case of misconduct that might require court sanction before a court may be approached. To hold otherwise would be contrary to the plain text of s 44(1), which stated that '(t)he provisions of this Act do not derogate in any way from the power of the High Court to adjudicate upon and make orders in respect of matters concerning the conduct of a legal practitioner, candidate legal practitioner or a juristic entity'. The 'power' referred to in s 44(1) could be none other than the common-law power the High Court had always possessed to discipline its officers, including attorneys. (See [18].)

Held, however, that that the LPC ought in this case to have first convened the disciplinary inquiry recommended by the committee. (See [13] – [15] and [19].) The LPC chose to ask the court for final relief merely on the prima facie evidence of misconduct placed before the investigating committee. As things stood, the LPC's papers were insufficient for purposes of supporting findings on key issues necessary to be considered before granting the relief sought, including the extent of the culpability of the first to fourth respondents' culpability, and the appropriate sanction if such culpability was found. In declining to follow the committee's advice and adopting the approach it did, the LPC deprived itself, and the court, of the definitive factual findings necessary to reach fair conclusions on the above issues. (See [5] and [15].)

Held, as to costs, that the general rule — that professional bodies were not mulcted with costs when they sought to strike off or suspend legal practitioners — had its limits. The LPC was expected to fairly and professionally assist the court in the discharge of its disciplinary functions. That regime may be put aside where it failed to provide the assistance a court was entitled to expect. (See [23].) The general rule should not apply in this case, in circumstances in which LPC sought orders that it ought to have known

could not be granted on the established facts; and acted against the advice of its own investigation committee. (See [24] – [25].)

Order granted dismissing the application, directing the LPC to convene a disciplinary enquiry before taking any further steps aimed at suspending the respondents, and directing it to the respondents' costs. (See [26] and [28].)

LL v AM AND OTHERS 2025 (1) SA 455 (GP)

Administration of estates — Deceased estate — Maintenance for children — Claim by biological mother against biological father's deceased estate — Claim not dependent surviving parent's ability to support child — Such situation need not be pleaded — Exception against particulars for failure to do so dismissed.

Children — Maintenance — From deceased estate — Claim by biological mother against biological father's deceased estate — Claim not dependent on surviving parent's ability to support child — Inability need not be pleaded — Exception against particulars for failure to do so dismissed.

Practice — Pleadings — Exception — To particulars of claim on ground that not disclosing cause of action — Not required that particulars should set out facta probantia — Failure to do so not rendering them excipiable.

The plaintiff, the biological mother and sole guardian of two children whose biological father died in 2021, submitted a maintenance claim on their behalf to the executors of the father's deceased estate (the defendants). It was based on the deceased's common-law duty to maintain his minor children. The total maintenance due from the estate was calculated by the plaintiff's actuary at over R2,6 million.

The defendants rejected the claim on the ground that the plaintiff failed to provide details of her own ability to maintain the children. In support of their position that she was obliged to do so, they cited precedent which — according to them — was to the effect that a claim such as hers arose only if the claimant was unable to provide for the children him- or herself. The defendants submitted that this was still the legal position.

The plaintiff then instituted the present action against the defendants. It was met by a 'bad-in-law' exception to the effect that the claim as pleaded did not disclose a cause of action because the plaintiff had failed to assert that she was unable to maintain the children. The defendants also suggested that the plaintiff should have pleaded the basis on which her actuary made his calculations. The exception was heard by the Pretoria High Court, which —

Held

It was clear from the authorities cited by the defendants that there was, at best for them, a difference of opinion as to whether the plaintiff had to demonstrate demonstrate that she is unable to maintain the minor children adequately before she could claim maintenance from the deceased estate. (See [14] – [16].) But the law had progressed to a stage where (i) fathers of illegitimate children were obliged to support them and (ii) surviving spouses were entitled to claim maintenance for minor children from their fathers' deceased estates. Precedent, to the extent that it suggested that it was only when a surviving spouse/parent is unable to support a minor child that a claim lied against a deceased estate, was wrong and no longer binding. It followed that it had not been necessary for the plaintiff to aver that she was unable to support the children. (See [18] – [19], [24].)

As to the argument based on the failure to plead the actuary's calculations: pleading this was unnecessary as it was no more than opinion to be tested by the court. The plaintiff's failure to plead facta probantia did not render her pleading bad in law. (See [25].) Exception dismissed.

MASHAVHA v ENAEX AFRICA (PTY) LTD AND OTHERS 2025 (1) SA 466 (GJ)

Costs — Party and party costs — Scale — New rule 67A — Approach to deciding whether party and party costs should be awarded on scale A, B or C — Uniform Rules of Court, rules 67A(1) – 67A(3) and 69(7).

Costs — Fee inflation — Courts to reign in fee inflation by ensuring that parties recover on B and C scales only in important, complex or valuable cases — Uniform Rules of Court, rule 67A.

On 12 April 2024, rule 67A of the Uniform Rules of Court came into effect. The rule applies only to costs as between party and party (rule 67A(1), and directs that they be awarded on scale A, B or C (67A(3)). The scales are the maximum rate at which counsels' fees may be recovered and are set out in rule 69(7) (see [2], [5], [7]).

A court's approach should be (1) to identify the appropriate scale in light of the importance, value and complexity of the case (rule 67A(3)*(b)*; and then (2) to consider whether because of conduct detailed in rule 67A(2), the scale should be reduced (see [11]).

Ad (1), scale A will usually be appropriate, unless the matter is unusually complex, important or valuable. Importance will be assessed objectively and complexity will be gauged by assessing the argument that had to be made to resolve the matter. (Here

for instance, the matter was resolved on straightforward points in limine — standing and jurisdiction — and it is on these points that complexity is gauged, rather than the more complicated merits which were not reached.) (See [16], [20] – [21].)

Ad (2), it is implicit in the rule that the power to reduce the scale should be exercised sparingly, and only where a case to do so has been made out (see [15]).

As to application of the rule to cases instituted before 12 April 2024, but only heard thereafter, the rule will apply only to work done after 12 April (see [12]).

At the end of its judgment the court sounded a cautionary note regarding fee inflation, which was pushing the cost of legal services ever further beyond the means of the vast majority of South Africans. It pointed out that courts would do substantial injustice if they were to exacerbate fee inflation by allowing parties to recover on the B and C scales in anything but truly important, complex or valuable cases. (See [25] – [27].)

MOODLEY v PUBLIC SERVICE COMMISSION AND OTHERS 2025 (1) SA 472 (WCC)

Public service — Public Service Commission — Recommendations of — Whether binding — Constitution, s 196(4)*(f)*(ii).

The Western Cape MEC for Health invited applications for the post of chief executive officer of a public hospital in Cape Town. It was a level 14 post in the public service that required, per directive of the Minister of Public Service and Administration, '5 years of experience at a senior managerial level'. The 'public service' is defined in s 8 of the Public Service Act 103 of 1994. It encompasses part, but not all of, the 'public sector'. Dr Moodley, an occupant of a level 14 post, and Dr Parbhoo, an occupant of a level 12 post, applied for the position. The MEC appointed Dr Parbhoo. Moodley, aggrieved, wrote to the MEC, challenging Parbhoo's appointment. Moodley argued that '5 years of experience at a senior managerial level' meant, for an applicant from the public sector, 5 years of experience at levels 13 – 16 of the public service, which Parbhoo, as a level 12, lacked.

The MEC rejected Moodley's grievance. Moodley escalated it to the Public Service Commissioner. The commissioner found, in a letter to the MEC, that Moodley's claim that Parbhoo lacked the requisite experience was meritless, but that the appointment was nevertheless irregular because the MEC had deviated from the proper appointment procedure. The MEC conveyed

to the PSC that he disagreed and that he would not be approaching a court to have his decision set aside. (See [16], [18] – [19].) *Moodley then applied to the High Court for the review and setting-aside of Parbhoo's appointment, and for a declarator that the* MEC *was bound by the* PSC*'s finding that the appointment was irregular. The* PSC *and* MEC *opposed the application. The issues were:*

Was the MEC's action of appointing Parbhoo to the post an administrative action? Held, that it was (see [33], [36], [38], [40]). — *Did s 157 of the Labour Relations Act 66 of 1995 prevent the High Court hearing the matter*? *Held*, that it did not (see [44], [53]). *Were findings and recommendations that the PSC makes under s 196(4)(f)*(ii) of the Constitution binding (see [1], [61])? (Section 196 of the Constitution provides that '(4) The functions and powers of the Commission are . . . *(f)* either of its own accord or on receipt of any complaint . . . (ii) to investigate grievances of employees in the public service concerning official acts or omissions, and recommend appropriate remedies . . .' (see [67]).) *Held*, that they are *not*. Accordingly, the PSC's finding that the MEC's appointment of Parbhoo was irregular did not bind the MEC, and the MEC's decision not to follow it was not unlawful (see [72] – [73], [76] – [77], [94]). — *The meaning of '5 years' experience at a senior managerial level'*. *Held*, that this was not restricted to five years of experience in a level 13 – 16 post, in the public service. It could include such experience in a post at level 12 or below in the public service; orsuch experience in a post, at any level, in an organ of state that is not part of the public service; or such experience in the private sector (see [1], [100], [106] – [107], [112] – [113]).

Moodley's application was accordingly dismissed (see [164]). —

STANDARD BANK OF SOUTH AFRICA LTD v BOGATSU 2025 (1) SA 514 (GP)

Mortgage — Foreclosure — Judicial execution — Primary residence — Reserve price — Reconsideration — Application for reduction — What applicant must state — Service requirements — Uniform Rules of Court, rule 46A(9)*(d)*.

Practice — Service — Substituted service — Application for — What applicant must state — Substituted service should not be resorted to if service can be effected at defendant's place of employment or outside of regular service hours — Uniform Rules of Court, rules 4(1) and 4(2).

In May 2022 the applicant bank, as plaintiff, issued summons against the defendant for his averred breach of a loan agreement and mortgage bond he had concluded with the bank. Service of the summons and particulars was effected to a tenant present at the mortgaged premises (the defendant's elected domicilium). The action was not

opposed and the bank in September 2022 obtained default judgment against the defendant. The court declared the property specially executable and set a reserve price for its sale at auction. After a failed auction, * the bank made the present application to the Pretoria High Court (the court) for an order reducing the reserve price in terms of rule 46A(9)*(d)* of the Uniform Rules of Court. The application lacked supporting documents, and no attempt was made to serve it. Instead, it was set down on the unopposed roll with a belated application under rule 4(2) for substituted service by way of 'registered email service' and affixment at the mortgaged property. † The application for substituted service was accompanied by an affidavit by the bank's attorney that for the first time set out facts of the original execution. The affidavit stated that the defendant had left the property and that it had failed to sell at auction because the reserve price was too high. The court first dealt with the reduction application and then with the substituted service application.

Held

An applicant seeking reduction under rule 46A(9)*(d)* should —

- support the application by affidavit;
- attach a copy of the judgment or order to the application;
- aver that a sale in execution was validly arranged;
- aver that there was proper service of all documents in respect of the attempted sale in execution;
- state how the property was advertised to obtain a market related price;
- state where and when the sale was held;
- state who attended the sale;
- state how many properties were on sale at the same time;
- set out the current outstanding balance;
- set out arrears paid since judgment;
- state the current value of the property;
- set out the outstanding balances in respect of services, taxes and levies;
- state whether the property is occupied by the defendant or by tenants;
- state whether attempts were made to obtain permission to sell the property by private treaty, and what the outcome was;
- state whether the defendant had been in communication with the plaintiff, and if so, set out the time and nature of such communication; and
- provide any other relevant information (see [31]).

The object of setting a reserve price was to obtain a market-related price, or at least to relieve the defendant of the greater part of his or her debt, and the above information was needed not only to assist the court deciding whether to reduce the reserve price, but to explain why the earlier reserve price was not met or no bids were made. Applications for reduction should not be dealt with in isolation since the way the sale was advertised was crucial. Moreover, a reduction should not be granted merely because the property was not sold. (See [32] – [34].)

Since the bank filed no affidavit and there were no facts before court to support the rule 46A(9)*(d)* application, it fell to be dismissed (see [35]).

In addition to setting the trite requirements (the nature of the claim, the manner of service sought to be authorised, last known whereabouts etc), an application for substituted service under rule 4(2) had to also state —

- that service could not be effected in terms of rule 4(1);
- that the defendant's whereabouts could not be ascertained;
- that he or she is in all probability in the Republic;
- that the proposed method of service would probably come to the knowledge of the person and the reasons therefore;
- how the service was to be proved;
- what the defendant's occupation or work history was, as well as enquiries made at such workplace;
- what other information was available to the applicant, such as in respect of family and friends of the defendant;
- that despite the enquiries, the applicant was unable to trace the defendant (a tracing report and a supporting affidavit in that respect should be included); and
- why service outside the prescribed time periods would not assist in effecting service (see [41] – [43]).

If these requirements were not met, an application for substituted service would fail. Here, there was no reason to accept at face value that the defendant no longer resided at the property or that service could not have been effected under rule 4(1) to a person residing there or at the defendant's place of employment or outside of the normal hours of service. All things considered, the application for substituted service had to fail. (See [50], [70] – [72].)

SUNDAYS RIVER CITRUS CO (PTY) LTD AND OTHERS v LONETREE CITRUS CC AND OTHERS 2025 (1) SA 529 (ECGq)

Company — Business rescue — Business rescue proceedings — Commencement — When court grants order, not when application made — Companies Act 71 of 2008, s 132(1)*(b)*.

Company — Business rescue — Participation by creditors — Concept of 'creditor' to be broadly interpretated to include also one whose debt only due in future, eg future obligation to deliver something — Such person may, as 'affected person', participate in hearing of main application — Notion of 'creditor' not confined to claims sounding in money and already due — Referring also to claims for anything else, whether unconditional, conditional or in the future — Companies Act 71 of 2008, s 131(3).

The first applicant, SRCC, * applied to participate in the business rescue of two respondents, Rolust and Lonetree. Rolust was the owner of a citrus farm operated by Lonetree. SRCC had financed Lonetree's operational costs for the 2023/2024 citrus season under a 'production loan agreement'. Rolust and Lonetree were also indebted to Standard Bank, who applied for their liquidation in February 2024. On 7 May 2024 application was made for order placing both Rolust and Lonetree in business rescue, thereby suspending the liquidation proceedings initiated by Standard Bank. ‡

Three days later, on 10 May 2024, SRCC received repayment from Lonetree of what was due under the production loan agreement. SRCC argued that when business rescue proceedings were commenced — according to it, by the making of the application on 10 May — it was still a creditor of Lonetree and hence an 'affected person' with the right to participate in the business rescue.

The *first question* for the court was whether court-ordered business rescue proceedings begin when the application is made, as suggested by s 132(1)*(b)* of the Companies Act 71 of 2008 (CA), or only when the order is granted, as suggested by CA s 131(4)*(a)*.

Held, that context and purpose of the CA supported the conclusion that business rescue proceedings initiated via the s 131 pathway commenced only when the court made a CA s 131(4)*(a)* order. The reference in CA s 132(1)*(b)* to commencement upon application was an anomaly requiring a reading-in. The result of this was that business rescue proceedings had not yet commenced and that Lonetree's repayment of the production loan occurred prior to, not during, business rescue proceedings (See [24] – [26].)

The *second question* was whether SRCC was an 'affected person' by virtue of the production loan.

Held, that while creditors were 'affected persons' who could participate in business rescue proceedings, former creditors could not. The context and purpose of the relevant provisions of the CA supported only the participation of those who remained creditors during the proceedings (in addition to other affected persons). (See [32].)

The *third question* was whether SRCC had a direct and substantial interest in the proceedings.

Held, that the CA afforded participation rights to defined 'affected persons', not to 'interested parties' or an otherwise undefined group. There was no space for those who were not 'affected persons' to enter the fray. (See [36].)

The *fourth question* was whether SRCC was a creditor, and hence an affected person, in respect of the obligation to deliver fruit. This was linked to SRCC's claim to be an affected person because it was a creditor in respect of 'packrights', that is, Lonetree's obligation to deliver fruit to SRCC's packing facilities in accordance with a delivery schedule agreed on at the beginning of the season. Lometree argued that this was not a monetary debt and therefore did not result in SRCC being its creditor.

Held, that a broad interpretation of the term 'creditor' was in accordance with CA 136(2)*(a)*, which envisaged a situation in which the company was a party to an agreement at the commencement of business rescue proceedings, with one obligation or more becoming 'due' during those proceedings. The words 'creditor' and 'debtor' applied, therefore, not only in respect of claims for money but to claims for anything else that was owing, whether unconditionally, conditionally or in the future. Such an interpretation would also be in accordance with with the accepted, ordinary meaning of the word in South African law. Hence, SRCC was an affected person on this basis and, therefore, entitled to participate in the hearing of the main application. (See [48] – [51].)

GREATER TZANEEN MUNICIPALITY v BRAVOSPAN 2025 (1) SA 557 (CC)

Appeal — To Constitutional Court — Leave to appeal — Application for — When granted — Interests of justice — Reasonable prospects of success, while necessary, not decisive — Substantive issues relevant to interests of justice may require refusal of leave even if appeal had reasonable prospects of success.

Review — Grounds — Legality — Self-review — Contract entered into pursuant to unlawful tender process — Application for leave to appeal judgment granting innocent contractor compensation for services delivered pursuant to contract — Acceptance by municipality of benefits of services provided under contract, even after institution of application for review — Unconscionable conduct on part of municipality — Granting leave to appeal would delay innocent contractor obtaining just and equitable compensation for services provided — Not in interests of justice to do so.

Consequent to a competitive tender process, the applicant, the Greater Tzaneen Municipality (the municipality), awarded the respondent (Bravospan) a tender for the provision of security services. The parties entered into a one-year contract on 20 November 2013. Shortly before the termination date, they agreed to extend the agreement for another 24 months. They did this *in the absence of an additional tender process*. This meant, contrary to specific assurances given by the municipality, that the extension agreement was non-compliant government procurement regulations. Relying on this, the municipality on 9 February 2015 applied to the Polokwane High Court for an order declaring the extension agreement invalid. The High Court granted the relief and refused Bravospan's counterapplication for payment for services rendered under the extension agreement. Bravospan, after failing to obtain leave to appeal, on 19 February 2018 brought an action of its own to the High Court for payment for services rendered under the extension agreement. The High Court granted Bravospan the relief it sought on the basis *of one of the four causes of action raised*, namely unjustified enrichment. On appeal, the Supreme Court of Appeal (SCA) ruled the High Court to have incorrectly awarded compensation on the basis it did, reasoning that as yet there was no general enrichment action recognised in South Africa. Nevertheless, the SCA, acting on its own accord, granted relief to Bravospan in the form of compensation under s 172(1)*(b)* of the Constitution, which, it held, conferred a wide discretionary power upon court to make any order that was just and equitable.

The Municipality approached the Constitutional Court with an application for leave to appeal. The key issues were (i) whether the SCA was entitled, mero motu, to utilise s 172(1)*(b)* of the Constitution as the basis to found liability for compensation, and (ii) whether s 172(1)*(b)* could be a self-standing basis for granting compensation in proceedings separate to those in which a contract was declared invalid in terms of s 172(1)*(a)* of the Constitution. The Constitutional Court held that this raised a

constitutional issue, therefore engaging the court's jurisdiction. It held, however, that leave to appeal ought not to be granted because was it was not interests of justice to do so. While the Constitutional Court justices were unanimous in this conclusion, their primary reasons therefor were different.

The *majority* (per Chaskalson J) held that the Constitutional Court granted leave to appeal only when it was in the interests of justice to do so. As held in *Fraser*, while reasonable prospects of success were a necessary requirement for an application for leave to appeal, they were not decisive. Substantive issues relevant to the interests of justice may sometimes require the refusal of leave to appeal *even if it could be shown that the appeal had reasonable prospects*. (See [57].) This was one of those cases.

The court explained that the facts showed that the Municipality had behaved unconscionably. It had wrongly assured Bravospan that it could lawfully extend the contract without a new tender process. It had accepted services from Bravospan under the extended contract without paying for these services. It had even induced Bravospan to continue providing services under the extended contract, while the review application was pending. It took the benefit of those services. Yet it still failed to pay Bravospan for the services. It resisted Bravospan's action for compensation, and purely on the basis of technical defences. (See [55].) Now, the judgment of the SCA would ensure that Bravospan, nine years after the Municipality had stopped payment, would finally receive just and equitable compensation for the services that it has provided. That, the court asserted, was plainly in the interests of justice. To grant leave to appeal would delay compensation further. That would be contrary to the interests of justice. Therefore, leave to appeal should be refused. (See [56] and [58].)

The *minority* (per Bilchitz AJ) held that, if leave to appeal were to be granted, the Constitutional Court would be obliged to consider whether the *common law of unjustified enrichment* could be developed to address the predicament of contractors such as Bravospan. (See [37] – [40] and [42]). However, given the manner in which the matter had unfolded in the lower courts, the Constitutional Court did not have the benefit of heads of argument of counsel for the parties, or the reasoning of the High Court or the SCA, on the various important legal issues relating to the development of the common law of unjustified enrichment. (See [41].) Were leave to be granted, the court would be placed in the untenable position, to make an authoritative pronouncement with far-reaching implications with only an incomplete and partial view

of the legal possibilities available. In such circumstances, it was not in the interests of justice to grant leave to appeal. (See [41] and [43].)

Bilchitz AJ disagreed with the approach of Chaskalson J to the extent that he refused leave to appeal primarily on the basis that the outcome achieved through doing so accorded with his sense of justice as a judge (see [44]). Generally speaking, the 'interests of justice' test ought not to be interpreted to grant the Constitutional Court a free-standing discretion to make ad-hoc decisions, on the basis that it approved of the outcome of refusing leave. Such an approach opened the door for judges to decide the substantive outcome of a case without adequate reasoning, representing a major widening of unguided judicial discretion at the leave to appeal stage. That would be inimical to the culture of justification that courts in South Africa are tasked with defending and enacting through their own practices. (See [45].)

BOTHA v SMUTS AND ANOTHER 2025 (1) SA 581 (CC)

Constitutional law — Human rights — Right to privacy — Ambit of protection — Principles discussed in multiple judgments — Personal details of farmer engaging in animal-trapping published on conservationist's Facebook page — Conservationist publishing photo of dead baboon in trap on its Facebook page along with post naming landowner and deprecating his practice — Conservationist also publishing names of farm and landowner's insurance brokerage, along with address of brokerage and landowner's home — Whether publication of names of landowner, his farm, his brokerage, and his business and home addresses violating landowner's right to privacy — Constitution, s 14.

During a group bicycle ride over a farm that was undertaken with the landowner's permission, one of the cyclists noticed a dead baboon in a cage trap. He photographed it and sent to a conservationist (Mr Smuts) along with a map depicting the farm's location. Smuts in turn contacted the farm owner's neighbour, who gave him the owner's name (Mr Botha) and cellphone number, and informed him that Mr Botha was an insurance broker. Smuts, using these details, conducted an Internet search, and obtained the name, address and telephone number of Botha's brokerage. Smuts then posted, on the Facebook page of second respondent, a conservation organisation, a photo of the baboon, a photo of Botha and his minor daughter, and a screenshot of the name, address and telephone number of the brokerage. Smuts accompanied this with a post deprecating Botha's trapping practice. This galvanised members of the

public to post beneath it negative comments about Botha and his practice. Botha then obtained an urgent rule nisi from the High Court ordering Smuts to remove the post and to refrain from making further posts referencing Botha, his family, his brokerage or the addresses of his farm, home or business. Botha premised his claim on defamation, to which Smuts pleaded fair comment. Smuts also raised his constitutional right of free expression. In reply Botha raised — for the first time — his constitutional right to privacy.

The High Court ruled that Botha's right to privacy should prevail over Smuts' right of free expression. It did not consider the issue of defamation. It confirmed the rule nisi but allowed the photo, posts, and comments to remain, subject to excision from the post and comments of any references to Botha, the brokerage, its address, and the name of the farm. Smuts and the conservation organisation obtained leave to appeal to the Supreme Court of Appeal (SCA). (See [16], [21] – [22].)

The SCA upheld the appeal and discharged the rule nisi. It found that Botha's expectation of privacy was unreasonable because his information was already in the public domain and that Smuts had a right to share, and the public to receive, information about trapping, including trappers' personal details (see [23], [25] – [26]).

Botha applied to the Constitutional Court (CC) for leave to appeal against the SCA's judgment. **The majority of the CC granted Botha leave to appeal,**

finding that his home address was protected by his privacy right, but not his ownership of the farm or his brokerage's address (see [2]).

The four judgments proceeded as follows:

Kollapen J

Should leave to appeal be granted? Held, that it should (see [41]).

Would an order excising Botha's details have any practical effect, given that Botha's case was well known, and his details had been available on the Internet for years? *Held*, that the matter was not moot: if Botha was successful, and his details were excised from the Facebook page, future visitors to the page would not learn Botha's name and details. And there were other considerations which made it in the interests of justice to hear the matter: the High Court and SCA had disagreed on the issues; and the point raised, viz control over personal details on the Internet, was of interest to the public (see [43], [46]).

Did Botha make out his privacy case in his founding affidavit? Held, that he did. While he only formally made the claim in reply, he foreshadowed it in his notice of motion

and founding affidavit, and Smuts responded to it in answer (see [47], [53], [55] – [57], [59]).

Did Botha expect that his ownership of the farm was private? Held, that he did not: he had not shown he had this expectation; and even if he had, his expectation was unreasonable, seen in the light that the public had a legitimate interest in trapping, and that the farm was a commercial enterprise, not a home (see [111], [113], [117], [123]). Did Botha expect his profession to be a private fact? Held, that he did not: he wanted the public to know it (see [132]).

Did he expect that his address was private? (His home and the brokerage had the same address.) *Held*, that he did not expect it to be private, insofar as it was his business address, but he did expect, insofar as it was his home address, that it was private (see [138]).

Was Botha's expectation of privacy regarding his address, qua home address, reasonable? Held, that is was (see [146] – [147]).

Should Botha's privacy right, in respect of his address, prevail over Smuts' right to impart information? Held, that it should. Factors impelling this conclusion were that his home address was peripheral to Smuts' cause, and that a home address was a very private fact (see [151]).

Kollapen J would grant Botha leave to appeal and uphold his appeal in part. He would set aside the SCA's order and replace it with an order upholding respondents' appeal against the High Court's order, which he would, in turn, replace with one discharging the rule nisi granted against respondents, interdicting respondents from publishing further posts referencing Botha's address, and directing that posts published by third parties which referenced the address be promptly deleted by respondents (see [181]).

Chaskalson AJ

Did Botha make a privacy complaint in his founding affidavit? Held, that he did not. He pleaded in his founding affidavit that ongoing publication of the post and comments created a security risk for him and his family at their family home, and a risk of commercial harm to his business. However, Smuts would not be prejudiced if Botha were to reframe his case as a privacy violation, the privacy violation constituted by the ongoing publication creating a risk that he and his family would be harassed at their home. Smuts would not be prejudiced in that Smuts would have met this case in the same way that he met the security-risk case (see [189], [203], [212] – [213], [215]).

Did Botha make a case to interdict ongoing publication of his home address? Held, that he did. He reasonably feared violation of his privacy right in the form of harassment at his home (see [208], [220] – [221], [227]).

Was this violation justified by a freedom of expression interest? Held, that it was not. There was no link between the home address and the anti-trapping campaign (see [227]).

Did Botha make a case to interdict ongoing publication of his name and his farm's address? Held, that he did not. Insofar as ongoing publication of his name violated his privacy right, his privacy interest was outweighed by Smuts' expression interest, and Smuts was entitled to publicly criticise Botha. As for the farm's address, there was no risk that its disclosure would eventuate in intrusion on Botha or his family: the farm was 100km from where he lived (see [231], [234]).

Had Botha made a case to interdict Smuts disclosing that he was an insurance broker? Held, that he did not. It would be absurd to interdict publication of this fact, given as the CC's judgment necessarily disclosed it and the extent of its publication in the press and in law firm commentaries. Moreover, Botha publicly advertised his brokerage, and on the continuum of privacy interests, his professional status was far from the core (see [208], [235]).

Accordingly, Chaskalson AJ would have grant Botha leave to appeal and uphold his appeal in respect of his home address, but dismiss his appeal in respect of the farm address and his broker status (see [182], [184]).

Rogers J

Held, that leave to appeal should be granted; the matter was *not* moot; and the privacy case *was* foreshadowed in Botha's founding affidavit (see [246]).

Was Botha's ownership of the farm a private fact? Held, that it was not, for the reasons in [109] – [116] of Kollapen J's judgment (see [248]).

Was Botha's privacy violated by the publication of the photographs that the cyclist took on the farm? Held, that it was not. In principle, what an individual did on his private property was private, and that it was a commercial activity, did not negate this. Thus, if party A entered onto party B's property without permission, took photos of what went on there, and published them, this would violate B's privacy, regardless of whether the activities B conducted there were commercial or domestic in nature. Here though, the cyclist-photographer was on Botha's property with Botha's permission, and Botha did not plead that his permission excluded the taking of photos (see [249], [251]).

Was Botha's privacy violated by Smuts publishing the name and address of Botha's business? Held, that if an individual widely published the name and address of his business on the Internet, he could not complain if a third party was to use that information for a purpose adverse to him. Indeed, if a third party disapproved of a business owner's activities, he or she could lawfully encourage a boycott of the business, even if the activities concerned were unrelated to the business (see [252]).
Given that the business address was, in addition, Botha's home address, did its publication violate Botha's privacy? Held, that it did not. Smuts did not know, and did not publish that the address was also the home address. All Smuts published was a screenshot of the business' name and address, which was information Botha had widely published on the Internet. And a reader of the post would also not have known that it was Botha's home address (see [253] – [254]).
Rogers J would grant Botha leave to appeal but dismiss the appeal (see [259]).

Zondo CJ

Zondo CJ would order that leave to appeal should be refused because the case Botha was seeking to make before the court — violation of his right to privacy — was not the case Botha made in his founding affidavit. He impermissibly made it in his replying affidavit. Therefore Botha should not to be allowed to make that case before the CC (see [267] – [271], [277], [281], [337]).

SOUTH AFRICAN CRIMINAL LAW REPORTS FEBRUARY 2025

PRINGLE v MAILULA 2025 (1) SACR 117 (SCA)

Harassment — Protection order — Procedure — Procedure leading up to hearing — Filing of affidavits — Procedure envisaged not limited to ordinary standard of three sets of affidavits — Replying affidavit by applicant permissible without prior approval of court — Protection from Harassment Act 17 of 2011, s 9.

Harassment — What constitutes — Racial slur — Comment by member of school governing body to principal of school at meeting of governing body that 'I will deal with Verwoerd's kids' constituting racial slur — Comment, taken together with preceding harassment by email, entitling applicant to final order.

The High Court set aside a harassment order, granted in terms of the Protection from Harassment Act 17 of 2011 (the Act), holding that the magistrate had accepted further

evidence in circumstances that violated the respondent's right to a fair hearing. The protection order arose from a series of incidents at a school where both parties were members of the school governing body, the appellant being the principal of the school and member ex lege and the respondent an elected parent of a pupil. Severe discord had developed between the parties with the respondent sending flurries of emails to the appellant with various complaints. His behaviour developed to the stage where the governing body suspended him. At the meeting where he was suspended, the respondent had gone into a rage pointing his finger at the chairperson, calling him a joke; referring to three white members, including the appellant, and, still pointing with his finger, saying, 'I will deal with Verwoerd's kids.' He had also pointed at the remainder of the members, threatening to deal with them as well. The appellant considered the remark defamatory, racist and a threat, and removed him from the governing body's WhatsApp group and blocked his cellular-telephone number on her personal phone. Undeterred, the respondent used an alternative cellular number to contact the appellant. The appellant then approached the magistrate's court and applied for an order in terms of the Act. The magistrate granted an interim order. The appellant also laid criminal charges against the respondent. The respondent subsequently filed an answering affidavit to which the appellant replied by filing a comprehensive replying affidavit, including a recording of the June 2021 governing-body meeting which the respondent had attached to email correspondence to her. She alleged that the recording had been edited and challenged the respondent to place the full recording before the court, but he did not. At the hearing, both parties were legally represented and the respondent raised points in limine, including that the appellant had impermissibly introduced new facts in reply without seeking the court's permission, which prejudiced him as he had not had an opportunity to respond to them. After hearing argument, the magistrate dismissed the points in limine, allowed the replying affidavit and gave the respondent an opportunity to apply for a postponement if he needed time to deal with the further evidence in the replying affidavit. His attorney indicated that the respondent was ready to proceed, and the magistrate confirmed the interim order. The High Court held that the respondent's right to a fair trial had been violated by the dismissal of points raised in limine when they should have been upheld. On appeal to the Supreme Court of Appeal,

Held, that s 9 of the Act was mandatory, in that the court had to consider further affidavits or oral evidence presented. It was obvious that the court hearing the application had a discretion to allow further affidavits and that, in the exercise of that discretion, had to ensure that the rights of all parties were protected. It was self-evident that on the return date the respondent had to be able to challenge the evidence adduced in his absence and the interim order was clearly designed to avert imminent threats of harm of which the court on prima facie evidence was satisfied existed. Given the brutal society in which we live, the legislature was compelled to allow for this procedure with greater latitude given to the presiding officer to receive further evidence. There was nothing to suggest that the procedure envisaged was limited to the ordinary sole standard of three sets of affidavits of which the replying affidavit was ordinarily the shortest. This was so as the court, on granting the order, also authorised a warrant for the respondent's arrest. The respondent had not been denied a fair trial. (See [18] – [19] and [23].)

Held, further, that the comment made by the respondent carried a racial connotation associated with the late former South African Prime Minister and what he stood for. This was a racial slur while threatening to deal with the appellant. The incident was not isolated as it was preceded by the unacceptable bombardment of the appellant with email correspondence. The cumulative effect of the electronic communications, the aggressive stance of the appellant culminating in racial slur and threat brought his behaviour within the definition of harassment and met the requirements for a final order. The appeal was accordingly upheld. (See [28] and [32].)

WARES v ADDITIONAL MAGISTRATE, SIMON'S TOWN, CAPE TOWN AND OTHERS 2025 (1) SACR 130 (WCC)

Extradition — Application for — Evidence — Admissions by extraditee — Appellant did not give evidence in original proceedings and counsel merely handed in list of admissions — Such admissions having binding effect.

Extradition — Committal of appellant in terms of s 12(5) of Extradition Act 67 of 1962 — Effect of release of appellant on bail pending decision of Minister.

Extradition — Committal of appellant in terms of s 12(5) of Extradition Act 67 of 1962 — Provision requiring extraditee to be detained pending decision of Minister — Constitutionality of.

Extradition — Offence for which extradition sought — Dual criminality — Sexual offence — Prescription of — Effect of Prescription in Civil and Criminal Matters (Sexual Offences) Amendment Act 15 of 2020 on s 18 of Criminal Procedure Act 51 of 1977.

The appellant was arrested in terms of a warrant of arrest issued upon a request by the United Kingdom (the UK) for his extradition based on the Extradition Act 67 of 1962 (the Act) and the European Convention on Extradition (the Convention) to stand trial on six charges of 'lewd, indecent and libidinous practices and behaviour', as described in Scottish law. He appeared in court and was released on bail. After hearing the matter, the magistrate determined that the appellant was liable to be extradited to Scotland in terms of the Act and he ordered accordingly. The appellant then filed an appeal against the decision of the magistrate under s 13 of the Act and sought a legality review. At the same time, he also launched a review under s 22 of the Superior Courts Act 10 of 2013 of the Minister's decision to surrender him under s 11 of the Act and attacked the constitutionality of s 10 of the Act on the basis that it did not permit his release on bail while awaiting the Minister's decision.

It was contended on behalf of the appellant that the magistrate had erred in recording the appellant's admissions before him as falling within the ambit of s 220 of the Criminal Procedure Act 51 of 1977 (the CPA) as proceedings under the Act were not criminal proceedings; that there was an issue of dual criminality regarding the nature of the offences in Scottish law and South African law; and the question arose whether any of the contemplated charges in Scotland had prescribed. The review was based on the assertion that the Minister erred in making an order for his extradition where the magistrate had failed to commit him to prison under s 10(1) of the Act and the Minister had exercised his discretion while the appellant was out on bail and therefore not 'committed'. In addition, it was contended that the Act was unconstitutional in that it deprived extraditees of the right to freedom guaranteed under s 12 of the Constitution.

It was common cause that counts 1 – 4 on which the appellant was sought to be indicted in Scotland had become prescribed as s 18 of the CPA provided for the prescription of offences older than 20 years and that this provision fell to be considered in the context of arts 2(1) and 10 of the Convention. The court was concerned with the parties making common cause on counts 1 – 4 in that they had not considered that s

18 of the CPA had been substituted in terms of the Prescription in Civil and Criminal Matters (Sexual Offences) Amendment Act 15 of 2020 with effect from 23 December 2020, which had been enacted to ensure that the prosecution of any sexual offence, whether in terms of the common law or statute, would not be subject to the 20-year elapsing provision and expressly provided for the revival of the right to prosecute all sexual offences which had lapsed before 27 April 1994.

After considering the matter the court held that the 2020 Act did not operate retrospectively and therefore agreed with the parties that the amendment to s 18(2) of the CPA did not change the position and, in our law, as it applied in September 2018, the right to prosecute the appellant under counts 1 – 4 had lapsed. (See [28].)

On the issue of the validity of the admissions in terms of s 220 of the CPA, the court held that, in circumstances where the appellant did not give evidence, but his counsel merely handed to the magistrate a list of admissions, it was not irregular for the magistrate to have regard to those admissions, save perhaps for the admission that he acknowledged that he was liable to be extradited, which was arguably a conclusion of law ultimately to be arrived at by the magistrate. The appellant was accordingly bound by the admissions. (See [41].)

On the issue of dual criminality, our law currently did not recognise that the determination of dual criminality was based on the elements-based approach, but rather that the conduct (or factual) approach should be applied in determining dual criminality. The appellant had readily admitted before the magistrate that the criminal conduct with which he was to be charged in the UK in respect of counts 6 and 7 (lewd behaviour) constituted a contravention of s 5(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, and in respect of count 5 (indecent assault) it was admitted that that offence constituted a contravention of s 3 of SORMA. Accordingly, the requirements of dual criminality in respect of counts 5 – 7 had been satisfied and that the appellant was liable to be extradited to the UK to face those charges. (See [54], [80] and [82].)

On the counter-review application by the respondents, that the magistrate's decision to grant bail pending the Minister's decision was a gross irregularity, the jurisdictional prerequisite of the extraditee's committal to prison, for the exercise of the Minister's power to surrender the appellant, was lacking and his decision in that regard was ultra

vires and unlawful. It therefore fell to be reviewed and set aside under the principle of legality. (See [95].)

On the issue of the constitutional attack on s 10, there was no doubt that in extradition cases there was a need to arrest persons liable to be extradited in fulfilment of South Africa's international obligation to extradite, and that this provided 'acceptable', 'satisfactory' or 'adequate reasons' for depriving persons concerned of their freedom, and the substantive facet was therefore satisfied for depriving such persons of their freedom. However, s 10(1) of the Act did not satisfy the test for the procedural facet as contemplated in s 12(1), namely the right not to be deprived of freedom arbitrarily or without just cause. The section did not pass constitutional muster insofar as it did not provide a magistrate, who had made a committal order, the power to extend or grant bail pending the Minister's decision in terms of s 11 of the Act, and the Act did not conform with the Bill of Rights insofar as it resulted in an unjustified limitation of the right against arbitrary deprivation of freedom. (See [113] – [116] and [134].)

GD v NB 2025 (1) SACR 179 (LP)

Domestic violence — 'Domestic relationship' — Meaning of as intended by s 1 of Domestic Violence Act 116 of 1998.

The appellant appealed from a decision by a magistrate to grant a final protection order in terms of s 6 of the Domestic Violence Act 116 of 1998 (the Act) at the instance of the respondent against the appellant. The appellant was the brother-in-law of the respondent, being married to one of the respondent's three sisters. The respondent complained in her application for an order about the appellant, who had previously managed the affairs of her father and the family trust. After the death of the father, however, the executors terminated the appellant's administration of the deceased's estate which led to difficulties arising between the parties. The respondent complained that the appellant had not handed over the property as agreed and had become involved in acts of violence; intimidation; controlling and abusive behaviour; psychological abuse; locking the farm gates and restraining the respondent from entering the property; accessing the family farm without consent; and continuous threats and economic abuse. The appellant baldly denied the allegations that were subsequently confirmed by various confirmatory affidavits of other members of the

respondent's family. Applying the normal rule in motion proceedings, the magistrate accepted the evidence in the statements of the respondent and granted a final protection order. On appeal the appellant contended, inter alia, that the magistrate had erred in finding that he and the respondent were in a 'domestic relationship' as intended by s 1 of the Act, before amendment by the Domestic Violence Amendment Act 14 of 2021 and the Judicial Matters Amendment Act 15 of 2023 which came into effect on 3 April 2024.

Held, that a restrictive interpretation seemingly ignored the intended aims of the Act, including that 'acts of domestic violence may be committed in a wide range of domestic relationships', and would not be in accordance with the proper interpretation of legislation which required taking into account the underlying purpose of a provision. A narrow perspective of 'family' or a 'domestic relationship' that favoured only parties to a marriage seemed to be unjustified. When one had regard to the definitions and interpretation of the Acts, it was clear that the Act was intended to be more inclusive rather than restrictive in nature, and the fact that the appellant was married to the respondent's sister created the basis for a conclusion that there was a domestic relationship by affinity. (See [29], [38], [51] and [54].) The court, finding that the other requirements for the order had been met, dismissed the appeal.

S v SHABALALA 2025 (1) SACR 201 (KZP)

Trial — Judgment — Alteration of — At end of trial judge reading judgment, but pausing and proceeding straight to verdict to conserve time — Additions subsequently made to transcript before written judgment signed and released — On appeal, court holding that nothing turning on such additions and/or embellishments unless could be shown to satisfaction of court that such had effect of undermining constitutional right to fair trial — In casu, additions to extempore judgment largely explanations of findings and embellishments aimed at enhancing readability of judgment — No irregularity occurring.

In an appeal from convictions and sentences for fraud; corruption; money- laundering; and contravention of the Public Finance Management Act 1 of 1999 (the PFMA), resulting in an effective sentence of 15 years' imprisonment, the appellant contended, inter alia, that the court a quo had in effect handed down different judgments, which constituted a material irregularity which vitiated the trial. It appeared that a judgment

was delivered extempore on 13 and 14 June 2022. After reading the summary of the evidence for the whole day on 13 June 2022, the trial judge had announced on 14 June 2022 that, considering the pedestrian pace at which the delivery of judgment was going the previous day, she had decided to pause the summary of the evidence and proceed straight to her findings. She indicated that when the transcript came out, she would simply insert the remaining part of the summary and, thereafter, edit, sign-off, and release her judgment. The explanation she provided in her extempore judgment was that she thought everyone was keener to know what her findings were, to which neither counsel objected. She then stated that after summarising the evidence the next part of the judgment would fall under the heading 'Procurement prescripts', followed by 'Section 217 of the Constitution', followed by the 'KwaZulu-Natal Procurement Act', followed by 'Item 16A of the Treasury Regulations', and ending with 'Practice Note No. SEM02/2005'.

The appellant contended that on 2 August 2022, the trial judge circulated another judgment comprising 129 pages to the parties' legal representatives which had approximately 30 additional pages of new material which did not form part of the 'first judgment'. He contended that the new material included references to an MEC's affidavit and direct quotations from it. The court a quo, however, did not have such an affidavit and did not know its contents when it handed down the extempore judgment; that the court a quo ex post facto embellished, altered, and added to the first judgment to include the evidence it had not considered when it gave its first judgment in open court and convicted the appellant; and that the court a quo amended considerable parts of the findings in the judgment, which changed its substance.

Held, that the appellant's reference to a 'second judgment' was surprising, particularly because neither he nor his counsel had raised any objection when the trial judge announced in open court that she had decided to 'pause' the summary of the evidence and proceed straight to her reasons for judgment. She explained that she thought everyone was more keen to know what her findings were. Incidentally, the 30 additional pages of 'new material' comprised exactly those aspects of the judgment which the trial judge indicated would be inserted in the transcript of the judgment when it came out. A considerable amount of time was spent by counsel pointing out to this court the number of additions made by the trial judge to the extempore judgment that was handed down by her on 13 and 14 June 2022. With the leave of this court, she

submitted a further document after the hearing of this appeal, detailing further differences between the extempore judgment and the final judgment. In essence, the additions made by the trial judge to the extempore judgment were largely explanations of her findings and embellishments aimed at enhancing the readability of the judgment. Nothing turned on the additions and/or embellishments in the final judgment unless it could be shown to the satisfaction of the court that they had the effect of undermining the appellant's constitutionally entrenched right to a fair trial, and precisely how so. Besides, the appellant's notice of application for leave to appeal to this court was silent in that regard. (See [35] and [44].) In the result, the appeal was dismissed.

S v MANZINI 2025 (1) SACR 219 (MM)

Domestic violence — Protection order — Breach of — Domestic Violence Act 116 of 1998, s 17, and assault with intent to do grievous bodily harm — Sentence — Assaulted complainant with hands, threatened to kill and stabbed with beer bottle — Callous and carefully planned attack — No compelling and substantial circumstances present — Imposition of prescribed minimum sentence of 10 years' imprisonment proportionate in circumstances — Criminal Law Amendment Act 105 of 1997, s 51(2).

The appellant appealed against his sentence of 10 years' imprisonment imposed for convictions of assault with intent to do grievous bodily harm read with the provisions of s 51(2) of the Criminal Law Amendment Act 105 of 1997 (the CLAA) and a contravention of s 17 of the Domestic Violence Act 116 of 1998 for breaching a protection order. The appellant and the complainant were in a love relationship, but in 2020 the complainant obtained a protection order under the Act after the appellant had damaged her door, threatened to get even with her or kill her and told her that he was not afraid of the police or jail, and had in fact once killed a police officer. Despite the order, on 4 March 2023, the appellant arrived at her home just after midnight, assaulted her with his bare hands, stabbed her with a beer bottle while threatening to cut her throat. The appellant left their home when he noticed that the complainant's grandchild was going to alert neighbours. It was contended on behalf of the appellant that the trial court had attached insufficient weight to his personal circumstances, and had failed to consider alternative means of punishment than direct imprisonment, and therefore failed to address the need for his rehabilitation. It was also contended that a

sentence coupled with correctional supervision or a suspended sentence would have rehabilitated.

Held, in terms of s 51(3) of the CLAA, the court could only deviate from the prescribed minimum sentence if it was satisfied that compelling and substantial circumstances existed that justified such a departure. (See [17].)

Held, further, that, in the circumstances the appellant had carefully planned the attack on the unsuspecting complainant and had preyed on her at an opportune time, when she, her family members and possibly the entire neighbourhood would be fast asleep. He did not consider the emotional wellbeing of the minor children who were in the house, and had subjected them to the trauma of seeing their grandmother being assaulted while lying in her own blood. Prior to the attack the appellant had threatened to kill the complainant and, despite having been served with a protection order, he had carried out his threats. The appellant clearly not only disrespected the complainant and her family, but also the law itself. He had been given a chance to mend his ways and was not arrested for his previous threats, but he demonstrated to the criminal justice system that he was not a suitable candidate for rehabilitation. (See [18] – [19].)

Held, further, that the sentence imposed by the trial court was not shocking, but proportionate, in the brutal circumstances in which the offence had been committed. The appeal was dismissed. (See [22].)

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Commissioner for the South African Revenue Service v Diageo SA (Pty) Ltd [2025] 1 All SA 299 (SCA)

Trade (Customs and Excise) – Identification of excisable goods for purposes of calculation of customs duties payable – Tariff classification for liqueur products – Interpretation of tariff notes – In determining whether liqueur products were liqueurs with a wine spirit base to which other non-alcoholic ingredients had been added as contemplated in tariff note, the meaning of the phrase “non-alcoholic ingredients” had to be established, both conjunctively and disjunctively – Wording of tariff note was clear and unambiguous, requiring ingredients added to the wine spirit base to be entirely non-alcoholic.

The appellant, the Commissioner for the South African Revenue Service (the "Commissioner"), determined that four of the respondent's "Cape Velvet" liqueur products had to be classified under Tariff Heading 2208.470.22 (and corresponding Tariff Item 104.23.21), contending essentially, that they were spiritous beverages with a wine spirit base, to which alcoholic ingredients had been added. The classification of the product by the Commissioner was taken on appeal by the respondent ("Diageo") to the High Court in terms of section 47(9)(e) of the Customs and Excise Act 91 of 1964. The court dismissed Diageo's appeal and upheld the Commissioner's classification of the product. That decision then was taken on appeal by Diageo to the Full Court which set aside the Commissioner's determination and found in favour of a classification as contended for by Diageo. Special leave to appeal to the present court against that order was granted to the Commissioner on petition.

Diageo's case was that the Commissioner had incorrectly classified its product, which should have been classified under Tariff Heading 2208.70.21, and Tariff Item Heading 104.23.21, because the product had a wine spirit base with "non-alcoholic ingredients added", as contemplated in Additional Note 4(b) to Chapter 22 of Schedule 1 Part 1 of the Act.

Held – In terms of section 47(1) of the Act, duties are payable in respect of all excisable goods in accordance with the provisions of Schedule 1 to the Act. Part 1 of Schedule 1 to the Act contains the Headings and Subheadings which describe the goods. This part of the Schedule is based on the Harmonized System for the classification of goods. Part 2 of the Schedule to the Act also contains Item Headings, which basically mirrors the Tariff Headings in Part 1, and they serve to identify the excisable goods. The legal sources for determining an appropriate classification are to be found in the Schedule and in Parts 1 and 2 of the Act.

While the Full Court mentioned the applicable legal principles, it did not apply them. It seemingly set out to purposively interpret Additional Note 4(b). But it concentrated solely on its conception of the note's secondary purpose, and background, instead of considering together its text, the context and the primary purpose (which was to explain and clarify to which liqueurs certain subheadings, specifically mentioned in that note, would be applicable). It was not disputed that the product in question had a wine spirit base. The issue between the parties was narrow and limited to determining

whether it was a liqueur with a wine spirit base to which “other non-alcoholic ingredients have been added”. In seeking to resolve that issue, the meaning of the phrase “non-alcoholic ingredients” had to be established, both conjunctively and disjunctively.

The wording of Additional Note 4(b) was clear and unambiguous, requiring ingredients added to the wine spirit base to be entirely non-alcoholic. That term had to be given its ordinary grammatical meaning, which meant containing no alcohol at all.

The Commissioner’s interpretation was correct and the appeal was accordingly upheld.

Eden v Ellis and another and a related matter [2025] 1 All SA 314 (WCC)

Civil Procedure – Rescission – Allegation that order for payment would not have been made if court was aware of fraudulent misrepresentations made by party seeking payment – Applicant seeking rescission of a judgment on grounds of fraud must prove that respondent, fraudulently with the intention to mislead the court, gave incorrect evidence during initial proceedings, and that court would have given a different judgment had it been aware of the true position – Inordinate delay in instituting application to rescind a default judgment may result in rescission being refused.

The main protagonists in the present litigation were Mr Eden and Mr Ellis, who had conducted a partnership between 2017 and 2019. In 2020, Mr Ellis brought an action for the dissolution of the partnership and the appointment of a receiver (the “dissolution action”), as well as a damages action. He obtained default judgment in respect of the dissolution action and a receiver (“Mr Gore”) was appointed, tasked with the preparation of a liquidation and distribution account (“L&D account”) to facilitate the equal distribution of the partnership assets. A second L&D account prepared by Mr Gore reflected the amount of R971 132,28 as owing by Mr Eden to Mr Ellis. Although Mr Eden did not object to the account, he failed to pay the amount due. Mr Ellis consequently brought an application to enforce payment. That application succeeded and writs of execution were issued. However, as the sheriff was unable to attach anything to satisfy the writs, he issued nulla bona returns. A nulla bona return being an act of insolvency in terms of section 8(b) of the Insolvency Act 24 of 1936, Mr Ellis instituted an application to sequestrate Mr Eden. No answering affidavit was filed by Mr Eden. Instead, an application was brought for rescission of part of the order made

in Mr Ellis' application to enforce payment. The rescission application and the sequestration application were heard simultaneously. In the rescission application, brought under the common law, Mr Eden alleged that Mr Ellis had fraudulently misrepresented to Mr Gore the true amount of his own personal expenses run through the bank account of the partnership. According to Mr Eden, had Mr Gore been aware of the alleged fraud when dissolving the partnership, the L&D account would have looked different; and had the court been aware of it when considering the enforcement application, the court would not have granted the order it did.

Held – An applicant seeking to obtain the rescission of a judgment and order on the grounds of fraud, must, in particular, prove that the respondent gave incorrect evidence during the initial proceedings, that he did so fraudulently with the intention to mislead the court, and that such false evidence diverged from the truth to such an extent that the court would have given a different judgment had it been aware of the true position. An inordinate delay in instituting an application to rescind a default judgment may count against the rescission applicant and result in rescission being refused. A court considering an application under the common law enjoys a wide discretion. It may refuse rescission if justice and equity demand it, notwithstanding that an applicant had shown formal compliance with the requirements for granting rescission. Mr Eden's rescission application was brought some 8½ months after the sequestration application was served on him. The delay was unreasonable and the explanation therefor was inadequate. It would not be in the interests of justice to condone the delay, and for that reason alone, the rescission application should, in the exercise of the court's discretion, be dismissed. Further, Mr Eden had failed to establish fraud on the papers.

The estate of Mr Eden was accordingly placed under provisional sequestration

Fairview Golf Estate Home Owners' Association v Wei-Yu Feng [2025] 1 All SA 331 (WCC)

Insolvency – Application for provisional sequestration – Failure to satisfy judgment debt constituting act of insolvency in terms of section 8(a) of Insolvency Act 24 of 1936 – In terms of section 43(2) of the Superior Courts Act 10 of 2013, sheriff's return

is prima facie proof of its contents, and party challenging return bears evidential burden to raise a dispute based on cogent evidence.

The applicant ("HOA") was the body corporate of a golf estate comprising residential nodes around a golf course. As a property owner in the estate, the respondent ("Mr Feng") was a member of the HOA and was bound by the terms of its constitution. The HOA's board of trustees disputed Mr Feng's entitlement to establish sectional title schemes on two of the erven that he owned, and refused to issue levy clearance certificates which Mr Feng required in order to transfer the units to new owners. Mr Feng therefore brought two applications to compel the HOA to issue the certificates. Before the hearing, the substantive relief sought in both applications became moot, leaving the issue of liability for the costs of both applications unresolved. The court ordered each party to pay its own costs, save that Mr Feng would be liable for identified wasted costs incurred by the HOA. The wasted costs were taxed, and the Taxing Master issued an allocatur which determined Mr Feng's liability to the HOA. Mr Feng failed to make payment, leading to the HOA obtaining a warrant of execution against his movable property. However, the sheriff could not identify property belonging to Mr Feng, to satisfy the debt. Consequently, in the present application, the HOA sought the provisional sequestration of Mr Feng's estate. Mr Feng served a notice in terms of Rule 7(1), requiring the HOA to furnish the resolutions authorising the institution of proceedings, and authorising the deponent (Mr Grimson) to depose to affidavits on behalf of the HOA. In response, the HOA issued a notice in terms of rule 30 of the Uniform Rules, positing that the rule 7(1) notice constituted an irregular step as rule 7(1) related to a contestation of the authority of an attorney representing one of the parties, and not to the authority of a deponent, and did not allow a party to call for specific documents. Mr Feng responded with an interlocutory application directing the HOA to deliver documents referred to in the rule 7(1) notice within 10 days; and postponing the main application sine die.

Having dismissed the interlocutory application, the court furnished its reasons.

Held – It had to be determined whether rule 7(1) could be employed to extract documentation from the HOA; and whether Mr Feng had established any basis on which the court might look behind the validity of the board's resolution to appoint Mr Grimson as chairperson, or its resolution authorising the present application and empowering Mr Grimson to sign all relevant documents and affidavits. Both issues

were decided against Mr Feng as he had failed to raise a direct challenge to any resolutions of the board of trustees. The court could not ignore any decisions of the HOA, as such decisions stood until set aside. Rule 7(1) can be appropriately employed to challenge the authority of a deponent claiming to represent a party; and is not merely limited to the authority of the attorneys representing any party. But Mr Feng's challenge to the authority of Mr Grimson was met by the production of the board's resolutions. Mr Feng's rule 7(1) notice and interlocutory application were intended to compel the production of documentary evidence in the hope that such documents would provide a stronger challenge to Mr Grimson's authority and the validity of the impugned resolutions. That was not the purpose of rule 7(1).

In the main application, the HOA relied on section 8(a) of the Insolvency Act 24 of 1936 to establish an act of insolvency. That refers to the failure to satisfy a judgment debt. In that regard, Mr Feng challenged the correctness of the sheriff's return of service. As section 43(2) of the Superior Courts Act 10 of 2013 establishes that the return is prima facie proof of its contents, Mr Feng bore an evidential burden to raise a dispute based on cogent evidence. That burden was not discharged. The sheriff's return was thus proof of an act of insolvency. Satisfied of the existence of the debt and the advantage to creditors, the court granted a provisional order of sequestration.

Gunter v Minister of Police [2025] 1 All SA 352 (FB)

Personal Injury/Delict – Injury to member of public caused by actions of police – Minister of Police bearing onus to prove justification for the assault – Failure to call witness who was available and able to testify to the facts on a disputed issue merited an adverse inference in the circumstances of the present case – Minister failing to discharge onus of establishing that conduct of police was not wrongful and was justified by necessity.

In an action for damages against the defendant (the "Minister"), the plaintiff alleged that a member of the police ("SAPS"), acting within the course and scope of his employment with the Minister, threw a stun grenade at the plaintiff and other members of the public, without justification. As a result of the explosion of the stun grenade, the plaintiff suffered permanent damage in the form of loss of hearing in both his ears. He claimed damages in the form of general damages in respect of suffering and/or

discomfort, loss of amenities of life and disability, and past and future medical expenses.

The Minister denied any breached of the duty of care, or that the plaintiff had sustained the injury in question as a consequence of any conduct by members of the SAPS. It was stated that the police had used stun grenades to disperse a crowd that had gathered unlawfully. The conduct of the crowd was pleaded as grounds of justification.

Held – Every infringement of bodily integrity is prima facie unlawful and once the infringement is proved, and the onus rests on the wrongdoer (the "defendant") to prove a ground of justification. The plaintiff must allege and prove the fact of physical interference. In this case, there was no reason to reject the plaintiff's evidence that the detonation of the stun grenade, being a sudden high noise exposure, caused hearing loss and tinnitus. The State has a constitutional obligation to protect individuals against criminal acts or violence by third parties. Failure to do so may give rise to delictual liability. The onus to prove a justification for the assault accordingly fell on the Minister. The reasonableness of the SAPS member's conduct, and whether the Minister should be held liable for such conduct, had to be considered. The determination of wrongfulness by the breach of a legal duty involved the determination of the objective reasonableness of the conduct of the person who caused the damage alleged. The question of whether a legal duty had been breached was also determined with reference to the boni mores or general legal conviction of the community. The Minister admitted that SAPS had a legal duty to take reasonable steps to prevent or limit injury to the public who attended the gathering held on the day of the incident, but contended that the actions by the members of the SAPS on the day in question were justified and satisfied the requirements of necessity as a ground for justification. The versions of the plaintiff and defendant were destructive to one another. Whether either party has discharged the onus upon it depends in the first instance on whether its version of events can be said to be more probable than that of the other party. When a court is faced with two conflicting versions, the court must make findings on the credibility of the various factual witnesses; their reliability; and the probabilities. It was significant that the Minister did not call the SAPS member who had thrown the grenade or the operational commander. The failure to call a witness who was available and able to testify to the facts on a disputed issue merited an adverse inference in the

circumstances of the present case. Having regard to the credibility of the factual witnesses, their reliability and the probabilities of the version presented by the parties, the version presented by the plaintiff was more probable than that of the Minister. The conduct of SAPS was found to have been wrongful and unreasonable. The Minister failed to discharge the onus of establishing that the conduct of the police officer which caused the plaintiff's injury was not wrongful and was justified by necessity. The plaintiff's claims for damages succeeded and the Minister was ordered to pay an amount of R757 561.

Hart v Hart and others [2025] 1 All SA 373 (WCC)

Wills, Trusts and Estates – Bequest of property by testator to sons, subject to special bequest of usufruct in favour of wife – Right of wife to dispose of property subject to executors' approval of investment of proceeds – Whether, on proper construction of will, testator's wife had unfettered right to insist on disposal of property despite sons being registered owners of the property – Interpretation of will establishing that intention of testator was clear and unambiguous, seeking to restrain the full effect of the dominant clause by the usufruct.

The applicant's husband (the "testator") died testate in September 2013. Until his death, the testator had lived with the applicant, and they conducted a guesthouse business from their property. In February 2013, the testator executed his last will and testament, nominating the first and the fourth respondents as executors of his estate. The testator bequeathed the entire estate to the four respondents in equal shares, subject to a special bequest of usufruct in favour of the applicant. The will provided for the applicant to dispose of any assets and invest the proceeds in any other asset provided that the executors approved the investment, which approval should not be unreasonably withheld. The applicant's comfort and well-being was to be the main criterion applied by the executors. Finding the guesthouse difficult to run at her age, the 78-year-old applicant decided to sell the property with a view to reinvesting the proceeds of the property in a financial investment to fund her living expenses. The respondents were opposed to the sale and disputed the applicant's right to sell without their consent. They contended that the applicant's interpretation of the will was flawed, in that it failed to give proper effect to what they considered to be the testator's true intention, which they said was to vest the estate in his four sons. The applicant therefore approached the court to enforce the provisions of the special bequest of the

will. Central to the declaratory relief sought was an order that, in terms of the special bequest, the applicant was entitled to dispose of the property, despite the fact that the respondents were the registered owners, and that the respondents, had no right to refuse to honour the applicant's decision to sell the property at a market-related price.

Held – The determination of the parties' respective rights hinged on the proper interpretation of the testator's will. The cardinal principle in construing a testamentary document is to ascertain the true intention of the testator. In the interpretation of a will, the object is not to ascertain what the testator meant to do, but to establish his intentions as expressed in the will. Based on the armchair evidence rule, the court is entitled to put itself in the testator's armchair and have regard to the material facts and circumstances known to the testator when he made the will. Where the terms of the will are clear and unambiguous, the general rule is that no evidence outside the will is normally admissible to explain the meaning or intention of the testator, unless in exceptional circumstances. The dominant clause must be given the overriding effect throughout the will and its effect must not be modified nor its meaning strained because there are other clauses in the will which apparently required that to be done, unless it was quite clear from the other clauses that the testator so intended.

The clause which bequeathed the entire estate to the four respondents in equal shares was the dominant clause in the will. The intention of the testator as expressed in the will was clear and unambiguous, seeking to restrain the full effect of the dominant clause by the usufruct. Based on the clear words expressed in the will, the testator intended to give the applicant an absolute right to dispose of the property. In so far as the respondents insisted that the proceeds of the property be invested only in immovable property, they were unreasonably withholding their approval. Declaratory relief as requested by the applicant was granted.

Johannesburg City Parks & Zoo and another v Zwane [2025] 1 All SA 388 (GJ)

Family Law and Persons – Burial rights – Rights over gravesite – Right to bury, which falls on heirs of deceased in absence of specific instructions from the deceased whilst alive, extends to right to erect tombstone.

The respondent and her late husband (the "deceased") were married in community of property in November 1993. In 2011, the parties ceased cohabiting and in 2013, the deceased obtained a default divorce decree which was however, subsequently set

aside. In January 2019, the deceased was killed in a shooting incident. The marriage between the deceased and the respondent still subsisted at the time of his death but the family of the deceased refused the respondent the right to participate in the burial of her husband as they wrongly believed that the parties were divorced. Despite the family's attitude, the respondent chose where the deceased would be buried and paid for the gravesite. The deceased's sister carried out the funeral arrangements and her name was accordingly on the relevant records. When the respondent later wished to erect a tombstone, officials of the appellants at the relevant cemetery advised her that she required the permission of the deceased's sister. The respondent, who had by then been appointed as executrix of the deceased estate, subsequently launched an application for urgent relief. The court ordered the appellants to recognise the respondent as the holder of rights to the deceased's grave site. That gave rise to the present appeal.

Held – The right to bury falls on the heirs of the deceased in the absence of specific instructions from the deceased whilst alive. That right extended to the right to erect a tombstone in remembrance of the deceased.

The respondent was not only the intestate heir, but was also the executrix of the estate. She had chosen the gravesite and paid for it.

The appellants' contention that the respondent should have proceeded by way of judicial review was not sustainable where the informing of the respondent that she required permission to erect the tombstone did not amount to administrative action.

A further issue was ownership of the burial site. The applicable by-law was clear and unambiguous in providing that a person who had paid the prescribed burial fees acquired private rights over the grave. It was uncontested that the respondent had paid the prescribed burial fees. Further, she automatically became owner of the contents of the grave by virtue of her marriage in community of property to the deceased. That common law right could never be taken away from her by virtue of a municipal by-law.

The Court criticised the City's rigid and inflexible approach and dismissed the appeal.

Land and Agricultural Development Bank of South Africa v Ntsekwa and another [2025] 1 All SA 395 (ECG)

Consumer – Breach of credit agreement – Entitlement of credit provider to judgment against consumers and order that mortgaged properties be declared specially executable in favour of credit provider – Consumer may remedy default at any time before credit provider has cancelled agreement – Only overdue arrear amount and related costs or charges required to be paid to remedy default – Legal proceedings may not be commenced unless notice in terms of section 129(1) of National Credit Act 34 of 2005 has been given to consumer – Creditor not entitled to order regarding executability of properties, as Rule 46A required a nulla bona return showing that consumers had insufficient movable property before an order declaring immovable property executable was granted.

In 2013, the applicant granted the respondents a loan in the amount of R1 620 000. It was a material term of agreement that the respondents would repay the term loan in 16 annual instalments. Should the respondents default, the full amount of the term loan would be payable and the full outstanding balance would immediately become due and payable without any further notice to the respondents. The applicant would be entitled to call up any security granted to the applicant, and to launch court proceedings in terms of which immovable properties over which covering mortgage bonds that were registered in its favour be declared executable. The respondents fell into arrears and were consequently indebted to the applicant, which approached the court for judgment against the respondents and an order that the mortgaged properties be declared specially executable in favour of the applicant. The application was opposed by the respondents, who stated that they had paid off their arrears in full.

Held – The issue for determination was whether two additional payments made by the respondents had remedied their default.

Section 129(3) of the National Credit Act 34 of 2005 provides that a consumer may at any time before the credit provider has cancelled the agreement, remedy his default. The only way to remedy a default is by paying all the amounts overdue, together with the credit provider's prescribed default administration charges and reasonable costs of enforcing the agreement up to the time of default. The respondents' request, after making the payments in question, for the withdrawal of the application against them,

was refused as the applicant wrongly believed that it was entitled to the full capital balance. Only the overdue arrear amount and related costs or charges was required to be paid to remedy the default. The respondents paid approximately double the arrear amount that was overdue. The default was thus effectively remedied by the respondents. The credit agreement was then ipso facto reinstated by operation of law. No legal costs had yet been quantified for payment, and the applicant had not called for a separate payment of costs. Accordingly, applicant's legal costs were not due and payable when the default was remedied.

The next question was whether the institution of the present proceedings was justified. Legal proceedings may not be commenced unless a notice in terms of section 129(1) of the Act has been given to the consumer. The notice must either be brought to the attention of the consumer or must have reached the consumer. The applicant's founding affidavit did not aver that the notice, on a balance of probabilities, reached the respondents. There was also no indication that a notice was ever sent to the second respondent. Such omission vitiated the proceedings. The applicant had not complied with section 129(1) of the Act. The section 129(1) notice is a necessary notice to complete the cause of action of the credit provider. It is a condition precedent to the institution of the legal proceedings. A cause of action can only be complete and perfected once a requisite notice was issued prior to the commencement of proceedings.

The applicant was also not entitled to an order regarding executability of the properties, as Rule 46A required a nulla bona return showing that the judgment debtor had insufficient movable property before an order declaring immovable property executable was granted. The application was dismissed with costs.

Maher v Avianto Pty Ltd [2025] 1 All SA 410 (GJ)

Corporate and Commercial – Breach of contract due to supervening impossibility of performance – Performance becomes objectively impossible after the contract has been concluded due to no fault of either party and as a result of unforeseen and unavoidable events – Rule is that the obligation to perform and the corresponding right to performance is extinguished – Lessor of venue required to refund payment based on unjust enrichment.

In terms of a contract entered into between the parties, the respondent agreed to lease a venue to the appellant for her wedding. The contract price of R63 000 had to be paid in full to secure a booking of the date of 28 March 2020. The appellant complied. Two days before the wedding date, South Africa went into a nationwide lockdown to curb the spread of the Coronavirus, with the result that the appellant's wedding could no longer take place on 28 of March as planned. The contract stated that a postponement of the function by the appellant would amount to a cancellation, and a cancellation by the respondent for any reason not attributable to the default of the appellant would result in a full refund. The appellant stated that the respondent cancelled her event due to no fault of the appellant but due to a force majeure event, namely the lockdown, and she was entitled to a full refund. The respondent's retention of the R63 000 led to the appellant approaching the court for confirmation of the cancellation of the contract and repayment of the money.

The court a quo found that since the postponement was due to force majeure, the appellant was not entitled to a refund. Her claim based on unjust enrichment was also dismissed.

Held – A court of appeal is only required to intervene in cases where the court below was clearly mistaken. In casu, the court below was mistaken because it applied the incorrect principles of law.

While non-performance of any contractual obligation is considered a breach of contract entitling the disadvantaged party to utilise available remedies to rectify the breach, the strict enforcement of those contractual principles may be unfair and detrimental when the lack of performance and breach result from an extraordinary event or circumstance beyond the parties' control. Consequently, the contractual clause of force majeure covers specific extraordinary events or circumstances that excuse parties from a breach of contract without assigning blame to either party. It is an exception to the contract law principle of pacta sunt servanda. Without a force majeure clause, the contracting parties must rely on the common law doctrines of supervening impossibility since that is the default position in South Africa. In terms thereof, performance becomes objectively impossible after the contract has been concluded due to no fault of either party and as a result of unforeseen and unavoidable events. In such a case, the rule is that the obligation to perform and the corresponding right to performance is extinguished. Two requirements need to be met for

performance to be regarded as objectively impossible. First, performance must be objectively impossible and not merely difficult, more burdensome, or economically onerous. Second, the impossibility must have been unavoidable by a reasonable person. To know what legal principle was applicable, it was necessary to understand whether the contract contained a force majeure clause that included the Covid-19 pandemic and the subsequent lockdown. The respondent was prevented from honouring its obligations, not by the Coronavirus but by the government's response thereto. That constituted supervening impossibility of performance rather than force majeure. In this case, the contractual obligations were reciprocal. The monies were paid in exchange for the venue. The impossibility of making the venue available on a specific date automatically meant that the contract was extinguished from the moment it became clear that the respondent would be unable to provide the venue. The requirements for unjust enrichment were established and the respondent was required to refund the appellant's payment.

Marais v Melck and another [2025] 1 All SA 422 (WCC)

Civil Procedure – Motion proceedings – Dispute regarding ownership of property – Referral to trial – Requirements – General rule is that an application for the hearing of oral evidence must be made *in limine*, not once it becomes clear that the applicant is failing to convince the court on the papers – Circumstances must be exceptional before court will permit applicant to apply in the alternative for matter to be referred to evidence should the main argument fail – Property – Proof of ownership – Test for whether applicant had discharged onus of proving his ownership of movable property which was not in his possession, was whether probabilities were balanced in his favour – Onus of proof is much heavier with movable property since there is a rebuttable presumption that the person in physical control of the thing is also the owner.

The present application concerned the removal of farming equipment from the applicant's farm. The equipment was removed on the second respondent's instruction with the applicant's consent, and relocated to the first respondent's farm. According to the applicant, he had established a joint venture with the second respondent to exploit the Kalahari melon seed for its cosmetic use, and became the equipment owner as part of the second respondent's contribution to the joint venture. He stated that he had consented to the second respondent removing the equipment used on his farm for about two years, on the understanding that the equipment would be returned.

The second respondent stated that the central issue was whether the applicant had proven that he was the owner of the equipment. He submitted that the applicant had failed to discharge that onus.

Held – A notice of motion informs the respondent and the court of the relief or remedy sought by the applicant. The founding or supporting affidavit to a notice of motion sets out the grounds upon which the relief is claimed. Sufficient facts (the “evidence”) must be disclosed to prove a cause of action. The founding affidavit contains the core allegations or assertions a party needs to establish to succeed (the facta probanda) and the facts or evidence to support those core allegations (facta probantia). The applicant’s case stands or falls by the contents of his founding affidavit. New information or issues not included in the founding affidavit may not be raised in a replying affidavit.

The test for whether the applicant had discharged the onus of proving his ownership of movable property, which was not in his possession, was whether the probabilities were balanced in his favour. The strength of the evidence that he had to produce to succeed depended upon the circumstances of the particular case. Once the applicant had established acquisition of ownership on a balance of probabilities, a rebuttable presumption that he was still the owner arose. In the case of movable property, the onus of proof is much heavier since there is a presumption that the person in physical control of the thing is also the owner. To satisfy the onus of proof, the applicant had to rebut the presumption. In this case, the applicant did not specify any of the requirements that would have entitled him to acquisition of ownership of the equipment.

During the course of the proceedings, the applicant contended that it had become apparent that the matter was no longer suitable for motion proceedings, and he sought a referral for oral evidence. As a general rule, an application for the hearing of oral evidence must be made in limine, not once it becomes clear that the applicant is failing to convince the court on the papers. The circumstances must be exceptional before a court will permit an applicant to apply in the alternative for the matter to be referred to evidence should the main argument fail. The applicant failed to satisfy the requirement for referral to trial. On the papers, he had not made out the case on which he had relied. The application was dismissed.

Maximum Profit Recovery (Pty) Ltd v Rustenburg Local Municipality and others [2025] 1 All SA 441 (NWM)

Constitutional and Administrative Law – Procurement by local authority – Challenge to award of tender by municipality – Whether decision awarding tender was taken pursuant to the exercise of a delegated power, rendering it necessary for party seeking review to have first lodged an appeal as envisaged in section 62(1) of the Local Government: Municipal Systems Act 32 of 2000 – Original authority vests in municipality and municipal manager acts as appeal authority in terms of section 62(4)(a) through a sub-delegation of powers by the municipality – Internal remedies must therefore be exhausted before review is sought.

In October 2022, the first respondent (the "municipality") published an invitation to tender for the appointment of a service provider to render services for a period of 36 months. The appellant ("Maximum Profit") submitted a bid but the municipality awarded the tender to the fourth respondent, a joint venture. Maximum Profit consequently launched an urgent review application seeking to set aside the municipality's decision. However, the court a quo upheld a point in limine raised by the municipality, that Maximum Profit had failed to exhaust its internal remedies contrary to the provisions of section 7(2)(a)-(c) of the Promotion of Administrative Justice Act 3 of 2000. It was held that Maximum Profit should have lodged an appeal as envisaged in section 62(1) of the Local Government: Municipal Systems Act 32 of 2000. The application was dismissed based on the court's interpretation of section 62(1). Such interpretation found that section 62(1) had two requirements. First, the decision appealed against must have affected the rights of Maximum Profit. Second, the decision affecting such rights must have been taken pursuant to the exercise of a delegated power. The court found that the decision to appoint the joint venture was a delegated power as envisaged in section 62(1) and as such Maximum Profit should have lodged an appeal in terms of that section.

On appeal, Maximum Profit raised two issues. The first (the "delegation issue") was based on the submission that an appeal can only be submitted if the decision was taken by a "political structure, political office bearer, councillor or staff member of a municipality" in terms of a power or duty delegated to such entity. Where the relevant decision-maker acts based on original authority, no appeal can be submitted. Maximum Profit argued that since the decision to award the tender was made by the

municipal manager, it was based on original authority and not on any delegated power. The second (the “accrual of rights issue”) stated that an appeal authority can do nothing if rights have accrued as a result of the decision.

Held – The delegation issue and the accrual of rights issue were inextricably linked. The most prudent starting point was the delegation issue. The question was whether the final award of the tender was made by the municipal manager by virtue of original or delegated authority. A municipal manager executes his duties or functions subject to the directions of a municipal council. Section 62 could not be read in isolation, but had to be read with sections 53, 55 and 59 of the Local Government: Municipal Systems Act and the Supply Chain Management Policy of the municipality to determine the issue of delegations. The Act is silent on any original powers which vest in a municipal manager, aside from the duties and delegations which derive from sections 53 and 59. That a municipal manager may be an appeal authority in terms of section 62(4)(a) is only derived from a sub-delegation of powers by the municipality in which the original authority vests. Moreover, the municipality’s Supply Chain Management Policy made it clear that the municipal manager, in making the final award, did so on delegated authority. Maximum Profit was therefore obliged to exhaust the internal remedy provided in section 62. Its failure to do so was fatal to its review application, and the appeal was dismissed.

Phephetho v Road Accident Fund [2025] 1 All SA 458 (NWM)

Personal Injury/Delict – Injury of pedestrian in motor vehicle collision – Claim for damages – Assessment of damages in respect of loss of earnings – Approach to loss of earning capacity requires the defendant to make good the difference between the value of the plaintiff's estate after the commission of the delict and the value it would have had if the delict had not been committed.

In 2016, the plaintiff was hit by a vehicle while he was a pedestrian. His negligence having already been determined at 80/20% in his favour, the court was called upon to determine his claim in respect of general damages, loss of earnings and past medical expenses. At the hearing of the matter, the defendant offered an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 (the “Act”) to the plaintiff in respect of his claim for future medical expenses. It also informed the court that general damages were not in dispute and that it was accepted that the plaintiff’s injuries were serious as contemplated in section 17(1)(a) and (b) of the Act.

Held – Evidence adduced established the numerous medical interventions required by the plaintiff as a result of the accident, and the degree of impairment subsequently experienced by the plaintiff. One of the main claims made by the plaintiff was that he had sustained a head injury in the collision and had lost consciousness after the accident until he woke up the next day in the hospital. The hospital records however, indicated that he had been fully oriented and conscious just two hours after his admission to hospital. The contradictory allegations by the plaintiff were cause for concern. It was further evident from the hospital records that the primary concern throughout the plaintiff's stay in hospital was his orthopaedic injuries and not a head injury. When the matter was heard, the court queried why no provision had been made in the draft order presented by the parties for the protection of funds to be paid to the plaintiff, and was informed that the plaintiff was adamant that he would not consent to a trust being created. If it were true that he had a significant head injury, the plaintiff's refusal to have his funds paid into a trust was questioned. As a result of all the above indications, the court was not convinced that the plaintiff had sustained a significant head injury and it concluded that he was not unemployable and did in fact have a residual earning capacity, which the court assessed to be in the region of 40%.

In respect of loss of earnings, it was concluded that having regard to the injuries sustained, accident-related sequelae, the plaintiff's age and subsequent medical boarding, his competitiveness in the open labour market had been impaired. The accident had therefore resulted in a profound truncation of his future employment chances and level of occupational functioning. He was considered unemployable in the open labour market and had suffered a total loss of income. The approach to loss of earning capacity, as confirmed in case law, requires the defendant to make good the difference between the value of the plaintiff's estate after the commission of the delict and the value it would have had if the delict had not been committed. The court assessed the plaintiff's past loss of earnings to amount to R1 389 011. and future loss of earnings to R1 837 057,80.

Raubex Building (Pty) Ltd v Bitou Municipality and another [2025] 1 All SA 472 (WCC)

Constitutional and Administrative Law – Procurement – Challenge to award of tender – Application for interim interdict pending review – Requirements for interim interdict involving Organs of State requiring applicant to establish a prima facie right even if it

is open to some doubt; a reasonable apprehension of irreparable and imminent harm to the right if an interdict is not granted; that the balance of convenience favoured the grant of the interdict; and the absence of any other remedy – No prima facie right established where applicant's bid was non-responsive.

The first respondent municipality awarded a tender for the development of housing units to the second respondent ("Carnivore") in April 2024. As an unsuccessful bidder, the applicant sought judicial review and ancillary relief relating to the municipality's decision. It contended that the award was fatally flawed, and set out seven grounds of review based on section 6 of the Promotion of Administrative Justice Act 34 of 2000 ("PAJA").

Carnivore opposed the application, contending that the applicant's bid was non-responsive in that it had failed to comply with the tender specifications. It was also contended that the applicant had failed to exhaust the internal remedy available to it in terms of section 62 of the Local Government Municipal Systems Act 32 of 2000 (the "Systems Act"), rendering the review application premature. Carnivore further argued that the grounds for review were speculative as the applicant had merely identified the sub-sections of section 6 of PAJA that it relied upon, without elaboration.

Held – The application was primarily concerned with whether the applicant should succeed with its application for an interim interdict pending the final determination of the review application. The requirements for an interim interdict involving organs of State requires an applicant to establish a prima facie right even if it is open to some doubt; a reasonable apprehension of irreparable and imminent harm to the right if an interdict is not granted; that the balance of convenience favoured the grant of the interdict; and the absence of any other remedy. A court will not easily grant an interdict restraining the exercise of statutory powers unless there are allegations of mala fides, exceptional circumstances, and a strong case for granting the interdict. The court's discretion must be exercised in a way that promotes the objects, spirit, and purport of the Constitution. A temporary restraint against exercising statutory power well ahead of the final adjudication of a claimant's case may be granted only in the clearest of cases.

The applicant had submitted a non-responsive bid in that its design provided for an additional floor and exceeded the applicable height restrictions. It attempted to

downplay that fact, despite it being the main reason for its failure to secure the bid. The conclusion was that it had failed to make out a case for an interim interdict. It had not identified a prima facie right beyond that of a prospective hope to prove the municipality's decision unlawful and invalid. The harm it identified if the relief was not granted is one-sided and abstract. The balance of convenience was also firmly against the applicant.

The application for an interim interdict was dismissed with costs.

Richards and others v Rabie and others [2025] 1 All SA 487 (WCC)

Interpretation – Dispute amongst members of church – Whether the church board was properly constituted to conduct the church's business at two board meetings – Interpretation of church constitution and two previous orders in litigation – Proper approach to interpreting legal documents is to read the words used in the context of the document as a whole and in light of all relevant circumstances attendant upon its coming into existence – Proper interpretation of relevant constitution leading to conclusion that meetings were not properly constituted due to non-compliance with obligatory prescripts of constitution.

The first applicant (the "applicant") was the Apostolic leader of the Kings Church International, Robertson (the "Church" or "KCI-R"), and the chairperson and member of the church's board (the "Board"). The church was affiliated with the Kings Church International, United Kingdom ("KCI-UK"). The applicant was also a spiritual leader of KCI-UK and a senior pastor of that church. The first to third respondents (the "respondents") were also members of the Board. The applicant sought orders declaring that two meetings held by the Board on 22 June and 16 November 2022 were invalid and that all decisions and resolutions adopted at those meetings were void. Ancillary relief was also sought against the respondents. While the applicant emphasised the ties between KCI-R and KCI-UK, the respondents asserted that the Church had existed long before the applicant attempted to take it from the community of Robertson. The Board had not had insight into KCI-UK. There were no joint board meetings, and nobody from KCI-UK, apart from the applicant and his son, was actively involved in the sermons or management of the Church. The respondents referred to certain aspects of the Church constitution to assert the Church's independence.

In terms of a previous order ("27 October 2021 order"), the members of the Board were declared to be the applicant and the first, second, and third respondents. That order was subsequently varied by a clarifying order (the "30 September 2022 order") confirming that the Church's Board members as of 24 February 2021 and 27 October 2021 were the applicant, the first, second, and third respondents, and no other person or persons. The relief sought by the applicant required the court to determine whether the Board was properly constituted to conduct the Church's business at the Board meetings of 22 June 2022 and 16 November 2022. The court had to interpret the 2017 Church constitution, on which the respondents relied for their appointment, and the 27 October 2021 and 30 September 2022 orders.

Held – The proper approach to interpreting legal documents is to read the words used in the context of the document as a whole and in light of all relevant circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the ordinary rules of grammar and syntax, the context in which the provision appears, the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible, each possibility has to be weighed against all these factors. The process is objective, not subjective. A sensible meaning is preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.

The parties agreed that the declaratory relief sought depended upon whether the Board was properly constituted on 22 June and 16 November 2022. The proper interpretation of the 2017 constitution led to the conclusion that the meeting held by the respondents on 22 June 2022 was not properly constituted as it did not comply with the obligatory prescripts of the constitution. As long as the Board was improperly constituted, the decisions made at the meeting and those taken at the November 2022 meeting were invalid, null and void. The declaratory relief sought by the applicant in that regard was granted, together with certain ancillary relief.

Rosevean Investments 0028 (Pty) Ltd v City of Cape Town and others
[2025] 1 All SA 516 (WCC)

Property – Installation by municipal authority of sewerage pipeline over private property without notification to owner and without owner's knowledge or consent – Rights over property of another must be exercised civiliter modo – The exercise of a

right in a civil and reasonable manner would include giving reasonable notice to the owner of the property and that the proposed access to the property be determined in consultation with the owner – City's installation of sewerage pipeline over privately-owned property unlawful.

The applicant ("Rosevean") owned immovable property in Hout Bay, Cape Town. The second respondent ("the hotel") owned a property downhill from Rosevean's property. Historically, an agreement existed between the hotel and a previous property owner, in terms of which sewerage from the properties belonging to Rosevean and the fourth respondent ("Wooll") would be conveyed in a pipeline down to the hotel property below. In 2017, the hotel and Wooll reached an agreement in terms of which the sewerage from Rosevean's and Wooll's properties would no longer be piped over the hotel property, but would instead be conveyed in a pipe across Wooll's property and from there across another property and then into the first respondent City's sewerage connection. Rosevean was not told about the rerouted pipeline at the time. It only discovered that fact in 2020 when it experienced a discharge of sewerage on its property. In October 2020, the City installed a sewerage pipeline over the Rosevean property, which connected two neighbouring properties to the pipeline which ran from the Rosevean property through to the Wooll property and from there into the municipal sewer. The new pipeline had been constructed above ground on the Rosevean property and snaked across a portion of the property. Rosevean was opposed to the pipeline traversing its property and alleged that it impeded the future expansion of its buildings. It asserted that the new sewer line was installed on its property without its knowledge or consent, and without any notification from the City. The appointed contractor and the City had not accessed the Rosevean property through the front entrance of the property or with the express permission or acknowledgement of Rosevean when installing the new pipeline. The City contended that it had a statutory power to access the property in whatever way it wanted in order to undertake its statutory obligations, and that it was incumbent on Rosevean to have objected to the actions at the time.

It was common cause that the City's entitlement to instal a sewerage pipeline over the Rosevean property ultimately derived from a servitude imposed on the Rosevean and Wooll properties at the time of the subdivision of the original erf they comprised, in favour of the City and neighbouring properties. Absent that servitude, the City could

not have sought to run a sewerage pipeline across privately-owned land; or at least would have had to follow a regulated process and pay compensation to the property owner. The key issue was therefore what the servitude allowed the City to do.

Held – Broad questions were whether the City had constructed the sewerage pipeline across Rosevean's property irregularly or unlawfully; and if so, what should be done about that slightly more than four years later.

Case authority establishes the principle that rights over the property of another must be exercised civiliter modo. The exercise of a right in a civil and reasonable manner would include giving reasonable notice to the owner of the property and that the proposed access to the property must be determined in consultation with the owner. The City's installation of the sewerage pipeline over the Rosevean property was held to be unlawful and Rosevean was granted a declaratory order to that effect, which order was suspended to prevent the dislocation that might otherwise ensue.

Rosevean's claims against the third respondent and Wooll were dismissed, and its application for an inspection in loco was refused.

SA Taxi Impact Fund (RF) (Pty) Ltd v Jacobs [2025] 1 All SA 538 (WCC)

Consumer – Default on credit agreement – Debt review application cancelled by credit provider and return of vehicle purchased under credit agreement demanded – Whether credit provider complied with obligation to negotiate in good faith prior to terminating debt review process – Whether credit provider was guilty of reckless credit – Credit provider engaged in good faith regarding debt restructuring proposals as required by National Credit Act, 34 of 2005 – Insufficient evidence advanced to support allegation of reckless credit.

As a licensed taxi operator, the respondent was a member of a taxi association. The applicant agreed to finance the purchase of a taxi vehicle for the respondent, who would repay the applicant in monthly instalments over 77 months. Despite delivery of the vehicle to the respondent, ownership remained vested with the applicant until all amounts outstanding in terms of the credit agreement had been paid by the respondent. Within eight months of entering into the credit agreement, the respondent applied in terms of section 86(1) of the National Credit Act 34 of 2005 to have himself declared over-indebted. At the time the respondent applied for debt review, he was in arrears, and therefore in default of the credit agreement. His debt counsellor provided

the applicant with a debt restructuring proposal for repayment of the loan. The proposal was rejected by the applicant and as the parties could not agree on the terms of a counter-proposal, the applicant gave notice to the respondent, the debt counsellor and the National Credit Regulator of its election to terminate the debt review in terms of section 86(10) of the Act. The applicant subsequently issued summons and terminated its agreement with the respondent. Although the total amount outstanding as at 12 June 2023 was R573 998,51, in its summary judgment application, the applicant claimed only the return of the vehicle and attorney and client costs.

The respondent's primary defence to the summary judgment application was an alleged breach by the applicant of the obligation to negotiate in good faith prior to terminating the debt review process. A second defence accused the applicant of reckless credit. The suggestion was that that entering into the credit agreement would make the respondent over-indebted.

Held – Despite the respondent's allegation that the applicant's counter-proposal consumed most of the 60-day period within which debt review may be cancelled by a credit provider in terms of section 86(10)(a) of the Act, there was still an opportunity for the respondent to consider the counter-proposal and to maintain negotiations with the applicant prior to the expiry of the 60-day period. The applicant's counter-proposal was made within a reasonable time, and its willingness to entertain a further debt restructuring proposal, and to respond with improved counter-proposals, with several elements of compromise pointed to negotiating in good faith. The fact that the counter-proposals were unattractive to the respondent did not suggest bad faith. The applicant's obligation, as credit provider, in terms of section 86(5), to participate in good faith in the review and in any negotiations designed to result in responsible debt re-arrangement had been discharged and the debt review was properly terminated.

The respondent's debt restructuring proposal contemplated that he would retain possession of the vehicle. However, as the credit agreement had been validly cancelled, he no longer enjoyed the right to retain the vehicle. The court had no power to reinstate the cancelled agreement, or to order a resumption of the debt review under section 86(11).

Regarding the allegation of reckless lending by the applicant, the respondent conflated his current position with that represented by him to the applicant at the time of

assessing his credit application. The court rejected the respondent's argument that the applicant was insufficiently diligent in assessing affordability. The respondent had failed to provide sufficient information to the court to enable it to hold that a declaration of reckless credit was a bona fide defence.

Termination of the credit agreement was confirmed and summary judgment was granted for return of the vehicle to the applicant.

Smartpurse Solutions (Pty) Ltd (applicant for leave) v FirstRand Bank, *In re*: FirstRand Bank Ltd v Smart purse Solutions (Pty) Ltd [2025] 1 All SA 552 (GJ)

Civil Procedure – Appeals – Application for leave to appeal – Test – Whether threshold in established test for leave to appeal had been raised by the coming into effect of the Superior Courts Act, 2013 – Substantive test largely unchanged in requiring court determining an application for leave to decide whether there was a reasonable prospect of success in the appellate forum – To establish a reasonable prospect of success on appeal, applicant must demonstrate that there exists some sound, cognisable reason why an appeal court would find differently to the court of first instance.

In April 2024, a final winding-up order was granted against the applicant. In the present application, the applicant sought leave to appeal.

Held – In section 17(1) of the Superior Courts Act 10 of 2013, the legislature sets out the substantive test to be applied in determining whether leave to appeal ought to be granted. Two alternative bases upon which leave might be granted are provided for. They are where the judge formed the view either that "the appeal would have a reasonable prospect of success" or that "there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration". Both grounds do not have to be present for leave to be granted, and the applicant appeared to rely on the latter. The test in section 17(1)(a)(i) applies whether leave is sought from the court that handed down the judgment or where it is sought from the Supreme Court of Appeal where the court below had refused leave (in other words, leave under both sections 17(2)(a) and 17(2)(b)). In so far as the applicant seemed to focus on section 17(1)(a)(i), it would be asking the court to grant it leave to appeal because "the appeal would have a reasonable prospect of success". If it was demonstrated that the appeal would have a reasonable prospect of success

(and the requirements in section 17(1)(b) and (c) were also met), the court had to grant the leave sought, and there was no discretion to be exercised.

In discussing the substantive test that was to be applied to determine whether leave should be granted, the court traced the legislative history. The substantive test was largely left to the common law for many years. The court determining an application for leave had to decide whether there was a reasonable prospect of success in the appellate forum. It had to be satisfied that, on the findings of fact or conclusions of law, the court hearing the appeal that was being sought might take a different view from that at which the court being appealed arrived. The question raised by the court in this matter was whether the bar had been raised by the Superior Courts Act. From the examination of the historical development of decisions on leave to appeal, it appeared that, from the early period under the South Africa Act, 1909, to the present, the test for leave to appeal remained unchanged. The debate over whether the threshold had been heightened in the wake of the promulgation of the Superior Courts Act rested upon a misunderstanding of the context of the use of the verbs “might” and “would” in the context of what was anticipated in the appeal court. But the Superior Courts Act did not introduce a new test for leave to appeal. To establish a “reasonable prospect of success” on appeal, the applicant must demonstrate that there exists some sound, cognisable reason why an appeal court would find differently to the court of first instance. In other words, there must be a reasonable possibility, not a certainty, of success on appeal.

As an appeal in this case had no reasonable prospect of success, the application for leave to appeal was dismissed.

Sundays River Citrus Company (Pty) Ltd (first intervening applicant) and another, *In re*: Bouwer v Lonetree Citrus CC and others [2025] 1 All SA 571 (ECP)

Corporate and Commercial – Company law – Business rescue proceedings – Commencement of business rescue – Whether court-ordered business rescue proceedings begin at the time of the application for the order, as suggested by section 132(1)(b) of the Companies Act 71 of 2008, or only when the court makes the order placing the company under supervision, in accordance with section 131(4)(a) –

Business rescue proceedings only begin once a court makes an order placing the company under supervision, in accordance with section 131(4)(a).

Corporate and Commercial – Company law – Business rescue proceedings – Right to participate – Scope for person who did not form part of the definition of an "affected person" as contemplated in Companies Act 71 of 2008 to participate in hearing of an application for business rescue, based on a direct and substantial interest in the proceedings – Only current creditors have any right to participate in proceedings.

The first respondent ("Lonetree") conducted citrus farming. It was indebted to the third respondent ("Standard Bank") in respect of credit facilities. Standard Bank applied for the liquidation of Lonetree and its owner ("Rolust"). The applicant, a member of Lonetree and its chief executive officer, applied to court in terms of section 131 of the Companies Act 71 of 2008, seeking an order placing Lonetree under supervision and commencing business rescue proceedings (the main application). That was followed by an application to place Rolust under court-ordered business rescue.

The first intervening applicant ("SRCC") had entered into a production loan agreement with Lonetree. At the time the main application was instituted, Lonetree was indebted to SRCC in terms of the production loan agreement in an amount of R4,5 million. SRCC was notified of the application and listed as a creditor. Less than two weeks earlier, SRCC, having become aware of Standard Bank's liquidation applications, demanded repayment of the full amount due to it in terms of the production loan agreement. Three days after the main application was filed, Lonetree purported to repay the production loan to SRCC. Nevertheless, SRCC sought to file an affidavit and to participate in both the main application and the Rolust application on the ground that business rescue proceedings, once ordered, would have commenced when it was a creditor of Lonetree in terms of the production loan and, as such, an "affected person" as contemplated in the Act. It averred that the repayment was made after the commencement of business rescue proceedings, and was precluded by section 134(1) of the Act and not in the "ordinary course of business", given that it was not made in terms of the ordinary repayment obligations contemplated by the production loan agreement SRCC was also concerned that the payment was invalid or a voidable disposition, which might ultimately be set aside.

Held that the case involved interpretation of the Act. The approach to statutory interpretation was explained. Section 131(4)(a) provides that the court may "…make an order placing the company under supervision and commencing business rescue proceedings…", and section 132(1)(b) states that "…proceedings begin when an affected person applies to the court for an order placing the company under supervision in terms of section 131(1)". It had to be determined whether it was possible to reconcile the two provisions without violating the language contained therein. The question was whether court-ordered business rescue proceedings begin at the time of the application for the order, as suggested by section 132(1)(b), or only when the court makes the order placing the company under supervision, in accordance with section 131(4)(a). Business rescue proceedings only begin once a court makes an order placing the company under supervision, in accordance with section 131(4)(a). An application to court in terms of section 131 merely initiates business rescue proceedings, but that cannot be the moment that business rescue proceedings commence or begin.

A further question involved the scope for a person who did not form part of the definition of an "affected person" to participate in the hearing of an application for business rescue, based on a direct and substantial interest in the proceedings. Regarding SRCC's standing as an "affected person", it appeared insensible to interpret the relevant provisions to permit persons who were no longer creditors the right to participate in the proceedings, even if they were previously creditors. SRCC Holdings' application for intervention, and its bid to participate in Rolust's application for business rescue thus failed.

However, SRCC was found to be a creditor in respect of another contractual obligation, and on that basis was granted leave to participate in the hearing of the business rescue application involving Lonetree.

END-FOR NOW