LEGAL NOTES VOL 3/2025[1]

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SOUTH AFRICAN LAW REPORTS (MARCH 2025)

RADEMEYER v FERREIRA 2025 (2) SA 1 (CC)

Prescription — Extinctive prescription — Interruption — By institution of proceedings — Claim for contractual damages — Double-barrel procedure — Proceedings initiated by claim for order granting specific performance, and entitling plaintiff to later seek cancellation of contract and damages should defendant fail to comply with order of specific performance — Initial claim for specific performance not interrupting damages claim, which arises, at earliest, on cancellation of contract.

On 27 August 2008 the respondent, Mr Ferreira, and the appellant, Mr Rademeyer, entered into a contract in terms of which Mr Ferreira sold to Mr Rademeyer one of a number of subdivided properties the former intended to develop in an upmarket residential estate in Theescombe, Port Elizabeth. In around September 2011, when Mr Ferreira was in a position to register the property, Mr Rademeyer breached the contract by failing to pay the purchase price, and to do the necessary to effect transfer. Consequently, Mr Ferreira approached the High Court. And on 7 August 2012 he was granted by Pickering J, in line with the 'double-barrelled' procedure adopted by Mr Ferreira, an order (the 'Pickering Order') (a) of specific performance of the contract, requiring Mr Rademeyer to sign all documents required to effect transfer; and (b) 'in the event

[1] Summaries for revision purposes

of [Mr Rademeyer] failing to comply with his obligations within five days of service of [the] order upon [Mr Rademeyer], cancellation of the said agreement of sale and damages'. Mr Ferreira served the order on Mr Rademeyer on 15 August 2012. Despite the elapsing of five days since that date, and demand for performance by Mr Ferreira, Mr Rademeyer failed to comply with his obligations. In April 2016 Mr Ferreira instituted action proceedings in the High Court, under a different case number to that of the initial proceedings, now seeking damages in the sum of R854 182,20, pursuant to the cancellation of the agreement, and as a result of Mr Rademeyer not complying with the Pickering Order for specific performance. Mr Rademeyer, in defence, raised a special plea of prescription, whose determination the parties agreed would be dealt with separately. (That forms the focus of the present appeal to the Constitutional Court.)

Mr Rademeyer submitted that, on the basis of the Pickering Order having been served on him on 15 August 2012, and it being common cause that he failed to comply with it, prescription on Mr Ferreira's claim for contractual damages began to run on 23 August 2012. He relied on s 11(d) of the Prescription Act 68 of 1969 and pleaded that Mr Ferreira should have instituted action proceedings within three years from 23 August 2012, whereas Mr Ferreira only instituted this action on 18 April 2016. Any claim for damages had accordingly prescribed, argued Mr Rademeyer. Mr Ferreira, in replication, submitted that the service of the initial application papers that ultimately led to the Pickering Order, interrupted the running of prescription on the damages claim. The High Court, finding in favour of Mr Ferreira, ultimately dismissed the special plea. The Supreme Court of Appeal agreed with the findings of the High Court. So, Mr Rademeyer brought an application for leave to appeal from the Constitutional Court, which granted it. Before the Constitutional Court, the question was whether, based on a consideration of the above arguments, Mr Ferreira's claim for contractual damages had prescribed.

Held, that, in terms of s 15(1) of the Prescription Act, prescription on a debt was judicially interrupted when the process initiating a lawsuit for recovery of that particular debt was issued and served on the debtor. In our law breach of contract was remediable through two mutually exclusive options: a claim for specific performance that sought, notwithstanding the breach, to keep the contract alive; or cancellation of the contract and a claim for damages (see [59]).

The innocent party must elect which remedy to proceed with (see [66]). Mr Ferreira, having regard to the relief he sought before Pickering J, elected, in the first instance, to keep the sale agreement alive and to insist that Mr Rademeyer uphold his part of the bargain (see [62]).

Held, that the debt in this matter was the contractual damages arising from the cancellation of the contract. As defined by Makate, the obligation to pay it, and the corresponding right to claim or receive payment, only arose at the earliest upon cancellation of the contract. That only occurred on 23 August 2012. The fresh breach and consequent damages could only in fact and law arise after Pickering J's order. On first principles, Mr Ferreira's conditional election to cancel, in the event of non-compliance with Pickering Order, only became available and effective when Mr Rademeyer failed to comply. That meant that the institution of initial proceedings before Pickering J could never serve to interrupt prescription of that debt, as the debt did not exist then or even later, at the time of the Pickering Order. The judicial interruption that did in fact occur was of the debt relating to specific performance which Mr Ferreira had elected to enforce (see [89]), and not in respect of damages. In the premises, the prescription point raised in Mr Rademeyer's special plea was good and Mr Ferreira's claim for damages had prescribed, since more than three years had passed between the date when the debt was due and payable subsequent to cancellation (which had occurred five days after service of the order on Mr Rademeyer) and the date when Mr Ferreira had issued summons for the recovery of the debt. (See [89] and [92].)

Held, accordingly, that the appeal should be upheld, and the order of the Supreme Court of Appeal replaced with one upholding Mr Rademeyer's special plea. (See [93] – [94].)

The minority held that the initial proceedings and the later claim for contractual damages were based in the same cause of action. That is, that Mr Rademeyer was being sued based on the breach of the written contract. The effect of this was that the right sought to be enforced in the previous application was substantially the same as the one which was the subject-matter of the present proceedings, in that the parties were the same, the amount claimed was the same, and the liability, therefore, arose out of the same cause of action and written agreement of sale. In such circumstances, the service of the original

application interrupted the running of prescription in respect of the claim for contractual damages. (See [38], [40], [44] – [46], [48] and [52].) Mr Ferreira's claim for contractual damages had thus not prescribed (see [56]). The minority held that what transpired in this case was not novel, but an instance of the enforcement of an established double-barrelled procedure that afforded a defaulting party the opportunity to remedy the breach and perform according to his or her contractual obligations. If, however, the defaulting party still refused to perform, as in the present case, the aggrieved party was entitled to cancel the agreement and claim damages. (See [51].)

AFRICAN CENTRE FOR BIODIVERSITY NPC v MINISTER OF AGRICULTURE, FORESTRY AND FISHERIES AND OTHERS 2025 (2) SA 31 (SCA)

Environmental law — Genetically modified organisms — Application for permit to conduct activities in respect of genetically modified organisms — Approval — Review — Decision-makers failed to (i) apply precautionary principle; or (ii) consider whether applicant should submit environmental impact assessment in accordance with NEMA — Approval set aside and referred for reconsideration — Genetically Modified Organisms Act 15 of 1997, s 5(1)(a); National Environmental Management Act 107 of 1998.
Under the Genetically Modified Organisms Act 15 of 1997 (the Act), a permit for the release of genetically modified organisms is determined by the Executive Council for Genetically Modified Organisms (the executive council), in consultation with an advisory committee. The fifth respondent, Monsanto South Africa (Pty) Ltd (Monsanto), successfully applied to the executive council for a permit for the general release of a genetically modified variety of maize, described as MON87460.
The African Centre for Biodiversity NPC (ACB), a non-governmental advocacy organisation with a focus on biosafety and agricultural biodiversity, appealed in terms of s 19 of the Act against the approval of Monsanto's application. The appeal board dismissed ACB's s 19 appeal, and the Minister of Agriculture, Forestry and Fisheries (the Minister) confirmed it. Next, ACB applied to the High Court to review and set aside the appeal board's decision and the Minister's

confirmation thereof; and that the application for approval be referred back to the executive council for reconsideration, with such guidelines as the court deemed fit.

The present case concerned ACB's appeal to the Supreme Court of Appeal against the High Court's dismissal of its review application. The thrust of ACB's case was that the executive council, the appeal board and the Minister (the state respondents) accepted, at face value, the claims made by Monsanto and failed to independently and critically evaluate Monsanto's application to satisfy themselves that the health and safety risks associated with the general release of MON87460 had been properly addressed. ACB contended that the expert evidence that served before the state respondents ought to have triggered the application of the precautionary principle enshrined in s 2 of the National Environmental Management Act 107 of 1998 (NEMA), which required that where there existed evidence of possible environmental harm, decision makers ought to adopt a cautious approach and are compelled to take protective and preventive measures before the anticipated harm materialised. ACB further contended that the executive committee failed to comply with s 5(1)(a) of the Act, with an obligation on the executive council to make a determination as to whether or not an applicant must submit an environmental impact assessment in accordance with NEMA. (See [10], [22].)

At issue was (1) whether the precautionary principle was triggered and ought to have been applied; and (2) whether the executive council — as a matter of fact — complied with s 5(1)(a) by considering the necessity of an environmental impact study to ascertain the impact on the environment of the proposed general release of MON87460.

Held

(1) The High Court's rejection of the appellant's reliance on the precautionary principle was based on its finding that the precautionary principle did not find direct application in review proceedings. Such an approach disregarded the fundamental role that the precautionary principle played in directing decision makers in the exercise of their discretion. The current state of knowledge and uncertainty, the potential for serious or irreversible harm and the adoption of a cautious approach were clearly consistent with the subject-matter, scope and purpose of the Act. The experts, who provided opinions in support of the

appellant, highlighted several fundamental concerns, all of which were articulated in the appeal document that served before the appeal board. The precautionary principle was triggered and ought to have been applied. (See [18], [20], [24].)

(2) This was a separate and distinct inquiry from whether the precautionary principle was triggered and should have been applied. The High Court conflated the obligation arising from s 5(1)(a) of the Act with the applicability of the precautionary principle, finding that an environmental impact study would only be required in the event of the precautionary principle being triggered. The evidence strongly suggested that, at the time that the executive council assessed the application, it failed to consider or determine whether an environmental impact study in terms of NEMA was necessary. It ought to have been a relatively simple and straightforward matter for the state respondents to have adduced evidence that a determination, one way or the other, had been made. They did not. The ineluctable conclusion was that the executive council failed to comply with a mandatory statutory prescript contained in s 5(1)(a). This meant that the executive council's decision could not stand, nor those by the appeal board and the Minister. In the result, the appeal would be upheld. (See [23] – [25].)

CODEVILLA v KENNEDY-SMITH NO AND OTHERS 2025 (2) SA 42 (SCA)
Land — Sale — Contract — Conditions — Suspensive condition — Condition that purchaser obtain financial institution's approval of mortgage loan for balance of purchase price — Lapsing of — Subsequent revival incompetent — New agreement required — Agreement to extend time for fulfilment of suspensive condition after its lapsing not sufficient, despite parties' intention thereby to revive sale.

In terms of a suspensive condition in an offer to purchase an immovable property (the OTP), the sale in question was made subject to the purchasers' (a married couple) obtaining a financial institution's written approval of a mortgage loan for the balance of the purchase price. The relevant clause (clause 7.2) also provided that the approval had to be furnished by no later than 14 February 2020, failing which the due date would be 'extended for a further . . . 30 days with the written consent of the Seller'. On 11 February 2020, three days before the due date, the seller and the purchasers concluded an addendum to the OTP in which it was

agreed that the due date would be extended to 19 February 2020 (the first addendum). This addendum also reflected the parties' agreement that all other terms and conditions of the OTP remained in full force and effect.

When the purchasers experienced ongoing difficulty in obtaining finance, Ms Codevilla, the mother of one of the purchasers, agreed that she would provide them with the funds they needed to buy the property. The seller, the executor of the deceased estate, was amenable but required a bank guarantee, alternatively, that the funds be paid into the conveyancing attorney's trust account by 19 February 2020. This, however, proved insufficient time for the release of the required funds, and on 20 February 2020 Ms Codevilla requested a further extension. The seller agreed, on advice of the conveyancing attorneys, that the 'sale would have to be revived by means of a formal, written addendum'. A second addendum to the OTP was then concluded. It envisioned the furnishing of a bond approvals in respect of the property being purchased and the property the purchasers currently owned, and a bank guarantee in respect of the balance of the purchase price of the property being purchased. The latter was to be provided by 25 February 2020. On 21 February 2020 Ms Codevilla, instead of providing a bank guarantee, paid the balance directly into the conveyancing attorney's trust account.

However, before transfer could be effected, the purchasers found themselves in financial difficulties as a result of the Covid-19 pandemic and requested the financial institution to withdraw bond approval. Ms Codevilla, having taken cession of the purchasers' claim and having obtained legal advice (i) that there was no valid agreement as it had lapsed due to non-fulfilment of the suspensive condition in the first addendum; and (ii) that it was not revived by the second addendum, sought to recover the amount she had paid the seller. The seller refused, insisting that the suspensive conditions in the second addendum had been fulfilled and demanding that the purchasers remedy their breach. When this was not forthcoming, the conveyancing attorneys, acting on behalf of the seller, purported to cancel the OTP as amended. Ms Codevilla then applied in the Western Cape High Court for a declaration that the OTP was null and void ab initio and that she was entitled to the repayment of the sum she had paid to the purchasers in furtherance of the transaction.

The High Court found in favour of the seller that the parties had intended to revive the agreement, that the second addendum had had that effect, and that it amounted to a 'fresh agreement' incorporating the terms of the OTP as amended by the first addendum.

In an appeal a full court of the same division found that a new agreement was not concluded but that the offer was validly extended for the 30-day period envisioned by clause 7.2. Since the second addendum was concluded within the 30-day period, it amounted to a further extension of the date for the fulfilment of the suspensive condition, with the result that the agreement was valid. Crucially, the seller did not plead this point before either court. The full court dismissed the appeal. (See [13] – [14].)

Ms Codevilla's made a further appeal to the Supreme Court of Appeal (the SCA). The central issue before it was whether the second addendum, signed after the failure of the suspensive condition, effectively revived the original agreement, or whether a new contract was required.

Both the majority and dissenting judgments rejected the full court's order as impermissible on the ground that its reasoning was not part of the seller's case before it or the court of first instance. The majority added that there was no evidence that the parties, when concluding the second addendum, considered that the right to extend the expiry date in clause 7.2 was being exercised for a second time (see [14], [41]).

The dissenting judgment emphasised the parties' intention. It held that the second addendum clearly expressed the parties' intention to continue with the sale despite the lapsing of the suspensive condition, and that this intention was borne out by their conduct, which demonstrated a desire to procure the sale and transfer the property. The dissent concluded that, given that the agreement of sale embodied in the OTP was validly revived by the second addendum, the appeal had to fail. (See [32] – [38], [42].)

The majority judgment disagreed with the dissent on the basis that, according to precedent, the failure of a suspensive condition rendered a contract unenforceable and incapable of revival. It pointed out that since it was common cause that the sale had lapsed due to the non-fulfilment of the suspensive condition in clause 7.2 of the OTP, the sole issue was whether the second addendum could revive or reinstate it. It was clear from the evidence that the

parties intended to 'revive' or 'amend' the OTP, and it was stated to be an 'addendum' to a sale agreement. Hence it was not a new agreement. The respondents' case was that the purpose of the second addendum was to 'revive' the transaction, and that the purchasers signed it on that basis. However, the purported revival of the OTP and extension of the time fixed for the fulfilment of the suspensive condition after the expiry date for its fulfilment were not legally competent because a long line of authority established that a contract was unenforceable if a suspensive condition was not fulfilled. Consequently, there was nothing to revive, and the OTP and all its terms became unenforceable. Clause 7.2 could not be varied after the expiry date for the fulfilment of the suspensive condition. Neither could the parties extend the OTP's validity in accordance with the terms of the second addendum. The OTP was invalid, having become unenforceable on 20 February 2020. It followed that the appeal would succeed. (See [43], [44], [50] – [55], [68], [71].)

EMONTIC INVESTMENTS (PTY) LTD v BOTHOMLEY NO AND OTHERS 2025 (2) SA 66 (SCA)

Insolvency — Creditors — Secured creditors — Realisation of security — Proceeds — Set-off — Creditor that has realised its security under IA s 83(3) cannot claim set-off of post-liquidation debt owed to it against proceeds of realisation of property it is obliged to pay to trustee under IA s 83(10) — Insolvency Act 24 of 1936, s 83(3) and s 83(10).

The issue in this case was whether a creditor that had realised its security was entitled to claim set-off of a post-liquidation debt owed to it against the amount it owed the trustee under s 83(10) of the Insolvency Act 24 of 1936. Section 83(10) states that a creditor who 'has realised his or her security . . . shall forthwith pay the net proceeds . . . to the trustee * . . .'.

The facts were that the appellant, Emontic, was the owner of a farm from which Montic (the fourth respondent) had run its business before it went bankrupt and was wound up. Emontic proved a claim for outstanding rental against Montic which, according to Emontic, was secured by a common-law landlord's lien over the immovables on the farm (the goods). After selling the goods at auction, Emontic set off against the sum obtained the post-liquidation rental owed to it by

Montic before paying the balance to Montic's liquidators (the first to third respondents). The liquidators argued that the set-off was unlawful and that Emontic would be paid the post-liquidation rental as part of the sequestration costs, provided the sums sought by it were owed. The liquidators put Emontic on terms to remit the balance of the rental. Emontic refused to pay up and the liquidators applied in the Pretoria High Court for an order enforcing payment. They asserted that Emontic was obliged, under ss 83(5) and 83(10), to provide them with a statement of the proceeds of the realisation and to pay them over 'forthwith'. Emontic opposed the application on two grounds. First, it argued that the rental ought to be classified as an expense incurred in the realisation of the property and subtracted from the gross proceeds in determining the net proceeds. Second, it argued that it had the right to set off the rental from the debt it owed the liquidators in respect of the proceeds of the sale. The High Court ruled in favour of the liquidators. Emontic appealed to the Supreme Court of Appeal, which —

Held

Emontic's set-off defence was contrary to the explicit wording of s 83(10), which, by requiring prompt payment to the liquidator of the proceeds of the sale of encumbered property, did not permit for set-off to operate against a liquidator's claim for its payment. Moreover, the obligation s 83(10) imposed on the creditor and the obligation of the liquidator to pay the creditor his preferent claim out of such proceeds were not reciprocal obligations: the creditor was entitled to receive payment out of the proceeds only 'after' it had paid them over, and only if certain requirements were met. It was not permissible for the creditor to require the trustee to first offer payment of his claim. The liquidators were obliged to recover the proceeds of the sale from Emontic and could not agree that it retain any portion of it. In addition, set-off could not operate because both debts were not payable by and to the same person: unlike the proceeds of the sale of encumbered property, rent owed post-sequestration formed part of the costs of sequestration, to be defrayed from the free residue of the estate. (See [20] – [24].)

GRANCY PROPERTY LTD AND ANOTHER v GIHWALA AND OTHERS 2025 (2) SA 76 (SCA)

Company — Directors and officers — Director — Fiduciary duty — Breach — Disgorgement of secret profit.
Company — Shares and shareholders — Shareholders — Breach of agreement to acquire additional shares — Quantification of damages — When shares would have been disposed of — Whether highest intermediate value principle applicable in South Africa.
Contract — Breach — Remedies — Damages — Calculation — Failure to acquire additional shares — When shares would have been disposed of — Highest intermediate value rule not applicable in South Africa — Disgorgement of secret profit.
In 2014 the Supreme Court of Appeal (SCA) ordered a two-stage accounting-and-debatement procedure (the debatement order) * in a contractual dispute relating to Black economic empowerment (BEE) investments Grancy Property (Grancy) had made in Spearhead Property Holdings (Spearhead) and Scharrig Mining (Scharrig). The first stage involved the adequacy of the accounts furnished. The present case concerned an appeal and cross-appeal to the SCA against the High Court's order in the second stage contemplated in the debatement order, in which the accounts were to be debated to determine their accuracy and whether any amounts were due to Grancy. (See [6] – [10].)
The first appellant was Grancy, the second, Montague Goldsmith AG (Montague), a company which acted on behalf of Grancy in respect of the BEE investments. The first respondent was one Mr Gihwala. He, through the Dines Gihwala Family Trust (the DGFT), had participated with others in the Scharrig and Spearhead investments. The second respondent was one Mr Manala, a participant in the Spearhead investment. The third respondent, Seena Marena Investments (Pty) Ltd (SMI), was a company in which the DGFT and Mr Manala held equal shares prior to Grancy's involvement in the Spearhead investment. The fourth to eighth respondents were the trustees of the DGFT. Grancy had no direct connection to its shareholding — both investments were managed by Mr Gihwala/DGFT, the Spearhead investment also by Mr Manala. (See [1] – [3], [35].)
Under the Scharrig investment, Grancy would participate equally with the DGFT in acquiring shares in Scharrig. It was common cause that the shares forming part of the Scharrig investment were to be acquired in two tranches (see [19],

[34]). The first, of 22 million shares at R2,25 per share, was allocated on the basis of the participants' financial contributions. The second, an option to acquire 34,38 million additional shares as and when they became available, would be allocated to give the empowerment partners in the Scharrig investment, including Mr Gihwala/the DGFT, a 15% stake in Scharrig. In July 2005 participants in the Scharrig transaction allocated 9 621 900 additional option shares to the DGFT for this purpose. (See [20], [121].) However, in breach of the Scharrig agreement, the DGFT only acquired 687 600 additional option shares for Grancy, and then sold these on 25 January 2006, together with Grancy initial shares, for R5,75 per share in an off-market transaction (see [121]). This, when the market price of Scharrig shares was R6,60 per share. Grancy claimed it was entitled to damages equal to the economic value of one-half of the additional option shares, ie 3 679 754 shares, at about R25 per share, being the value thereof in October 2007 when it allegedly would have sold the shares. In the alternative, Grancy claimed that it was entitled to damages calculated at the difference between the market price of the Scharrig shares and the discounted price at which they were sold (see [36]). Mr Gihwala/the DGFT contended that Grancy was not entitled to any additional Scharrig shares (see [37], [69]).
The High Court found that Grancy did not agree to dispose of its shares at a discounted price, and had established a breach of the Scharrig agreement. It held that Grancy was entitled to 50% of the 'bonus pool' shares with which Mr Gihwala ultimately exited from the Scharrig transaction, and directed Mr Gihwala/the DGFT to pay Grancy the commensurate amount. (See [38] – [40].) Grancy contended that the High Court erred in respect of when the value of the shares was to be determined; that instead it should have applied a flexible approach to the calculation of damages, more specifically, the 'highest intermediate value' adopted by the courts in the United States, to assess the measure of damages in conversion cases where the property in question fluctuates in value (see [116].)
Under the Spearhead investment, Mr Gihwala (through the DGFT), Mr Manala and Grancy acquired linked units in Spearhead. (See [14] – [20], [35].) In April 2007 Messrs Manala and Gihwala made an unauthorised investment of R2 million in Strand Property Investments, using Grancy's funds in the Spearhead investment. None of the proceeds was paid over to Grancy (see [188]). The High

Court granted most of Grancy's monetary claims under the Spearhead investment but dismissed others. Notably, it dismissed Grancy's claim for the disgorgement of a secret profit of R3 million obtained from the unauthorised property investment, accepting Mr Gihwala's contention that the R3 million was a repayment of loans in respect of a different transaction and that Grancy had been repaid R2 million used in that investment (see [199] – [200]).
The main issues before the SCA were (1) whether Grancy was entitled to 50% of the 9 621 900 shares allocated, or only 50% of the shares with which Mr Gihwala ultimately exited from the Scharrig transaction; (2) when Grancy probably would have sold its shares and at what price; and (3) the correctness of the High Court's dismissal of Grancy's claim for disgorgements of the secret profits in the Spearhead investment.
Held
(1) Mr Gihwala knew that 7,5% of the Scharrig shares had been allocated to him for the purpose of BEE but he denied Grancy the opportunity of participating in that allocation, instead 'reallocating' it directly to DGFT. Once that allocation was made, Grancy was entitled to half the value of those shares in accordance with the Scharrig agreement, ie of 3 679 754 additional option shares. (See [61], [64] – [65].)
(2) When Grancy would have sold the additional option shares and at what price, depended on what inferences could be drawn from the proven facts (see [112]). The evidence showed that Grancy was aware that its shares had been sold at R5,75 per share, and how the amount which it received had been calculated — and did not at any stage object to the sale (see [80]). This contradicted Grancy's claim that it would have exited from the Scharrig transaction around October 2007 at some R25 per share. The High Court was correct in holding that Grancy would not have sold its shares when the share price was near its peak. The evidence that Grancy would have done so was speculative and contrived. Grancy failed to prove that the disposal of the initial investment took place without its knowledge or authorisation. The natural and plausible inference to be drawn from the proven facts, was that Grancy would have disposed of its entire shareholding, ie its initial and option shares as well as the additional 3 679 754 option shares, at R5,75 per share in January 2006. (See [89] – [92], [114], [121] – [122].)

The invocation of the highest intermediate value rule was inapposite. This was not a case of 'wrongful conversion' of shares but one of breach of contract in which it was found that Grancy's entire shareholding would have been disposed of in January 2006. The highest intermediate value rule was, moreover, foreign to South African law and conflicted with settled principles relating to causation, remoteness and quantification of damages for breach of contract in our law. (See [118] – [119].)

(3) As to the Spearhead investment, the High Court, however, erred in dismissing Grancy's claim for the disgorgement of the R3 million profit. The High Court's conclusion was tantamount to a finding that Grancy was not entitled to disgorgement of the profit of R3 million because it suffered no loss. But this disregarded the rationale for the no-profit and no-conflict rules, which was to underpin the fiduciary's duty of undivided loyalty to the principal. An undisclosed profit which directors obtain as a result of the execution of their fiduciary duties belonged to the company. It followed that Grancy's appeal in this respect would succeed. (See [201] – [202], [214].)

HANEKOM NO AND OTHERS v NUWEKLOOF PRIVATE GAME RESERVE FARM OWNERS' ASSOCIATION 2025 (2) SA 128 (SCA)

Housing — Consumer protection — Community Schemes Ombud — Adjudicator — Decision of — Appeal to High Court — Appeal administrative in nature — Leave for further appeal to be sought from High Court, not Supreme Court of Appeal — Cases in which SCA nevertheless granted special leave on 'special circumstances' wrongly decided — Community Schemes Ombud Service Act 9 of 2011, s 57; Superior Courts Act 10 of 2013, ss 16(1)(a), 16(1)(b) and 17(3).

The first and second appellants were trustees of the WTH Trust, the owner of one of the properties in the Nuwekloof Private Game Reserve Farm (the reserve). The respondent was the reserve's homeowners' association (the association). The reserve was a community scheme as defined in the Community Schemes Ombud Service Act 9 of 2011 (the CSOS Act). The trustees had applied to the Community Schemes Ombud Service (CSOS) for declaratory relief iro the reserve's constitution, which the adjudicator granted. In the association's appeal to the High Court, under s 57(1) of the CSOS Act, the court — two judges sitting — set aside the adjucator's order.

In the present case the trustees sought special leave to appeal from the Supreme Court of Appeal, in terms of ss 16(1)(b) and 17(3) of the Superior Cours Act 10 of 2013, against an order of the High Court. At issue was whether the SCA had jurisdiction. The association contended that the High Court sat as a court of first instance, so that the trustees should have sought leave to appeal from the High Court in terms of s 16(1)(a), and not, as they did, special leave to appeal from the SCA in terms of ss 16(1)(b) and 17(3) (see [9]). The trustees submitted that the High Court did not sit as a court of first instance because adjudication in terms of the CSOS was not an administrative appeal but a judicial appeal (see [10]). In the alternative, the trustees contended that, in the 'special circumstances' of this case, the court should exercise its inherent powers under s 173 of the Constitution to regulate its own procedure, by deciding this appeal. In this regard, they relied on two SCA cases where — despite finding that leave to appeal to it was irregular and ought to have been sought in the High Court — it found 'special circumstances' which warranted the exercise of its inherent jurisdiction to regulate its own procedure, condoned the irregularity and heard the appeal (see [14], [15], [24]).

Held*

First judgment

The appeal was not a judicial appeal. If an appeal against a statutory appeal judgment would always require special leave from the SCA, an anomaly would arise between such a situation and where there was an appeal against a review judgment, which did not require special leave. (See [13].)

The court's inherent power under s 173 of the Constitution could not be resorted to when the court lacked jurisdiction; it was trite that this court could only entertain an appeal if it had jurisdiction to do so. If the High Court was sitting as a court of first instance, leave to appeal should have been sought from it. The cases the association relied on were clearly wrong; the approach adopted did not accord with the earlier jurisprudence of this court. The SCA, in those cases, did not have jurisdiction and erroneously granted special leave to appeal. (See [17] – [19].)

As the court lacked jurisdiction to grant special leave to appeal, the matter was not properly before it and it would be struck from the roll (see [22] – [23]).

Second judgment

The right to appeal to this court was neither automatic nor absolute, since leave to appeal was required; leave was a jurisdictional fact for an appeal. Where, as here, the High Court, whose judgment was sought to be appealed, sat as a court of first instance, it must first be approached for leave. If it were refused, the party wishing to appeal would have a right to petition this court for such leave. It must thus follow that the order granting special leave to the appellant to appeal to this court was a nullity. The consequence was that the matter fell to be struck from the roll. (See [25] – [27], [37].)
As to the contention advanced that this court could, in the exercise of its inherent jurisdiction to regulate its own procedure, entertain the appeal, in neither of the cases relied upon did the court have jurisdiction. It was well settled that this court could not, under the guise of exercising its inherent power, enter into the merits of an appeal over which it had no jurisdiction. Jurisdiction was a necessary precondition for the exercise of its inherent power. The contrary approach adopted was clearly wrong. In the result, the order of the first judgment would be concurred with. (See [27], [32] – [37].)

HEROLD GIE & BROADHEAD INC v HARRIS NO AND OTHERS 2025 (2) SA 144 (SCA)

Housing — Housing development scheme for retired persons — Purchase of life right in — Claim by retiree against developer where legal practitioner entrusted with payment prematurely disbursed it to developer — At time of such disbursement, (i) conditions for payment to developer not fulfilled; and (ii) developer not yet insolvent — Section 6(4) of Housing Development Schemes for Retired Persons Act 65 of 1988 not providing basis for retiree's claim against developer.
In this matter the developer of a 'development scheme' under the Housing Development Schemes for Retired Persons Act 65 of 1988 concluded life-rights agreements with retired persons (the respondents). In terms of the agreements, the developer sold the retirees' life rights in a retirement hotel. The retirees paid over the purchase prices to a legal practice (the appellant firm) for it to keep in its trust account for payment over to the developer on fulfilment of the statutory conditions in s 6(1) of the Act. The retirees took occupation before fulfilment of

the conditions and authorised the firm to transfer the purchase prices to the developer, which it duly did. The statutory conditions were, however, never fulfilled, and years later, on this basis, the retirees cancelled the agreements and demanded the developer repay them the purchase prices. The developer refused to do so, after which it was sequestrated.

The retirees then, relying on s 6(4) of the Act, sued the firm for repayment of the purchase prices they had paid into the firm's trust account (see [7], [20]).

The High Court found, on a question of law formulated by the parties, that s 6(4) gave a buyer who had entrusted funds to a practitioner under s 6(3)(a) a right of action against the practitioner for repayment of the entrusted funds, if the firm had released them to the developer prior to compliance with s 6(1) (see [12], [16]).

The High Court, on the practitioners' request, gave the practitioners leave to appeal this finding to the Supreme Court of Appeal.

It held, that ordinarily, moneys having been paid to the developer, albeit held in the practitioner's trust account pending fulfilment of s 6(1), would, on the developer's sequestration, be part of the developer's insolvent estate, and subject to the concursus creditorum (see [30]).

However, if (1) the buyer transferred moneys into the practitioner's trust account for the developer's benefit; (2) the conditions in s 6(1) had not yet been fulfilled; (3) the moneys were still in the account when (4) the developer became insolvent, then these moneys became 'immediately . . . payable' by the practitioner to the purchaser. That is, s 6(4) empowered the practitioner to immediately release the moneys to the purchaser (see [22], [24], [26] – [27]).

But s 6(4) only applied where the above requisites were met. The section did not apply in the situation posed as the separated issue, where a purchaser transferred funds to a practitioner, for the practitioner to hold in trust for the developer's benefit, where prior to compliance with s 6(1), and prior to the developer's insolvency, the practitioner transferred the funds to the developer (see [12], [29]).

Appeal upheld, separated issue decided against the buyers, the High Court's order set aside, and remaining issues referred back to the High Court for determination (see [32]).

VORSTER v CITY CLOTHING (PTY) LTD 2025 (2) SA 156 (SCA)

Magistrates' court — Civil proceedings — Jurisdiction — Monetary limit — Claim for damages in delict — Apportionment agreed on — Particulars subsequently amended to increase quantum beyond limit — But apportioned amount not exceeding it — Since value of claim decisive, court having jurisdiction — Fact that court has to inquire into larger sums and complicated accounts irrelevant — Magistrates' Courts Act 32 of 1944, s 29(1)(g) and 37(2).

The appellant, Ms Vorster, fell and injured herself while shopping at City Clothing. She claimed R256 000 delictual damages in the local regional court. Before the trial commenced, the merits were settled 75/25 in her favour. The settlement agreement was made an order of court and the issue of quantum was postponed to a later date.

Before the hearing on quantum, Ms Vorster amended her particulars of claim by increasing the quantum of her claim to R531 000 minus the 25% apportionment. Clothing City subsequently filed a notice to amend its plea by introducing a special plea to the effect that the amount of R530 000 exceeded the regional court's R400 000 monetary jurisdiction. The regional court upheld the special plea. Ms Vorster appealed to the Mahkanda High Court, which dismissed the appeal. The High Court found that Ms Vorster had, by agreeing to apportion her claim, usurped the function of the court, which had to look at the total claim to determine jurisdiction. Ms Vorster appealed to the Supreme Court of Appeal (SCA).

In the SCA, Ms Vorster argued that the High Court was wrong to decide jurisdiction on the basis of the total damages instead of damages actually claimed. For its part City Clothing endorsed the High Court's finding that Ms Vorster had impermissibly usurped the court's role by prematurely agreeing to apportionment. The SCA —

Held

The starting point in deciding on jurisdiction was always the pleadings. The test was the amount claimed. It was settled law that, to determine whether the claim fell within the jurisdiction of the magistrates' court, the court simply had to look at the prayer: if it was for an amount under the prescribed amount, then it fell within its jurisdiction. From Ms Vorster's prayer alone, it was clear that the value of her

claim fell below the R400 000 regional court threshold. Section 37(2) of the Magistrates' Courts Act, which governed magistrates' courts' incidental jurisdiction, was applicable, so that the fact that the regional court might have had to inquire into larger sums and accounts for more, was irrelevant as long as the value of the claim did not exceed the monetary jurisdiction of the regional court. Appeal upheld, the special plea dismissed, and the action referred to the regional court for the determination of damages. (See [11], [14], [17] – [19].)

BUHLE WASTE (PTY) LTD v MEC OF HEALTH, GAUTENG AND OTHERS 2025 (2) SA 163 (GJ)

Appeal — Appealability — Interlocutory order — Application to execute order pending appeal — Whether order final in effect — Risk that order appealed against might be rendered academic due to anticipated delays in appeal process not making them final in effect.

Costs — Advocate — Taxable costs regime under new rule 67A read with amended rule 69(7) — Seniority of counsel not deciding factor in award of party and party costs, but rather complexity of matter and value of claim or importance of relief sought — Courts should generally grant or approve costs on scale which counsel of certain seniority would not ordinarily charge his or her own attorney and client.

Buhle Waste (Buhle) applied for leave to appeal against an order dismissing its application for leave — made in terms of ss 18(1) and 18(3) of the Superior Courts Act 10 of 2013 — to execute an order which was suspended pending appeal. The suspended order set aside a contract awarded to the 10th respondent.

Buhle contended that, given the relatively short duration (three years) of the contract, that by the time the matter was argued and finalised before the Supreme Court of Appeal (the SCA), it may have become academic, so that any relief it obtained in due course would likely have no practical effect as the contract would have already run its course. The respondents argued that s 18(4) of the Superior Courts Act 10 of 2013 only allowed an appeal against a decision to execute an order and not against a decision not to execute it.

The main issues were whether the order was appealable, and if so, whether the requirements for appealability of interlocutory orders were met; and whether

there was a reasonable prospect of success (see [4]). Another issue was introduced by the court requesting submissions as to the taxable costs regime ushered in by new Uniform Rule 67A, read together with amended rule 69(7). All counsel submitted that, given the complexity of the matter, scale C should be the applicable tariff for all counsel, including junior counsel where so employed (see [27]).

Held

The dismissal of an application to execute an order pending an appeal was by its very nature interlocutory and hence not appealable unless a party could show that the order had final effect (see [5]). While application for leave to appeal a dismissal order may be appealable, the applicant must still show that such order was of final effect within the meaning of s 18(2). The applicant had failed to meet this standard (see [10], [11], [22]). The risk of orders being appealed against being rendered academic because of anticipated delays in the appeal process, no matter how great or well founded, did not make them final in effect. Should the risk materialise and the appeal court were to find that the delay was caused by any party to the litigation, it would be free to make an appropriate order dealing with this. And even if it had done so, it did not satisfy the requirement that there be reasonable prospects that another court may come to a different conclusion (see [17]). The application for leave to appeal would be dismissed (see [22]).

While the new taxable costs regime ushered in by new Uniform Rule 67A read together with amended rule 69(7) did not consider seniority of counsel to be the deciding factor in the award of party and party costs, but rather the complexity of the matter and value of the claim or importance of the relief sought, a court should be wary not to grant or approve costs on a scale which counsel of a certain seniority would not ordinarily charge his or her own attorney and client. This would run counter to the intention of the new costs regime. Normally counsel in the category of junior counsel employed by the state respondents would charge out their services closer to the upper limit of scale B rather than scale C, irrespective of the complexity of the matter. (See [28] – [29].)

GROSS v DM 2025 (2) SA 172 (GJ)

Court — High Court — Jurisdiction — Ouster — Exclusion of jurisdiction over foreign peregrini — Foreign peregrine joined in divorce action by way of edictal citation — Lack of jurisdiction raised by way of exception — Plaintiff seeking declarator that ouster unconstitutional on various grounds — Triable issue raised — Exception dismissed — Superior Courts Act 10 of 2013, s 21(2).

The plaintiff in a divorce action, Ms DM, alleged in her particulars of claim (POC) that her husband was the beneficial owner of immovable property registered in the name of one Mr Gross, a foreign peregrine whom she had joined by way of edictal citation as the third defendant. She claimed that such property be included in calculating the accrual she was entitled to under her antenuptial agreement with the first defendant, Mr MD. (See [11], [15] – [16].)

However, s 21(1) of the Superior Courts Act 10 of 2013 provides that the court has no jurisdiction over any person who does not reside in or is not in the jurisdiction of that court, except in certain specified instances set out in s 21(2), and then only 'if the said person resides or is within the area of jurisdiction of any other Division' (see [6]). Ms DM, recognising that s 21 excluded the court's jurisdiction over Mr Gross, challenged the section's constitutional validity as impairing her rights to equality (s 9), dignity (s 10), property (s 25(1)) and access to justice (s 34). She therefore included prayers for an order that s 21's wording be struck out to the extent that it did not provide for the joinder of a foreign peregrine as a party to an action in circumstances where an effective judgment may be granted against that peregrine, and that a reading-in be ordered amending s 21 to provide for jurisdiction in such cases. In addition, she sought the development of the common law pursuant to s 173 of the Constitution, to enable the High Court to exercise jurisdiction over a peregrine where leave was granted to sue a peregrine by way of edictal citation, service was rendered and where there was sufficient connection between the suit and the area of jurisdiction of the High Court concerned, so that the disposal of the suit by it was appropriate and convenient. (See [19] – [20].)

The present matter concerned Mr Gross' exception to Ms DM's particulars of claim as disclosing no cause of action. He argued that there was no basis for the contention that s 21 was inconsistent with the Constitution, nor was it proven that

her constitutional rights were impaired; and that the remedy sought would amount to impermissible judicial legislation. And, as to the development of the common law, he contended (inter alia) that conflict would arise because it would render s 21(2) of the Act redundant; and that even if it were competent for the court to develop the common law in conflict with or contrary to the Act, there were no grounds to do so. (See [21] – [22].) Ms DM, in opposing the exception, contended that both prayers for constitutional invalidity and the development of the common law constituted triable issues and ought not to be determined by way of exception but rather at the trial of the action, after ventilation of such facts as may be pertinent thereto (see [23]).

Held

It was well established that the exception stage of the proceedings did not require a court to determine the merits of the plaintiff's claim. Rather, the court was tasked with determining whether the plaintiff had pleaded with sufficient particularity to establish a triable issue against the excipient. For this purpose the facts pleaded in the POC were accepted as correct. (See [25] – [26].)

The court had the jurisdiction to enforce Ms DM's accrual claim against Mr MD through a judgment sounding in money, thereby rendering any judgment in relation to the cause in respect of which the excipient had been joined effective. She would, however, be denied the portion of the accrual that would be due to her if the excipient were not a party to the action. In cases such as the present one, the court's assumption of jurisdiction over the excipient would enable equitable accrual calculations and prevent the abuse of jurisdictional rules to deprive divorcing spouses of their share of accrual. (See [27] – [29].)

No foreign jurisdiction was capable of assuming jurisdiction for the purpose of calculating the plaintiff's accrual entitlement, and consequently Ms DM would be deprived of the opportunity to have her dispute resolved by an impartial forum and will not have access to the courts. In the absence of a declaration of constitutional invalidity and a development of the common law, her accrual claim in the action could not be equitably determined. (See [30] – [31].)

The granting of the novel order prayed for by the plaintiff was certainly conceivable under our law as potentially developed in terms of s 39(2) of the Constitution. It would signify the court's recognition of the necessity and desirability of exercising jurisdiction over the excipient. Section 21(2) of the Act

pertained to local peregrines, whereas the development in question involved the edictal citation procedure and pertained to foreign peregrines. Consequently, the development of the common law and s 21(2) would serve distinct objectives. (See [34], [36].)

As to the constitutional challenge, the POC sufficiently demonstrated triable issues, in that —

- s 21(2) precluded her from enforcing her accrual claim against the excipient in its current form, denying her the full complement of her accrual entitlement and thereby arbitrarily impairing her property rights (see [49]);
- while formally applying equally to all plaintiffs, s 21 had the effect of disadvantaging divorcing spouses, particularly women, whose husbands register their property in the hands of foreign peregrines with the sole purpose of concealing their wealth and diminishing the divorcing spouse's accrual claim (see [52] – [54]);
- by depriving her equality of arms in the accrual action, s 21 impinged her dignity (see [56]); and
- she was deprived of any recourse before the courts, and so from having her dispute adjudicated before an impartial forum as no foreign jurisdiction was capable of assuming jurisdiction for the purpose of calculating the plaintiff's accrual entitlement (see [59]).

In the result the exception would be dismissed (see [70] – [72]).

JONES AND OTHERS v DELPORT AND OTHERS 2025 (2) SA 193 (GP)

Company — Directors and officers — Director — Removal — Review — Scope of — Court not limited to consideration of whether procedural requirements met — Court to undertake complete reconsideration, in wide sense, of board's determination — Companies Act 71 of 2008, s 71(5).

On 3 August 2023, acting under s 71(3)(b) of the Companies Act 71 of 2008, the board of directors of the two companies, Rand Airport Holdings (Holdings) and Rand Airport Management (Management) — the seventh and eighth respondents — determined by resolution that three of its directors had 'neglected, or been derelict in the performance of, the functions of director', and accordingly removed them. In the present matter, those three directors — the first to third applicants

— brought an application under s 71(5) of the Companies Act to review the board's determination.

A key basis on which the respondents in this case — which in addition to the companies, included the rest of the board of directors as first to sixth respondents — opposed the application was the following: That the court considering a review under s 71(5) was limited to considering whether the peremptory procedural requirements for the review, as set out in s 71(4), had been met; it could not enquire into whether the determination in terms of s 71(3) was correct. This argument called for the court to consider the scope of a review in terms of s 71(5).

Held, declining to follow Pityana v Absa Group Ltd and Others 2024 (1) SA 491 (GP) and instead approving Wait v Marais and Others 2022 JDR 3202 (ECP), that s 71(5), properly interpreted, required a court to undertake a complete reconsideration, in the wide sense, of the board's determination. It was not limited to reviewing only the procedural aspects of the decision. (See [36] – [39] and especially [40].)

Held, further, considering the merits of the companies' determination in terms of s 71(3)(b), that the applicants were not negligent or derelict in the performance of their functions of directors of the companies, and that the first to sixth respondents could not validly determine to remove the applicants as directors of the companies. (See [57].)

Held, accordingly, that the determinations of the board of the companies to remove the applicants as directors of the companies fell to be reviewed in terms of s 71(5). (See [58].)

KAPATA v CHAIRPERSON, STANDING COMMITTEE FOR REFUGEE AFFAIRS AND OTHERS 2025 (2) SA 205 (KZD)

Immigration — Asylum seeker — Application for asylum — Grounds — Dependency — Whether individual may apply for asylum on ground (c) in s 3, claiming dependency on individual who had earlier applied for asylum on ground (a) or (b) — Refugees Act 130 of 1998, s 3

In 2008, or before, Ms KK, a DRC national, entered South Africa and was issued with a temporary asylum seeker permit. It was not clear whether KK applied for asylum (see [2], [41]). In 2015 KK's sister LK, the applicant, entered South Africa, and in 2017 LK applied for asylum. She qualified for asylum, she said,

because she was a dependant of KK. That is, she fell into category (c) of s 3 of the Refugees Act 130 of 1998 while KK was covered by category (a) or (b). Section 3 provides, inter alia, that:

'. . . a person qualifies for refugee status . . . if that person —

(a) owing to a well-founded fear of being persecuted . . . is outside the country of his . . . nationality and is unable . . . to avail himself . . . of the protection of that country . . . ; or

(b) owing to . . . events seriously disturbing public order in . . . his . . . country of . . . nationality, is compelled to leave . . . in order to seek refuge . . . outside his . . . country of . . . nationality; or

(c) is a spouse or dependant of a person contemplated in paragraph (a) or (b).'

LK's application was refused, and she was detained (pending deportation). But later she was released by order of the High Court pending review of the refusal of her application (see [4], [7] – [8]). On review by the High Court the issues were the following:

May party 1 personally apply on ground (c), citing dependency on family member 2, who some time earlier, and separately, applied on ground (a) or (b)? Held, that he or she may not. The Act envisages party 2 applying on ground (a) or (b), and then and there, as an adjunct to her application, applying for party 1 as her dependant on ground (c). (See [26], [28], [31] – [32], [34].)

Did LK qualify on ground (a) or (b)? Held, that she may not (see [36], [43]).

Review accordingly dismissed (see [46]).

NDWANDWE v TRUSTEES, TRANSNET RETIREMENT FUND AND OTHERS 2025 (2) SA 211 (KZD)

Pension — Benefits — Distribution — Fund's overriding discretion — Fund overriding deceased's instructions on nomination form — Court on review upholding fund's decision, pointing out that it had honestly applied its mind to facts — Court emphasising that not for it to decide whether fund's distribution fairest or most generous one possible — Review dismissed.

X had two wives, Y and Z. Y had been X's common-law wife since 1983, Z his customary-law wife since 1988. He had two children with Y and five with Z. He also had three other children — one still a minor — from a previous relationship

(the 'other children'). Both Y and Z were financially dependent on X and were, as his wives, considered 'qualifying spouses' under the rules of his pension fund.
X died in September 2018. By then he had R4 million saved in his pension fund. In a beneficiary-nomination form completed 18 years before his death, X had nominated Z to get 60% of his death benefit, two of his children with Z to get 10% each, and two of his children with Y to get 10% each. Y herself — with whom X had been in a permanent relationship for three decades when he died — and the other children got nothing.
Notwithstanding X's stipulations in the nomination form, the fund apportioned the R4 million as follows: 40% to Y; 40% to Z; 3,66% to each of the adult other children; and 12,69% to the minor other child. The fund's rules and the empowering Act allowed the fund to override the deceased's distribution to make any distribution it deemed equitable (see [50], [56]). The right-to-override provision also mirrored the one in s 37C(1)(bA) of the Pension Funds Act 24 of 1956, which according to the Supreme Court of Appeal conferred a 'wide' discretion. A wide discretion was not unfettered but required the decision-maker to honestly apply its mind to the facts without taking into account irrelevant, improper or irrational factors or making a decision no reasonable decision-maker would make (see [51] – [53]).
Z, complaining that the fund's decision was contrary to its own rules, as well as unreasonable and biased, approached the Durban High Court for its review. The fund defended its decision to make the 40% apportionments to Y and Z on the basis that they could use the money to meet their own financial needs and to support their children. The fund argued that it did not ignore X's nomination form but that his distribution was unfair because it made no provision for Y or the other children. The fund argued that its decision was reasonable and rational, and based on a consideration of all the relevant material. It denied any bias against Z.
Held
Since the fund was expressly not bound by the nomination form, the contents of which were merely a guide to the trustees, it was not a sustainable ground for review, that the fund applied its own discretion in making the allocations to the deceased's dependants and ignored the nomination form: it was obliged to do so. (See [57] – [58].)

While it was clear that the fund could have rationally and defensibly decided on different allocations and apportioned X's death benefit in accordance with the nomination form, this did not mean that the fund had ignored relevant information or relied on irrelevant information. It did not ignore Z's financial circumstances or those of her surviving children, but correctly concluded that she was entitled a sizeable benefit for her own maintenance and, if necessary, to assist in the maintenance of her adult children. But Y was 10 years older than Z and also in need of financial assistance. These were material and relevant considerations that the fund had been obliged to apply, as was the fact that the other children were unemployed with no alternative source of support. The fund's decisions were based on the information obtained during its investigation, and while the benefit allocated to Z was not as generous as what she would have received under the nomination form, it was not for the court to decide what would be the fairest or most generous distribution. (See [60] – [69], [75].)

The fund applied its mind honestly and, given the competing demands of X's dependants, reached a decision a reasonable decision-maker could have reached. It did not become irrational because one factor in the 'basket' of factors which the fund had to consider was not elevated above the others, or given the consideration Z wished, or even that another decision-maker may have chosen. If it was based on existing facts and rationally linked to them, the decision could not be disturbed on review. (See [76].)

Given the full set of factors before it, the fund had legitimate reasons to depart from the express terms of the nomination form, which did not adequately cater for Y or the other children. There was also no evidence of bias against Z. The fund's decision was rational and reasonable, and would be upheld. (See [77], [85].)

SINGH v CAXTON CTP PUBLISHERS AND PRINTERS AND ANOTHER 2025

Defamation — What constitutes — Newspaper article describing primary school principal's arrest for sexual assault, detention and subsequent release on bail — Article published before entering of plea — Article balanced and going no further than reporting facts — No suggestion that accused, who was later acquitted, in fact guilty — No contravention of s 154(2)(b) of CPA, which prohibits publication of details relating to complainant who laid charge, not those of accused — Article

published in contravention of section would not automatically render it defamatory — Article not defamatory.

This was an action for damages by the plaintiff in which he claimed that that an article that had appeared in both the paper and digital editions of the free community newspaper, the Chatsworth Rising Sun, was in its entirety defamatory of him. The first defendant, Caxton CTP Publishers and Printers, and the second defendant, Rising Sun Community Newspaper (Pty) Ltd, were co-owners of the newspaper. The article, headlined 'Principal Released on Bail following Sexual Assault case', effectively reported the plaintiff's arrest on the charge of sexual assault laid against him by a female teacher at the primary school of which he was principal, his detention and his subsequent release on bail. The article also featured an interview with the complainant, in which she explained the trauma she had experienced and asserted that she would not let the plaintiff get away with what he had done. At the time of the appearance of the article, the plaintiff had not yet pleaded to the charges. He was later to be acquitted of any crime. The matter turned on whether or not the article was defamatory of the plaintiff. The plaintiff claimed that, to the ordinary reader, the article created the impression that he had sexually assaulted the complainant and was accordingly guilty of an offence. In this regard, he claimed that the article was deliberately misleading because it failed to mention that he had been charged with an 'alleged' offence. Furthermore, the plaintiff sought to rely on s 154(2)(b) of the Criminal Procedure Act 51 of 1977. That provided that '(n)o person shall at any stage before the appearance of an accused in a court upon any charge referred to in section 153(3) or at any stage after such appearance but before the accused has pleaded to the charge, publish in any manner whatever any information relating to the charge in question'. These provisions meant, the plaintiff argued, that he, as an accused charged with sexual assault, could not be named until such time that he had pleaded. The publication of the article in breach of such section, the plaintiff argued, in itself established that the plaintiff had been defamed.

Held, that the plaintiff had not established any breach of s 154(2)(b), which did not have the meaning contended for. It did not refer to a prohibition of the disclosure of the identity of the accused person: it referred to the disclosure of particulars of the charge. That was intended to offer some form of protection not

to the accused person, but to the victim, prohibiting their name from being disclosed. The fact that editors of newspapers had generally interpreted it to mean that the identity of the accused person could not be revealed was of no consequence and did not make it so. (See [27].)
Held, that, in any case, non-compliance with the section did not in itself automatically result in an act of defamation. Which was not to say that such a disclosure can never be defamatory but any assessment of that would obviously depend on how the disclosure was made and the words employed in doing so. (See [29].)
Held, having regard to its headline and body, that the article was balanced and went no further than simply reporting the facts, bereft of commentary by the second defendant. There was no apparent intention to defame in the tone and style of the article. The article simply meant to the average reader that the plaintiff had been arrested and charged with sexual assault, had appeared in court and had been released on bail. He was simply part of the criminal justice system which would ultimately determine his fate. It went no further than that and did not suggest that he was guilty or that he had probably committed the act for which he was charged. And all that the article alleged, was true. The article was not defamatory of the plaintiff. (See [40] and [41].)

GOVAN MBEKI LOCAL MUNICIPALITY v GLENCORE OPERATIONS SOUTH AFRICA (PTY) LTD AND OTHERS 2025 (2) SA 238 (CC)

Constitutional law — Local government — Powers and duties — Power to adopt bylaw embargoing transfer of property in absence of certificate of compliance with municipal planning requirements — Constitutionality of such bylaws — Infringement on national government's legislative domain — No source for municipality's purported power to make bylaws imposing transfer embargo — Bylaws declared unconstitutional and invalid — Constitution, ss 25, 156(2), 156(5); Local Government: Municipal Systems Act 32 of 2000, s 118(1); Spatial Planning and Land Use Management Act 16 of 2013, s 32(1).

In this matter the applicant municipalities adopted bylaws providing that a property owner could not apply to the registrar of deeds to transfer his land,

unless the municipalities had issued the owner with a certificate confirming the property's compliance with all municipal planning requirements.

The Govan Mbeki Local Municipality's bylaw provided as follows (and the Emalahleni Local Municipality's bylaw was nearly identical):

'76 Certification by Municipality

(1) A person may not apply to the Registrar of Deeds to register the transfer of a land unit, unless the Municipality has issued a certificate in terms of this section.

(2) The Municipality may not issue a certificate to transfer a land unit in terms of any law, or in terms of this By-law, unless the owner furnishes the Municipality with —

(a) a certificate of a conveyancer confirming that funds due by the transferor in respect of land, have been paid;

(b) proof of payment of any contravention penalty or proof of compliance with a directive contemplated in Chapter 9;

(c) proof that the land use and buildings constructed on the land unit comply with the requirements of the land use scheme;

(d) proof that all common property including private roads and private places originating from the subdivision, has been transferred; and

(e) proof that the conditions of approval that must be complied with before the transfer of erven have been complied with;

(f) proof that all engineering services have been installed or arrangements have been made to the satisfaction of the Municipality.'

Respondent property owners approached the High Court and obtained orders declaring the bylaws unconstitutional and invalid, and the municipalities appealed to the Supreme Court of Appeal (SCA). It dismissed the municipalities' appeals (see [13], [16]).

The municipalities applied to the Constitutional Court for its leave to appeal the SCA's decision. The issue, as framed by the majority (per Chaskalson AJ), was whether the municipalities had the power to make the laws, and specifically, whether, as the municipalities asserted, s 156(2), or s 156(5) of the Constitution, or s 32(1) of the Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA) were sources of the power (see [26], [38], [60]).

Did s 156(2) confer the power? (Section 156(2) provides: 'A municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer.') Held, that it did not: the municipalities could not use the power to make laws for a domain that was an area of national-government competence (deeds registration). The power in s 156(2) was intended to assist municipalities in administering matters they were obliged to administer, but here the municipalities were attempting to use it to enlist other organs of state in the administration of those matters. Moreover, the transfer embargoes were not necessary — as the municipalities claimed — for their enforcement of their land-use schemes because other enforcement mechanisms were provided in the bylaws. (See [63], [65], [70], [73], [76].)
Did s 156(5) give the power to make the bylaws? Held, that it did not: had it done so, s 156(2) would have been rendered superfluous (see [79]).
Did s 32(1) of SPLUMA confer the power? Held, that it did not. Section 53 of SPLUMA and s 118(1) of the Local Government: Municipal Systems Act 32 of 2000 set the full extent of transfer-embargo powers. Section 32(1) of SPLUMA, had it been the source of such a power, would have allowed the making of bylaws which exceeded those statutory bounds. (See [82], [84] – [85].)
Held, accordingly, that, given that there was no source for the municipalities' purported power to make the bylaws imposing the transfer embargoes, they were unlawful and invalid (see [93]).
Leave to appeal granted but the appeal dismissed (see [98]).
Dodson AJ (with Kollapen J), dissenting, would have granted the municipalities leave to appeal, and in each of the municipalities' cases, have upheld their appeal in part. Dodson AJ would have set aside the SCA's order, and replaced it with an order setting aside the High Court's order, and replacing the High Court's order with an order that paras (a), (d) and (e) of both bylaws, and (f) of Govan Mbeki municipality's bylaw, as well as the words 'ín terms of any law, or', in both bylaws, were unconstitutional and invalid (see [287]).
Dodson AJ considered the following.
Were the bylaws invalid for conflicting with s 118 of the Systems Act? (Section 156(3) of the Constitution provides that 'a by-law that conflicts with national or provincial legislation is invalid'. The argument was that the requirements the bylaws imposed were far more numerous than those s 118 imposed, and as a

result negated the right that s 118 provided to transfer of property after fulfilment of s 118's less numerous requirements.) Held, that para (a) of each of the bylaws did conflict with s 118(1), and were therefore invalid. But (b) was not, provided the words 'in terms of any law, or' were excised. And the same went for the remaining paragraphs of the subsection: provided the aforementioned words were excised, there was no overlap with s 118 (see [102], [108], [116], [121]).
Did any of paras (d) – (f) of the bylaws give rise to an arbitrary deprivation of property? Held, that paras (d) – (f) and (d) – (e) of the respective bylaws did, and that they were accordingly invalid (see [133], [139], [151], [156], [164] – [165], [170]).
Did the transfer embargoes encroach on an area of national legislative competence (deeds registration), so rendering them invalid? Held, that they did not. The embargoes did not encroach on deeds registration: no statutory powers were taken from the deeds registries or their registrars. And even if the embargoes fell outside the legislative authority conferred by s 156(2) read with s 156(1)(a) and part B of sch 4 of the Constitution, and to a limited extent did involve deeds registration, this would, in s 156(5)'s terms, be reasonably incidental to the exercise by the municipalities of their municipal planning power (see [225], [227], [233], [255] – [256]).
Was there merit to the proposition that because SPLUMA gave municipalities no power to make transfer embargoes, municipalities had no power to do so? Held, that there was not: municipalities' powers to legislate the transfer embargoes were sourced in the Constitution in the sections cited immediately above, and not in SPLUMA (see [258] – [259], [262]).
Rogers J concurred in Dodson AJ's judgment, save for his treatment of paras (d) – (e) and (d) – (f) of the respective bylaws. In Rogers J's view, the obligations those paragraphs imposed should apply only to the developer of the land unit concerned, and, construed in this fashion, the right of a buyer of a land unit not to be arbitrarily deprived of his property was not infringed (see [289], [291], [304]).
Rogers J would confine the declaration of invalidity to para (a) of the respective bylaws (see [305]).

SOUTH AFRICAN CRIMINAL LAW REPORTS (MARCH 2025)

S v LUDIDI AND OTHERS 2025 (1) SACR 225 (SCA)

Sentence — Prescribed minimum sentences — Imposition of in terms of Criminal Law Amendment Act 105 of 1997 — Substantial and compelling circumstances — When sentence of life imprisonment prescribed — Whether court should consider time spent in pretrial incarceration as substantial and compelling circumstance.

Where a sentence of life imprisonment was to be imposed in terms of the Criminal Law Amendment Act 105 of 1997, the period in custody as awaiting-trial prisoners was not in and of itself a substantial and compelling circumstance justifying deviation, unless this was an exceptionally long period of time to which the conduct of the accused persons had not materially contributed. (See [17].)

DE BRUIN v DIRECTOR OF PUBLIC PROSECUTIONS, FREE STATE AND ANOTHER 2025 (1) SACR 231 (FB)

Bail — Application for — To High Court after application made to lower court postponed — Urgent application over weekend — Exceptional circumstances — Court warning that applicants did not have carte blanche to approach High Court as court of first instance where dissatisfied with bail processes in lower courts.

Bail — Application for — Duty of prosecutor — Duty to present facts to court fairly — Effective cooperation with police and other agencies essential from outset.

Bail — Application for — Duty of investigating officer — To be present at court and communicate with prosecutor

The applicant applied on an urgent basis to the High Court on Saturday morning, 9 November 2024, to be released on bail. He had been arrested on Friday 8 November 2024 when he reported to the police station as requested, accompanied by his attorney. He had earlier attended the police station on 4 November. Because court was only held in the town on Mondays and Fridays, he was told to return on 8 November 2024 to appear in court. On that day, the

investigating officer was already in possession of the applicant's criminal profile which showed that he had no previous convictions and the J88 form which showed that no serious bodily harm had been caused. Section 60(11) of the Criminal Procedure Act 51 of 1977 was therefore not applicable. The investigating officer indicated that she would not oppose bail and recommended bail of R2000. However, when the matter came before the court the prosecutor requested that the accused be held in custody pending a bail application to be brought on the following Friday, 15 November. The applicant's attorney objected to the postponement. He stated that the investigating officer had recommended bail and that all the necessary information for a bail application was already in the docket, and urged the magistrate to stand the matter down for the investigating officer to testify. From the magistrate's query to the prosecutor it appeared that the prosecutor pertinently avoided answering the magistrate's question, implying that the applicant was interfering with state witnesses as she was not sure where he got his information. The prosecutor continued to say that there were two other bail applications on the roll that day which had to get priority as they had been postponed from the previous week. She stated that the arrangement that had been made between the accused person and the police had nothing to do with her at that stage as she was in possession of the docket and it was now her case. The prosecutor further insisted on a postponement to the following Friday with the applicant to be held in custody pending that day. On the Saturday morning at the High Court the first respondent came to an arrangement with the applicant for an order to be made by the High Court granting bail in the amount of R5000.
Held, that, although the court might not be prepared to grant bail if it was opposed on proper grounds, it was not necessary to dwell on the aspect any further. However, a warning had to be sounded that the present matter was based on exceptional circumstances and in particular the agreement reached between the legal representatives of the applicant and the Director of Public Prosecutions, as well as the prosecutor's failure to consult the investigating officer. Bail applicants did not have carte blanche to approach the High Court as a court of first instance in each and every case where they are dissatisfied with bail processes in the lower courts. The floodgates were not open, and every

application would still have to be considered on its merits, bearing in mind that exceptional circumstances had to be present. (See [14].)
Held, further, that the discretion to be exercised by a prosecutor related also to the decision whether to oppose an application for bail or to release an accused person who was in custody following arrest. The process of establishing whether or not to prosecute usually started when the police presented a docket to the prosecutor. Prosecutors had to present the facts of the case to a court fairly and disclose information favourable to the defence, even though it may be adverse to the prosecution case. That also applied to bail proceedings. On the one hand, prosecutors had to ensure that persons accused of serious crimes were kept in custody in order to protect the community and uphold the interests of justice. But, prosecutors should also not oppose the release from custody of an accused person if the interests of justice permitted. In terms of item 7 of the Prosecution Policy of which only the 2013 edition was available and was a public document, effective cooperation with the police and other investigating agencies from the outset was essential to the efficacy of the prosecution process and had to be conducted with mutual respect for the distinct functions and operational independence of each profession. (See [19].)
Held, further, that investigating officers were supposed to be present during criminal trials or were at least readily available, and that also applied to bail proceedings as well. The importance of that aspect could not be overemphasised, bearing in mind that too many bail applications were postponed for further investigation where bail ought to have been granted during the initial process of investigation. (See [23].)
Held, further, that the seat of the court was in a small town in the Free State Province and the court and police station were probably within walking distance of each other. The investigating officer was present at court before the applicant's case was called and there should have been communication between her and the prosecutor about the case and the intended application for bail. In any event, nowadays everyone was in possession of a cellphone and there was no acceptable excuse for the prosecutor's failure to have contact with the investigating officer. She had neglected her duties and deprived the applicant of his freedom by employing an egregious stratagem. (See [27].)

S v THYS 2025 (1) SACR 243 (WCC)

Trespass — Contravention of s 1(1) of Trespass Act 6 of 1959 — Use of prosecution under Trespass Act to procure eviction without compliance with Extension of Security of Tenure Act 62 of 1997 (ESTA) — Presumption of lack of authorisation in s 250 of Criminal Procedure Act 51 of 1977 rebutted if accused was ESTA occupier.

The appellant was charged in a magistrates' court for contravening the provisions of s 1(1)(a) or (b) read with ss 1(1A), 1(2) and 2 of the Trespass Act, and further read with s 250(1)(d) of the Criminal Procedure Act 51 of 1977. He was sentenced on the same day to pay a fine of R20 000 — or twenty month's imprisonment, which was wholly suspended for five years, on certain conditions. The matter was submitted for review because of a jurisdictional question, but ultimately decided on the issue of whether a property owner could use the mechanism of criminal proceedings to constructively evict an occupier as defined in the Extension of Security of Tenure Act 62 of 1997 (ESTA), in this case Olifantskop farm.

Held, that, in the context of criminal proceedings, where the charge was one of trespassing, and having regard to how the provisions of the Trespass Act were phrased, a criminal court had to start with determining whether the accused is an ESTA occupier or not. Once it was found to be the case, a conviction in terms of s 1(1) of the Trespass Act could not follow. Nor could a summary ejectment as provided for in s 2(2) of the Trespass Act be granted. (See [35].)

Held, further, that it should have been apparent to the magistrate, prosecutor and the appellant's attorney that the appellant could not have been found guilty. First, it was expressly stated on the record that the complainant was using the Trespass Act to evict the appellant. This is exactly what the Trespass Act was trying to prevent by its direct reference to ESTA. That conclusion alone should have resulted in a plea of not guilty being entered on behalf of the appellant. However, the further exchanges between the magistrate and the appellant's legal representatives should have led them to the conclusion that the appellant was clearly an occupier as defined in ESTA. The land applicable was a farm or rural land and the appellant had lived on the farm all his life with his mother. Furthermore, he had worked for the complainant on the farm, but was recently fired from his work. That meant he had no income in excess of the threshold of

R13 635 per month and could never have been found guilty of the crime of trespassing. Further, the presumption in s 250 of the CPA was rebutted if an accused was an ESTA occupier, and could not assist the state. The conviction and sentence therefore fell to be set aside. (See [54] – [56].)

S v MCHUNU AND ANOTHER 2025 (1) SACR 257 (KZP)

Evidence — Confession — Admissibility of — Semble: regrettable and unfortunate that amendment to s 217(1)(a) of Criminal Procedure Act 51 of 1977 had not yet come into operation.
Evidence — Confession — Admissibility of — Rights not properly set out and recorded in forms used by police — Confessions inadmissible.
Evidence — Confession — Admissibility of — Officer taking confession had been made aware of facts of case beforehand — Effect of.

The appellants appealed from their conviction by the High Court of robbery with aggravating circumstances and murder. They were arrested after the South African Police Service Joint Operations Centre was robbed at gunpoint of 15 pistols, 2 cellphones and a set of keys. After the robbery the appellants allegedly decided to kill the deceased, who had been one of the robbed police officials. Another accused and the first appellant then went to the deceased's home and shot him. After their arrest the appellants alleged that they had been assaulted by the police and forced to make statements. A trial-within-a-trial was held but their confessions were held to be admissible. The trial court relied on the evidence of a witness who had been severely beaten by police from the same unit. The court noted on appeal that the trial court ought to have cautiously considered the manner in which the police obtained information from the witness, who could only have been a suspect, and he ought to have been informed of his right to remain silent. No ordinary witness would be brought to the police station in the early hours of the morning and be interrogated in those circumstances. (See [15].)
The court then examined the statements of the appellants and noted that it was clear from the content of the document that the first appellant was not given an opportunity to consider each of the said rights, nor given a chance to respond to each warning. In fact, no room was left for any answer on the form. Instead, it

was noted that he was informed and that he understood. What then followed was simply a range of answers. Given the ramifications of any statement made at the pretrial stage, the appellant, at the very least, ought to have been given an opportunity to answer each question. The form used by Capt Lockem who took the statement, allowed for a list of possible answers. A careful analysis of the options showed that there was no separate option to elect and choose a legal practitioner. It stated: 'After being warned as I have acknowledged above, I elect to: 4.1 remain silent; 4.2 remain silent now and consult with a legal practitioner; 4.3 make a statement which will be taken down in writing below; and 4.4 answer questions which will be taken down in writing below.' The captain marked 4.3 but none of the other options. It was not clear what was meant by option 4.2. If this option was intended to deal with the accused's right to choose and exercise his right to a legal practitioner, it made a mockery of the right. What was more disturbing from Capt Lockem's evidence was that he knew about the facts of the case prior to the first appellant making the confession. According to him, he merely went to the office to assist the investigating officer and was then requested to take down a warning statement. Not only was the version tendered by Capt Lockem highly improbable, but there was also no explanation as to why he did not stop taking down the statement when he realised that it amounted to a confession, and realised that the proper procedures were not in place.

In respect of the statement of the second appellant, the court held that, importantly, given the fact that the confession was challenged as not being made freely and voluntarily, the court a quo ought to have looked for safeguards, for example, the medical examination before and after these confessions. Although mindful that Judges' Rules were regarded as administrative directives to be observed by the police, they were, however, not without effect. A breach of these rules may influence the court as to whether an incriminating statement (in this instance, a confession) had been made freely and voluntarily. In the absence of any photographs taken of the appellants, and not being medically examined, it was not possible to determine whether the kind of clothing worn by them would have obscured any visible injuries. Usually, a medical report would either have supported the allegations of any assault, or refuted them. In casu, no such examinations ever took place. No explanation was given as to why the appellants

were not taken to a medical doctor both before and after their confessions. (See [17] – [26].)

The court remarked in conclusion that it deserved mention that it was regrettable that the amendment to s 217(1)(a) of the Criminal Procedure Act 51 of 1977 had not as yet come into operation, because if it had, it would have impacted upon the conduct of the officers investigating this case. The amendment, in all likelihood, would have resulted in a procedure that aids and supports due process by not allowing police officials, albeit commissioned officers, to take any confessions. (See [29].) The confessions were inadmissible and, as there was no other satisfactory evidence, the convictions had to be set aside. (See [30].)

S v SEOTHAENG 2025 (1) SACR 270 (GP)

Extortion — Sentence — Restaurant employee spitting on ice-cream cup and attempting to extort R100 000 from employer by threatening to post on social media — Convicted of extortion and malicious injury to property — Sentenced to 10 years' imprisonment for extortion and 5 years' imprisonment for malicious damage to property — Sentences confirmed on appeal, but ordered to run concurrently in view of their being one continuous event.

The appellant, an employee at a McDonald's restaurant, made a video depicting someone wearing a McDonald's uniform spitting on an ice-cream cup and placing hands on a cooldrink and threatening that it would be circulated on social media unless R100 000 was paid within two days. As a result, the restaurant was closed. The video was followed by a threatening text message. After investigations were conducted it was revealed that the threat had been made by the appellant, who conceded that he had made the threat because he was angry at McDonald's. He was charged with extortion and malicious damage to property. He was convicted and sentenced to 10 years' imprisonment for extortion and five years' imprisonment for malicious damage to property. The sentences were not ordered to run concurrently. On appeal, he challenged the sentence, arguing that the court overemphasised the seriousness of the two offences and that the sentences were disturbingly inappropriate.

Held, that the contention by the appellant that the offence was motivated by anger towards his employer did not reduce the moral blameworthiness of his conduct. By extorting R100 000 from his employer, he broke trust, which had to

be viewed in a serious light. To interfere with the sentence that was imposed by the court a quo would send a wrong message and negate the seriousness of this kind of offence. It followed that for the offence of extortion the appeal against sentence had to fail. (See [11] – [12].)

Held, further, that the malicious injury to property was committed with the express intention to extort money. It was trite that, in instances where the offence constituted one continuous incident, an order that the sentence should run concurrently be made. (See [13].) In the result, the sentences were confirmed, but it was ordered that a certain period of the sentence was to run concurrently with that on count 1. (See [13] – [15].)

MAKHALA AND ANOTHER v DIRECTOR OF PUBLIC PROSECUTIONS, WESTERN CAPE 2025 (1) SACR 275 (CC)

Evidence — Admissibility — Hearsay evidence — Admissibility of in terms of s 3 of Law of Evidence Amendment Act 45 of 1988 — Statements made in terms of s 204 of Criminal Procedure Act 51 of 1977 — Recantation of at trial — Whether statement constituting hearsay where witness testifies and recants.

Evidence — Admissibility — Hearsay evidence — Admissibility of in terms of s 3 of Law of Evidence Amendment Act 45 of 1988 — Statements made in terms of s 204 of Criminal Procedure Act 51 of 1977 — Recantation of at trial — Whether court entitled to utilise such evidence against accused where witness had clearly lied.

Evidence — Admissibility — Hearsay evidence — Admissibility of in terms of s 3 of Law of Evidence Amendment Act 45 of 1988 — Statements made in terms of s 204 of Criminal Procedure Act 51 of 1977 — Recantation of at trial — Whether trial-within-trial to be held to determine admissibility of statement.

The two applicants were convicted in the High Court of murder, the possession of an unlicensed firearm, and the unlawful possession of ammunition. Their conviction was based upon two statements made by a witness, that he had procured the services of a third accused to shoot and kill the deceased. The first statement was made to a colonel in the police, who was investigating the murder, and who informed him before making the statement that he would be treated as a

witness under s 204 of the Criminal Procedure Act 51 of 1977. The colonel informed the witness of his constitutional rights, namely his right to legal representation, his right to remain silent, and the right not to incriminate himself. The first applicant approached his brother, to acquire the services of the third accused. The witness collected the third accused in Cape Town and, after the first applicant pointed out the home of the deceased to the third accused prior to the shooting, returned the third accused to Cape Town after the shooting. When the witness was called to give evidence at the trial, without forewarning to the prosecution, he recanted the contents of his two statements that incriminated himself and the other accused in the murder. The prosecution sought to have him declared a hostile witness, which the trial court proceeded to do. The witness testified that the incriminating portions of the statements were fabrications which the police had forced him to record in his statements, and that he was intimidated by the police and threatened with assault. The trial court considered whether the witness had been coerced to make the statements, but found that the evidence of the colonel and a sergeant, who took the statements, was overwhelmingly convincing and corroborated by a further sergeant. The trial court then considered whether the two statements should be admitted as evidence in terms of s 3(1) of the Law of Evidence Amendment Act 45 of 1988 (the Hearsay Act) and did so on a consideration of the factors listed in s 3(1)(c) of the Act. It considered the risk of falsity to be minimal and that the content of the statements included information that would otherwise be unknown to the police. Aspects of the statements were also confirmed by independent and objective evidence. The conviction of the accused was based almost exclusively on the admission of the two statements of the witness.
On appeal to the Supreme Court of Appeal, the applicants challenged the admissibility of and the use of the two statements.
The SCA held that the statements in question had not been obtained in violation of the witness's rights; that the trial was not rendered unfair by the admission of the statements; nor was there anything done in securing the statements that constituted any material detriment to the administration of justice; that the trial court correctly declared the witness to be a hostile witness; that he had not been denied a right to choose to be represented by an attorney and had suffered no substantial injustice by not being provided an attorney at state expense before

being declared a hostile witness; that the trial court had properly applied the cautionary rule applicable to the evidence of an accomplice; and that there was sufficient corroborative evidence to convict the applicants. It held that s 3(1)(c) of the Hearsay Act applied to the admission into evidence of extracurial statements made by s 204 state witnesses who recanted statements that incriminated themselves and the accused in the commission of the offences in question. One of the judges dissented only in respect of the applicability of s 3(1)(c) of the Hearsay Act to the extracurial statement made by a witness. The SCA dismissed the appeal.

In a further appeal, the court (per Tshiqi J, Madlanga ADCJ, Majiedt J, Mathopo J, Mhlantla J and Theron J) held that s 3(4) of the Hearsay Act defined hearsay as evidence, whether oral or in writing, the probative value of which depended upon the credibility of any person other than the person giving such evidence. The s 204 witness was the author of the two statements. He was called at the trial to testify. His version was that he lied to the police who took his statement. The probative value of the statements depended on his credibility. Because the witness testified and was cross-examined, the statements were not hearsay evidence. (See [67].)

The court held further that, having branded the witness as a liar, it could not have found that circumstantial evidence corroborated the previous statements of a liar, without further corroboration. Because there was evidence that showed that he may have been truthful in certain instances, his statements did not suddenly become reliable in their entirety as the truth of what occurred, particularly since the other evidence did not link the accused to the commission of the offence. The provisions of s 219A(1) of the CPA were similar to the provisions of s 217 of the CPA to the extent that they provided that such statements were only admissible 'against such a person' or in relation to the accused. (See [70].) It held further that ss 219 and 219A of the CPA had no relevance in the matter. Section 219 of the CPA stated that 'no confession made by any person shall be admissible as evidence against another person'. The section prohibited admission of confessions made by one person against another person. The statements were therefore not confessions. (See [71].) The majority held accordingly that the state had failed to discharge the onus to prove the guilt of the applicants beyond a reasonable doubt and they should have been acquitted. (See [75].)

In a separate judgment per Bilchitz AJ (Dodson AJ and Chaskalson AJ concurring) the judges agreed that the statements were not hearsay (see [82]) but disagreed that, having established that the statements were not hearsay, the next step was simply to evaluate the weight to be afforded to the statements in light of the onus to prove the guilt of the accused beyond a reasonable doubt. The first question was whether such statements were rendered inadmissible by ss 219 or 219A of the CPA. Since the court would find that they were not excluded by these provisions, then what was needed was for the court to articulate the legal framework applicable to the admissibility of prior inconsistent extracurial statements and to make its decision on that basis. (See [86] – [87].) The court noted in relation to s 219, that the provision referred to a confession made by any 'person' and provided that it shall not be admissible in evidence against any other 'person'. The word 'person' had to be interpreted in its statutory context and construed harmoniously with other provisions of the CPA. Section 217 was the main provision dealing with the admissibility of confessions and was titled 'Admissibility of confession by accused'. (See [90].) What was apparent from this provision was that the word 'person' related to the commission of an offence by that person and was used in the context of criminal proceedings 'against' that person. The word 'person' was thus clearly to be understood as an 'accused person' against whom criminal charges had been laid and who was facing a criminal trial. The same conclusion emerged from a consideration of s 219A of the CPA, which utilised similar wording and connected the person who made the admission with a person who was facing criminal charges and standing trial relating to that offence. If an extracurial statement by a co-accused was admitted but the co-accused chose not to testify, the right of the others to challenge the truthfulness of the incriminating parts of such a statement was effectively nullified. The right to challenge evidence enshrined in s 35(3)(i) of the Constitution was thereby rendered nugatory. Section 39(2) of the Constitution did not point towards a different interpretation: given that the accused retained the full right to challenge the evidence, this interpretation of the provision did not negatively implicate the accused's constitutional rights in this regard. It also sought to attain an appropriate balance between the protection of the accused, their right to cross-examine and ensuring that relevant evidence was admissible in the interests of discovering the truth. There was consequently no good reason

to retain the traditional exclusionary common-law rule (as had been done in other jurisdictions) which only served to exclude relevant evidence and obscure the truth in a criminal trial. At the same time, there remained concerns that underpinned the traditional rule which had to be addressed through the development of legal principles to ensure that extracurial statements were only admitted where they met certain requirements that addressed the dangers attaching to such statements. (See [116].) It followed from the reasoning for why statements of this kind were not hearsay, that the witness who gave the statement had to testify and there had to be an opportunity for the accused's counsel (and the prosecution if the witness had been declared hostile) to cross-examine the witness about the statement in both the trial-within-a-trial and at the main trial. Even though the witness may recant, the cross-examination could probe the reasons for the change in version and whether those reasons were persuasive. They could indicate whether the relationship between the accused and the witness, coercion, amnesia or some other reason existed for departing from the previous statement. Given that the witness testified in court under oath, it should be drawn to the attention of the witness, where they recanted, that failure to tell the truth could result in forfeiture of the benefits of s 204 (if applicable) and a conviction for perjury — that, in some cases, may succeed in focusing the mind of the witness. Such testimony at the trial-within-a-trial may also assist in determining both procedural and substantive reliability. (See [132].) Given that a trial-within-a-trial had not been held, there had been an infringement of the applicants' rights in terms of s 35(3)(i) of the Constitution to challenge and adduce evidence, and thus precluded a finding that the trial was fair. (See [141].) There being no good reason to order a retrial, the appeal had to be upheld. (See [145].)

S v THEYS 2025 (1) SACR 318 (NCK)

Police — Directorate for Priority Crime Investigation — Powers of — To investigate procurement irregularities — Although corruption not alleged, Hawks entitled to investigate serious commercial crime where amount of R13 million involved — Not necessary for Provincial Treasury to initially investigate — South African Police Service Act 68 of 1995, s 17D.

Prosecuting authority — National Director of Public Prosecutions — Power to institute prosecution — Independence of NPA entrenched in National Prosecuting Authority Act 32 of 1998, ss 20(1)(a), 32(1)(a).
Public finance management offences — Failure to comply with duties under Public Finance Management Act 1 of 1999 in contravention of s 86(1) — What constitutes — Head of provincial health department authorising leases without regard to supply chain management requirements.

The appellant appealed against his conviction on three counts of contraventions of s 86(1) of the Public Finance Management Act 1 of 1999 (the PFMA). The charges arose from actions performed by the appellant in his position at the time as Acting Head of the Department of Health of the Northern Cape in concluding three lease agreements for a property to be used as a nurses' residence. The leases in question were concluded between the Department and an entity (JP Hugo Residence t/a Hoffe Park). In the lease agreement the latter described itself as the owner of the property. However, the true owner of the property was in fact Transnet. It appeared that the appellant, as the accounting officer of the Department, had not followed any procurement process prior to concluding the leases and had failed to record the reasons for his deviation from inviting competitive bids.
Insofar as he procured services as he did, it was contended that he unlawfully, wilfully or alternatively in a grossly negligent manner failed to comply with the specific provisions of the PFMA and, in addition, that he had failed to ensure that the Department had, and maintained, an appropriate procurement and provisioning system which was fair, equitable, transparent, competitive and cost-effective, and that he had failed to prevent unauthorised, irregular and/or fruitless and wasteful expenditure. The evidence also showed that Auxiliary Services of the Department initially attended to payment of the rental as 'sundry' payments, but that the payments were subsequently paid by the Human Resources Department. This was contrary to normal procedures which provided for a comprehensive process of procurement involving various separate bodies in order to ensure proper governance.
The appellant argued that the trial court ignored the materiality and centrality of the provincial treasury in instituting disciplinary and criminal proceedings against

the accounting officers and that such proceedings could not be capriciously set in motion based on information from an unknown whistle-blower, without the concurrence of or consultation with the provincial treasury as contemplated in various sections of the PFMA read with the Treasury Regulations 2005. Based on the aforesaid legiSLAtive framework the appellant argued that the trial court's finding, that it was not necessary for the criminal charges on financial misconduct to be preceded by a complaint from the provincial treasury, was erroneous. The appellant further contended that the trial court erred because it did not consider that the Hawks and the NPA could not initiate and prosecute the appellant arbitrarily without the concurrence of the Provincial Treasury. The appellant argued that the trial court failed to consider that his prosecution in terms of s 20(1) of the NPA Act could only be lawful if preceded by a lawful investigative process referred to in the PFMA. He also argued that s 17D of the South African Police Service Act 68 of 1995 and s 20 of the National Prosecuting Authority Act 32 of 1998 did not supersede the powers vested in provincial treasuries in terms of the PFMA to initiate investigations and exercise their discretion to complain or refer financial misconduct for criminal proceedings. To hold otherwise, it was argued, would be to usurp the powers conferred upon another organ of the state. The appellant's further challenge was that the trial court erred in convicting him in terms of s 86(1) read with s 38 of the PFMA, without particularising which of the provision(s) of the PFMA had been violated. It was submitted that the trial court failed to sufficiently evaluate the evidence with reference to the specific statutory provisions which the appellant had been accused of contravening and that it was impossible to discern from the judgment whether the appellant was found guilty of contravening all the statutory provisions and acquitted on some. It was further submitted that the offences created by s 86 of the PFMA were restricted to the wilful or gross negligence emanating from failure to comply with s 38, 39 or 40 of that Act. Reference to any other provisions of the PFMA in the charge-sheet, it was argued, was inconsistent with s 86 and rendered the charges defective.

Held, that it was so that the present alleged impropriety did not involve corruption as set out in ch 12 of the Corruption Act or an offence created by s 34 of that Act, or an organised crime. However, an untransparent tender process was just as nefarious and might require the Hawks' investigation. In any event, insofar as the

value of the leases was found by the trial court to have been in the order of R13 million, the offence amounted to a serious commercial crime referred to in s 17B(a) of the SAPS Act. Accordingly, that the investigation the Hawks carried out was improper, was not correct, and the appellant's argument on this score had to falter. (See [50].)

Held, further, that there was no question that the provincial treasury was endowed with the obligation to enforce the PFMA in the manner sought by the appellant. Regulations 4.2.1 and 4.2.2 of the Treasury Regulations did very little in prescribing the circumstances in which the National Treasury or provincial treasury may direct that disciplinary steps be taken against the accounting officer or that criminal charges be laid against a person found to have committed a financial misconduct. Regulations 4.2.1 and 4.2.2 did not disentitle interested parties from laying a criminal complaint with the police for the violation of financial prescripts. To find differently might render ineffectual the constitutional mandate of a concerted effort that ought to be made to fight against white-collar crime. In the present case there had been no complaint from the provincial treasury that it was denied an opportunity to exercise a discretion on whether to institute criminal proceedings against the appellant or a remonstration from it that it did not concur in the investigation. The point taken was devoid of any merit. (See [52].)

Held, further, that, as far as the NPA was concerned, their independence concerning prosecutions was entrenched in s 179 of the Constitution and given effect to by ss 20(1)(a) and 32(1)(a) of the NPA Act. Section 20(1)(a) vested the power to institute and conduct criminal proceedings on behalf of the state in the prosecuting authority, whereas s 32(1)(a) provided that a member of the prosecuting authority had to serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice, and subject only to the Constitution and the law. The NPA therefore acted within its constitutional mandate to prosecute the appellant. (See [53].)

Held, further, that some of the provisions of the PFMA referred to in the charge-sheet may not be directly relevant to the offence. However, they did not render the charges defective. This was especially so because the appellant, who enjoyed legal representation at all relevant times, had not objected to the charges being vague or ambiguous, or request that he be furnished with further

particulars before he entered his plea. He undoubtedly understood the charges. (See [58].)
Held, it was never the state's case that the services that Hoffe Park rendered were unnecessary or that value did not enure to the benefit of the Department. In light of this submission, it seemed that the appellant could not be said to have failed to take effective and appropriate steps to prevent fruitless and wasteful expenditure and losses resulting from criminal conduct, and the trial court's reasoning was not that the appellant committed the Department to such expenditure. What the court mentioned in passing was that, had the bid specification committee, the bid evaluation committee and the bid adjudication committee been engaged in the procurement process, it would have assisted the appellant in making an informed decision before he signed the leases; it would have led to proper leases being drafted and obviated 'possible' fruitless and wasteful expenditure. Largely, the state's argument was that the procurement of leases, absent a fair and competitive bidding process, resulted in irregular expenditure. (See [61].)
Held, further, that reg 16A6.4 did not find application because the procurement of student accommodation was not an emergency, it had not been urgent, and neither were the transactions in issue concluded in a case of a sole supplier. It was not in dispute that the value of each of the leases far exceeded the threshold of R500 000. It was also common cause that the appellant had not invited competitive bids when he procured students' accommodation. His defence in essence was that it was impractical to procure any alternative accommodation, therefore, in terms of Treasury Regulation 16A6.4 he approved that Hoffe Park be procured. He accordingly appended his signature to the deviation documents which he intimated were forwarded to the provincial treasury. He repeatedly stated that SCM had regard to the relevant statutory framework when they procured Hoffe Park, which included catering, security and other services they offered in terms of the leases. The question therefore was whether the appellant properly invoked reg 16A6.4 read with Practice Note 8, item 3.4, when he dispensed with the bidding process. (See [65] – [66].)
Held, further, that the process embarked upon, of identifying a suitable building through a search conducted around Kimberley, was completely irregular and ought not to be countenanced. This would naturally thwart the greater

participation by potential suppliers in what ought to have been an open tender process. Item 2.2 of the National Treasury Practice Note 6 of 2007/2008 underscored that the SCM process of procuring goods and services by means of public advertisement, including its publication in the Government Tender Bulletin, gave effect to the constitutional prescripts that all potential suppliers be afforded the right to compete for public-sector business through competitive bidding. A competitive bidding process was appropriate for the procurement in issue. Any 'judgment call' by the appellant was ill-considered and irrational. No criticism could be accorded to the trial court's remarks that the application of the normal procurement process ought to have been explored to test the market before the deviation was employed as this fortified transparency and would have served to establish whether the leases were cost-effective. It should be added that that would have also dispelled any doubt on the availability of suitable alternative students accommodation. (See [72].)

Held, further, that the evidence of how payment was effected was fatal to the appellant's defence that he lawfully deviated from inviting competitive bids because Hoffe Park was the sole supplier of the services. Additionally, the appellant was statutorily enjoined to report, inter alia, the reasons for dispensing with the prescribed competitive bidding process within 10 working days, to the Provincial Treasury and the Auditor-General (the AG) because the transactions were above the value of R1 million (VAT inclusive) and had allegedly been procured in terms of reg 16A6.4. The so-called deviation documents were nowhere to be found. The trial court could not be faulted in having drawn an inference based on the evidence that the sundry payments were made due to lack of proper procurement and that the lack of proper supporting documents was as a result of failure to inform the Provincial Treasury of the negotiations that went about between the contracting parties. The inference was also supported by evidence that SCM had no record of the transaction because they were not involved in the procurement process. (See [76].)

Held, further, that the deviation the appellant embarked upon smacked of impropriety and illegality. Accordingly, he did not comply, and ensure compliance by the Department, with the provisions of the PFMA as envisaged in s 38(1)(n) and committed the Department to irregular expenditure as contemplated in s 38(1)(c)(ii). For the impropriety to be criminal in nature and thus attracting a

sanction in terms of s 86(1) of the PFMA the accounting officer concerned had to have acted wilfully or in a grossly negligent way in his or her failure to comply with the provisions of s 38 of the PFMA. Ordinary negligence would not suffice to sustain a conviction under s 86(1). (See [81].)
Held, further, that the evidence further showed that there had been no proper service-level agreement which described the quality of additional services; there was no proper control on how the service provider invoiced the Department, and did so at his whim; and the lack of involvement of SCM in the whole procurement process signalled ostensible irregularity, and must have alerted a conscientious and vigilant accounting officer to the inappropriateness of the transactions. The appellant had to respond with a high sense of duty to prevent the irregular use of taxpayers' moneys, which was clearly occasioned by a complete lack of effective oversight in this case. In its analysis the trial court incorrectly classified the conduct as both deliberate and grossly negligent. It was patently clear that the court made a mistake because wilfulness appeared only once in its judgment whereas gross negligence covered a wider field of its reasoning. The misdirection was not of such a nature as to vitiate the proceedings, and the appellant was grossly negligent. In the result, the appeal had to fail.(See [87] and [94].)

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Badenhorst v De Kock [2025] 1 All SA 597 (WCC)

Corporate and Commercial – Company law – Reckless trading by company – Personal liability by director for debts of company in terms of section 424 of Companies Act 61 of 1973 – Incurring of debts on behalf of company when no reasonable business person would consider that the company would be able to satisfy those debts when they fell due would prima facie demonstrate reckless trading even if the directors bona fide thought otherwise.

The respondent was the sole director and shareholder of an investment holding company ("GHH"). In November 2015, GHH, represented by the respondent, purchased shares and loan accounts from the applicant. Payment of the purchase price was to be made in instalments over a period of two years. GHH fell far short of

meeting its payment obligations and in January 2022, the applicant obtained a final liquidation order in respect of GHH. In her present application, she sought an order, in terms of section 424 of the Companies Act 71 of 1973, that the respondent was personally responsible for GHH's debt. The applicant contended in her founding affidavit that the business of GHH was at all relevant times carried on recklessly by the respondent, and that he was aware thereof as envisaged in section 424 of the 1973 Act. It was alleged further that the respondent had caused GHH to trade in insolvent circumstances and had failed to embark on business rescue proceedings, and had instead untruthfully certified in the annual financial statements that GHH was able to continue as a going concern.

A dispute arose in the parties' versions of the terms of the sale agreement. According to the applicant, the respondent had never indicated that GHH might not be able to pay the full purchase price within the agreed 24-month period. The respondent, on the other hand, alleged that he had specifically informed the applicant that GHH would need time to realise one of its investments in order to pay the purchase price.

Held – To succeed in her application for final orders on motion, the applicant had to establish her case on the basis of the facts put up by the respondent, together with those facts averred by her that the respondent could not deny. The factual version put up by the respondent would only be disregarded if, exceptionally, it could safely be rejected on the papers alone.

Section 424 provides that where any business of a company was "carried on recklessly or with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the court may, on the application of the Master, the liquidator, the judicial manager, any creditor or member or contributory of the company, declare that any person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct". The section reserves its application for those who were knowingly a party to the carrying on of the business as aforesaid. The incurring of debts on behalf of a company at a time when no reasonable business person would consider that the company would be able to satisfy those debts when they fell due would *prima facie* demonstrate reckless trading even if the directors *bona fide* thought otherwise.

Because the respondent was at all relevant times the sole director of GHH, he was the only person to whom the conduct of the business of GHH could be attributed. The respondent knew of and took personal responsibility for every action of GHH, but denied that his conduct in that regard was reckless. However, in committing GHH to acquire the relevant shares from the applicant on the terms agreed, the respondent was party to the reckless carrying-on of the business of GHH. He showed scant regard for the well-being of GHH, and incurred debt on its behalf with no reasonable prospect of it being able to pay when the debt fell due. Moreover, he caused GHH to adopt a business model that was dependent, for GHH's survival, on the goodwill, patience and acquiescence of creditors. All that constituted reckless trading, and the applicant had in principle established a basis for relief against the respondent under section 424. The respondent was consequently declared personally liable for the total indebtedness of GHH to the applicant.

Besso Investments (Pty) Ltd and others v Capeco Development (Pty) Ltd and others [2025] 1 All SA 622 (ECP)

Corporate and Commercial – Company law – Removal of company directors – Calling of shareholders meeting – Section 61(12) of the Companies Act 71 of 2008 – Shareholders entitlement to require board of directors to convene a meeting of shareholders to consider motion to remove directors – Whether affected directors are entitled to be provided with the reasons or grounds for their proposed removal – Where applicants had provided respondents with sufficiently clear and specified reasons for their intended removal, case was made out for appropriate relief in terms of section 61(12).

In terms of section 61(12) of the Companies Act 71 of 2008, the applicants, as shareholders of the first respondent ("Capeco"), sought an order requiring Capeco's board of directors to convene a meeting of shareholders to consider a motion to remove the third and fourth respondents as directors. The application was brought on an urgent basis.

The context in which the application was brought was as follows. The son of one of the ultimate owners of Capeco acted in the role of general manager of the business as a consultant rather than an employee. After the termination of the contractual basis for his role, he (Baeyens) continued with his involvement in Capeco. The evidence

overwhelmingly supported the conclusion that Baeyens' continued role in Capeco was not constructive. Information provided to the applicants led them to believe that the third and fourth respondents (under the influence of Baeyens) were engaging in conduct that was detrimental to Capeco.

Held – that the central question related to the requirements for a statutorily compliant notice calling a shareholders' meeting pursuant to a demand in terms of section 61(3) of the Act – and more specifically, whether the affected directors are entitled to be provided with the reasons or grounds for their proposed removal.

A preliminary issue to be addressed was that of urgency. Uniform Rule 6(12) empowers the court to authorise a departure from the requirements of Rule 6(5) in matters of urgency and to allow the matter to be disposed of on an expedited basis. The applicant must comply as far as practicable with the existing rules and must set forth explicitly the circumstances which are averred render the matter urgent and the reasons why substantial redress cannot be obtained at a hearing in due course. Self-created urgency resulting from a failure to act expeditiously is impermissible. Where, however, an applicant undertakes genuine efforts to resolve the issue and thereby avoid litigation, that would not be regarded as dilatoriness if such efforts fail. In this case, the application was shown to be sufficiently urgent to justify the applicants' non-compliance with the court's rules.

On the merits, the third and fourth respondents stated that they were willing to call a shareholders' meeting, but were presently unable to issue the notice calling the meeting until all the statutory requirements had been met. The Court found no basis for finding that the applicants were not acting in good faith or in the best interests of Capeco or for a legitimate purpose. They required the co-operation of the respondents (in the absence of a court order) to call a shareholders' meeting and would be left without any meaningful remedy if they were precluded from resorting to the mechanism created by section 61(12). The court also rejected the respondents' contention that the application was premature because the applicants had not provided sufficient information in their demand for the meeting so as to enable the respondents to issue the notice of the meeting. The issue was whether the respondents were entitled to reasons for their intended removal as directors of Capeco. It was evident that the applicants had provided the respondents with sufficiently clear and specified reasons for their removal. The applicants had therefore

made out a case for appropriate relief in terms of section 61(12) of the Act, compelling the respondents to call a shareholders' meeting in terms of section 61(3). Before the respondents were obliged to call the meeting, the applicants should furnish Capeco with the resolutions which were to be considered at the meeting.

De SA Miranda v True Ruby Trading 1035 CC and another [2025] 1 All SA 645 (WCC)

Corporate and Commercial – Application to wind up close corporation on just and equitable grounds – Whether it would be just and equitable to wind up close corporation, notwithstanding its solvency – In terms of section 81(1)(d)(iii) of the Companies Act 71 of 2008, a solvent company may be wound up on the grounds that "it is otherwise just and equitable for the company to be wound up" – Breakdown of trust relationship between members pointing to winding up being just and equitable.

The second respondent ("De Jesus") held a 78% share in the first respondent ("True Ruby"), with the applicant ("De Sa Miranda") holding the remaining 22% members' interest. After their relationship deteriorated over time, the applicant decided to launch an application in mid-November 2023 seeking to wind up True Ruby on just and equitable grounds. A preliminary matter was an application by De Jesus for the striking out of various matter in the applicant's founding and replying affidavits, and the admission of a further answering affidavit in the event that the striking-out was unsuccessful. De Jesus alleged that the material identified in the notice to strike out involved either scandalous and vexatious allegations; or hearsay and opinion evidence; or new matter impermissibly adduced for the first time in reply.

Held – Rule 6(15) of the Uniform Rules of Court, dealing with scandalous and vexatious matter in affidavits, requires a court to be satisfied that a party seeking to strike out the identified allegations will be prejudiced if the allegations remained. Taking into account the various objections raised by De Jesus, the court dismissed the strike-out application except for a few paragraphs and annexures.

In the main application, the question was whether it would be just and equitable to wind up True Ruby, notwithstanding its solvency. The application was brought in terms

of section 67 of the Close Corporations Act 69 of 1984 read with section 81(1)(d)(iii) of the Companies Act 71 of 2008 which states that a solvent company may be wound up by a court at the instance of a director or shareholder of the company, or the company itself, on the grounds that "it is otherwise just and equitable for the company to be wound up". De Jesus's non-communication with De Sa Miranda for approximately a decade and his failure to ensure that the corporation complied with its basic obligations were key reasons for the present application. While those issues now appeared to have been addressed, another key component of the applicant's case was that De Jesus disputed the applicant's entitlement to be a member of the close corporation and refused to allow him to participate in the management of True Ruby. If De Jesus' stance regarding the applicant's membership of True Ruby was, on a balance of probabilities, untrue, then the applicant would be entirely justified in insisting that the trust relationship had been irremediably destroyed and that he and De Jesus could accordingly no longer co-exist as members of the same corporation. It would then also seem just and equitable for True Ruby to be wound up, as no viable alternative remedies had been suggested by De Jesus and there was also no suggestion that De Jesus could buy out the applicant's member's share. Having regard to the historical facts, it was concluded that the balance of probabilities was strongly in favour of the applicant's version – it being considerably more plausible than that of the second respondent. True Ruby was thus placed under a provisional order of winding up.

Jantjie obo Moamoga v MEC for Department of Education North West Province [2025] 1 All SA 667 (NWM)

Personal Injury/Delict – Claim for damages – Assault of learner – General damages and loss of earning capacity – Legal principles relevant to determination of amount of damages to be awarded.

In an action against the Member of the Executive Council for Education, North West Province ("MEC"), the plaintiff claimed damages in the amount of R7 000 000 on behalf of her son for future medical expenses, loss of amenities of life, and pain and suffering. The claim arose from the plaintiff's son being assaulted with a stick on his hand by a teacher at the school where he was a Grade R learner.

During the trial, an informal application for a postponement was made by the MEC from the bar.

Held – A postponement is not for the mere asking. The legal principles relevant to considering a postponement have been set out in case law. The trial judge has a discretion as to whether to grant an application for a postponement. A court should be slow to refuse a postponement where the true reason for a party's non-preparedness has been fully explained, where his unreadiness to proceed is not due to delaying tactics and where justice demands that he should have further time for the purpose of presenting his case. An application for a postponement must be made timeously must always be *bona fide*. The court should weigh the prejudice which will be caused to the respondent in such an application if the postponement is granted against the prejudice which will be caused to the applicant if it is not.

The evidence of the plaintiff on the issue of liability was accepted by the court, leaving the issues of quantum on general damages and loss of earning capacity to be addressed. The court had an unfettered discretion, to be exercised judiciously, to determine an amount of damages that was just, fair and equitable. In respect of the claim for loss of earning capacity, the onus rested on the plaintiff to prove her case on a balance of probabilities. That required her to adduce sufficient evidence on the sequalae of the injury causing event, to enable the court to assess and quantify the loss of earning capacity of the child, as alleged by the plaintiff. The plaintiff's son did not lose the use of his hand and was not rendered disabled. He suffered pain and discomfort for approximately two weeks in total, received medical treatment at a clinic and in hospital, and there was no evidence of any permanent disability. His learning ability appeared unaffected by the injury he had sustained. The plaintiff failed to prove that her child would suffer a reduction in his earning capacity. Consequently, no award was made for loss of earning capacity.

The defendant was declared liable for 100% of the plaintiff's proven damages, and was directed to pay the plaintiff an amount of R30 000 for damages suffered as a result of the assault.

Koji v Director of Public Prosecutions [2025] 1 All SA 680 (NWM)

Personal Injury/Delict – Claim for damages – Malicious prosecution – Claimant must allege and prove that the defendants set the law in motion; acted without reasonable and probable cause; acted with malice (or animo injuriandi); and that the prosecution failed.

In 2012, the plaintiff ("Koji") was arrested on charges of public violence, arson and malicious damage to property. At the end of his trial, he was found not guilty and discharged by virtue of the invocation of section 174 of the Criminal Procedure Act 51 of 1977. He subsequently instituted an action for damages against the National Director of Public Prosecutions ("NPA") for malicious prosecution, claiming damages in the sum of R405 000. It was contended that the prosecutors could not have *bona fide* believed in Koji's guilt given the absolute lack of evidence, subjectively or objectively. A further contention was that the NPA had not presented any evidence to justify the prosecution of Koji on the charge of public violence and had not tendered any evidence to demonstrate why Koji was prosecuted on the remaining eight counts relating to arson and malicious damage to property. That was said to constitute malice.

Held – The National Director of Public Prosecutions derived its mandate from section 179 of the Constitution. Section 179(2) expressly empowered the prosecuting authority to institute criminal proceedings on behalf of the State. That should not be construed to mean that a prosecution can be initiated without a proper consideration and application of the relevant law. What is required in a constitutional era is that when a decision is made to prosecute, prosecutorial oversight accompanies such decision so as to continuously assess the process to determine whether the prosecution is justified or not. The jurisdictional requirements for a successful claim for malicious prosecution are settled in our law. A claimant must allege and prove that the defendants set the law in motion (instigated or instituted the proceedings); that the defendants acted without reasonable and probable cause; that the defendants acted with malice (or *animo injuriandi*); and that the prosecution had failed. The jurisdictional requirements must be proved on a balance of probabilities. The concept of reasonable and probable cause for a prosecution in the context of malicious prosecution exists if a reasonable person would have concluded that the accused was probably guilty on the facts available to the prosecutor at the time. Suspicion of guilt on reasonable grounds suffices. The question is what a reasonable prosecutor would have done considering the information available at the relevant stage. Viewed holistically and in context, the NPA did not have at its disposal at the time it decided to prosecute, reasonable and probable cause in the form of grounds for suspicion of guilt on which the prosecutors were entitled to act. There was no evidence for a reasonable person to conclude that Koji was probably guilty.

To meet the *animo injuriandi* requirement, Koji had to prove that the NPA foresaw the possibility that initiating the prosecution was wrongful in that reasonable grounds for it were lacking, but that the prosecutors acted recklessly in that regard. The defendant must not only have been aware of what he was doing in initiating the prosecution, but must also at least have foreseen the possibility that he was acting wrongfully, and nevertheless continued to act, reckless as to the consequences of his conduct (*dolus eventualis*). Negligence on the part of the defendant will not suffice.

Koji succeeded in showing that the NPA acted without reasonable and probable cause and with malice in taking the decision to prosecute. The defendant was liable to compensate Koji for damages, to be proven during the quantum stage of the trial, in respect of the claim for malicious prosecution.

Maow v Minister of Home Affairs and others [2025] 1 All SA 690 (WCC)

Immigration – Asylum seeker – Lawfulness of order for detention and deportation – Failure by authorities and magistrate to heed requirements set out in Constitutional Court judgment in which parts of section 134(1) of Immigration Act 13 of 2002 were declared unconstitutional, resulting in order for immediate release of detained asylum seeker.

The applicant (Mr Maow) was a Somalian national, who stated that he had entered South Africa on 14 June 2023, via Zimbabwe, after having left Somalia to escape tribal conflict. He applied for asylum at the Gqerberha Refugee Reception Office on 8 November 2023 and returned to that office in May 2024 for his fingerprints to be taken. In between his visits to the Refugee Reception Centre, Mr Maow apparently also applied for a new Somali passport at the Somali embassy in Pretoria. In June 2024, while Mr Maow was visiting a friend in the town of Kleinmond, the police and Department of Home Affairs (“DHA”) officials arrested him. They ignored his advice that he had applied for asylum and had a return date at the Refugee Reception Centre, and insisted on detaining him and taking his Somalian passport. At Mr Maow’s subsequent appearance before the fifth respondent (the magistrate), his asylum application could not be traced due to his details having been incorrectly recorded, resulting in the magistrate finding that he was an undocumented person as described in the Immigration Act 13 of 2002, and authorising a warrant for his detention for purposes of deportation. To that end, the magistrate signed a form informing the

relevant authorities that Mr Maow had made himself liable to deportation and that he should not be released pending such deportation. Mr Maow approached the High Court to challenge the magistrate's directives.

In the present judgment, the court provided its reasons for ordering Mr Maow's release from detention and for him to be permitted to remain in South Africa pending the final outcome of his application for review of the decision to deport him.

Held – The main reason for the court's order was that it was satisfied that Mr Maow had *prima facie* established that he had applied for asylum before he was arrested, and that being so, he was insulated from deportation by section 21(4) of the Refugees Act 130 of 1998 until his application had been finally considered. A further basis for the court's order was that the matter had been argued before the court on the basis that section 34(1) of the Immigration Act was of full force and effect, when in fact, the Constitutional Court had found subsections of section 34(1) to be unconstitutional. Contrary to the regime put in place by the Constitutional Court, neither the Department of Home Affairs nor the magistrate had considered whether the interests of justice permitted the release of Mr Maow subject to reasonable conditions. They instead considered it dispositive that he had no documentary proof of an asylum application or a right to live or work in South Africa and that the system apparently had no record of any such application. The respondents were also guilty of having flouted other aspects of the Constitutional Court's order referred to above. In those circumstances, the detention of Mr Maow was unlawful and his release was imperative.

Mazibuko and others v Rustenburg Local Municipality [2025] 1 All SA 706 (NWM)

Property – Eviction by municipality of occupiers of land and demolition of structures erected in land – Occupiers seeking interdictory relief based on unlawfulness of municipality's acting without court order – Municipality not entitled to rely on court order granted previously where circumstances and occupiers sought to be evicted were not the same.

The applicants had each taken occupation of land owned by the respondent municipality. They brought an application for an order declaring unlawful, invalid and

inconsistent with section 26(3) of the Constitution, the municipality's evicting them from their homes and demolishing their dwellings and/or structures on the land without a valid or lawful court order. The applicants stated that post-eviction, they were made aware of a court order of 6 March 2018 in eviction proceedings between the municipality and the unlawful occupiers of various land. They contended that the 2018 court order did not relate to them as the property they occupied was in a place other than that referred to in that order. They contended that they had made a case for the grant of interdictory relief in the form of a mandatory interdict and a prohibitory interdict. In terms of the mandatory interdict sought, the applicants sought restoration of the status *quo ante* before their unlawful eviction and/or demolition of their dwellings; and in terms of the prohibitory interdict, they sought an order prohibiting the municipality from evicting them from the property and/or demolishing their structures without a lawful court order. They contend that all the requirements for a final interdict had been met, in that they had a clear right in terms of the Constitution and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998; their rights had been breached; and there was no alternative remedy available to them following their eviction and/or demolition of their structures.

The municipality contended that it had, over the years, experienced a crisis where the relevant properties were invaded, causing it to launch an application in October 2019 to prevent invasion of all the properties in question and the erection of any structures and/or occupation of unoccupied structures. It purported to act against the applicants on the basis of that order.

Held – Applicants were seeking final relief by way of a *mandamus*. A dispute was created by the municipality which claimed that the structures on the land were unoccupied, whereas the version of the applicants was that the structures were occupied. On the application of the applicable rule, the version of the occupiers of the property had to prevail.

Regarding the structures which were demolished by the municipality, reliance was placed on the 2019 order. There was no evidence that any of the applicants were part of the unlawful invaders as envisaged in the 2019 order, or how service of the 2019 order reasonably would have come to their attention. Further, the municipality adduced no evidence that the 2019 order was enforced at the time it was granted. The court

referred to case authority which stated that an interdict which sought to prevent harm from happening (such as the invasion of land), is only for prevention of imminent harm and not harm way into the future. The 2019 order could not be used as continuous justification for self-help by the municipality, particularly where the identities of the respondents were constantly changing. To take action against the applicants, the municipality was required to approach the court with an application in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, which it had not done.

The applicants had established a case for the relief sought. An order of restoration by way of a mandatory interdict and a prohibitory interdict was granted.

Mochware v S [2025] 1 All SA 718 (NWM)

Criminal Law and Procedure – Conviction and sentence on charges of murder and attempted murder – Prescribed minimum sentence of life imprisonment on murder charge – Appeal against sentence based on allegation of not having been informed of applicability of prescribed minimum sentence – Allegation of diminished criminal responsibility not established on a conspectus of the evidence – Consideration of mitigating and aggravating factors showing no substantial or compelling circumstances of the appellant to justify a deviation from the prescribed minimum sentence.

The appellant pleaded guilty to charges of murder and attempted murder. He was convicted on both counts and sentenced to life imprisonment in respect of the count of murder and ten years' imprisonment on the count of attempted murder. On appeal, the correctness of the sentence was challenged on numerous grounds. The court dealt with the grounds of appeal in two categories. The first was based on the view of the appellant that there had been an unfair sentencing process. In that regard he contended that the court a *quo* had not appropriately cautioned him as to the existence of the mandatory life sentence which found application in respect of the murder count in the absence of substantial and compelling circumstances warranting a lesser sentence. He also raised the issue of his alleged diminished criminal responsibility, stating that he was in a troubled state of mind and that he had been drinking when he committed the offences.

Held – The imposition of sentence falls within the trials court's discretion. An appellate court will only interfere if the reasoning of the sentencing court was vitiated by misdirection, or the sentence imposed induced a sense of shock or could be said to be startlingly inappropriate. A mere misdirection is insufficient to entitle an appellate court to interfere with the sentence. The sentence must be of such a nature, degree, or seriousness that it shows that the trial court did not exercise its sentencing discretion or that it exercised it improperly or unreasonably. The court of appeal must also determine whether the sentence imposed was justified.

In pleading guilty, the appellant was duly represented and confirmed the content and the correctness of his statement. He and his legal representative were aware of the prescribed minimum sentence which was applicable.

The presence of diminished criminal responsibility is determined on a conspectus of the evidence. There was no basis to find that the appellant acted with diminished criminal responsibility. He had murdered a woman with whom he had been in a relationship, and had violated the terms of a protection order she had obtained against him. His conduct pointed to premeditation and intent to kill. On a full conspectus of the mitigating and aggravating features, there was nothing substantial nor compelling about the personal circumstances of the appellant to justify a deviation from the prescribed minimum sentence. The appeal was dismissed.

Schol Property and Consulting v Gajjar [2025] 1 All SA 733 (ECG)

Personal Injury/Delict – Injury sustained by patron at shopping centre after falling on uneven floor – Whether owner of mall took sufficient reasonable precautions to prevent potential danger created by uneven floors – Test for negligence obliging property owner to take such precautions as were reasonable to guard against reasonable possibility of visitors falling – Failure to take adequate precautionary steps resulting in negligence being established.

While walking to a restaurant in a shopping centre owned by the appellant, the respondent stumbled, tripped and fell on an uneven floor. She sustained injury on her shoulder and subsequently underwent an operation in hospital. As a result, she instituted a civil claim against the appellant for damages arising from its alleged negligent conduct relating to the maintenance of its shopping mall. The unevenness

in the floor level was due to the need to facilitate water runoff. The trial court held that the appellant was negligent and therefore liable for such damages as might be proved by the respondent.

On appeal, the appellant submitted that a demarcation by means of a white line separating the two floor levels constituted a sufficient warning of the potential hazard caused by the unevenness. It argued that the trial court erred in finding that the white line fell short of adequate warning for the safety of the patrons.

Held – The issue for determination was whether the appellant, as the owner of the mall, took sufficient reasonable precautions to prevent the potential danger created by the uneven floors. It is common cause that it owed a duty of care to the members of the public entering the mall to ensure their safety.

The purpose of the white line separating the two floor levels was not adequately explained by the appellant. Its expert witness, who testified in explanation of the white line, did not qualify as expert evidence as his testimony did not establish the cogency of the concept of a white line. An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise, and should never assume the role of advocate. He should also make it clear when a particular question or issue falls outside his expertise.

The test for negligence posits that for the purpose of liability, *culpa* arises if a *diligens paterfamilias* in the position of the defendant would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; would take reasonable steps to guard against such occurrence; and the defendant failed to take such steps. The reasonable possibility of a person tripping and falling as a result of the uneven floors was foreseeable in this case. The appellant was obliged to take such precautions as were reasonable to guard against that eventuality. It failed to take adequate precautionary steps, and negligence was accordingly established.

The next question was whether the negligent conduct of the appellant was the cause of the respondent's injury. The onus rested with the respondent to show that, but for the failure to give a timely warning by means of placing visible warning signs, she would not have tripped and fallen. The court agreed with the trial court that causation had been established.The appeal was thus dismissed.

South African Legal Practice Council v Louw and others [2025] 1 All SA 744 (GJ)

Legal Practice – Misconduct by attorneys – Application for striking off – Inadequacy of evidence resulting in relief not granted – Papers lacking adequate factual substrate on which court could undertake required three-stage inquiry to determine whether the misconduct alleged actually took place; whether the misconduct established meant that each of the relevant respondents was no longer fit and proper to practice as an attorney; and to determine appropriate sanction to be imposed.

The Legal Practice Council ("LPC") applied for the striking from the roll of attorneys of the first to fourth respondents, who were attorneys employed by the fifth respondent firm.

The application was based substantially upon a dishonest scheme apparently conceived of and executed by the first respondent when he was the *de facto* managing partner of the firm. The scheme involved understating the firm's annual fee income by paying the firm's expenses directly from its trust account, and drawing down the professional fees due to the firm after the firm's expenses had been deducted from them. That permitted the firm to state its annual fee income at just below R50 million when it was in fact in excess of R100 million. The purpose was to avoid attracting the more onerous Broad Based Black Economic Empowerment ("BBBEE") requirements that would have been applied to the firm had its reported fee income exceeded R50 million, and with which the firm could not comply.

Held – While the above allegations were beyond dispute, the LPC relied on several other instances of misconduct, the facts surrounding which were less clear. Consequently, the papers lacked an adequate factual substrate on which the court could undertake the three-stage inquiry required: first, to determine whether the misconduct alleged actually took place; second, to determine whether the misconduct established means that each of the first to fourth respondents is no longer fit and proper to practice as an attorney; and third, to determine the appropriate sanction, if any, to be imposed.

Despite the deceptive nature of the scheme, it could not be said that the first respondent's striking off the roll was inevitable without a fuller picture of the firm's affairs and his role in them. Moreover, unlike in a standard case of theft or another plainly unlawful misappropriation, it was not clear that the other respondents had misconducted themselves, and, if they had, whether they nevertheless remained fit and proper to practice. It could not be concluded, as a matter of principle, that knowledge of the details of a firm's accounts must always and everywhere be imputed to each of the directors of that firm, with the result that any misstatement of the firm's financial position had to inexorably lead to their disbarment. Oral evidence was needed from each of the first to fourth respondents, subject to cross-examination, to provide the answers lacking on the papers about whether all of the misconduct alleged had been established, what each of the respondents knew about it, when they knew, and what level of culpability they each had for that misconduct. The LPC was required to hold a disciplinary inquiry before approaching the court. Until then, the application was dismissed.

Stone v Bingo Ivanisevic and another [2025] 1 All SA 751 (WCC)

Personal Injury/Delict – Claim for damages arising from injury in school water polo fixture – Plaintiff bearing onus of proving that a reasonable person in defendant's position would have foreseen reasonable possibility that his attack would injure the plaintiff; would have taken reasonable steps to guard against it; and that he failed to take such steps – Onus discharged on balance of probabilities.

In February 2018, during a water polo fixture between Rondebosch Boys' High School ("Rondebosch") and the second defendant ("Bishops"), the plaintiff ("Ross") participated in the match for Rondebosch, and the first defendant ("Bingo") for Bishops. During the last chukka of the match, Bingo punched Ross, causing injuries to Ross's face, teeth and jaw. Bingo immediately received a red card for brutality and the match was drawn to an early close. Thereafter, in accordance with Bishops' school rules, disciplinary procedures and codes of conduct, Bingo was called to a disciplinary meeting at which he was found by Bishops to have breached the school rules and was sanctioned, *inter alia*, with a seven-match ban.

It was common cause that when the incident occurred, Bishops, acting through its teachers, coaches and other members of staff, bore a duty not to cause Ross harm due to Bishops' own negligence.

Ross brought a delictual claim for damages against Bingo, who had punched him, and against Bishops as an alleged joint wrongdoer. The claim against Bishops was based on the averment that the school had allowed Bingo to participate in the fixture despite allegedly being aware of his alleged prior poor disciplinary record. Bingo's explanation for the incident was that he had been tackled in the water, and had swung a reactive punch to defend himself.

Held – Beginning with Ross's case against Bingo, the Court was faced with two diametrically opposed versions of the incident. Ross bore the onus to establish on a balance of probabilities that Bingo caused the incident resulting in the punch and that, in punching him, Bingo was negligent. Applying the established approach to determining a dispute of fact, the Court found that while Ross was an honest, credible and reliable witness, the same could not be said of Bingo who was an evasive witness who attempted to distance himself from taking responsibility, and demonstrated a propensity for economy with the truth. The probabilities also favoured Ross's version. Ross was not required to prove Bingo's unlawful assault on him beyond a reasonable doubt. All he was required to show was that a reasonable person in Bingo's position would have foreseen the reasonable possibility that his attack on Ross would injure him; would have taken reasonable steps to guard against it; and that he failed to take such steps. Whether a reasonable person would have taken those steps involved a value judgment. The evidence established on a balance of probabilities that Bingo made an unprovoked attack on Ross; that a reasonable, experienced water polo player would have foreseen that pushing Ross under water so that he could not breathe could cause Ross to react in a manner enabling him to surface; and that the force of the punch above water caused Ross serious injury. Ross' claim against Bingo on the merits thus succeeded.

In his claim against Bishops, Ross had to prove on a balance of probabilities that Bishops had breached its legal duty towards him to take all reasonable steps to ensure his safety and well-being. The test for wrongfulness is an objective one. The question whether a legal duty has been breached is determined with reference to the *boni*

mores or general legal convictions of the community. Ross's case was ultimately limited to whether or not, in light of a previous alleged poor sport disciplinary record of which Bishops was, or should reasonably have been, aware, it should have not allowed Boingo to play in the fixture. However, the evidence showed that Bingo had a clean disciplinary record in both schools. It could not be said that Bishops had breached its duty to Ross by playing Bingo in the match. Ross's case against Bishops accordingly failed.

Technologies Acceptances Receivable (Pty) Ltd and another v Pieter Toerien Productions CC t/a Theatre on The Bay and others [2025] 1 All SA 775 (WCC)

Corporate and Commercial – Rental agreement – Termination of contract – Claim for payment failing where amount claimed was based on invalid amendment to agreement – Unjust enrichment counter-claim not possible where relevant parties had not been impoverished and other parties had not been enriched.

The third defendant ("Oxbow") leased two printers to the first defendant ("Toerien"), represented by the second defendant ("Sage"), in terms of a written Master Rental Agreement ("MRA"). The plaintiffs contended that the MRA was ceded to the second plaintiff ("FUN") and from FUN to the first plaintiff ("TAR"). Toerien contended that it was over-charged for three years, in consequence of which it purported to cancel the MRA and tendered return of the printers. It brought a counter-claim for repayment of what it averred it had over-paid. The plaintiffs contended that Toerien was liable in the amount of R451 466,66, alternatively they claimed that amount from Oxbow, on the basis of representations, warranties and indemnifications by Oxbow.

Held – The first issue to be addressed was the plaintiffs' claim in convention against Toerien and Sage. That claim relied on an amendment to the MRA, which was disputed by the defendants. In terms of the amendment, the monthly rental of R6235,80 due by the defendants had been crossed out and replaced with the handwritten amount of R11 426,47. The question was whether the disputed amendment was effective, which was linked to whether it complied with a non-variation clause in the agreement. While the amendment was initialled by Sage, neither Toerien nor Oxbow had signed it. As such, the amendment did not comply with the non-variation clause in the MRA and was therefore not effective and of no force and effect. The plaintiffs therefore failed in their claim in convention against Toerien and Sage.

The second claim was an enrichment claim in reconvention by Toerien. As a result of the overpayments, Toerien averred that TAR, alternatively FUN, was enriched at the expense of Toerien, which enrichment was unjustified. However, the facts established that Toerien owed an early cancellation fee for terminating its agreement with a previous supplier, and that FUN had settled that debt. The amount of the debt was greater than the amount claimed by Toerien in its counter-claim. As Toerien had not been impoverished and neither of the plaintiffs had been enriched, the counter-claim had to fail.

The next question addressed was whether the enforcement of the non-variation clause was against public policy. It was evident that Oxbow could have complied with the non-variation clause but simply failed to do so. Its attempt to rely on public policy to counter enforcement of the non-variation clause was rejected by the court. Its argument based on fraud also did not succeed, as its interpretation of relevant case law in that regard was unsupportable.

Toerien and Sage being found not liable to the plaintiffs, it had to be determined whether Oxbow was liable. The plaintiffs' case against Oxbow was based on certain contractual provisions pleaded in their particulars of claim. The Court made it clear that the contract to be considered was the unamended version, in which event, there was no breach.That left the plaintiffs without a successful claim against any of the defendants.

True North Holdings (Pty) Ltd and others v Sky Gecko Software Lab (Pty) Ltd and another [2025] 1 All SA 803 (WCC)

Corporate and Commercial – Contract for review of software systems – Incorporation of restraint of trade and confidentiality protection clauses in contract – Enforcement of rights allegedly arising from agreement – Application for interdictory relief preventing contractor from rendering services to any competitor for period of three years – No basis for finding that restraint or confidentiality terms of expired software agreement continued to bind parties after core services were completed.

The second respondent ("Hendricks") was a director and shareholder of the first respondent, which was the vehicle through which he provided services to third parties. In 2018, he was contracted to provide services to the applicants in the form of a review of their software systems. Prior to commencing the agreed review, the respondents

signed a confidentiality agreement with the applicants. The agreement contained both restraint of trade and confidentiality protection clauses. The restraint applied during the subsistence of the agreement and for three years thereafter. In October 2023, the relationship between the parties broke down, and the applicants terminated the relationship. Their demands that the respondents comply with the terms of the confidentiality agreement, and not to render services to any competitor for a period of three years from 17 October 2023 were not accepted by the respondents, leading to the launch of the present proceedings, to enforce the rights which the applicants alleged arose from the confidentiality and software agreements.

Held – The applicants were required to establish both the existence of a contract and the terms thereof. Their claim could be based on a written, oral or tacit agreement. While the written software agreement on which the applicants relied had lapsed on 31 March 2019, they claimed that, on 2 April 2019, there was an oral renewal of the agreement on materially the same terms but with some amendments. If the contractual framework on which the applicants' cause of action was based could not be established, then the clear right on which they based their claim for interdictory relief could not be established.

The confidentiality agreement was entered into because it was necessary for the respondents to be given access to the applicants' existing computer systems to enable them to perform their review and to make recommendations, and the applicants sought to protect their information. The services for which the respondents were engaged under the confidentiality agreement constituted only the envisaged review and making of recommendations, which were completed at the latest by the end of September 2019. The duration of the confidentiality agreement was limited to the period of the engagement for which it was concluded. Thus, the primary operation of the confidentiality agreement expired once the envisaged services were complete, with only the restraint and confidentiality provisions living on subject to certain restrictions. Although the date for the delivery of the core work was extended, that did not amount to a renewal of the main agreement. The core work was submitted in June 2019, and the agreement terminated then. There was no basis to find that the restraint or confidentiality terms of the expired software agreement continued to bind the parties in the period after June 2019. In resolving the factual dispute between the parties, the court accepted that from June 2019, both parties accepted that a new written contract

had to be concluded to regulate the new deliverables requested of the respondents. The inference was that the detailed terms of the agreement would be open to negotiation. It could be presumed that just because the parties had established a restraint of trade in earlier contracts, the same would necessarily follow in a new contract, or that the terms would be the same.

The applicants failed to establish an entitlement to enforce the contractual restraints and confidentiality provisions on which they relied, as no clear right to the relief sought was shown to exist. The application was dismissed.

Van Heerden and another v MT Earthmoving CC and others [2025] 1 All SA 822 (NWM)

Corporate and Commercial – Loan agreement – Claim for payment – Defence of set off – Requirements for defence of set-off including proof that the debt was due and payable – Party's concession of the existence of the set-off agreement resolving dispute.

The appellants, as plaintiffs, sued the respondents (as defendants) for payment of what they claimed was the amount owing in terms of a loan agreement entered into between the parties in March 2018. The judgment in the appeal referred to the parties as in the court below. In their plea, the defendants claimed that as a result of substantial payments made by the first defendant to the plaintiffs, only R1 376 140 of the R2 301 140 claimed by the plaintiffs remained due and payable. Further, an amount of R1 150 000 was set-off against the loan amount in terms of an oral agreement in terms of which the first defendant as represented by the second defendant, sold the plaintiffs a truck and trailer for an agreed purchase price of R1 150 000. An additional amount of R50 000 was said to be set-off in terms of an oral service agreement in terms of which the first defendant, as represented by the second defendant, would render transportation services to the plaintiffs. Consequently, the defendants alleged that the only amount owing to the plaintiffs was an amount of R176 140, constituting interest on the loan amount. Their tender of payment of that amount was rejected by the plaintiffs.

The court *a quo* identified the only issues to be determined as being whether the defendants had made payment of the loan amount in full to the plaintiffs; and whether there was a set-off because of the transfer of the truck and trailer. However, the court

also considered another issue raised by the defendants regarding the maxim *adjectus solutionis gratia*, and its applicability in this case. The plaintiffs accepted the defendants had made certain payments in terms of the loan agreement, which amounts were not deducted from the balance of the loan amount due. The plaintiffs contended that the *adjectus* defence which was not pleaded, arose during the course of the trial, when the defendants contended that payments in an amount of R1 million were made to a third party on behalf of the plaintiffs.

Held – The ground of appeal predicated on the *adjectus* issue was nothing more than a red herring and the only issues which should have engaged the court *a quo* were the defences raised by the defendants.

As set out in case law, to rely on set-off, a claimant must allege and prove the indebtedness of the defendant to the claimant; that the debt was due and payable; that both debts were liquidated; and that the parties were indebted to each other in the same capacity. The plaintiffs contended that the defendants failed to adduce evidence, relevant to the requirement that the purchase price of R1 150 000 for the truck and trailer was due and payable by the plaintiffs to the defendants. However, at trial, the first plaintiff had conceded the existence of the set-off agreement and the deductions relevant to the truck and trailer and a loader. Thus, the appeal predicated on the set-off issue could not be sustained and was dismissed.

Zakade v MEC for Health, Western Cape [2025] 1 All SA 838 (WCC)

Personal Injury/Delict – Medical negligence – Claim for damages – Test for negligence is whether a reasonable practitioner in such circumstances would have foreseen likelihood of harm, would have taken necessary steps to guard against its occurrence and that the concerned practitioner failed to take such steps.

In December 2010, the plaintiff was admitted to the Mitchells Plain Midwife Obstetric Unit ("MOU") to have her baby delivered. She alleged that the medical staff at the MOU failed to implement the appropriate procedures when it was evident that she presented with shoulder dystocia. In her claim for damages, the plaintiff alleged substandard care and negligence by the staff, resulting in her baby suffering an injury to his brachial plexus and being diagnosed with hypoxic ischemic encephalopathy.

Held – The evidence of the plaintiff (as a single witness) should be treated with caution, as she was the only party before the court testifying about her pregnancy and

delivery. Her testimony had to be credible to the extent that her uncorroborated evidence had to satisfy the court that, on the probabilities, it was the truth.

A medical practitioner is required to exercise the degree of skill and care to be expected from the skilled practitioner in his or her field. The test is when a reasonable practitioner in such circumstances would have foreseen the likelihood of harm, would have taken the necessary steps to guard against its occurrence and requires that the concerned practitioner failed to take such steps. To determine whether the defendant's staff were negligent, the court would be guided by the determination with regard to the view of the experts. A court weighing up the views of the parties' experts has to be satisfied that their opinions have a logical basis, and whether the experts had directed their minds to the question of comparative risks and benefits and reached a defensible conclusion on the matter. The general onus of proof lies with the plaintiff. The defendant bears a duty to adduce evidence to counter a *prima facie* case made by the plaintiff.

The plaintiff had to establish that the wrongful and negligent conduct of the nursing staff acting within the course and scope of their employment, caused the harm. In this case, the plaintiff established on a balance of probabilities that the injury was caused by the failure of the hospital staff to assess whether the plaintiff had risk factors for shoulder dystocia and to apply the correct procedure in delivering the plaintiff's baby. Causal negligence on the part of the nursing staff was established. The defendant was liable for the plaintiff's proven damages.

Zhao v Minister of Police and others [2025] 1 All SA 855 (NWM)

Civil Procedure – Urgency – Urgency is predicated on the provisions of rule 6(12) which requires a party to satisfy the court that non-compliance with the rules is justified, and that it would not be afforded substantial redress if the matter were to be entertained in the ordinary course.

Criminal Law and Procedure – Search and seizure operation by police – Validity of search warrant – Warrant must be issued pursuant to consideration by magistrate or justice, of information under oath – For warrant to be valid, there must be a reasonable suspicion that a crime has been committed, and reasonable grounds to believe that

objects connected with the offence may be found on the premises or persons intended to be searched.

In July 2024, the applicant's business premises were searched by the police. At the time, the person on the property, who could barely speak English, attempted to inform the police to wait for the applicant's attorney to arrive but the police officers showed him a piece of paper and asked him to open the gate, which he did. Pursuant to the search, 130 electronic devices, which contained computer software and hardware used for electronic games, were seized. Other than the police, among the people in attendance at the property was an official of the Gambling Board. In an urgent application, the applicant sought an order setting aside and declaring invalid the search and seizure conducted at his premises by police officials. He contended that he had been in peaceful and undisturbed possession of the items seized at his property before the execution of the warrant. He disputed the validity of the search warrant, contending that the third respondent had merely acted as a rubberstamp in issuing the warrant, failing to consider that no basis for any offence had been established. The applicant further challenged the presence of the Gambling Board official, as a violation of his right to privacy. The said official, who was not a member of the police and who was not authorised to assist in the search and seizure during the execution of the warrant, was said to have tainted the execution of the warrant, rendering the seizure of the items unlawful and entitling the applicant to restoration of the items.

Held – The first issue was whether the matter was urgent, such as to warrant a departure from the normal rules of court relating to procedure and timeframes applicable in applications. Urgency is predicated on the provisions of rule 6(12) which requires a party to satisfy the court that non-compliance with the rules is justified, and that it would not be afforded substantial redress if the matter were to be entertained in the ordinary course. The court was satisfied that the application was indeed urgent and warranted a deviation from the ordinary rules.

In order to succeed in obtaining spoliatory relief, the applicant had to prove that he was in peaceful and undisturbed possession of the goods seized, and that he was unlawfully deprived of such possession. The *mandament van spolie* is available even to a person who has no existing right to the property in question. The rule is concerned with the possession of the property, and not the title thereto. It is further concerned

with the fact that the possession may not be removed without due legal process. Regarding the validity of the search and seizure warrant, the law requires that it be issued pursuant to the consideration by the magistrate or justice, of information under oath. For a warrant to be valid, there must be a reasonable suspicion that a crime has been committed, and reasonable grounds to believe that objects connected with the offence may be found on the premises or persons intended to be searched. The information before the third respondent in this case offered insufficient basis for the issuing of the warrant, nor could it have led to a reasonable belief that an offence had been committed. As the third respondent was required to satisfy himself that the affidavit in support of the request or the warrant contained sufficient information regarding the existence of the relevant jurisdictional facts, in the absence thereof, he ought to have refused to issue the warrant. There was also merit in the applicant's objection to the presence of the Gambling Board official during the search, as the respondents did not suggest that his presence had been properly authorised. Consequently, the applicant was entitled to restoration of the items seized by the respondents.

END-FOR NOW