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ADMINISTRATION OF JUSTICE

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The Judiciary

Fractious jibing in the Constitutional Court

Thirty years ago, this chapter discussed what it described as 'Fractious Jibing in the Appellate Division' (Edwin Cameron, Gilbert Marcus & Dirk van Zyl Smit 1988 *Annual Survey* 500, 542). The comment was based on remarks, astonishing at the time, by Joubert JA for the majority, in *Bank of Lisbon and South Africa Limited v De Ornelas & another* 1988 (3) SA 580 (A), [1988] 2 All SA 393. The majority (Rabie ACJ, Joubert, Hefer and Grosskopf JJA) held that the *exceptio doli* as a defence to the enforcement of an unfair contract was a 'superfluous defunct anachronism' and not part of our law (605B–F, 609I–610E). Jansen JA dissented (at 611ff). The 1988 authors (at 542) noted:

> [I]n delivering the majority judgment Joubert JA (at 609G) pointedly stated that it was to be noted that his judgment had been largely completed and made available to his colleagues by 15 August 1987; that of Jansen JA was made available to him only on 16 March 1988. Mercilessly Joubert JA added, in dealing with Jansen JA's dissent, that various 'basic misconceptions' underlay it.

The 1988 authors considered these comments 'remarkable' referring, as they did, to the most senior judge of appeal, asking:

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'Why wait until four months before his retirement to deliver what must have been a humiliating stab?' (at 542). The 1988 authors speculated that the answer lay in rumours, then widely current in the legal profession, that Jansen JA had been passed over for the Chief Justiceship because he was, in the irony-laden expression the 1988 authors chose, 'insufficiently strong' (at 543). In any event, 'this was an unusual disclosure of appellate discord. If one ascribes the event to a certain heartless fractiousness, history will surely not condemn the inference' (at 543).

Times have changed. Rightly, both profession and public proffer less fawning deference to judges. Moreover, within the judiciary, judgments and differences between them feature more robust candour. Yet there remains a long tradition in South African, and indeed in non-American Anglophone courts, of restrained dissent and courteous collegial differences. Given this, the comments by Joubert JA, at the time that they were made, were remarkable. More than thirty years later, the restrained discursive mode has, in the main, persisted. At least, until recently.

Dissent in law is inevitable and welcome. Legal decisions are the product of contestation and debate. The highest court usually deals with matters that are unprecedented and do not permit of easy answers. The dissent is the product of fidelity to the oath of office that requires judges to 'uphold and protect the Constitution' and to 'administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law' (Item 6 of Schedule 2 to the Constitution of the Republic of South Africa, 1996 (the Constitution)). Acting according to one's conscience lies at the heart of judicial independence. And apex courts, almost invariably stacked with necessarily opinionated, strong-minded judges, dealing with often intractable issues, can be expected to split, sometimes pronouncedly.

Therefore, a strongly held belief about the law, even if not shared by other judges, may oblige a judge to dissent. However, nothing apart from tradition and pragmatism prescribes *how* judges should articulate their dissents.

The tone of dissent in the United States Supreme Court stands out in marked contrast to the restraint that the courts in the Commonwealth usually exercise. Differing judgments in the United States Supreme Court are often strident, vituperative, and even personal. The late Antonin Scalia J epitomised this. In *Obergefell v Hodges* 135 SC 2584, a landmark case in which Kennedy J

(by a bare majority of five to four) proclaimed the right of same-sex couples to marry, Scalia J not only joined in the main dissent by Roberts, Thomas and Alito JJ, but chose, in addition, to pen a further separate dissent. He did so 'to call attention to this Court's threat to American democracy' (at 2626). The majority decision, he said, lacked 'even a thin veneer of law. Buried beneath the mummeries and straining-to-be-memorable passages of the opinion is a candid and startling assertion: no matter *what* it was the people ratified, the Fourteenth Amendment protects those rights that the Judiciary, in its 'reasoned judgment', thinks the Fourteenth Amendment ought to protect' (at 2628).

This, Scalia J asserted, was 'a naked claim to legislative – indeed, super-legislative – power', one 'fundamentally at odds' with the United States system of government. He excoriated the majority judgment as a 'judicial Putsch' whose 'hubris' astounded him (at 2629). Not content, he went further: 'The opinion is couched in a style that is as pretentious as its content is egotistic. It is one thing for separate concurring or dissenting opinions to contain extravagances, even silly extravagances, of thought and expression; it is something else for the official opinion of the court to do so' (at 2630). In a footnote here, he jibed at the four liberal justices who accepted Kennedy J's perhaps grandiosely expressed path to marriage equality. Scalia J stated:

> If, even as the price to be paid for a fifth vote, I ever joined an opinion for the court that began: 'The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity' I would hide my head in a bag. The Supreme Court has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie (n22).

Comments of this sort have undeniable entertainment value – but judges are not comics. At the highest level, they deal with cases that affect the lives of people and the shape of democracy fundamentally. It is scarcely conducive to trust in the judicial system that judges should squabble in so unseemly a way.

South African judges have, in the main, shied away from this kind of invective and rhetoric. However, strains are beginning to appear. This is evident from a decision handed down as the year was drawing to a close on 29 December 2017, which is reported as *Economic Freedom Fighters & others v Speaker of the National Assembly & another* 2018 (2) SA 571 (CC), 2018 (3)

BCLR 259 (*EFF 2*). The subject matter was intensely political. It concerned an attempt by all major opposition political parties to remove then-President Jacob Zuma from office in terms of section 89 of the Constitution. This section provides that the National Assembly may remove the President from office by a resolution adopted with a supporting vote of at least two thirds of its members on the grounds, among other things, of 'serious violation of the Constitution and the law'. The Constitutional Court's judgment in *Economic Freedom Fighters v Speaker of the National Assembly & others; Democratic Alliance v Speaker of the National Assembly & others* 2016 (5) BCLR 618 (CC), 2016 (3) SA 580 (*EFF 1*), delivered in March 2016, was the catalyst. That decision upheld the Public Protector's report and remedial action on the upgrading of President Zuma's private homestead in Nkandla at taxpayers' expense.

The Constitutional Court found that President Zuma had not paid for certain non-security upgrades to his home, and that in so failing he had not given effect to the Public Protector's remedial action. The court concluded that the President had failed to uphold, defend, and respect the Constitution. It also faulted Parliament for its ineffectual, evasive response. This failure was manifest from the substantial disregard for the remedial action the Public Protector had stipulated.

After *EFF 1*, attempts by opposition parties to pass motions of no confidence in President Zuma and to have him removed in terms of section 89 failed. Opposition parties then approached the Constitutional Court in an effort to ensure that Parliament put in place appropriate section 89 mechanisms to deal with motions of impeachment. The central plank of the argument was that the National Assembly had failed to provide mechanisms to investigate the President's conduct so as to determine whether it amounted to an impeachable offence in terms of section 89.

The court divided seven to four. Jafta J (Cameron J, Froneman J, Kathree-Setiloane AJ, Kollapen AJ, Mhlantla J, and Theron J concurring) upheld the challenge and directed the National Assembly to make rules regulating the removal of a President in terms of section 89. Zondo DCJ (Mogoeng CJ, Madlanga J, and Zondi AJ concurring) dissented on the premise that there were already sufficient mechanisms to deal with impeachment.

Mogoeng CJ was not content simply to be a party to the main dissent. He chose, in addition, to write a separate dissent. In it, he self-consciously levelled a serious charge against his colleagues in the majority. Referring to the majority judgment, he said that it was

> . . . a textbook case of judicial overreach – a constitutionally impermissible intrusion by the Judiciary into the exclusive domain of Parliament. The extraordinary nature and gravity of this assertion demands that substance be provided to undergird it, particularly because the matter is polycentric in nature and somewhat controversial (para [223]).

Expanding, he stated:

> It is at odds with the dictates of separation of powers and context-sensitive realities to prescribe to the National Assembly to always hold an enquiry, and to never rely only on readily available documented or recorded evidential material, to determine the existence of a ground of impeachment. It is just as insensitive to this doctrine to hold that impeachment grounds must always be determined by the Assembly before the debate and voting on a motion of impeachment could take place and it is even more so when the consequential order then directs the Assembly to make rules that would effectively regulate the process as so prescribed (para [224]).

The Chief Justice's accusation prompted a separate judgment by Froneman J (concurred in by other members of the majority). He stated:

> But for the first paragraph of the Chief Justice's judgment . . . I would have been content for my concurrence to merely be noted in the usual manner. The Chief Justice, however, characterises the . . . judgment as a 'textbook case of judicial overreach – a constitutionally impermissible intrusion by the Judiciary into the exclusive domain of Parliament'. He himself recognises 'the extraordinary nature and gravity of this assertion'. It should not be left unanswered (para [279]).

Froneman J proceeded to say:

> It is part of constitutional adjudication that, as in this matter, there may be reasonable disagreement among judges as to the proper interpretation and application of the Constitution. The respective merits of opposing viewpoints should be assessed on the basis of the substantive reasons advanced for them. There is nothing wrong in that substantive debate being robust, but to attach a label to the opposing view does nothing to further the debate (para [280]).

Froneman J did not consider 'the different outcome' to be anything other than 'a serious attempt to grapple with the important constitutional issue at hand'. The fact that he did not agree with the reasoning or outcome proposed by the dissent, 'does not mean that I could consider them to have abdicated their responsibility to ensure that the National Assembly acts in accordance with the Constitution' (para [281]).

The tensions inherent in these passages did not end with the written disposition. They spilled over when the judgment was handed down in open court. Given the importance of the case, this event was covered on national television. As the author of the majority judgment, Jafta J read out a summary of it. As is usual, dissents are also expressed during handing-down. Jafta J had in fact summarised the dissent – but Mogoeng CJ, seemingly vexed, interrupted him, handing him a page to read out.

This prompted an angry response from the Secretary-General of the EFF, Godrich Gardee, MP, who stated 'we consider his call for his own judgment to be read in full and on record as an abuse of power. He was visibly shaken and irritated, which left us disturbed.' Gardee considered it to be 'unprecedented for such an irritation to be displayed by the holder of the highest judicial office who tried to impose his own judgment into record'. He stated further that 'we really have to look at the decorum and conduct of the Chief Justice, he cannot be over celebrated, otherwise we are going to have a beast and monster out of him' (Gertrude Makhafola 'Zuma impeachment ruling is a case of judicial overreach – Mogoeng' *IOL News Gauteng* 29 December 2017 available at *https://www.iol.co.za/news/south-africa/gauteng/zumaimpeachment-ruling-is-a-case-of-judicial-overreach-mogoeng-12564010)*.

This saga invites three comments, about language, collegiality, and leadership. The Chief Justice's use of language was politically loaded. Damagingly so. The point was captured by Devenish, who observed that 'the use of ''judicial overreach'' by a judge in this context appears to be unprecedented. It is usually politicians who use the term, when they disapprove of a judgment in which the executive or legislature has been found to have acted unconstitutionally' (George Devenish 'Writing On The Wall For Zuma To Resign' *Daily News* 4 January 2018). While the Constitutional Court has often said that judges should be respectful of the constitutional separation of powers, it has never actually used the term 'judicial overreach'. Yet, in the lead-up to the judgment this is a phrase that had gained some political currency and even notoriety.

In May 2017, African National Congress (ANC) spokesperson, Zizi Kodwa, said that the ANC was urging President Zuma to appeal against a High Court ruling requiring him to provide the reasons for and record of his decision to remove Finance Minister, Pravin Gordhan, and his Deputy, Mcebesi Jonas, from

office. This was denounced as a case of 'judicial overreach' (G Quintal 'Abuse of the Courts or the Last Line of Defence?' Business Day 12 May 2017 available at *https://www.businesslive.co.za/bd/opinion/2017-05-12-abuse-of-courts-or-the-last-line-of-defence/*). In the same month, about 1 000 ANC supporters were reported to have marched through the streets of Durban behind a banner displaying the rhetorical question 'Who Runs SA, Courts or Executive' (Phillip de Wet 'Judicial Overreach is Back' *Mail & Guardian* 19 May 2017 available at *https://mg.co.za/article/2017-05-19-00-judicial-overreach-is-back*). The Speaker of Parliament, Baleka Mbete, is reported to have stated that Parliament was being taken to court for political reasons and that it was necessary for the issue of judicial overreach to be resolved (Siyabonga Mkhwanazi 'Baleka Mbete Slams "Judicial Overreach"' IOL News Politics 30 May 2017 available at *https://www.iol.co.za/news/politics/baleka-mbete-slams-judicial-overreach-9426544*).

In levelling the accusation of judicial overreach against his colleagues, the Chief Justice was self-consciously echoing a potent political narrative. There was no need for him to have done so. His attack was pure rhetoric, unfounded in the substance of the court's difference. As Froneman J pointed out, there was a genuine difference of opinion about the interpretation of the Constitution. To colour this in the way chosen by the Chief Justice added nothing to the debate and threatened to damage the court and the legitimacy of the majority decision.

Here lies the second point. The Chief Justice's accusation went beyond the mere choice of words. It was a self-consciously serious accusation to level against colleagues with whom he works on a daily basis. The process of judgment writing in the Constitutional Court is cumbersome and time-consuming. Judgments are exchanged, inputs are received, and the issues extensively debated. This is precisely what occurred in *EFF 2*, as the judgments reflect. Why, in the face of a biting allegation which had caused offence, did the Chief Justice not pause to reconsider his language? Bader Ginsburg has written authoritatively about this (Ruth Bader Ginsburg 'Speaking in a judicial voice' (1992) 67 *New York University Law Review* 1185). She questions 'resort to expressions in separate opinions that generate more heat than light'. Bader Ginsburg quotes Roscoe Pound, who stated that it was 'not good for public respect for courts and law and the administration of justice' for an appellate judge to burden an opinion with 'intemperate denunciation of . . . colleagues,

violent invective, attributions of bad motives to the majority of the court, and insinuations of incompetence, negligence, prejudice, or obtuseness' (at 1194; Roscoe Pound '*Cacoethes dissentiendi*: The heated judicial dissent' 38 *ABAJ* 794, 795).

The Constitutional Court is different from other appellate courts in South Africa. Its quorum requirement, which requires that a minimum of eight judges must sit (s 167(2) of the Constitution), means that most judges must sit in every case. Unlike the Supreme Court of Appeal, the Constitutional Court cannot constitute separate panels. The comments of the Chief Justice in his separate dissent can do little to foster collegial relationships so essential for the smooth running and efficiency of any court. As Bader Ginsburg points out, 'even in the most emotion-laden, politically sensitive case, effective opinion writing does not require a judge to upbraid colleagues for failing to see the light or to get it right' (ibid at 1197).

Finally, the Chief Justice's behaviour can hardly do other than diminish his role as leader. The Chief Justice is the head of the Judiciary. He occupies a role that ought to set an example for all judges and, indeed, society at large. The preamble to the Constitution reflects that its adoption was intended to 'heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights', and the foundational values enshrined in section 1 include 'human dignity, the achievement of equality and the advancement of human rights and freedoms'. This surely envisages a society in which differences of opinion can be resolved by debate and civility. The Chief Justice is uniquely placed to set an example for society at large, but in this instance conspicuously omitted to do so. Moreover, his rhetoric was unable to attract the support even of his three fellow-dissentients. He found himself isolated, and needlessly so.

Judicial accountability

The discussion under this heading of the 2016 *Annual Survey* (at 12) began as follows:

> It is scarcely comprehensible that the 'Hlophe saga', triggered by the visit of the Judge President of the Western Cape High Court to the Constitutional Court (CC) in May 2008, should remain unresolved a full nine years later. The many events which have preceded the latest round of litigation will be found in this chapter of the Survey annually since that year's volume.

Sadly, incomprehension must yield to seemingly inevitable reality, as the Constitutional Court justices who were the appellants in the case discussed in 2016 sought to exhaust every possible curial avenue to avoid having to participate in the disciplinary tribunal process investigating allegations of grave judicial misconduct against the Judge President of the Cape High Court.

In *Nkabinde & another v Judicial Service Commission & others* 2017 (3) SA 119 (CC), 2016 (11) BCLR 1429, the two justices, Nkabinde and Jaftha, sought to rescind an earlier order in which the court refused their application for leave to appeal against the decision of the Supreme Court of Appeal which was noted last year, and which had found against them. In the original order, (available at *http://saflii.org/images/CCT%2071-16%20Nkabinde%20and%20another%20v%20JSC%20ORDER%2016%20May%202016.pdf*) the Constitutional Court had dismissed their application for leave to appeal. This was done 'in the light of the principle regulating the position where a court is incapacitated because of conflicts disabling its members from sitting to determine the merits of the application, as set out in *Hlophe v Premier of the Western Cape Province, Hlophe v Freedom Under Law & others* 2012 (6) SA 13 (CC)'.

The applicant justices applied for rescission of this order in terms of Rule 42(1)*(a)* of the Constitutional Court Rules. This provision allows the Constitutional Court to rescind an order in circumstances where it has been erroneously granted in the absence of one of the parties affected by it. Grounds for rescission are: (1) the court decided the matter on the basis of an issue not raised by the parties, thereby depriving them of their right to make representations and ultimately infringing their right of access to courts (s 34 of the Constitution); (2) the order was irregular in that disqualified members of the court participated in the decision (paras [14] [15]).

The JSC and the Minister of Justice opposed the application, relying both on the provisions of the Constitution, and the applicable rules of the court, and on the actual factual circumstances of this particular case (paras [16]-[18]).

The court spent some time in its judgment reflecting both on the process by which it deals with applications for leave to appeal and on the precedents established in its prior consideration of applications for rescission (paras [4]-[8]). It noted that this 'procedure is obviously well known to the applicants, as they

have been party to many decisions made by this court' (para [9]). The court spelled out in great detail exactly why at least four of its members were disqualified from hearing the matter, as well as noting that '. . . all members of the court may have been compromised because of the personal relationship between colleagues at the Court' (para [10]). The decision was handed down, appropriately, given the very unusual circumstances, in the name of the court. It found that the applicants' reliance on Rule 42(1)*(a)* was wholly inappropriate given that the order was made at the 'Judges' Conference', where no applicant has a right to make representations – this rule could be relied on only when a decision was made in circumstances where a litigant was entitled to be present in court, but a decision was made in their absence. The court held that this error by the applicants was sufficient, on its own, to dismiss the application (para [20]), but continued to address the grounds raised.

The court rejected the applicants' first argument regarding the infringement of their right of access to courts. The applicants were well aware of the court's procedure that allows it to dismiss applications summarily and without representations from either party. In paragraph [22] the court lists all of the issues the applicants would have known at the time of making the original application for leave to appeal (eg, that the court would have lacked a quorum) and, despite this knowledge and the precedent in the *Hlophe* decision (above), the applicants chose not to address these issues in their founding papers. The contention that the applicants were denied an opportunity to give representations was therefore without merit (para [24]).

The court similarly rejected the argument that the order was irregular because disqualified judges participated in the decision, citing the precedent in *Hlophe.* The court pointed out (para [28]) that ten judges had already heard the applicants' complaints against the decision of the Judicial Service Commission (JSC) to establish a Judicial Conduct Tribunal to hear the allegations against Hlophe JP, and that this complaint had been unanimously dismissed. It concluded its judgment with words which aptly express the frustrations of most of those concerned about the legitimacy of the administration of justice in this country:

> [W]e would be failing in our duty if we did not take this opportunity to emphasise that it is in the interests of justice that the matter of the complaint against Judge President Hlophe be dealt with and con-

> cluded without any further delay. The events that gave rise to the complaint occurred in 2008. . .It is in the interests of justice that this matter be brought to finality (para [29].

Might it be that these words are heeded in the near future? Based on the many obstacles and obfuscations which have characterised this saga thus far, one could be forgiven for not holding one's breath.

The second decision to be considered in this section on judicial accountability also revolves around the conduct of Hlophe JP. *Mulaudzi v Old Mutual Life Insurance Company (South Africa) Limited & others, National Director of Public Prosecutions & another v Mulaudzi* [2017] 3 All SA 520 (SCA), 2017 (6) SA 90 has had a long history. In short, the applicant had invested in an Old Mutual (OM) policy and later ceded his rights in this policy to Nedbank. OM failed to endorse the policy to this effect. When the policy matured, the applicant requested payment and OM, despite the cession, paid out the money to the applicant. OM realised the error when Nedbank requested payment of the proceeds and the matter was reported to the police and the National Director of Public Prosecutions (NDPP).

This led to a series of applications brought by the various parties involved. The NDPP obtained a provisional restraining order over the applicant's property in the form of a rule *nisi* in the Western Cape High Court, granted by Weinkove J. The applicant anticipated the return date and obtained the discharge of the order by Hlophe JP. The NDPP and OM appealed this decision to the Supreme Court of Appeal.

After Hlophe JP had discharged the order, OM obtained an order in the Gauteng High Court, by De Vos J, that the applicant pay to it the policy sum and, pending such payment, that he be restrained from dealing with his investments. The applicant then obtained leave to appeal against this decision to the Supreme Court of Appeal but after giving notice to the Registrar of his appeal, failed to lodge the record for eleven months with the result that his appeal lapsed. The applicant applied for condonation and reinstatement of the appeal. The applicant was subsequently sequestrated.

The Supreme Court of Appeal (Ponnan JA, and with him Cachalia JA, Theron JA, Mathopo JA and Mbatha AJA) had to deal with several issues including: the substitution of the applicant in the litigation with the trustees after the sequestration of the applicant's estate; whether the applicant would still be allowed to

intervene in the proceedings in his personal capacity; and whether condonation should be granted. The court found that the trustees were necessary parties in all of the matters before it; it allowed the applicant to act personally in the proceedings; but it refused condonation (paras [15]-[41]).

Of relevance is the court's investigation into whether there was a reasonable apprehension of bias on the part of Hlophe JP when he discharged the rule *nisi*. The factual background against which the NDPP and OM alleged the reasonable apprehension of bias, is set out in paragraph [44]. Hlophe JP did not dispute these facts, but rather the inference of an apprehension of bias.

The Supreme Court of Appeal stressed the gravity of the allegations from the outset:

> It is no small matter that one of the litigants who raises that assertion is the NDPP. The NDPP is an officer of the court and thus no ordinary litigant. The NDPP assured us, and it must be accepted, that the allegation is not lightly made. In any event, the law will not lightly suppose the possibility of bias in a judge. But, there is also the simple fact that bias is such an insidious thing that even though a person may in good faith believe that he was acting impartially, his mind may unconsciously be affected by it (para [42]).

Ponnan JA reiterated the general principles in regard to the test to be applied in determining the presence of bias in judicial proceedings (para [48]). The court noted that it is settled law that not only actual bias, but also the appearance of bias will disqualify a judge from presiding. Should a judge continue to preside, the further proceedings are a nullity. Moreover, he or she is acting inconsistently with the Constitution. The established test for recusal is whether 'there is a reasonable apprehension of bias in the mind of a reasonable litigant in possession of all of the relevant facts, that a judicial officer might not bring an impartial and unprejudiced mind to bear on the resolution of the dispute before the court' (para [48]). It is important for present purposes to note the detailed aspects of this test:

> An apprehension of bias may arise from an association or interest a judicial officer has with or in one of the litigants or in the outcome of the case. It may also arise from conduct or utterances by a judicial officer prior to or during proceedings. There is as well what has been described as 'prejudgment', which means that a decision may have been made or an opinion formed, most often unfavourable, about a person or issue before knowing or examining all the facts. In all these situations, the judicial officer must ordinarily recuse himself or herself. The test for recusal adopted by the Constitutional Court is whether

> there is a reasonable apprehension of bias in the mind of a reasonable litigant in possession of all the relevant facts, that a judicial officer might not bring an impartial and unprejudiced mind to bear on the resolution of the dispute before the court (para [46]).

Against this background, the court then had to decide whether Hlophe JP should have heard a matter in which the applicant was represented by the Judge President's personal attorney, Barnabas Xulu. The Supreme Court of Appeal's view was succinctly expressed as follows:

> It must be accepted, I believe, that the longstanding professional relationship between the Judge President and his personal attorney, who has represented him in various judicial and quasi-judicial tribunals since approximately 2009, and who continues to do so, in grave disciplinary proceedings, gives rise to the reasonable apprehension that in the light of the particular nature of that relationship, the Judge President would not bring an impartial mind to bear on the adjudication of a matter brought before him by his attorney (para [50]).

The court referred in justification for this view to the Norms and Standards for the Performance of Judicial Functions, issued by the Chief Justice in terms of section 8 of the Superior Courts Act 10 of 2013, which require case allocation to be transparent and open (para [50]). The court also referred to *S v Dube & others* [2009] ZASCA 28, 2009 (2) SACR 99, in which it was held (para [14]) that a judge should not sit in a matter in which the state was represented by his wife and where the court had said that where a judge has a relationship with a party or legal representative, the judge must consider the degree of intimacy involved – the more intimate the relationship, the greater the need for recusal.

The court sought support for its stance in the approach taken in other jurisdictions (paras [51]-[58]. In the United States of America, with a few exceptions not relevant in the present case, a judge may not sit in a matter in which a lawyer who is currently representing him or her also represents one of the parties. In the United Kingdom, in *Taylor v Lawrence* [2002] EWCA Civ 90, [2002] 2 All ER 353, a judge was not disqualified from acting because the attorney representing one of the parties also drafted and stored his will and was attending to a codicil. The court, however, distinguished that case from the present facts because the representation was limited and of a non-contentious and non-litigious nature. The court also reviewed Australian and Canadian approaches to recusal (para [58]).

The court concluded that the proper test for recusal where the judge is currently represented by an attorney who represents a

party to litigation before him, requires consideration of several factors. The factors include: whether the attorney represents the judge in his personal capacity; whether the attorney is personally representing the judge or only a member of a firm of which another member is representing the judge; whether the attorney is personally representing a party to the litigation, or whether it is another member of the firm; and the nature of the representation, ie whether the matter is litigious and substantial (para [59]). In this matter, the court concluded that the factors weighed heavily in favour of a finding that it may have been inappropriate for the Judge President to allocate the matter to himself and hear it.

This was, however, not the only ground which was relied upon to establish the appearance of bias. This conclusion was strengthened by the following factors (para [60]): Hlophe JP was not one of the duty judges, but nevertheless allocated the matter to himself; he had dismissed OM's application in circumstances where he had clearly not allowed himself sufficient time to read and properly consider the papers; he had discharged the rule *nisi* granted in favour of the NDPP where he had not read the replying affidavit filed by the NDPP; he had not referred to the evidence in the NDPP's replying affidavit which contradicted the applicant's defence; and, in this extremely complicated matter, the reasons provided by Hlophe JP ran to only six pages, which again raised questions as to the care with which he had approached the case. As a result, the Supreme Court of Appeal stated the questions as follows:

> It is so that where the offending conduct sustains the inference that the presiding judge was not open minded, impartial or fair during the hearing, this court will intervene and grant appropriate relief, including declaring the proceedings invalid without considering the merits. Here, however, it was submitted that an examination of the reasons furnished fortifies the inference that the learned Judge President was prejudiced against Old Mutual and the NDPP and prejudged the case against them. It is accordingly necessary to consider those reasons to determine whether this submission is well grounded (para [61]).

The court proceeded to examine the substance of Hlophe JP's decision, highlighting its many flaws (paras [62]-[67]). The court concluded that while some of the individual factors would themselves not have been sufficient to indicate that the NDPP and OM had not been afforded a fair hearing, taken together there could be no doubt that their reasonable apprehension that the Judge President had not brought an open and impartial mind to bear on

the matter, was justified (para [68]). Hlophe JP's order, therefore, was set aside and the proceedings before him were declared a nullity. The matter was remitted to the High Court.

This is an extraordinary judgment, cast in the usual mutually respectful language in the collegial traditions of the judicial office. If one strips away the form, however, the substance is devastating: there seems to be little doubt that Hlophe JP acted in a manner which raises many questions as to his partiality. When viewed in the context of the immediately preceding saga, as well as his earlier questionable conduct in receipt of a monthly retainer from an asset management company, his continued tenure in a leadership role in the Judiciary is surprising, to put it mildly.

The Legal Profession

Attorneys

The at least questionable, and sometimes corrupt, manipulation of the process for claiming from the Road Accident Fund (RAF) by attorneys for the victims of accidents, in concert with medical experts and officials of the RAF, has become notorious over the past twenty years, and this section of the *Annual Survey* is replete with accounts of this professional misconduct.

Yet another example is to be found in the judgment of Plasket J in *Mfengwana v Road Accident Fund* 2017 (5) SA 445 (ECG). The applicant and his attorney, Rubushe, had entered into a contingency fee agreement. The applicant's claim against the RAF was settled before proceeding to trial. Before making the settlement an order of court, the court was obliged to peruse the contingency fee agreement as well as the affidavits in terms of section 4(1) and (2) of the Contingency Fees Act 66 of 1997. Contingency fee agreements falling foul of the Contingency Fees Act are invalid. A court is called upon to ensure strict compliance with the legislation in order to prevent abuse by unscrupulous legal practitioners. In this matter, the particulars of claim were only four pages long, as was the plea; the entire 'bundle' comprised 37 pages, no pre-trial conferences were held, counsel had not been briefed, and the quality of the work done left much to be desired.

The fee agreement in this matter provided for Rubushe to charge 25 per cent of the total settlement or award. In this case, that fee would have amounted to R226 000. This was grossly disproportionate to the work done, 'and amounts to overreaching

on an outrageous scale' (para [19]). Considering the poor quality of the work, Plasket J took serious issue with Rubushe's conduct. The fee agreement was contrary to the provisions of section 2 of the Contingency Fees Act, which prohibits attorneys from charging 25 per cent of damages. Rather, an attorney may charge a fee that is higher than their usual fee subject to two limitations: (1) the fee may not exceed twice the attorney's usual fee; and (2) the fee may not exceed 25 per cent of the damages awarded. In this instance, and given that the clauses which fell afoul of the Contingency Fees Act went to the heart of the agreement, the provisions could not be severed and the entire agreement was, therefore, invalid. In accordance with the legal regime, therefore, the common law applied, which meant that Rubushe was only entitled to a reasonable fee in relation to the work done.

The court lamented the ongoing abuse of contingency-fee agreements as follows:

> This is yet another case in which an attorney – an officer of the court who is supposed to act with integrity and comply with the highest ethical standards – is guilty of an attempt to grossly overreach his client, of rapacious and unconscionable conduct. Unfortunately, in this jurisdiction, this is a problem that is all too common. That said, however, it seems to me that the problems in relation to contingency fee agreements that come to the attention of the courts are, in all likelihood, the tip of the ice-berg . . . This is all cause for grave concern and, if I am correct, a manifestation of endemic corruption embedded in the attorneys' profession (paras [27] [29]).

Plasket J ordered that a copy of his judgment be delivered to the Cape Law Society.

Given the frequency with which cases of this nature have appeared in recent editions of *Annual Survey*, this judgment once again serves to emphasise the critical role of the superior courts as a means of drawing attention to the gross abuse of professional authority by legal practitioners; yet one cannot but question the efficacy of such dire warnings, given the repeated infractions of both ethics and the law which come to light in this way.

The critical role of the Law Society in monitoring and regulating professional ethics is clear, yet one's confidence in its capacity and commitment to fulfil such an obligation can only be severely shaken by the next case to be considered, *Ex Parte Mdyogolo* 2017 (1) SA 432 (ECG). The applicant had applied for admission to the roll of attorneys in the Eastern Cape High Court. He had

three previous criminal convictions: the first for theft of a cassette tape; the second for robbery with aggravating circumstances when he, armed with a semi-automatic rifle, robbed a petrol station in Fort Beaufort in June 1994; and the third for drunken driving. Of relevance was the conviction for robbery, which the applicant claimed had been politically motivated. Once more, Plasket J (and with him, Beshe J) heard the matter.

When the application first came before the court, it was postponed *sine die* in order: (1) to allow the applicant an opportunity to supplement his papers with information relating to judgment and sentence in the robbery trial as well as his application to the TRC for amnesty; and (2) to allow the Cape Law Society to submit its views. In his supplementary papers, the applicant submitted that trial records were no longer available, being destroyed as a rule ten years after the hearing, and that he had not pursued his application for amnesty as he had been released on parole. He could not, therefore, furnish the court with the outcome of this application. The Cape Law Society filed papers ultimately endorsing the applicant's application. In dealing with the robbery conviction, the Law Society noted that the offence was politically motivated and, given the passage of time, it was not of the view that this precluded him from practising as an attorney. Given the public importance of this matter, the court requested the Eastern Cape Society of Advocates to act as *amicus curiae*.

The court investigated the reasons for the robbery provided by the applicant in his application for admission – that the robbery was committed as part of the armed struggle. The court compared this to the reasons he provided in his application for amnesty – that the police got him drunk and used him in a planned operation to discredit the Pan Africanist Congress, the applicant having claimed to be a member of its armed wing. Plasket J examined the historical context against which the robbery was committed and concluded that by the time the applicant took part in it on 19 June 1994, the armed struggle was over and a democratically elected Parliament had been established. The applicant's crime was committed after the amnesty cut-off date and the account of the robbery given in his amnesty application was 'bizarre and nonsensical' and indicative of a person 'who is unwilling to take responsibility for his actions, and of a person who is willing to fabricate a version' for his benefit (para [27]). Accordingly, his application for admission had to be decided on the basis that the applicant's explanation was false.

In considering the law applicable in these circumstances, the court set out the well-established principles (paras [29]-[31]). It reiterated that the mere fact that a person has a criminal conviction does not bar him or her from admission, but that often the conviction will show the person to be of such a character that he or she is 'not worthy to be admitted to the ranks of an honourable profession'(para [30]). In this case, the robbery conviction; the applicant's forfeiture of bail; the mendacious version of events that the applicant put before the TRC; and the untruthful justification for the robbery provided in the admission application which was intended to mislead the Law Society and the court, taken together indicated a lack of honesty, integrity, and trustworthiness, which are essential qualities for a member of the attorneys' profession. Consequently, the application for admission was dismissed as the applicant had not discharged the onus of establishing that he was a fit and proper person to be admitted to practise (para [35]).

The court was very critical of the manner in which the Cape Law Society had handled the matter, observing that whomever considered the application could not have properly applied his or her mind. Given that the robbery had been committed in June 1994, it should have been apparent that the applicant's claim that it had been politically motivated was unlikely to be true and, at the very least, should have prompted further investigation. A duty rests on the Law Society to develop and maintain professional and ethical standards in the interests of both the profession and the public (para [38]). It had clearly failed to discharge that obligation in this instance.

Finally, in relation to professional practice, the duties and responsibilities of a curator of a financial fund and the Financial Services Board (the FSB) occupied the attention of the court in *Nash & another v Mostert & others* 2017 (4) SA 80 (GP). Mostert had been appointed by the FSB as a curator for the Sable Industries Pension Fund, which had been left with no assets as a result of theft committed against it. The High Court order setting out Mostert's mandate provided for 'periodical remuneration in accordance with the norms of the attorneys profession, as agreed with the FSB' (para [2]).

The FSB and Mostert had entered into a remuneration agreement which provided that 'in the circumstances, recovery of assets . . . shall be subject to the curators' remuneration of 16,66 per cent (exclusive of VAT) of such assets recovered' (para [14]).

In other words, in the event of failure to recoup the funds, the curator would receive no remuneration. The dispute in this case, which eventually ran to several thousand pages of documentation (para [3]), turned on the meaning to be given to these words. Nash, who was a member of the Sable Fund and who had been accused of the theft, instituted an application against Mostert and the FSB arguing that the remuneration agreement was void *ab initio* for non-compliance with the Contingency Fees Act.

On the issue of the validity of the remuneration agreement, Tuchten J found (para [80]) that contingency fee agreements in respect of non-litigious matters were against public policy for reasons similar to those which made them problematic in respect of litigious matters, ie, they could lead to conflicts of interest between the duty and interests of legal practitioners.

The remuneration agreement concluded between the FSB and Mostert was, therefore, contrary to the norms of the attorneys' profession and invalid (para [93]). The court ordered Mostert to provide the applicants with a statement of account of money received or debited by him as fees. The court did not order Mostert to repay the funds immediately as requested by the applicants. Instead, it held that it was open to Mostert and the FSB to conclude a valid remuneration agreement in accordance with the original High Court order appointing Mostert, but without remarking on the retrospectivity of the operation of such an agreement.

The judgments canvassed in this section once again demonstrate the great value of the superior courts in holding the attorneys' profession to the standards set for it in legislation, as well as the norms which it sets for itself. Yet, there remains a strong sense of disquiet about the frequency with which the courts have to play their accustomed watchdog role in keeping the profession honest. The next case to be reviewed displays a shocking degree of abuse of power within a vital aspect of the administration of justice, the National Prosecuting Authority (the NPA).

Advocates

In *General Council of the Bar of South Africa v Jiba & others* 2017 (2) SA 122 (GP), the appellant General Council of the Bar (GCB) brought an application to have Jiba (then deputy National Director of Public Prosecutions, NDPP), Mrwebi (then Special Director of Public Prosecutions), and Mzinyathi (then Director of

Public Prosecutions for North Gauteng) removed from the roll of advocates on the ground that they were no longer fit and proper to practise.

The general background to this matter is notorious. The NPA had requested the GCB to bring an application for the disbarment of the respondents after judgment was handed down in *National Director of Public Prosecutions & others v Freedom Under Law* 2014 (4) SA 298 (SCA), 2014 (2) SACR 107 (SCA), [2014] 4 All SA 147 (*Mdluli SCA)*. The complaints against the respondents were based on their conduct in handling the matter of *Freedom Under Law v National Director of Public Prosecutions & others* [2013] 4 All SA 657 (GNP), 2014 (1) SA 254 (GNP) (*Mdluli HC*) and *Mdluli SCA*, and adverse remarks made during the course of these matters by both the High Court and the Supreme Court of Appeal. Other complaints and adverse remarks had been made against Jiba in *Democratic Alliance* (DA) *v Acting National Director of Public Prosecutions* [2013] ZAGPHC 242; *Zuma v DA* [2014] ZASCA 101 (*Spy tapes*) and *Booysen v Acting NDPP* 2014 (2) SACR 556 (KZD). These were review proceedings instituted against the NPA in circumstances where several sets of charges had been withdrawn (*Mdluli* and *Spy tapes*) and instituted (*Booysen*).

The court (Legodi and Hughes JJ concurring) opened by remarking that the 'pre-admission character-screening of lawyers seems not to be effective any more. Post-admission moral development is imperative' (para [1]), and then listed the following as 'the least of the qualities' that a lawyer should possess in order to be considered fit and proper (para [3]): (1) integrity; (2) objectivity; (3) dignity; (4) knowledge and technical skills; (5) capacity for hard work; (6) respect for legal order, and (7) a sense of equality and fairness.

The test to be applied in determining whether a person remains 'fit and proper' to carry out his or her functions as a legal professional is a three-part one (para [9]): (1) the court must decide whether the conduct complained of has been established on a preponderance of probabilities; (2) it must consider if the person is, in the court's discretion, not a fit and proper person to continue to practise and, in so doing, weigh the conduct complained of against the conduct expected of a fit and proper person; and (3) the court must inquire whether the person is to be removed from the roll or suspended for a period with the primary consideration being the protection of the public. From paragraph

[10] onward, the court set out the legislative and constitutional framework within which the NPA operates, as well as the directives contained in the prosecutorial code of conduct regarding conduct, independence, and impartiality.

In paragraphs 17–40, Legodi J dealt with several interlocutory issues raised by Jiba, including: the failure to afford Jiba a fair hearing; that the application and relief sought offended against the separation of powers; and that the application was premature. The court also set out the reasons for its decision to disallow the filing of further affidavits by Jiba, before considering and ruling on the validity of several sets of complaints against each of the respondents in turn, in relation to their conduct in a number of high-profile and highly controversial prosecutorial decisions.

Complaints against Jiba in relation to the Booysen matter (paras [41]-[67]) related to Jiba's decision to institute charges against Major General Booysen under the Prevention of Organised Crime Act 121 of 1998. The allegation was that Jiba had failed to comply with the NPA's Code of Conduct, and had made clearly untruthful statements under oath. After considering all the evidence, the court concluded that no case for suspension or removal from the roll had been made out against Jiba in this matter. Again, complaints against Jiba in relation to the *Spy tapes* case were considered (paras [69]-[99]). The background is set out in paragraphs [69]-[72]. In brief, the DA had instituted a review of the NPA's decision to withdraw certain criminal charges against then President Zuma. It was Jiba's conduct during the course of these review proceedings, which, among other things, led to the present application for her removal from the roll.

Allegations about Jiba's conduct during the course of the review proceedings, remarked on by the Supreme Court of Appeal in its earlier judgment, included: her failure to comply with an order granted by the Supreme Court of Appeal; adopting a supine attitude towards directives issued by the Supreme Court of Appeal; not taking a position as to the confidentiality of the tapes, but rather metaphorically shrugging her shoulders; acting disingenuously, in a manner unworthy of the office of the NDPP; and not acting independently (para [74]). Once again, after reviewing the evidence, the court was unable to find against Jiba on any of these grounds.

However, complaints against all three respondents in relation to *Mdluli* yielded an altogether different set of outcomes (see paras [100]-[174]). Complaints against Jiba here included: failure

to file a full and complete Rule 53 record, notwithstanding the existence of an order compelling her to do so; failure to comply with a directive from the Deputy Judge President; failure to heed Advocate Motau SC's advice, which she had sought; failure to heed the advice of Advocate Halgryn SC that persisting with the defence of the matter was akin to being on a sinking ship; failure to disclose to the court prosecutor Breytenbach's memorandum and the representations for the internal review of Mrwebi's decision; and her failure to consider the contradictions in Mrwebi's evidence.

After reviewing the evidence, the court concluded that

- in her conduct in failing to file the record, Jiba had acted contrary to her oath as an advocate, and had 'flouted the rules of the game of the high position she holds';
- in failing to comply with the DJP's directive, her conduct was wanting, and that she had showed no concern about the slow pace at which the matter was proceeding and that, taken together with the other complaints in this matter, justified her removal from the roll;
- in responding to the complaint regarding her failure to heed Advocate Motau's advice, she 'ran away' from her responsibilities both as head of the NPA and as an officer of the court, and that her conduct in this regard had been both serious and unprecedented – the court commented that Jiba 'was steadfast in defying logic and advice for as long as her wishes were not accommodated';
- in her failure to heed the advice of Advocate Halgryn, Jiba had shown that she was steadfast in her insistence that the charges against Mdluli should be permanently withdrawn despite the evidence against him. Jiba had acted *mala fide*, had displayed an ulterior motive, and had offended against the rule of law and the Constitution and, therefore, had to be found no longer fit and proper;
- in her failure to take the court into her confidence regarding the internal review, Jiba had intended deliberately to mislead the court in her attempt to put to rest the charges against Mdluli; and
- in her failure to consider the contradictions in Mrwebi's evidence, Jiba had been aware that there was no possible defence to the dropping of the charges against Mdluli.

In conclusion, the court described Jiba's conduct as

> . . .wanting and inconsistent with the conduct of a lawyer who should remain on the roll of advocates. But Jiba was relentless in fighting the case brought by FUL and directly or indirectly dismissed teams of advocates one after the other, because she did not agree with their advice. That was done, irrespective of the merits of the advice. By so doing, she ceased to be a fit and proper person to remain on the roll of advocates (para [138].

In summary, the court found that Mrwebi

- had lied regarding the timing of his decision;
- had not heeded the rules of court or the advice of Advocate Halgryn;
- had taken a passive role in the proceedings which were aimed at challenging his decision;
- had deliberately failed to provide a full record;
- had discussed the matter with Mzinyathi – as he was legislatively obliged to do – and had agreed that a decision would not be taken without further research, but thereafter proceeded to take the decision, and that his conduct in this regard constituted 'a betrayal and a consultation in bad faith by an officer of the court', sufficiently serious to justify his removal from the roll;
- had not been honest and candid before the court;
- had failed to heed the solid and correct advice of Advocate Halgryn and had later attempted to distance himself from this; and
- had withdrawn the charges against Mdluli despite the existence of *prima facie* evidence against him.

For all these reasons, Mrwebi had 'clearly made himself liable to cease to be a fit and proper person to remain on the roll of advocates' (para [164.1]). Legodi J made the following remarks about the misconduct of both Jiba and Mrwebi:

> I cannot believe that two officers of the court . . . who hold such high positions in the prosecuting authority will stoop so low for the protection and defence of one individual who has been implicated in serious offences. . . . It is this kind of behavior that diminishes the image of our country and its institutions, which are meant to be impartial, independent and transparent in the exercise of their legislative powers (paras [165]ff).

As Mzinyathi did not address the court in these proceedings, and the GCB did not insist on proceeding against him, no finding of a failure to be a fit and proper person was made against him (para [174]).

This long and careful judgment, which also contains several examples of devastating cross-examination of Mrwebi by Trengove SC, gives only glimpses into the very controversial conduct by Jiba and Mrwebi in shielding Mdluli from prosecution, apparently in deference to the will of the President of the country. Their behaviour was shockingly improper, and it is gratifying that the High Court so convincingly found as it did. This judgment once again highlights the value of an independent, impartial, and courageous judiciary, committed to the values of the Constitution, in particular, accountability, responsiveness, and openness (s 1*(d)*).

It should be noted, however, that a bare majority of the Supreme Court of Appeal surprisingly upheld the appeals of both Jiba and Mrwebi in mid-2018: see *Jiba & another v General Council of the Bar of South Africa & another; Mrwebi v General Council of the Bar of South Africa* [2018] ZASCA 103, [2018] 3 All SA 622. This judgment will be discussed in the 2018 *Annual Survey*.

Judicial appointments: JSC duty to give reasons

The Supreme Court of Appeal earlier confirmed that the Judicial Service Commission (the JSC) is required to give reasons for its decisions when they are taken on review (*JSC v Cape Bar Council* [2012] ZASCA 115, 2013 (1) SA 170). The next question to arise, in *Helen Suzman Foundation v Judicial Service Commission & others* 2017 (1) SA 367 (SCA), was whether the JSC is required to release the transcript of its deliberations as part of the review record. The Supreme Court of Appeal, confirming the decision of the High Court, held that the JSC's deliberations need not be disclosed. Writing for a unanimous bench, Maya DP (as she then was) concluded:

> A decision-maker's deliberations do not automatically form part of the record of the proceedings as contemplated in rule 53. The extent of the record must depend upon the facts of each case. In certain cases the decision-maker may be required to produce a full record of proceedings which includes its deliberations. But there may be cases, such as this one, where confidentiality considerations may warrant non-disclosure of deliberations for the reasons set out above. I agree with the court a quo that the JSC is set apart from other administrative bodies by its unique features which provide sufficient safeguards against arbitrary and irrational decisions. The relief sought by HSF would undermine its constitutional and legislative imperatives by, *inter alia*, stifling the rigour and candour of the deliberations, deterring potential applicants, harming the dignity and privacy of candidates

who applied with the expectation of confidentiality of the deliberations and generally hamper effective judicial selection (para [39]).

However, the decision has since been overturned by the Constitutional Court in *Helen Suzman Foundation v Judicial Service Commission* [2018] ZACC 8, 2018 (4) SA 1 (CC), 2018 (7) BCLR 763 which we shall review in the 2018 *Annual Survey*.

The Executive

In the 2016 *Annual Survey* (37–39), we discussed the decision in *Minister of Justice and Constitutional Development v Southern African Litigation Centre* 2016 (3) SA 317 (SCA), in which a full bench of the Supreme Court of Appeal held that the government had acted unlawfully in not arresting Omar Al Bashir, the President of Sudan, for trial before the International Criminal Court (ICC). Al Bashir was present in South Africa for a meeting of the African Union. He was later allowed to leave the Republic with the full knowledge of the South African government. Following the decision of the Supreme Court of Appeal, shortly before the matter was to be heard in the Constitutional Court, South Africa gave notice to withdraw from the ICC. Other African nations did the same. At the same time, the government withdrew its application for leave to appeal in the Constitutional Court, leaving the Supreme Court of Appeal the final word on the Al Bashir matter.

Subsequently, the decision of the national executive to withdraw from the ICC was itself successfully challenged in *Democratic Alliance v Minister of International Relations and Cooperation & others* 2017 (3) SA 212 (GP). The full bench of the High Court (Mojapelo DJP, Makgoka and Mothle JJ) upheld a challenge to the purported withdrawal. The court held that section 231(2) of the Constitution entails that South Africa can only validly withdraw from the Rome Statute with the prior approval of Parliament and following the repeal of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (para [51]).

At the time of writing, an appeal against the High Court decision invalidating South Africa's withdrawal is pending in the Constitutional Court. The outcome of the case in the Constitutional Court will be discussed in the 2018 *Annual Survey*.

Chapter 9 Institutions

Public Protector

In the 2016 *Annual Survey* (19–26), we discussed the decision of the Constitutional Court in in the '*Nkandla* case', *Economic*

Freedom Fighters v Speaker of the National Assembly & others; Democratic Alliance v Speaker of the National Assembly & others [2016] ZACC 11, 2016 (5) BCLR 618 (CC), 2016 (3) SA 580. In that matter, the Constitutional Court held that the Public Protector's remedial action in terms of section 182(1)*(c)* of the Constitution – directing then President Jacob Zuma to pay back to the state a portion of the costs of non-security upgrades to his private residence – was binding. In analysing the decision, we anticipated that one of its consequences would be an increase in the frequency of applications to review and set aside action by the Public Protector. In 2017, we have already seen two such matters.

In *Minister of Home Affairs & another v Public Protector of the Republic of South Africa & another* [2017] 1 All SA 239 (GP), 2017 (2) SA 597, the Minister and Director-General of Home Affairs sought to review and set aside a report of the Public Protector regarding alleged misconduct by a diplomatic official in Cuba. The official concerned allegedly had been involved in serious traffic law violations and other incidents in Cuba, prompting the Department to withdraw him (paras [13]-[16]). The official complained to the Public Protector that his withdrawal without a hearing was unlawful (para [16]). The Public Protector investigated the complaint and granted the official remedial action which included requiring the Director-General to pay the official certain benefits, to investigate why proper processes had not been followed, and to apologise to the official (para [63]). Prinsloo J held that the decisions and actions of the Public Protector constitute administrative action in terms of the Promotion of Administrative Justice Act 3 of 2000, and are subject to review (para [47]). On the facts, the court held that the outcome of the investigation was rationally justifiable and that the decision and remedial action fell within the bounds of reasonableness (para [68]). The review application, therefore, failed.

A second review application against a decision of the Public Protector was successfully brought in *South African Reserve Bank v Public Protector & others* 2017 (6) SA 198 (GP), [2017] 4 All SA 269. This matter concerned an investigation by the current Public Protector, Advocate Busisiwe Mkhwebane, who succeeded Advocate Thuli Madonsela, the highly regarded Public Protector who led the investigations into the Nkandla upgrades and subsequent investigation into 'state capture'. Advocate Mkhwebane succeeded Advocate Madonsela in late 2016. One

of her first acts was to investigate government's alleged failure to recover funds used in an apartheid-era Reserve Bank bailout of Bankorp, a commercial bank. Acting in terms of section 182(1)*(b)* of the Constitution, the Public Protector issued a report directing the Special Investigating Unit to reopen investigations into these matters, and instructing the Chairperson of the Parliamentary Portfolio Committee on Justice and Correctional Services to take certain steps to amend the Constitution to alter the constitutional mandate of the Reserve Bank. The second of these remedial actions – paragraph 7.2 – was the subject of the review application that we consider here.

Murphy J upheld the challenge, holding that this remedial action trenched on Parliament's exclusive authority and violated the doctrine of the separation of powers in section 1*(c)* of the Constitution (paras [43]-[44]). The court also held that this action encroached on the national executive's prerogative to set economic policy (para [45]). The court held further that the remedial action was irrational in relation to its stated purpose of securing socio-economic progress for the poor, because it would, on the uncontested evidence, instead result in impoverishment (paras [49]-[52]). Moreover, the superficial reasoning and erroneous views on the Reserve Bank's mandate contained in the Public Protector's answering affidavit did not bear scrutiny on any reasonable basis (paras [56] [57]). The remedial action, therefore, had to be set aside for both irrationality and unreasonableness (para [57]). As the Public Protector had failed to disclose beforehand that she intended to amend the primary object of the Reserve Bank, the remedial action also fell to be set aside on the basis of procedural unfairness (para [58]).

The court closed with the following ringing statement:

> Suffice it to say, the Public Protector's explanation and begrudging concession of unconstitutionality offer no defence to the charges of illegality, irrationality and procedural unfairness. It is disconcerting that she seems impervious to the criticism, or otherwise disinclined to address it. This court is not unsympathetic to the difficult task of the Public Protector. She is expected to deal with at times complex and challenging matters with limited resources and without the benefit of rigorous forensic techniques. It is easy to err in informal alternative dispute-resolution processes. However, there is no getting away from the fact that the Public Protector is the constitutionally appointed custodian of legality and due process in the public administration. She risks the charge of hypocrisy and incompetence if she does not hold herself to an equal or higher standard than that to which she holds

> those subject to her writ. A dismissive and procedurally unfair approach by the Public Protector to important matters placed before her by prominent role players in the affairs of state will tarnish her reputation and damage the legitimacy of the office. She would do well to reflect more deeply on her conduct of this investigation and the criticism of her by the Governor of the Reserve Bank and the Speaker of Parliament (para [59]).

The comments from the court are a sharp reminder of the importance of the institution of the Public Protector and the need for the Constitution's guardian of state propriety herself to be beyond reproach.

Police

Case law

In *Helen Suzman Foundation & another v Minister of Police & others* 2017 (1) SACR 683 (GP), an application was made to set aside the decision of the Minister of Police to appoint Major General Ntlemeza as the national head of the Directorate for Priority Crime Investigations (DPCI). He argued that, in making this appointment, the Minister had acted unlawfully and irrationally, and had failed to perform a constitutional duty to protect the independence of the DPCI.

Much of the argument focused on General Ntlemeza's suspension of Major General Sibiya for the latter's involvement in the illegal rendition of Zimbabwean prisoners in 2010. General Sibiya successfully challenged his suspension. In upholding the Sibiya application, Matojane J made the following remarks about General Ntlemeza:

> In my view, there exists no basis in law or a fact for the third respondent to take the drastic measure of placing applicant on precautionary suspension. I agree with the applicant that the decision by the third respondent was taken in bad faith and for reasons other than those given. It is arbitrary and not rationally connected to the purpose for which it was taken and accordingly, it is unlawful as it violates applicant's constitutional right to an administrative action that is lawful, reasonable and procedurally fair (para [10]).

When General Ntlemeza sought leave to appeal against his judgment, Matojane J amplified his critique as follows:

> In my view, the conduct of the third respondent shows that he is biased and dishonest. It further shows that the third respondent is dishonest and lacks integrity and honour, he made false statements under oath (para [11]).

In his justification for the appointment of General Ntlemeza, the Minister of Police stated that he had afforded General Ntlemeza an opportunity to provide an explanation for the remarks made by the judge. On receipt of the explanation, the Minister was 'satisfied' that the remarks made by the judge were 'not findings'. Mabuse J, on behalf of a full bench, held that the Minister was required to show that he had carefully considered the two judgments to which reference has been made, and any countervailing representations, and was then under a duty properly to weigh the opposing facts and arrive at a rational decision. By contrast,

> [t]he Minister's decision not to take all these adverse factors into account amounted to a consent by him to approve the appointment of Major General Ntlemeza under polemic circumstances and was not a proper approach. Accordingly the Minister must get more kicks than halfpence. He could not have been satisfied that Major General Ntlemeza was a fit and proper person to be appointed as the national head of DPCI if he did not consider all the relevant factors (para [27]).

The problem which confronted the Minister was that the judgments of Matojane J constituted 'direct evidence that Major General Ntlemeza lacks the requisite honesty and integrity and consciousness to occupy the position of any public office, not to mention an office as important as that of the national head of the DPCI' (para [36]). Accordingly, by not taking sufficient account thereof, the Minister had failed properly to evaluate the judicial remarks by Matojane J. Consequently, the Minister failed to appreciate the serious doubt which had been cast on the fitness and proprietary of General Ntlemeza to hold so important an office. The appointment had to be set aside for want of rationality.

Crime statistics

On 24 October 2017 the South African Police Service released the country's crime statistics for 1 April 2016 to 31 March 2017. During the recorded period a total of 19 016 murders were reported, an increase from the previous year's figure of 18 673. The Eastern Cape reported the highest murder rate at 55,9 per hundred thousand people; the Western Cape, as the next highest, reported 51,7 per hundred thousand people; while the lowest was Limpopo at 14,2 per hundred thousand people. In summary an average of 52,1 people were murdered every day.

Sexual offences, as set out in the Criminal Law (Sexual Offences and Related Matters Act) 32 of 2007, include rape,

compelled rape, sexual assault, compelled sexual assault, and compelled self-sexual assault. In the reported year, 2016/2017, a total of 49 606 sexual offences were recorded by the police, which is a reduction from the 51 895 in the previous year. Some 41 503 rapes were recorded, down from 59 828 in the previous year. The Eastern Cape had the highest rape rate at 105,3 per hundred thousand people. In general, the rape rate decreased from 75,5 to 71,3 per hundred thousand people. Gareth Newham, head of the Institute of Security Studies' Justice and Violence Prevention Program, warned that these figures do not paint an accurate picture. While the official statistics reflected a decline in rape of some four per cent, Newham observes:

> If police were to start treating crime victims including rape victims with dignity and sensitivity when they come to report the crime then rape cases would increase because everyone would come report with good faith . . . At the moment sexual offences statistics are unreliable. Crime stats can only give a certain proposition of crime because very few incidents of some categories like assault and sexual offences are reported. (As quoted in *City Press* 29 October 2017.)

In 2016/17 156 450 common assaults were reported, which translates to a daily average of 428,6 people as victims of common assault. The rate of assault decreased from 301,1 per hundred thousand to 280,2 per hundred thousand during the reported year.

In the reported year, 53 418 common robberies were recorded, which is a decrease from 54110 in the previous year. On average, 146,4 common robberies were recorded every day. Robbery with aggravating circumstances occurs when a person uses a weapon to remove, unlawfully, intentionally, and forcibly, property belonging to another person. During the reported year, 140 956 robberies with aggravating circumstances were recorded, which was an increase of 6,4 per cent from the previous year. In summary, 386,2 robberies with aggravating circumstances were recorded each day.

A further set of crime statistics was released by the South African Police Services in September 2018. They cover the period April 2017 to March 2018. They paint an even more disturbing picture of the violent nature of South African society.

The statistics refer to '17 community-reported serious crimes' which are divided as follows:

Contact crimes (601 366 cases)	Contact related crimes (115 361 cases)	Property related crimes (507 975 cases)	Other serious crimes (438 113 cases)
• Murder • Sexual Offences • Attempted murder • Assault GBH • Common Assault • Common Robbery • Robbery Aggravated including the following TRIO Crimes: ▪ Carjacking ▪ Robbery - Residential ▪ Robbery - Non Residential	• Arson • Malicious damage to property	• Burglary at residential premises • Burglary at non-residential premises • Theft of motor vehicle and motor cycle • Theft out of or from motor vehicle • Stock theft	• Other theft • Commercial crime • Shoplifting

This bleak picture is best illustrated by the following two-year comparison:

	Murder	Attempted Murder	Robbery with aggravating circumstances	Common Robbery	Rape	Sexual Assault	Assault with the intent to inflict grievous bodily harm	Common Assault
2016/17	19 016	18 205	140 956	53 418	39 828	6 271	170 616	156 450
2017/18	20 336	18 233	138 364	50 730	40 035	6 786	167 352	156 243
Case Diff	1 320	28	–2 592	–2 688	207	515	–3 264	–207
%Change	6,9%↑	0,2%↑	–1,8%↓	–5,0%↓	0,5%↑	0,2%↑	–1,9%↓	0,1%↓

The murder rate represents the steepest increase; 57 people are murdered every day. The following breakdown of percentages of the cumulative murder rate indicates the pattern of murder across the nine provinces:

- Eastern Cape 18,8%; Western Cape 18,3%; KwaZulu-Natal 21,5%;Gauteng 20,8%; Free State 5,2%; North West 4,7%; Mpumalanga 4,5%; Limpopo 4,5%; and Northern Cape 1,7%.

Correctional Services

In *Naidoo v Minister of Correctional Services* 2017 (2) SACR 14, [2017] 2 All SA 651 (WCC), the plaintiff instituted action against the Minister of Correctional Services arising from injuries suffered after being severely assaulted by a prisoner who had recently been released on parole. The allegation was that the prison authorities had failed to act with reasonable care and diligence, when taking the decision to release him, given his previous convictions, including numerous counts of theft, multiple counts of assault, and one count of murder, as well as previous violations of parole conditions. Before his release on parole the prisoner had served a sentence of nine and a half years' imprisonment for theft and assault with intent to do grievous bodily harm and contravening the Dangerous Weapons Act 71 of 1968. During sentencing, the magistrate had noted that he could not be released on parole without the court being informed. Further, while serving his sentence, he had been found guilty of three offences in prison, including: conducting himself indecently by word, act or gesture; being in possession of an unauthorised article; and being in possession of dagga. Four months after his release, he assaulted the plaintiff.

Section 42 of the Correctional Services Act 111 of 1998, provides for the establishment of a case-management committee at a correctional facility. The function of this committee is to report to the parole board regarding possible placement of an offender on parole. In producing its report, the committee is mandated to place critical information before the parole board, including a report on the person's mental state, the likelihood of his or her relapsing into crime, the risk posed to the community, and the manner in which this risk can be reduced, as well as the assessment, results and progress concerning a correctional sentence plan. The court found that there was no clear evidence which enabled a decision to be taken that this prisoner had been rehabilitated which could have justified the grant of parole. In particular, a social worker's report which had been made available, had not assessed whether the programmes conducted at the prison, and which the prisoner had attended, had actually raised any prospect of rehabilitation. The mere attendance of such programmes was not sufficient to justify the granting of parole. The parole board ought, in the circumstances, to have taken reasonable steps to guard against the foreseeable harm of his release on parole, or refused the application. Its failure was an

act of negligence, and in breach of section 42(2) of the Act. Its negligence was causally connected to the harm suffered by the plaintiff, in that but for his release on parole, the plaintiff would not have been attacked. For these reasons, the Minister was held to be liable for damages.

In *Minister of Justice and Correctional Services v Walus* [2017] ZASCA 99, [2017] 4 All SA 1 (SCA), 2017 (2) SACR 473 the court was required to determine whether the decision of the Minister of Justice and Correctional Services not to place the respondent on parole was irrational and unreasonable. The respondent was convicted of the murder of the late Chris Hani. In convicting him, the trial court found that the murder had been a calculated, cold-blooded assassination of a defenceless victim for which the perpetrators had shown no remorse. The respondent was initially sentenced to death for the murder, and to five years' imprisonment for the illegal possession of an illegal firearm. In 2000, the death sentence was commuted to life imprisonment.

In 2015, following the hearing of an application for parole, the Minister decided not place the respondent on parole. At that stage, the respondent had served 21 years and six months of his sentence. Respondent successfully applied to the High Court to set aside the Minister's decision. The court ordered that the respondent be placed on parole and remitted the matter to the Minister to impose the necessary parole conditions within fourteen days of the granting of the order.

On appeal, Maya P held that all relevant information, including a full record of the proceedings, the victim impact statement, and representations which had been made by the prisoner seeking parole, constitute 'a substantive requirement' in the evaluation of an application for parole (para [17]). The court found that the Minister had not considered Mrs Hani's victim representations, including that the respondent had never apologised or shown any genuine contrition for the murder, continued to withhold the full truth about the murder, and had failed to reveal the identities of his co-conspirators – which he had previously threatened to divulge to the media (para [19]). The appellant had further given contradictory accounts of who exactly had been involved in the crime, and refused to denounce his political beliefs which he claimed had underpinned the murder.

None of this was brought to the attention of respondent (para [19]). As to the argument of the Minister that the victim impact statement would have further militated against the granting of

parole, the court observed that it overlooks that he would have had to consider the respondents representations as well, and that it is unknown what impact they would have had on the decision. And, by the same token, his decision, if the matter is remitted for his reconsideration, cannot be a forgone conclusion. That said, the omissions constitute a fatal procedural irregularity . . . (para [19]).

For these reasons, the court remitted the matter back to the Minister for a reconsideration of his decision in the light of the victim-impact statement made by Mrs Hani, and responses to it which may be generated by the respondent.

Prisons

In the annual report of the Department of Correctional Services 2016/2017 the total number of prisoners as at 31 March 2017 is reflected as follows:

Region	Total number of sentenced offenders			Total number of unsentenced inmates			Total number of inmates
	Male	Female	Total number of sentenced offenders	Male	Female	Total number of unsentenced Inmates	
Eastern Cape	14 948	321	15 269	5 083	82	5 162	20 434
Gauteng	24 848	881	25 729	10 180	375	10 555	36 284
Free state & Northern Cape	18 122	298	18 420	4 971	68	5 039	23 459
KwaZulu-Natal	21 357	496	21 853	6 163	141	6 304	28 157
Western Cape	17 223	625	17 848	10 183	441	10 624	28 472
Limpopo, Mpumalanga and North West	17 778	358	18 136	6 024	88	6 112	24 248
TOTAL	**114 276**	**2979**	**117 255**	**42 604**	**1 195**	**43 799**	**161 054**

The average number of sentenced defendants per category and age group during 2016 is reflected as follows:

Average number of sentenced offenders per category per age group during 2016/2017						
Children (younger than 18 years)		**Juveniles (18-20 years)**		**Youth and adults (21 years and older)**		**Total**
Females	Males	Females	Males	Females	Males	Females/ Males
1	147	78	3 578	2 873	111 078	117 755

As at the end of March 2017, South African prisons had 119 134 bed spaces as compared to an overall prison population 161 054; a disturbing and significant picture of overcrowding.

Prisons in urban areas have the worst overcrowding rates. The Johannesburg Correctional Centre's Medium B is 233 per cent full, while Pollsmoor Prison has a shortage of 2 448 beds. In its report the Department states that 24 506 of the 25 042 prisoners who tested positive for HIV are on anti-retroviral therapy.

Subsequent to the latest annual report from the Department of Correctional Services, Minister Michael Masutha stated that as of April 2018 Correctional Services had 163 140 inmates in 243 correctional facilities, comprising 45 294 remand prisoners and 117 820 sentenced prisoners. Again, he emphasised that this figure had to be contrasted with a 119 000 bed capacity (IOL 17 May 2018).

ADMINISTRATIVE LAW

HELENA VAN COLLER*

LEGISLATION

There was no new legislation in the field of administrative law during the period under review.

CASE LAW

During 2017, the courts were required to consider a number of cases dealing with the definition of 'administrative action' as contained in section 1 of the Promotion of Administrative Justice Act 3 of 2000 (the PAJA). Specific aspects received judicial attention, including decisions taken by the Public Protector and the exclusions from the definition. Issues addressed include the nature and content of various grounds of review, *locus standi*, issues of delay, remedies, and the issue of collateral challenges brought by organs of state. Judgments were also handed down relating to access to information under the Promotion of Access to Information Act 2 of 2000 (the PAIA). The most pertinent decisions are discussed below.

ADMINISTRATIVE ACTION

Two cases were brought in the North Gauteng High Court against decisions by the Public Protector (*Minister of Home Affairs v Public Protector* 2017 (2) SA 597 (GP) and *South African Reserve Bank v Public Protector* 2017 (6) SA 198 (GP)). In *South African Reserve Bank,* a final report issued by the Public Protector set out remedial action in the form of an instruction to Parliament to amend section 224 of the Constitution of the Republic of South Africa, 1996 (the Constitution), by altering the constitutional mandate of the Reserve Bank. The report was issued after an investigation by the Public Protector into the alleged failure of the government to recover misappropriated funds. The remedial action is binding and the Reserve Bank approached the court on an urgent basis, seeking the setting

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aside of the remedial action. Despite the fact that the Public Protector had conceded to the merits, and consented to all the relief sought, the Reserve Bank nevertheless requested the court 'to give full consideration to the issues and to satisfy itself that the order is competent and accords with the Constitution and the law' (para [9]). In terms of section 182(1) of the Constitution, the Public Protector is empowered to investigate, to report, and to take appropriate remedial action. Additional powers and functions are prescribed by national legislation. This begs the questions as to whether a decision taken by the Public Protector to take appropriate remedial action does indeed constitute 'administrative action'. The court did not really address this issue; instead, it appears to have assumed that the remedial action by the Public Protector was 'administrative action' for purposes of the PAJA, and proceeded to deal with the grounds of review:

> The remedial action should be set aside on this ground alone in terms of section 6(2)*(a)*(i) of the Promotion of Administrative Justice Act [footnote omitted] ('PAJA') on the ground that the Public Protector was not authorised by section 182(1) of the Constitution to take such action. However, given the importance of the matter and the interest of the financial markets in the resolution of the questions raised, it is necessary to consider the other grounds of review raised by all the parties (para [42]).

In addition to relying on the PAJA's grounds of review, the court proceeded to state that the remedial action is also reviewable under section 1*(c)* of the Constitution 'for violating the doctrine of the separation of powers and under section 6(2)(i) of PAJA on the ground that it is unconstitutional' (para [46]). According to the court:

> The remedial action therefore violates the doctrine of the separation of powers guaranteed by section 1*(c)* of the Constitution. The principle requires constitutionally established institutions to respect the confines of their own powers and not to intrude into the domain of others. An order directing Parliament to amend the Constitution and going so far as to prescribe the wording of that amendment offends the principle of the separation of powers mostly by seeking to fetter in advance the legislative discretion vested in Parliament. It removes from the members of Parliament their right and obligation to exercise an independent judgment when voting on proposed legislation. It potentially compels them to vote against their conscience and possibly breach their oath of office. Worse still, it forces the legislature to adopt an amendment to the Constitution which may circumvent the constitutional procedures enacted for that purpose (para [44]).

Murcott and Van der Westhuizen ('Administrative Law' (2017) 3 *JQR* para 2.1.2) argue that a violation of the separation of powers principle 'ought not to be directly invoked so as to form the basis for an independent ground upon which to review an exercise of public power, when PAJA is applicable'. The court, however, did not debate whether the remedial action taken by the Public Protector was indeed the exercise of an administrative public power and, therefore, subject to the PAJA. Because of the unique position of the Chapter 9 institutions in our constitutional order, and the fact that the remedial actions were empowered by the Constitution, an argument can be made that the remedial action might have been classified as executive in nature and, consequently, subject to the review under the constitutional principle of legality. The court did not address this issue, but simply proceeded to review and set aside the remedial action.

In *Minister of Home Affairs v Public Protector* a similar issue was brought before the court. In this instance, the Minister of Home Affairs sought the review and setting aside of a final report produced by the Public Protector relating to the alleged conduct of employees of the Department of Home Affairs. Contrary to the approach taken in *South African Reserve Bank*, the court in *Minister of Home Affairs* tackled the issue of whether or not the decisions taken by the Public Protector amounted to 'administrative action' as envisaged in the PAJA. The court commenced by setting out the functions of the Public Protector with reference to section 182 of the Constitution and the relevant sections of the Public Protector Act 23 of 1994. Prinsloo J referred to *South African Broadcasting Corporation SOC Ltd & others v Democratic Alliance & others* 2016 (2) SA 522 (SCA) 552H-J, where the court held:

> Any affected person or institution aggrieved by a finding, decision or action taken by the Public Protector might, in appropriate circumstances, challenge that by way of a *review application* (emphasis added) (*Minister of Home Affairs* para [35]).

And further:

> For it is well settled in our law that until a decision is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences and cannot simply be overlooked (*Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 6 SA 222 (SCA) . . . It was submitted, however, that that principle applies only to the decision of an administrative functionary or body, which the Public Protector is not (*Minister of Home Affairs* para [36]).

The judge was of the view that '[i]t does, however, appear, if I understood the judgment correctly, that the learned judges of appeal considered the decisions of the Public Protector to amount to administrative action' (para [36]). However, these excerpts actually point away from administrative action, since the reference to a 'review application' in the quote above, does not necessarily mean it is a review of 'administrative action'. Further, it is clear that, by implication, the court deemed the Public Protector *not* to be an administrative functionary. This is supported by the High Court decision in *Democratic Alliance v South African Broadcasting Corporation Ltd* 2015 (1) SA 551 (WCC), in which the court made it clear that they relied on the principle of legality and did not answer the questions as to whether the decision was in fact administrative action or not. According to the court:

> In the present case the DA relies on the doctrine of legality. Since the application was launched promptly after the decisions complained of, it would make no difference whether or not we classified the impugned decisions as 'administrative action' for purposes of PAJA. It suffices to find, as I do, that the decisions involved the exercise of public power and are in principle susceptible to review (*DA v SABC* para [166]).

In *Minister of Home Affairs* Prinsloo J then turned to the definition of 'administrative action' in the PAJA. The court found that the Public Protector is an organ of state or, at least, a juristic person that performs a public function. With reference to *Minister of Defence and Military Veterans v Motau & others* 2014 (5) SA 69 (CC), the court took the following view:

> The observation of the learned Judge, at 85C–E, that 'while administrative powers more commonly flow from legislation, PAJA's definition of ''administrative action'' expressly contemplates that the administrative power of organs of state may derive from a number of sources, including the Constitution' appears to be in complete harmony with the position of the Public Protector (para [44]).

The court was satisfied that 'as a general proposition, the decisions and actions of the Public Protector amount to administrative action as intended by PAJA' (para [47]). To cover his bases, Prinsloo J stated:

> (2) If I am wrong in this conclusion, the decisions of the Public Protector amount to something akin to administrative action, *à la SABC v the DA*.
> (3) Either way, the actions and decisions of the Public Protector can, in a proper case, be challenged in terms of PAJA, as was done in this case by the applicants. Where appropriate, there will also be

> room for a so called 'legality review' if it is alleged that the Public Protector exercised powers and performed functions beyond that conferred upon her by law (para [47]).

The court did not explain further what exactly it meant by a review *à la SABC v DA*'. Moreover, it neglected properly to consider whether the decision might have been executive in nature and subject to the principle of legality. The court ought to have taken this opportunity to apply the factors laid down previously by the highest court in *President of the Republic of South Africa & others v South African Rugby Football Union & others* 2000 (1) SA 1 (CC). These factors include consideration of the source of the power, the nature of the decision, and the nature of the Public Protector as a Chapter 9 institution. Proceeding on the assumption that the decision of the Public Protector constituted 'administrative action', the court was satisfied that 'the outcome of the Public Protector's investigation is rationally justifiable and her decisions and the remedial action taken fall within the bounds of reasonableness' (para [68]). The court dismissed the application.

State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd 2017 (2) SA 63 (SCA) was an appeal to the Supreme Court of Appeal by the State Information Technology Agency (the SITA) against a decision by the Gauteng High Court dismissing its application to declare a decision to conclude a contract with Gijima Holdings (Pty) Ltd unenforceable for lack of compliance with public procurement requirements. After the SITA had unlawfully cancelled a contract with Gijima for the provision of information technology services, it concluded a further agreement with Gijima which had not gone through a competitive bidding process, as part of a settlement. When Gijima raised concerns, the SITA assured them that it had the necessary authority to conclude the contract. A payment dispute arose between the parties, and during the arbitration proceedings the SITA argued that the contract had been concluded in contravention of the public procurement system under section 217 of the Constitution. The SITA argued that the PAJA did not apply when an organ of state seeks to review its own decision, and that even if the PAJA did apply, it had a choice to proceed either by way of a review under the PAJA, or to rely directly on the principle of legality (para [2]). The majority in the Supreme Court of Appeal agreed with the High Court that a decision to award a contract for services constituted 'administrative action' as defined in the PAJA. It held as follows:

> It is well established that a decision by a state entity to award a contract for services constitutes administrative action in terms of s 1 of PAJA. Once this is accepted, there is no good reason for immunising administrative decisions taken by the state from review under PAJA (para [16]).

As the PAJA does not expressly exclude the state from instituting review proceedings, the court was satisfied that no reasons existed why the PAJA should not apply when state entities challenge their own decisions (paras [16] [22]). For a thorough discussion of the minority approach taken by Bosielo JA, see Danie Brand, Melanie Murcott & Werner van der Westhuizen 'Administrative Law' (2016) 3 *JQR* paragraph 2.1.1. They argue against the approach that the SITA should be allowed to invoke legality rather than the PAJA, and the narrow approach advanced Bosiela JA in interpreting 'any person' to 'exclude the state and offer protection only to ''private citizens''. In the light of the Constitutional Court's approach in *Merafong* and *Tasima* (discussed below under 'Remedies in relation to collateral challenges'), in which the court ruled that an organ of state was permitted to bring a collateral challenge, and that its mere status as an organ of state does not exclude it absolutely from a reactive challenge, Bosielo JA's view might not stand. Arguably, and similarly, there should be no reason why an organ of state should be excluded from bringing a review application under the PAJA for the review of its own decision, solely on the basis of its status as an organ of state. The court proceeded to review the SITA's decision as a final decision which had the capacity adversely to affect Gijima's rights. It held that its failure to follow a competitive process could be reviewed on the basis of various provisions of the PAJA, including that 'it did not have the authority to contract outside of a competitive bidding process to do so; it contravened s 217 of the Constitution; and had also failed to comply with a mandatory and material procedure prescribed by law' (para [21]). The court also applied the delay rule provided for in section 7 of the PAJA. In so doing, the court rejected the SITA's argument that, in bringing its review application outside of the PAJA-prescribed 180-day rule and not applying for condonation, it could rely on the principle of legality. The court firmly rejected this view, and confirmed that the proper role for the principle of legality is to act as a 'safety-net or a measure of last resort when the law allows no other avenues to challenge the unlawful exercise of public power. It cannot be the first port of call or an

alternative path to review, when PAJA applies' (para [38]). This approach is correct. The court concluded:

> In summary, we hold that PAJA applies when an organ of state seeks to set aside its own administrative decisions. And when PAJA does apply, litigants and the courts are not entitled to bypass its provisions and rely directly on the constitutional principle of legality. But even if this case is approached as a legality review, SITA failed to place facts before the court to overcome the hurdle of the unreasonable delay in commencing proceedings against Gijima (para [44]).

The majority, therefore, held that the PAJA applied to review applications instituted by organs of state, and dismissed the appeal with costs.

South Africa National Roads Agency Ltd v Cape Town City 2017 (1) SA 468 (SCA) was an appeal from the Western Cape High Court to review and set aside two decisions relating to a proposal to declare parts of the national roads near Cape Town toll roads. The South African National Roads Agency Ltd (the SANRAL) proposed the declaration of portions of various highways near Cape Town toll roads. The Minister of Transport, acting in terms of the South African National Roads Agency Ltd and National Roads Act 7 of 1998, approved the proposal. The High Court started by asking the threshold question of whether the two decision constituted 'administrative action' for purposes of the PAJA. The court answered this question in the affirmative. The High Court condoned the City's delay and granted the application for review. On appeal, the Supreme Court of Appeal – despite acknowledging that the categorisation of the various decisions with reference to the PAJA was a 'convenient starting point, in addressing SANRAL's contentions' (para [70]) – still expressed its reluctance to deal with the issue of the PAJA's relevance. Navsa AJ noted:

> I am rather less sanguine concerning the nature of the Transport Minister's powers in making the decisions. In *Grey's Marine Hout Bay (Pty) Ltd & others v Minister of Public Works & others* [2005] ZASCA 43; 2005 (6) SA 313 (SCA), Nugent JA, stated that the question as to 'what' constitutes administrative action – the exercise of the administrative powers of the State – has always eluded complete definition (para [71]).

The court did touch on certain aspects pointing to the decision being executive rather than administrative, but could have engaged with the issue of administrative action in far greater detail – especially as it had been raised by the parties and dealt

with in detail by the court *a quo*. The Supreme Court of Appeal stated:

> Although my inclination, insofar as to whether the Minister and SANRAL's Board were engaged in administrative action, is the converse of that of the court below, I do not find it necessary to express a definitive conclusion on this question. Because the challenges to the Board's decision and the decisions of the Transport Minister in terms of s 27 of the Act are based on the principle of legality, it does not, for practical purposes, matter whether condonation for the delay in launching the application is approached in terms of the provisions of PAJA or otherwise. As will be demonstrated below, in both instances, ultimately the decision whether to condone the delay is based on whether the interests of justice so require (para [78]).

This approach evidences disrespect for the legislature's role in enacting the PAJA (Brand, Murcott & Van der Westhuizen above para 2.1.1). The court proceeded to condone the City's delay in bringing the application for review and dismissed the appeal with costs.

Specific exclusions: Judicial functions

In *NCP Chlorchem (Pty) Ltd v National Energy Regulator* 2017(6) SA 158 (GJ), the South Gauteng High Court scrutinised the exercise of the dispute-resolution power of the National Energy Regulator of South Africa (the NERSA), when it made a ruling under the Electricity Regulation Act 4 of 2006 (the ERA). The applicant, NCP Chlorchem (Pty) Ltd (NCP), is South Africa's largest producer of liquefied chlorine used for water purification. NCP drew its electricity direct from Eskom, but was charged a municipal retail rate by the Ekurhuleni municipality. Aggrieved, NCP approached the NERSA to exercise its dispute-resolution powers in terms of section 30 of the ERA. NCP requested the NERSA to declare that it was entitled to contract directly with Eskom for electricity at the Eskom rate. The NERSA ruled that NCP must pay the Eskom rate together with a mark-up of 24 per cent. NCP then approached the court seeking to review the NERSA ruling. Of importance is the court's analysis of the nature of the NERSA's dispute-resolution power. The court reviewed the various functions with reference to section 4 of the ERA (para [15]). The mediation and arbitration power of the NERSA is regulated by section 30 of the ERA. Subsection 30(4) reads:

> The mediation or arbitration in terms of this section is done at the request of the parties to the dispute and no decision of the Regulator

> or the person contemplated in subsection (2), taken in the course of the mediation process, must be regarded as a decision contemplated in section 10(3) or (4) of the National Energy Regulator Act (para [15]).

A 'decision', in accordance with section 10(3), refers to proceedings in the High Court for judicial review under the PAJA, and in section 10(4) to an appeal to the High Court. On an interpretation of these provisions, the court was of the view that mediation or arbitration took place at the request of the parties and, therefore, was similar to any private arbitration leaving it up to the parties to decide whether or not to comply with the ruling. The court held:

> NERSA resolves disputes between licenses and consumers or end users by mediation and arbitration. It does so at the request of the parties and its consequent decisions are not 'decisions of the Energy Regulator' in terms of section 10 of the National Energy Regulator Act. It does not have powers to enforce such decisions and does not attempt to do so. Rather, like any private arbitration, it is up to the parties themselves to comply with a ruling and, if necessary, to enforce a ruling in their favour. It is for this reason that the exercise of the dispute-resolution power is not administrative action that is subject to review in terms of PAJA (para [17]).

The court relied on the *dictum* in *Total Support Management (Pty) Ltd & another v Diversified Health Systems (SA) (Pty) Ltd & another* 2002 (4) SA 661 (SCA) paragraphs [24] and [25], where it was held that '[a]rbitration does not fall within the purview of ''administrative action''; it arises through the exercise of private rather than public powers' (*Total Support Management* para [24]):

> As arbitration is a form of private adjudication the function of an arbitrator is not administrative but judicial in nature . . . Decisions made in the exercise of judicial functions do not amount to administrative action . . . It follows in my view that a consensual arbitration is not a species of administrative action and sec[tion] 33(1) of the Constitution has no application to a matter such as the present (*Total Support Management* para [25]).

However, in paragraph [26] of *Total Support*, referring to the case of *Carephone (Pty) Ltd v Marcus NO & others* 1999 (3) SA 304 (LAC), the Supreme Court of Appeal emphasised that '[t]he position may be different in the case of statutorily imposed arbitrations'.

In terms of the authority vested in the NERSA in terms of section 30 of the ERA, the NERSA was authorised to resolve a dispute referred to it 'by such means and on such terms as the Regulator sees fit' (para [18] of *NCP Chlorchem*). The court accepted that

the NERSA had chosen to exercise its dispute resolution power by way of arbitration in terms of legislation, and in the exercise of a public power. On that basis, the court was willing to review it as the exercise of public power, in terms of the principle of legality. The court held:

> Even if it is not administrative action, such a decision is subject to the requirement, stemming from the principle of legality, that it must be lawful and rational. The latter concept includes a duty to act fairly – a duty that can arise independently of any statutory obligation imposing the duty. It follows that the decision of NERSA is reviewable (para [18]).

The exercise of the dispute-resolution power by the NERSA, therefore, is not at all similar to a private arbitration, but a clear ruling by an administrative body in the exercise of a public power in terms of legislation – clearly something that in the ordinary course should be reviewable in terms of the PAJA. If the court was restrained by its interpretation of section 10, it should have entertained the submission on the constitutionality of section 30(4) of the ERA. Instead, the court noted as follows:

> It follows that the decision of NERSA is reviewable. In view of this finding and EMM's concession that the NERSA decision is, indeed, reviewable, there is no need to consider the question of the constitutionality of section 30(4) of the Electricity Regulation Act as foreshadowed in prayer 4 of the notice of motion (para [18]).

Allowing a review in accordance with the principle of legality, but not administrative review in terms of the PAJA, clearly points towards the possibility of section 30(4) being unconstitutional for not giving effect to section 33 of the Constitution. The court proceeded to review the decision in terms of the principle of legality, and set it aside based on procedural unfairness in the dispute resolution process. The court found that the lack of consensus between NCP and the NERSA was sufficient to constitute exceptional circumstances 'which would justify the court substituting its decision for that of NERSA' (para [26]), and declaring that Eskom was not entitled to refuse to enter into an electricity-supply agreement with NCP (para [56]).

Specific exclusions: Executive functions

Earthlife Africa Johannesburg v Minister of Energy 2017 (5) SA 227 (WCC) was a challenge against certain determinations in the procurement of nuclear power by the Minister of Energy in accordance with section 34 of the ERA. The Minister issued two

determinations under section 34 – one in 2013 and one in 2016 – declaring that new electricity capacity is required to meet South Africa's electricity supply. Under the 2013 determination, the energy was to be procured by the Department of Energy, whilst the 2016 determination appointed Eskom Holdings (SOC) Ltd as the new procurer. Earthlife Africa instituted review proceedings in the Western Cape High Court, submitting that both the Minister's determination and the NERSA's concurrence under section 34 of the ERA, constituted administrative action for purposes of the PAJA and were reviewable for lack of lawfulness, rationality, and procedural fairness. The respondents submitted that neither decision constituted administrative action and that both amounted to 'encased policy directives' taken by the national executive ([para [18]). The applicants were of the view that it was unnecessary for the court to decide whether the decisions constituted administrative or executive action. They argued that they constituted 'policy', which would in any event be subject to a rationality review in accordance with the principle of legality. The court, however, did answer the question, referring to the distinction drawn in the *SARFU* and *Ed-U-College* cases (above) between the implementation of legislation and the formulation of policy (para [30] [31]). (See *SARFU* para [143] and *Permanent Secretary, Department of Education and Welfare, Eastern Cape v Ed-U-College, (PE) (Section 21) Inc* 2001 (2) SA 1 (CC) para [18]). The court considered various factors, such as the source of the Minister's power, the nature of the power as one with far-reaching consequences, and the binding effect of the power on the NERSA. All of these factors pointed to the conclusion that the section 34 determination by the Minister constituted 'administrative action' (para [32]). As for the NERSA's concurrence, the court had been satisfied that it met all the requirements of the definition of 'administrative action' (paras [37]–[40]).

In *University of the Free State v Afriforum* 2017 (4) SA 283 (SCA), the university appealed against a decision of the Free State High Court in the matter of *Afriforum & another v Chairman of the Council of the University of the Free State* [2016] ZAFSHC 130 (21 July 2016). The university had adopted a new language policy in terms of which English was to become the primary medium of instruction at the University of the Free State (the UFS). The applicants argued that the adoption of the new policy contravened various grounds of review, and sought an order setting aside the decision. The court held that the decision to

adopt the new language policy was not rationally connected to the facts and circumstances which informed the decision (para [59]) and reviewed and set aside the decision. The Supreme Court of Appeal took the correct approach by first addressing the threshold question of whether the decision by the UFS to adopt the language policy in fact constituted 'administrative action' for purposes of the PAJA. The court noted that the applicants sought a review of the decision to adopt the policy, an order setting it aside as unlawful administrative action, and not to interdict the implementation of the policy (para [15]). As the decision related to the adoption of the policy and not the policy itself, the court stated:

> It is the UFS's executive decision to determine its language policy that is being attacked and not any of its administrative actions flowing from the adoption of the policy. The impugned decision therefore does not constitute administrative action as contemplated by PAJA (para [18]).

Clearly, the court saw the decision as the adoption of a policy rather than its implementation:

> The determination of whether an action by an organ of state is administrative action requires an analysis of its nature and a positive decision that it is of an administrative character. In general policy-making lies within the realm of an organisation's executive authority, and the implementation or application of policy lies within its administrative domain. The more closely a decision is related to the formulation – or the adoption – of policy, the more likely it is to be executive in nature; where it is closer to the implementation of policy, this suggests it is administrative. Administrative decisions are generally and appropriately subjected to a more exacting administrative standard of review than executive decisions (para [17]).

Accordingly, the court found that the decision to adopt the language policy did not qualify as administrative action reviewable under the PAJA. This notwithstanding, the court accepted that taking of the decision still amounted to the exercise of a public power, and proceeded to review it based on the principle of legality. The court held the UFS had not misconstrued its powers, and upheld the appeal.

Grounds of Review

Lawfulness: Authority

Minister of Home Affairs v Saidi 2017 (4) SA 435 (SCA) is the sequel to the High Court application by various asylum seekers

for the review and setting aside of a decision by the refugee reception officer (the RRO) refusing their application for refugee status and the extension of their permits. The RRO is empowered by the Refugees Act 130 of 1998 to extend an asylum seeker's permit. The applicants had applied for refugee status, and been granted permits. However, their application for refugee status, and their subsequent appeals, were refused. In accordance with section 22(3) of the Refugees Act, the RRO 'may, from time to time extend the period for which a permit has been issued'. The RRO interpreted this section to mean that the power given to her to extend permits in terms of this section, did not endure beyond the exhaustion of internal remedies, and when she refused the extension, she had not taken the merits of the case into account. The High Court made an order declaring that the RRO has the power to extend the permits even after an applicant has exhausted internal remedies, and that the decision to refuse the extension falls to be reviewed and set aside. The applications were remitted back to the RRO for consideration (para [8]). The principal issue in the subsequent appeal was whether the Refugees Act empowered the RRO to extend permits. The court also allowed a cross-appeal to the effect that it was argued that should the court find that the RRO was so empowered, the High Court should have directed the RRO to extend the permits (para [10]). In relation to the issue of authority, the court found that there was 'nothing in the language of s 22(3) itself which limits the power to extend permits to the period prior to the exhaustion of the internal remedies' (para [12]) The court interpreted the various sections of the Refugees Act, its purpose, and its background with reference to various international conventions, and section 39(2) of the Constitution which requires that statutes be interpreted 'to promote the spirit, purport and objects of the Bill of Rights' (para [27]). The court concluded that section 22(3) of the Refugees Act 'is at least capable of the interpretation that the RRO is empowered to extend permits after the internal remedies have been exhausted' (para [28]). As to the cross-appeal, the asylum seekers argued that the High Court should have directed the RRO to extend the permits as they had a 'substantive legitimate expectation' that the permits would be extended, or that the court should have substituted its decision for that of the RRO. In relation to both, the exercise of a discretion by the RRO was determinative in the court's ruling. In relation to the legitimate expectation, the court held:

> Each RRO is required to exercise her or his own discretion. To fail to do so could clearly be impugned on review. In my view, these factors preclude any finding that the asylum seekers proved that they had a legitimate expectation that the permits would be extended as contended for by them (paras [39] [40]).

As for the substitution order, the court viewed the discretion conferred on the RRO in terms of section 22(3), with reference to the word 'may', as a 'true discretion' as opposed to 'power coupled with a duty to use it in a certain way' (para [42]). With reference to the case of *Trencon*, and the 'exceptional circumstances' requirements, the court was of the view that the High Court was correct not to substitute its own discretion for that of the RRO (para [43]). Both the appeal and the cross-appeal were dismissed with costs.

Gees v Provincial Minister of Cultural Affairs and Sport, Western Cape 2017 (1) SA 1 (SCA) was an appeal against a decision by the Western Cape High Court, refusing to set aside a decision by Heritage Western Cape (HWC) to grant a permit to the appellant subject to various conditions. The appellant applied for a demolition order on a property he wanted to develop. As the structure on the property was more than 60 years old, he required a demolition permit in terms of the National Heritage Resources Act 25 of 1999. The permit was initially refused, but eventually granted by the appeals tribunal, subject to various conditions. The appellant was aggrieved by all the conditions and argued that the tribunal had exceeded its powers and was not authorised, in terms of the relevant sections of the Act, to impose conditions. In interpreting these sections, the court relied on section 48(2) which conferred a discretion on a heritage authority to issue a permit 'subject to such terms, conditions and restrictions or directions as may be specified in the permit, including a condition. . .' (para [17]). The court interpreted 'including' to mean that in the exercise of its discretion, the authority may include any appropriate condition (para [17]). The court held:

> In my view, the purpose and effect of the conditions imposed in the present matter were clearly designed to enable HWC to fulfil its duty in terms of the Act, ie to conserve a heritage resource. Therefore the conditions, contrary to the appellant's submission, were not aimed at controlling development as such, but constituted conditions with a conservation objective. It follows that the conditions were lawfully imposed in terms of s 48(2) of the Act (para 29]).

The court dismissed the appeal with costs.

Lawfulness: Error in law

In *Da Cruz & another v City of Cape Town & another* [2017] 1 All SA 890 (WCC), 2017 (4) SA 107, the applicants, the body

corporate and one of the owners of a unit in the Four Seasons building in Cape Town, sought to review and set aside a decision by the City of Cape Town (the City) to approve building plans for the renovation of a building adjoining the Four Seasons, which would effectively convert their existing balconies into small courtyards. The applicants argued that in approving the plans, the City had ignored relevant sections of the National Building Regulations and Buildings Standards Act 103 of 1977, and that the City had to address the reasonable expectations of notional purchasers of apartments in the Four Seasons building – which it had failed to do. The applicants based their application for review on various grounds of review under section 6(2) of the PAJA, including that the City's decision had been materially influenced by an error of law; was not rationally connected to the information before the decision-maker; had been taken because relevant considerations were not considered; and was unreasonable (para [20]). The court proceeded to consider the scope and purpose of the relevant sections in detail. Further, the court highlighted the importance of contextual assessment when considering applications, and noted:

> The object of harmonious and co-ordinated building development is common to the planning and the building legislation. This highlights the responsibility resting on a local authority, when it considers a building plan application, to have regard not only to the compliance of the proposed building with the technical restrictions and regulatory prescriptions in respect of building development on the building plan applicant's property, but also to the contextual effect of the contemplated finished product. The obligation to consider the contextual effect of the proposed building implies that the local authority must take account of how the proposed structure would fit in with the existing development of neighbouring properties, and, of course, what might reasonably be anticipated to be the possible future use of such properties (para [45]).

The court was of the view that the Building Act 'unambiguously imposes a duty of contextual assessment on local authorities whenever they consider a building application' (para [47]). This assessment occurs in the second stage of the inquiry, after the local authority has satisfied itself that the proposal complies with the required restrictions which, in this case, it did. The court concluded that the functionaries in this case had approved the plans without considering their effect on the extant building on the adjoining erf, and, consequently, that this mistaken view was based on an error of law:

> The functionaries failed to consider and address the question whether a reasonable and informed purchaser of a unit on the eighth floor of the Four Seasons building would foresee that the regulating authority, having approved balconies along the common boundary, would permit the development of the adjoining erf in such a manner as to effectively destroy the utility of the balconies as such, and with the degree of overbearing intrusiveness that allowing a three storey solid wall to be built up hard against them would unavoidably occasion. For these reasons I have concluded that the applicants have established that the approval of the second respondent's building plan application occurred in circumstances in which the decision-maker was materially influenced by an error of law (ie a misapprehension of the import and requirements of s 7(1) of the Building Act) and in which there was a resultant failure by the decision-maker to take into account a relevant consideration (ie whether, in the peculiar factual circumstances, the construction of the second respondent's building hard up against the balconies on the eighth floor of the Four Seasons building and close to the windows on the ninth and tenth floors in the manner required by the provision gave rise to any of the disqualifying factors (paras [68] [69]).

The City's decision to approve the building plans was reviewed, set aside, and remitted back to the City for reconsideration.

Gerstle v Cape Town City 2017 (1) SA 11 (WCC) concerned a decision by the City of Cape Town to approve building plans in respect of two single-storey properties situated in the front row of a group-housing development called Mill Row. The applicants, owners of a double-storey property in the back row of the development, sought the review of the City's approval of building plans submitted by owners of two of the dwellings in the front row to convert their buildings into double-storey structures. The applicants argued that the City had failed to comply with section 7(1)*(b)*(i) of the National Building Regulations and Building Standards Act 103 of 1977 by not complying with the applicable zoning scheme. Further, they argued that by taking away their access to sunlight and a view, the proposed development would negatively affect the 'harmonious architectural entity' – the definition of a group-housing dwelling. The court accepted the fact that 'what constitutes a harmonious architectural entity is a difficult question which would 'call for a fair amount of subjectivity' (para [26]). Persuaded by the specific factual context, the court stated:

> [The] appellants' case was correctly characterised as an attempt to utilise the concept of an 'harmonious architectural entity' to be extended so as to create rights to a view, to privacy and to light, notwithstanding that none of these claims were specifically provided

> for in any of the applicable legal mechanisms which were available to the developers and to which reference has already been made (para [32]).

The court concluded that there were no reasons to interfere with the City's approach in adopting the 'carefully considered and justifiable' recommendations of the building control officer (para [37]). The court dismissed the appeal with costs.

Genesis Medical Scheme v Registrar of Medical Schemes & another 2017 (9) BCLR 1164 (CC), 2017 (6) SA 1, was another application for judicial review based on an error of law as a ground of review under section 2 of the PAJA. The Registrar of Medical Schemes rejected Genesis Medical Scheme's financial statements. In so doing it relied on a judgment of the High Court in *Registrar of Medical Schemes v Ledwaba NO & others* [2007] ZAGPHC 24 (*Omnihealth*), where the court held that personal medical savings accounts (PMSA) funds constituted 'trust property' in terms of the Financial Institutions (Protection of Funds) Act 28 of 2001, and, therefore, did not fall into Omnihealth's insolvent estate and should be administered separately in accordance with the FIA (*Genesis* paras [17] [18]). Following the decision in the *Omnihealth* case, schemes were advised to comply with the rulings handed down in that case. The Registrar then based his rejection of Genesis's financial statements solely on the *Onmihealth* case. The financial statements incorrectly reflected its financial position as they mistakenly reflected Genesis's PSMA funds as 'assets' and understated Genesis's liabilities (para [8]). The court was confronted with the issue of whether the decision in the *Omnihealth* case was correct. Genesis argued that the *Omnihealth* case had been decided incorrectly and, therefore, that the Registrar's decision stood to be reviewed and set aside under the PAJA as following *Omnihealth* constituted 'an error of law' which materially influenced the Registrar's decision (para [13]). As for whether this amounted to an error of law, Jafta J for the minority held:

> [T]he error of law relied on by Genesis must arise from the misinterpretation or misapplication of the MSA provisions by the Registrar which relate to the submission of annual financial statements. This is so because the impugned decision was reached in the exercise of power conferred on the Registrar alone by those provisions (para [93]).

Cameron J, writing for the majority, disagreed and stated that this interpretation was 'inappropriately rigid'. He noted:

> Constitutional precepts caution against adopting so rigid an approach. By explicitly affording the right to just administrative action, the Constitution bestows on courts the power to review every error of law, provided of course it is 'material'. PAJA embodies this right, in explicit terms. There is nothing in the statute that narrows or stifles it (para [21]).

A flexible approach is preferable. In relation to its 'materiality', the court was of the view that the Registrar's decision was not solely influenced by the decision in *Omnihealth.* The majority proceeded as follows:

> *Omnihealth* was effectively the be-all and end-all of the Registrar's decision. Without *Omnihealth*, the Registrar would not have taken it. The parties would never have been at odds. In lawyers' language, *Omnihealth* was 'material' to the disputed decision. And if *Omnihealth* was wrong, that means the Registrar's decision was wrong then – and that it is wrong now (para [22]).

After an analysis of the various provisions of the Medical Schemes Act, the court concluded that *Omnihealth* had been incorrectly decided and a wrong approach had been taken in defining 'PSMA funds'. The court held that '[w]hen *Omnihealth* tumbles, the Registrar's decision tumbles, and with it the circulars, all in one' (para [62]). The court upheld the appeal.

Procedural fairness/rationality

In *Earthlife* (above), the court had to decide whether two section 34 decisions made by the Minister of Energy and the NERSA complied with the requirements of procedural fairness under the PAJA. The applicant argued that neither of the decisions had been preceded by public participation. Sections 9 and 10 of the ERA set out the duties of members of the energy regulator, and the procedural requirements for decisions – similar to sections 3 and 4 of the PAJA, which require administrative action to be procedurally fair. According to the court, a rational and fair decision-making process would have provided for 'public input so as to allow both interested and potentially affected parties to submit their views and present relevant facts as evidence to NERSA' (para [45]). As there had been no public participation, the court found the NERSA's decision to concur in the Minister's determination, procedurally unfair and in contravention of section 10 of the ERA and section 4 of the PAJA. The court held:

> For these reasons, I consider that NERSA's decision to concur in the Minister's proposed 2013 determination without even the most limited

> public participation process renders its decision procedurally unfair and in breach of the provisions of s 10(1)*(d)* of ERA read together with s 4 of PAJA (para [46]).

Moreover, the court noted that should the decision have been decided on the principle of legality, it still had to meet the test for rational decision-making. According to the court:

> [The NERSA] failed to explain, for one, how it acted in the public interest without taking any steps to ascertain the views of the public or any interested or affected party. For these reasons I consider that NERSA's decision fails to satisfy the test for rationality based on procedural grounds alone (para [50]).

The court applied the same reasoning in relation to the 2016 decision. In addition to procedural fairness, several substantive grounds of review were raised. However, the court considered that it would serve no purpose to consider the substantive issues as the procedural challenges succeeded. Both determinations, including the concurrence by the NERSA, were reviewed and set aside.

Remedies and procedures

Locus standi

Areva NP Incorporated in France v Eskom Holdings SOC Ltd & others 2017 (6) SA 621 (CC), 2017 (6) BCLR 675, is an appeal to the Constitutional Court in respect of a tender process (see the discussion of *Westinghouse Electric Belgium SA v Eskom Holdings (SOC) Ltd & another* 2016 (3) SA 1 (SCA) in 2016 *Annual Survey* 68 and 81). The *Westinghouse* case concerned a tender process by Eskom in respect of the replacement of six generators at the Koeberg nuclear power station. There were only two qualified bidders involved in the tender process, the appellant, Westinghouse Electric Belgium SA (Westinghouse), and Areva NP (Areva). In the High Court Areva's argument that Westinghouse lacked *locus standi* was rejected. In the Supreme Court of Appeal, the court focused its attention on the tender process and concluded that the award was unlawful and irrational and set it aside. The Supreme Court of Appeal also dismissed Areva's argument on *locus standi* and remitted the matter back to Eskom for reconsideration.

Areva then approached the Constitutional Court. Again it raised the issue of *locus standi*. Zondo J, for the majority, focused mainly on the procedural issue relating to standing, while

Moseneke DCJ, for the minority, addressed both the issue of standing and the substantive issues relating to the fairness of the bidding process. Areva's argument was that Westinghouse Electric Belgium SA was not the true tenderer, but Westinghouse USA, a multinational corporation. When Westinghouse submitted its tender, the covering letter indicated that it was submitted on behalf of Westinghouse USA (para [10]). The court found that 'its [Westinghouse SA's] statement that it made the bid in its own right is ''plainly wrong''. . . The own interest litigant must therefore demonstrate that his or her interests or potential interests are directly affected by the unlawfulness sought to be impugned' (para [32]), and proceeded to the question of whether Westinghouse SA demonstrated a sufficient interest to satisfy the requirements for standing to bring the challenge. The court held:

> I think not. In the present case the only thing that WEBSA said in its founding affidavit in the High Court in support of its contention that it has *locus standi* was that it was one of the two bidders and it lost the bid to Areva. This has been shown not to be true. It also said that it and Westinghouse USA are part of the same group of companies . . . It is abundantly clear from the language of the final offer upon which WEBSA relies as the offer that it made to Eskom in its own right that that offer was submitted by WEBSA on behalf of Westinghouse USA and not in its own right (paras [33] [34]).

The court was further of the view that Westinghouse SA and Westinghouse USA were 'two separate legal entities and each one of them bears its own separate rights and incurs its own separate obligations' (para [37]). The court held:

> When each one of the two separate legal entities acts in its own right, no obligations or rights attach to the other simply by virtue of the fact that they both belong to the same group of companies. This purported defence is no defence at all in law. Just because company A belongs to the same group of companies as company B does not give any one of the two companies *locus standi* to institute court proceedings in its own right in a matter that only directly affects the other company (para [38]).

The court concluded that Westinghouse SA lacked *locus standi* and granted Areva's appeal. The minority was of the view that Westinghouse had the requisite standing, both at common law and in terms of section 38, and that 'it is not in the interests of justice for a court of final instance to dispose of a matter, of this constitutional magnitude, commercial import and of high public interest, by way of only a technical and dilatory bar as locus standi' (para [50]). The majority, however, took the view that

where a litigant has failed to show standing, the court should only consider the merits in 'exceptional cases or where the public interest really cries out for that' (para [41]). The fact that both bidders were neck-and-neck in the bid for the tender and were both capable of doing the job, and because time was of the essence, the court declined to enter into the merits of the application and upheld Areva's appeal.

Substitution

Aquila Steel (SA) Ltd v Minister of Mineral Resources 2017 (3) SA 301 (GP) concerned an application for review of a decision taken by the Minister of Mineral Resources to reject the internal appeal launched by Aquila Steel (SA) Ltd (Aquila) against the grant of a prospecting right to another company, and the decision by the Minister to dismiss Aquila's mining rights application. Aquila requested declaratory relief in the form of a substitution order requesting the court to substitute its own decision for that of the Minister, based on the grounds including delay and institutional bias. Aquila was the holder of prospecting right over a number of properties and later applied for mining rights in respect of one of these properties. Having heard nothing from the Department, they were informed that their application had not been considered as an earlier prospecting right had been granted to another company. In relation to the decision to dismiss Aquila's mining rights, the Minister found that the fact that there was an existing prospecting right over the same property 'precluded the grant of the Aquila mining right. This was the only ground upon which the Minister found that the Aquila's application for a mining right should not be granted' (para [105]). The issue before the court was whether to set aside the decision and remit it back to the Minister, or

> whether I should, as Aquila asks, substitute the decision of the court for that of the Minister to the extent that I direct that the Minister grant Aquila the mining right for which it applied and direct the Minister to determine, within a specified time, appropriate conditions to which the mining right should be subject (para [105]).

The court acknowledged that such a request raised the important principle of separation of powers. (See 2016 *Annual Survey* 81 for a discussion of *Westinghouse Electric Belgium SA v Eskom Holdings (SOC) Ltd & another* 2016 (3) SA 1 (SCA) and 2015 *Annual Survey* 66 for a discussion of *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd*

& another 2015 (5) SA 245 (CC), 2015 (10) BCLR 1199 in relation to substitution orders.) In brief, *Westinghouse* involved a tender process by Eskom in respect of the replacement of six generators at the Koeberg nuclear power station. The court *a quo* was asked for a substitution order, but the application was dismissed. The appeal succeeded in the Supreme Court of Appeal. The court referred to its own decision to award an order of remittal to a bid-evaluation committee which had been reversed by the Constitutional Court in the *Trencon* case. In explaining the exceptional-circumstances test required for a substitution order, the Constitutional Court in *Trencon* emphasised the need to be mindful of judicial deference, and highlighted certain important factors that need to be considered based on the separation of powers doctrine. Delay, bias, or the incompetence of the administrator were mentioned as some of these factors. In *Aquila*, the court confirmed this view and one of the factors relied upon by Aquila was the existence of institutional bias. However, the court was of the view that parts of the decision had in fact been decided in Aquila's favour, and noted that it would have expected the Minister to display 'consistent bias' (para [108]. The court found that although institutional bias had not been established, there was evidence of institutional incompetence, delays, and failure of any attempt by the Minister to provide proper reasons. It found that the court was in as good a position as the Minister to make the decision (para [112]). It further held:

> The absence of any suggestion from the respondents in the papers in these proceedings that there is any issue of substance which might be raised to deny Aquila the grant of the mining right it seeks leads me to conclude that this court is in as good a position as the Minister to make the decision. Had the Minister, or any other respondent, advanced facts which suggested that during any negotiations between the Minister around appropriate conditions might result in the refusal of the mining right, I might well have come to a different conclusion. But no attempt at all has been made in that regard. From this it follows too that the grant of the mining right to Aquila is, or ought to be, a foregone conclusion (para [112]).

The court was satisfied that a case for substitution had been established and granted the application. (For some interesting views on the requirement of 'exceptional circumstances' as laid down by the Constitutional Court in the case of *Trencon*, see Raisa Cachalia 'Clarifying the exceptional circumstances test in Trencon: An opportunity missed' (2015) VII *Constitutional Court Review* 115; Lauren Kohn 'The test for ''exceptional circum-

stances'' where an order of substitution is sought: An analysis of Trencon against the backdrop of the separation of powers' (2015) VII *Constitutional Court Review* 91.)

Demolition orders

Serengeti Rise Industries (Pty) Ltd & another v Aboobaker NO & others 2017 (6) SA 581 (SCA) (*Aboobaker 2*) was the sequel to *Aboobaker NO & others v Serengeti Rise Body Corporate & another* 2015 (6) SA 200 (KZD) (*Aboobaker 1*), in which a demolition order was handed down by the High Court. The lower court's decision is discussed in greater detail in H Van Coller 'Administrative Law' 2015 *Annual Survey* 57.

In *Aboobaker* 1, a decision had been taken by the eThekweni Municipality (the Municipality) approving building plans to rezone certain property. The zoning process was challenged by some of the applicants based on the principle of legality. They contended that the rezoning of the scheme did not qualify as 'administrative action' for purposes of the PAJA. The other applicants disagreed and claimed that the rezoning of the site constituted administrative action under the PAJA. The court noted that the rezoning process amounted to administrative action, and that the respondents' conduct in relation to this process had been unfair. However, the court proceeded to find that the conduct violated the principle of legality. The Municipality's approval of the rezoning was declared invalid and set aside on review. In the Supreme Court of Appeal, the court avoided the question of whether the review in the High Court should have been grounded on the PAJA or on the principle of legality, and rather focused its attention on the demolition order granted by the High Court. The court found the demolition order invalid for three reasons. Firstly, although the High Court had found that the decision was invalid and should be set aside, it had failed to make an order to that effect (para [12]). Secondly, the court was of the view that the order lacked 'certainty and clarity', since there was no clear description of the portion that had to be demolished in terms of the order granted (para [13]). Finally, the High Court had failed to exercise its discretion properly when it should have granted an order that was 'just and equitable' (para [15]). The court upheld the appeal with costs.

Collateral challenge and delay

Two judgments dealing with collateral challenges were delivered by the Constitutional Court during this period, a mere month apart.

The two cases were *Merafong City v Anglogold Ashanti Ltd* 2017 (2) SA 211 (CC) (*Merafong* CC) and *Department of Transport v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC). The judges who wrote the minority judgment in *Merafong* CC also wrote the minority judgment in *Tasima*, namely Jafta J, Bosielo AJ, and Zondo J, with Mogoeng CJ joining the minority in the *Tasima* case.

The concept of a collateral challenge dates back to the case of *Oudekraal Estates (Pty) Ltd v City of Cape Town & others* 2004 (6) SA 222 (SCA). It has since been the subject of various cases (see 2016 *Annual Survey* 77 with reference to *Airports Company South Africa Ltd v Airport Bookshops (Pty) Ltd t/a Exclusive Books* 2016 (1) SA 473 (GJ) and the High Court judgment in *Merafong City v Anglogold Ashanti Ltd* 2016 (2) SA 176 (SCA)(*Merafong* SCA). *Merafong* concerned a collateral challenge brought by an organ of state. The High Court ruled in AngloGold's favour and dismissed the counter-application. It concluded that the Minister's ruling was valid and binding on Merafong until set aside by a court of law (*Merafong* SCA para [13]). The High Court based its decision on the fact that an organ of state could not now raise the invalidity of the decision as a collateral challenge. Merafong brought an appeal to the Supreme Court of Appeal, where the court endorsed this outcome and dismissed the appeal. The court confirmed the view that the Minister's ruling, even if it was unlawful, existed in fact and had legal consequences (para [15]) and rejected Merafong's attempt to raise a collateral challenge. The court was of the view that Merafong could not treat the decision as if it did not exist, and that it was obliged to approach the court to set the Minister's ruling aside. Accordingly, the court ruled that Merafong had breached the principle of legality by simply disregarding the ruling (para [17]). It also confirmed that a collateral challenge was not available to an organ of state against a decision of another organ of state. Merafong appealed to the Constitutional Court.

Two important issues came before the court in *Merafong* CC, namely whether the remedy of a collateral challenge was available to an organ of state (the court in *Merafong* SCA ruled that it was not) and the status of such an unlawful exercise of public power (the court in *Merafong* SCA was of the view that the decision existed in fact, and an organ of state could not ignore the decision, but must approach a court to set it aside). In relation to the first question, the majority and minority agreed that there was no logical reason why an organ of state should be prohibited from raising a collateral challenge. The court explained the

approach taken by the Supreme Court of Appeal in excluding public authorities from raising a collateral challenge as an approach that 'squeezes collateral challenge into a rigid format – one that neither doctrine nor practical reason appears to warrant' (para [25]). The court proceeded to give an overview of collateral challenges in the pre-Constitution era and concluded that it showed that the law had always been approached by our courts with a measure of flexibility (para [30]). The court was also against a 'rigid doctrinal limitation' upon the viability of a collateral challenge and held that

> [w]hile reactive challenges, in the first instance, and perhaps in origin, protect private citizens from state power, good practical sense and the call of justice indicate that they can usefully be employed in a much wider range of circumstances. There is no practical, or conceptual, justification for strait-jacketing them to private citizens. It is readily conceivable, for instance, that an organ of state may through legal proceedings seek unjustly to subject another organ of state to a form of coercion. Where appropriate, that other should be able to raise a defensive or reactive challenge. Categorical exclusions should be eschewed. A reactive challenge should be available where justice requires it to be. That will depend, in each case, on the facts (para [55]).

The court concluded that '[s]ince Merafong's status as an organ of state does not categorically exclude it from a reactive challenge, I would not close the court's door in its face in these proceedings' (para [68]). The court decided to remit the decision back to be decided afresh by the High Court for reasons such as the distinctive character of Merafong's collateral challenge, to address the issue of delay, and to consider evidence on the issue of a suitable remedy (paras [73]–[80]). The court upheld the appeal in that respect and noted that

> [u]nlike the Supreme Court of Appeal, I would not disqualify Merafong's reactive defence because it is an organ of state. Merafong must be permitted to raise a challenge to the Minister's decision, but on appropriate terms that call for it to explain properly its delay in challenging that decision. In those circumstances, the most equitable order as to the costs is to allow the reviewing court to determine them (para [83]).

The minority judgment supported this view and saw 'no reason in logic or principle that militates against the state raising a collateral challenge where it faces a claim that it should comply with an illegal decision' (para [101]).

In relation to the second aspect of the validity of the unlawful act, the majority and minority held very different views. The majority endorsed the view of the Supreme Court Appeal that the

decision remained valid until set aside by a competent court. The minority, however, felt that such an act was void *ab initio* and of no force, irrespective of whether the court had pronounced upon its validity or not. Of importance were the various interpretations given to the decision in *Oudekraal Estates (Pty) Ltd v City of Cape Town & others* 2004 (6) SA 222 (SCA), [2004] 3 All SA 1 (*Oudekraal*), where the court laid down the general principle:

> Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern state would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognized that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside (para [26]).

The majority in *Merafong* SCA described this 'conundrum of Oudekraal' that 'an unlawful act can produce legally effective consequences' as necessary and constitutionally sustainable, because 'unless challenged by the right challenger in the right proceedings, an unlawful act is not void or non-existent, but exists as a fact and may provide the basis for lawful acts pursuant to it' (para [36]). As Forsyth puts it, 'some ''functional voidability'' of invalid administrative action is thus implied by section 172: an invalid administrative act will be effective until any judicial-set period of suspension has come to an end' (see *Merafong* CC n56 with reference to Christopher Forsyth 'The theory of the second actor revisited' 2006 *Acta Juridica* 209, 228). The court interpreted *Oudekraal* to mean:

> Government cannot simply ignore an apparently binding ruling or decision on the basis that it is invalid. The validity of the decision has to be tested in appropriate proceedings. And the sole power to pronounce that the decision is defective, and therefore invalid, lies with the courts. Government itself has no authority to invalidate or ignore the decision. It remains legally effective until properly set aside (para [41]).

The court appears to draw a distinction between the lawfulness of the decision and its effectiveness. The act remained unlawful, but can be legally effective. The court, correctly, held that a reference to the fact that a decision that has not been properly set aside 'remains valid', needs to be interpreted to mean 'that it remains legally effective'. Absence of challenge by the appropriate litigant in the correct forum at the right time does not magically heal the administrative-law flaws in the decision. It means that the decision continues to have effect in law until

properly set aside (n63). The majority's view also appears to suggest that

> Oudekraal and Kirland did not impose an absolute obligation on private citizens to take the initiative to strike down invalid administrative decisions affecting them. Both decisions recognised that there may be occasions where an administrative decision or ruling should be treated as invalid even though no action has been taken to strike it down. Neither decision expressly circumscribed the circumstances in which an administrative decision could be attacked reactively as invalid. As important, they did not imply or entail that, unless they bring court proceedings to challenge an administrative decision, public authorities are obliged to accept it as valid. And neither imposed an absolute duty of proactivity on public authorities. It all depends on the circumstances (para [44]).

This approach might not be very helpful in the absence of a clear indication of what these circumstances might be in which a public body would not be expected to have instituted review proceedings in relation to an allegedly unlawful decision. Jafta J, for the minority, also relied on *Oudekraal*, but took the view that that *Oudekraal* should not be seen as authority 'for the proposition that an invalid administrative act is binding as long as it is not set aside by a competent court. No court has the power of converting an unconstitutional and invalid act with no legal force into a valid act with binding effect' (para 116]). He further stated:

> An illegal administrative act is inconsistent with the Constitution and the rule of law. The inconsistency renders it invalid, regardless of the fact that it is not set aside, because in our constitutional order the Constitution is supreme. In our law an unlawful act is void ab initio and thus it can have no legal force and effect (para [130]).

This again raises the issue of the lawfulness and effectiveness of a decision, referred to above. Mckenzie (Angus McKenzie *The development of collateral review and the status of unlawful acts in South African law* (2017) unpublished LLM dissertation, University of the Witwatersrand 26) argues that this proposition fails to appreciate 'the distinction between whether an act is legally enforceable, in the sense that a court will order compliance with it, and whether it must be obeyed pending a review to set it aside'. Where a public body is forced to abide by a specific decision pending the outcome of a review application, it does not necessarily validate the decision or render it lawful, it merely treats the decision as valid by making it legally enforceable until a court pronounces otherwise. The court upheld the appeal and correctly held that Merafong's status as organ of state should not

preclude it from bringing a collateral challenge, but that in the specific circumstances of the case, it was appropriate to remit the matter back to the High Court for a determination on the lawfulness of the Minister's decision and what remedy should be granted.

Tasima (above) concerned a contract concluded by a company for the provision of IT services to the Department of Transport. The contract was unlawfully extended by an official in the Department. The Department later acknowledged that the extension had been unlawful for failing to comply with the prescribed procurement processes, and subsequently refused to meet its contractual obligations to Tasima. Tasima approached the court for various orders, including interdictory relief and orders compelling the Department to comply with the extended agreement. The Department raised a collateral challenge against the Director-General's extension of the contract. The High Court condoned the delay in bringing the review application and upheld the Department's collateral challenge. The Supreme Court of Appeal upheld Tasima's appeal on the basis that, as an organ of state, the Department was precluded from raising a collateral challenge against its own decision. The main issue before the Constitutional Court was similar to that raised in *Merafong* CC*,* namely, whether an organ of state may raise a collateral challenge and the validity of the unlawful act. The court in *Tasima* also dealt with the issue of delay in bringing a review application. The approach taken by the court in *Tasima* in relation to the first two issues was very similar to the court's approach in *Merafong* CC*.* Both the majority and minority followed *Merafong* CC and held that organs of state should be permitted to bring a collateral challenge:

> Drawing on this line of reasoning, the majority judgment in *Merafong* held that the Municipality was not disqualified from raising a reactive challenge merely because it is an organ of state. The same must apply here. It is both a logical and pragmatic consequence of the aforementioned developments in our jurisprudence to allow state organs to challenge the lawfulness of exercises of public power by way of reactive challenges in appropriate circumstances. I therefore agree with the first judgment's sentiment that the Supreme Court of Appeal was incorrect to find that the Department was barred from bringing a reactive challenge to the extension of the contract solely because it is a state functionary (para [140]).

In relation to the issue of obeying the relevant court orders, the minority was of the view that by ordering compliance with the

invalid extension agreement, 'the agreement was given legal force and effect. As it appears later in this judgment, the extension was not only unconstitutional and unlawful but was also motivated by corruption and fraud' (para [41]). They held that '[t]he violation of the Constitution, the PFMA and the Treasury Regulations, individually and collectively, rendered the extension in question invalid from the outset' (para [110]). However, the majority felt that '[i]t should not be taken to mean that a party is entitled to ignore a court order enforcing a contract that is subsequently found to be unlawful' (para [177]). According to the majority,

> [n]either the effectiveness nor the dignity of the judiciary is protected when an organ of state ignores a court order, let alone several. The Department, an organ of state, had a duty, above and beyond that of the average litigant, to comply with the court orders. The integrity of the Constitution demanded this (para [187]).

The court further found that the extension was only challenged after the court order had been issued and consequently, the review had no bearing on the validity of the order. Therefore, the 'interdict granted by Mabuse J only falls away once the counter-application is upheld by a court. Until this point, it is binding and enforceable' (para [199]). The Department, therefore, had to comply with the court orders until their counter-application had been successful. The court took an approach very similar to that in *Merafong* CC and held:

> But these sentiments did not prevail in those cases. The majority judgment in *Kirland* held that the Court should not decide the validity of the decision because 'the government respondents should have applied to set aside the approval, by way of formal counter-application'. In the absence of that challenge – reactive or otherwise – the decision has legal consequences on the basis of its factual existence. One of the central benefits of this approach was said to be that requiring a counter application would require the state organ to explain why it did not bring a timeous challenge. The same was required of the Municipality in Merafong.
>
> This position does not derogate from the principles expounded in cases like *Affordable Medicines Trust and Pharmaceutical Manufacturers*. These decisions make patent that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency. This includes the exercise of public power. Moreover, when confronted with unconstitutionality, courts are bound by the Constitution to make a declaration of invalidity. No constitutional principle allows an unlawful administrative decision to 'morph into a valid act'. However, for the reasons developed through a long string of this

> court's judgments, that declaration must be made by a court. It is not open to any other party, public or private, to annex this function. Our Constitution confers on the courts the role of arbiter of legality. Therefore, until a court is appropriately approached and an allegedly unlawful exercise of public power is adjudicated upon, it has binding effect merely because of its factual existence.
>
> This important principle does not undermine the supremacy of the Constitution or the doctrine of objective invalidity. In the interests of certainty and the rule of law, it merely preserves the fascia of legal authority until the decision is set aside by a court: the administrative act remains legally effective, despite the fact that it may be objectively invalid (paras [146]–[148]).

As regards the issue of delay, *Merafong* CC indicated that since a court has a discretion to entertain a review, issues of delay might be relevant to the court when it exercises its discretion. The court highlighted that in 'classical' collateral challenges, delay plays no role (para [69]). 'The virtue of ''classical'' reactive challenges lies precisely in the fact that they provide a defence to parties who face the enforcement of the law but who never previously confronted it' (para [70]). The court in *Merafong* CC saw Merafong's collateral challenge as one falling into the category that necessitated scrutiny in regard to delay (para [72]). This is also because there is a general duty on public bodies to approach a court to challenge unlawful conduct as soon as is reasonably possible. For that reason the court remitted the matter back to the High Court. In the words of the court:

> Whether under PAJA, or legality review, it was obliged to institute proceedings to review the decision without unreasonable delay. The rule against delay in instituting review exists for good reason: to curb the potential prejudice that would ensue if the lawfulness of the decision remains uncertain. Protracted delays could give rise to calamitous effects. Not just for those who rely upon the decision but also for the efficient functioning of the decision-making body itself. Had Merafong instituted a review application, as it ought, the court hearing it would have had to consider whether the delay precluded its challenge (para 73]).

The court in *Tasima* highlighted the fact that when an organ of state relies on undue delay in bringing a review application, the reasons for the delay should be assessed by looking at whether the delay was unreasonable and whether a court should exercise its discretion to overlook it and nevertheless entertain the application (para [152]). The court endorsed the approach taken by the Supreme Court of Appeal in respect of the delay itself in that it lacked 'good constitutional citizenship' (para [159]). The court

then had to decide whether there were good reasons to overlook this delay. Conscious of the fact that a delay could have the potential to prejudice the respondent, weaken the ability of a court properly to consider the merits of the case, and undermine the public interest in bringing finality and certainty to administrative action, the court assessed the nature of the decision and the relevant circumstances surrounding its making. Although the court found that the extension was in violation of the Constitution and relevant legislative provisions, it held that the Department had not acted in bad faith in respect of the administrative action – '[i]ts behaviour has been muddled, but not malicious' (para [168]). For those reasons, the court disregarded the Department's undue delay in bringing the counter-application. The court upheld the appeal and the counter-application succeeded.

Passenger Rail Agency of South Africa v Swifambo Rail Agency (Pty) Ltd 2017 (6) SA 223 (GJ) concerned an application by the Passenger Rail Agency of South Africa (the PRASA) to review and set aside its own decision to award a contract for the supply of locomotives to Swifambo, as well as its decision to conclude the contract. The main issue related to delay on the side of the PRASA in bringing the review application and an appropriate remedy in the circumstances. The application by the PRASA was brought 793 days late, and the PRASA had to show good cause for the delay and make out a proper case for the extension of the 180-day period. The court referred in detail to a list of explanations set out by the PRASA for the delay, including aspects relating to mismanagement, corruption, and issues of capacity. The court expressed the following opinion:

> In my view to hold state institutions too strictly to the prescribed period, and thereby to shield the perpetrators, encourages the commission and concealment of egregious conduct of the nature found in this matter and would discourage prosecution by state institutions. It would also negatively impact on the administration of justice. There is no prejudice to the respondent if the application is heard. The consequences of refusing to hear the application and, as a result, allowing the invalid decision to stand will be borne by the public at large for many future generations. In my view the hearing of the application will advance the principle of legality and the interests of justice. This is an appropriate case where the time period to have brought the application is extended and should be condoned (para [79]).

The court found that the prospect of success was 'overwhelming' and proceeded to highlight some of the irregularities that had

occurred, although the merits had not been opposed by the respondents. The next issue related to an appropriate remedy where a contract, which has already been partially implemented, has been concluded as a result of a corrupt tender process. The court had to decide whether a declaration of unlawfulness was sufficient in the circumstances, 'in order to hold the relevant decision makers accountable and to discourage public administrators from engaging in similar conduct' (para [78]). Having regard to the specific circumstances of the case, the court acknowledged that the issue of what constituted an appropriate remedy was 'one of the most difficult decisions that a court must make in review applications that are tainted with material irregularities and corruption like in the present matter' (para [88]). Swifambo argued that it had been an innocent tenderer and the court should decline to set the contract aside. The PRASA, however, contended that Swifambo was no innocent tenderer as the contract constituted fronting for purposes of the Broad-Based Black Economic Empowerment Act 53 of 2003. After examining the facts, the court held that there was sufficient evidence before it to prove, on a balance of probabilities, that the arrangement constituted fronting and that: 'Swifambo under the agreement with Vossloh was merely a token participant that received monetary compensation in exchange for the use of its B-BBEE rating' (para [95]). The court held that the only just and equitable remedy was to set the contract aside with retrospective effect. The court, therefore, granted the relief sought by the PRASA by reviewing and setting aside its decision to award the contract or tender to and then to conclude the contract with Swifambo.

Cape Town City v Aurecon SA (Pty) Ltd 2017 (4) SA 223 (CC) concerned an appeal to the Constitutional Court by the City of Cape Town against a decision by the Supreme Court of Appeal in *Aurecon South Africa (Pty) Ltd v Cape Town City* 2016 (2) SA 199 (SCA) (*Aurecon* SCA, reported in 2016 *Annual Survey*). Cape Town City (the City) sought to review its own decision to award a tender to Aurecon. The Supreme Court of Appeal held that the City had not launched review proceedings within a reasonable time and that the delay 'was inexcusable and for this reason alone the court *a quo* should not have granted the application for review' (*Aurecon* SCA para [20]). The court did, however, proceed to deal briefly with the alleged irregularities, and after a careful analysis of the facts, concluded that those irregularities were not, in fact, irregularities. The court upheld the appeal and

replaced the High Court's order with one allowing Aurecon to bid for the tender. The City was ordered to pay the costs (*Aurecon* SCA para [46]). The City launched its application 352 days late and the court had to decide whether a proper case for condonation had been made. The court took into account the procedural issues raised and the prospects of success. It concluded that '[t]he interests of clean governance would require judicial intervention. However, this is not such a case and a weighing of factors leans decidedly against granting condonation' (para [50]). The court dismissed the appeal.

Asla Construction (Pty) Ltd v Buffalo City Metropolitan Municipality 2017 (6) SA 360 (SCA) was an appeal by Asla Construction Pty (Ltd) (Asla) against a decision by the High Court setting aside an engineering contract awarded to Asla by the Buffalo City Metropolitan Municipality (the Municipality). The Municipality failed to pay Asla for work completed in terms of their contract. When Asla instituted provisional sentence proceedings, the Municipality launched a counter-application, arguing that the contract was invalid in that it failed to comply with procurement requirements. Asla argued that the review application was brought outside of the required time limits, but the court agreed with the Municipality that the interests of justice required that an extension of time be granted in light of the serious breach of procurement regulations. Asla approached the Supreme Court of Appeal.

The issue in the Supreme Court of Appeal was whether the High Court had correctly exercised its discretion in terms of section 9 of the PAJA to grant an extension of time where it is in the interest of justice to do so, and whether the Municipality was required to make a substantive application for extension. The court held that section 9 of the PAJA requires a substantive application to be brought for an extension of time within which a review application is brought; this the Municipality failed to do. The court also found that the High Court's discretion was based solely on the seriousness of not complying with the procurement processes, and in doing so the court decided the merits of the review before considering the application for condonation (paras [9] [10]):

> This erroneous approach resulted in a failure by the court *a quo* to properly consider whether the respondent had furnished 'a full and reasonable explanation for the delay which covers the entire duration thereof' (para [15]).

The court also found that the court *a quo* had ignored the possible prejudice to the appellant should the contract be set aside, and that the prejudice to other parties and the broader public interest should have been taken into account. The court accordingly held that the court *a quo* had erred in granting the section 9 extension, and the application for the review and setting aside of the contract should have been refused. The appeal succeeded.

In *SANRAL* (above) the Supreme Court of Appeal condoned the City's delay in bringing a review application. The court highlighted the 'interest of justice' requirement and proceeded to consider whether the delay was unreasonable. The City did in fact concede that the three-year delay was unreasonable (para [83]).The court, therefore, turned to the merits, the element of prejudice, and the public interest. The court considered the lawfulness of the recommendation to the Board and the various resolutions, and concluded that the Board's failure to make a decision was a fundamental flaw which made it subject to judicial scrutiny. It also recognised the element of prejudice and the public interest. The court noted:

> There is of course the considerable financial burden to be borne by the public and the State. The public interest is a weighty factor. The principle of legality and the constitutional principles of transparent and accountable governance also intrude (para [108]).

The court agreed with the decision of the court below to grant condonation (para [10]).

Access to Information

The issue of access to political party funding in *My Vote Counts NPC v Speaker of the National Assembly & others* 2016 (1) SA 132 (CC) was fully discussed in the 2016 *Annual Survey* 86. It concerned an application to the Constitutional Court by My Vote Counts NPC (*My Vote 1*), requesting the court to compel Parliament to pass legislation that would oblige political parties to disclose the sources of their private funding. The majority, with reference to the principle of subsidiarity, held that the Promotion of Access to Information Act 2 of 2000 (the PAIA) gives effect to the constitutional right of access to information, and any shortcomings in the legislation should be brought through challenging the constitutional validity of the legislation itself. The minority argued that the PAIA was the only legislation envisaged by the Constitu-

tion to give effect to the right of access to information, and that it has only partially fulfilled this right. The majority held that the applicants ought to have attacked the constitutional validity of the PAIA in the High Court, and that its failure to do so was dispositive of the case. The application was dismissed (para [193]). My Vote subsequently approached the Western Cape High Court in *My Vote Counts NPC v President of the Republic of South Africa* 2017 (6) SA 501 (WCC) (*My Vote 2*), arguing that access to the private party funding information of political parties is necessary for the effective exercise of the right to vote under section 19 of the Constitution. In line with the view taken by the majority of the court in *My Vote 1,* the applicant argued that the PAIA was inconsistent with the Constitution and invalid insofar as it did not allow for the recording and disclosure of private funding information. The applicants submitted that information about political parties' private funding was required under section 32 of the Constitution in order properly to exercise the right to vote and to make political choices under section 19 of the Constitution (para [13]). With reference to the minority decision in *My Vote 1*, the court scrutinised the unique role of political parties and, in agreeing with the minority view, held that '[t]he unique nature of political parties and their influential role has a significant bearing on whence and from whom their funds derive' (para [28]). The court endorsed the findings of the minority judgment in *My Vote 1* and concluded that section 32 read with section 19 required the disclosure of private funding information, and that the information was required 'for the exercise of an informed right to vote' (para [29]).

In considering whether the PAIA did in fact allow for the disclosure of this information, the court interpreted the relevant sections of the PAIA, and held that the PAIA as a whole did indeed not provide for the disclosure of the required private funding information of political parties ((para [64]). It was consequently not in sync with section 32 and limited both sections 32 and 19 of the Constitution. With reference to the limitation clause, the court held that the limitation was not justified as required by section 36 of the Constitution and declared the PAIA 'inconsistent with the Constitution and invalid insofar as it does not allow for the recordal and disclosure of private funding information' (para [75]). The court suspended the declaration of invalidity for a period of eighteen months to allow Parliament to make the necessary changes that will allow for the recording and disclosure of private funding information.

In *Belwana v MEC for Education, Eastern Cape* 2017 (6) SA 182 (ECB), two educators in the employ of the Eastern Cape Department of Education applied for posts within the Department. Both were unsuccessful, and after an unsuccessful request to the Department for information and failure of their internal appeals, they approached the court seeking an order under the PAIA for access to information on the interview and appointment process. Ms Belwana applied for two head of department posts in Port Elizabeth. She was not shortlisted, and the SGB failed to respond to her request for reasons. Through an attorney, she then requested copies of the relevant documents pertaining to the shortlisting process, and having received no response, lodged an appeal. Her internal appeal was dismissed and she subsequently launched this application for access to the documents in terms of the PAIA. The court rejected Belwana's application on the basis that she had failed to make the shortlist of candidates and that

> [t]he information which she seeks does not relate to her as a requester. It relates to interviews from which she was excluded. It relates to meetings where she was not the subject of discussion. It relates to opinions about and recommendations with respect to candidates who were interviewed and candidates who were shortlisted. She is not one of them. I can see no valid reason why the applicant should be entitled to information regarding a process that she was not a part of (paras [33] [34]).

In accordance with section 45 of the PAIA, the court found her application to be 'manifestly frivolous and vexatious' and held that it was reason enough to end the enquiry (para [39]).

The circumstances of the other candidate, Ms Langeveldt, were different and distinguishable. She also applied for a vacant post of head of department at her school in the Graaff-Reinet district, but she had been shortlisted and interviewed, but was not appointed in the post. After an exchange of various letters, and when it came to Langeveldt's attention that someone else had been appointed to the post, she requested access to the relevant documents. Her request for information was denied, and her internal appeal dismissed. She approached the court for relief. Unlike in Belwana's case, the court did not find her application frivolous or vexatious. It noted that the process had been completed and a candidate had been selected, and that Langeveldt's application was, therefore, not premature. The court granted Langeveldt's request for information, but dismissed Belwana's appeal.

In *Mahaeeane & another v Anglogold Ashanti Limited* [2017] 3 All SA 458 (SCA), 2017 (6) SA 382, the appellants, former employees of the mining company, contracted silicosis and were medically boarded. Proceedings for the certification of a class action were launched in the High Court to request access to records held by a private body in terms of section 50 of the PAIA. The applicants were unsuccessful. The court held that they were excluded by section 7(1) of the PAIA, which provides that access to a record is excluded if the request is brought after the commencement of the proceedings. Moreover, the applicants had failed to prove that the records were required for the exercise or protection of any rights as contemplated by section 50. On appeal, the Supreme Court of Appeal first dealt with the inquiry under section 50 and whether the applicants had a *prima facie* right to access the records. The court considered the reasons placed before it as to why the records were required, and held that they were not sufficient to meet the test of the records 'being required to exercise or protect the right relied on' (para [17]). As the appellants had not met the threshold test of section 50(1) of the PAIA, the court deemed it unnecessary to deal with the issue in terms of section 7(1) of the PAIA, and dismissed the appeal with costs.

ADMIRALTY LAW

HILTON STANILAND*

LEGISLATION

In 2017, the South African Maritime Safety Authority (SAMSA) issued the following marine notices and guidance notes, adequately described by their titles, which could be relevant to proceedings in the Admiralty Court, the Court of Marine Enquiry, or any court exercising criminal or civil jurisdiction: Marine Notice 6 of 2017: Lessons Learnt from Recent Casualties; Marine Notice 7 of 2017: Academic Requirements for Engineering Officers; Marine Notice 9 of 2017: Performance Standards for Marine Radio Equipment required by the Merchant Shipping (Radio Installations) Regulations, 2002, amended by Notice 457 of July 2013, and the Merchant Shipping (Automatic Identification System) Regulations, 2004 (GNR 1291 *GG* 26938 5 November 2004); Marine Notice 10 of 2017: Guidelines to Crew Agreements Inspections with particular reference to Fishing Vessels Inspections; Marine Notice 11 of 2017: Portable Ladders; Marine Notice 12 of 2017: Heeding of Marine Weather Forecasts; Marine Notice 13 of 2017: Vessels Requiring a Place of Refuge for Repairs; Marine Notice 14 of 2017: Certificates of competence issued to holders of the Naval Coxswains certificates; Marine Notice 16 of 2017: Issue of New Format Certificates for MM and Fishing and Validity of All Seafarers Certificates, other than small Vessel Certificates; Marine Notice 17 of 2017: Code of Practice for Marine Fire Service Stations – Approved SAMFAS Stations; Marine Notice 18 of 2017: Cyber Security; Marine Notice 19 of 2017: List of valid Marine Notices; Marine Notice 20 of 2017: Reporting of oil spills and shipping casualties threatening pollution; Marine Notice 21 of 2017: Small Vessel Survey Fees Charged by SAMSA External Appointed Surveyors and Safety Officers from the following SAMSA Designated Authorised

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Agencies: – SADSAA, SALTBAA and SASCA; and Marine Notice 22 of 2017: Lessons learnt from Casualties: Freeing Ports and Safe Access.

On 8 September 2017, the International Convention for the Control and Management of Ships' Ballast Water and Sediments, 2004 (the Convention) entered into force at the international level, with 80 parties, covering 80,94 per cent of the world's tonnage. Ballast water is taken onboard by ships (most of which are designed or constructed to carry ballast water) to control their trim, list, draught, stability, or stresses. The proper loading and unloading of ballast water is, therefore, crucial to the safety of a ship.

But ballast water may contain thousands of aquatic or marine microbes, plants, and animals and can be carried to and released in ports around the world, leading to the introduction of new invasive marine species, often with devastating consequences for local ecosystems. So, under article 2(1) of the Convention parties undertake to give full and complete effect to the instrument in order to prevent, minimise, and ultimately eliminate, the transfer of harmful aquatic organisms and pathogens through the control and management of ballast water. And, by virtue of article 5 of the Convention, each party undertakes

> to ensure that, in ports and terminals designated by that Party where cleaning or repair of ballast tanks occurs, adequate facilities are provided for the reception of sediments, taking into account the Guidelines developed by the Organization [the International Maritime Organization]. Such reception facilities shall operate without causing undue delay to ships and shall provide for the safe disposal of such sediments that does not impair or damage their environment, human health, property or resources or those of other States.

Furthermore, parties to the Convention must encourage ships entitled to fly their flag to avoid, as far as practicable, the loading of ballast water with potentially harmful aquatic organisms and pathogens as well as sediments.

Although the Convention came into force for South Africa on 8 September 2017, it has not yet been implemented into the law of the Republic. And, it must be said, South Africa is also failing to give full and complete effect to other international legal instruments of the International Maritime Organization to which it is also a party.

CASE LAW

Arrest of Ships

In *Northern Endeavour Shipping Pte Ltd v Owners of MV NYK Isabel & another* 2017 (1) SA 25 (SCA), the appeal involved a claim for security under the Admiralty Jurisdiction Regulation Act 105 of 1983 by the second respondent, Nippon Yusen Kabushiki Kaisha trading as NYK Line (NYK), against the appellant, Northern Endeavour Shipping Pte Ltd (NES). In the KwaZulu-Natal Local Division, the claim was upheld and NES ordered to provide the security demanded by NYK in an amount of some USD 10 million within ten days of the order. Failure to provide the security would have resulted in the deemed arrest of the *NYK Isabel* (which had been obtained in order to pursue an action *in rem* in respect of a maritime claim against NYK) falling away so that, in practical terms, NES would have been unable to continue with its action. The further facts of the case, which were unusual and detailed, do not require to be traversed. But two of the legal issues are of significance. They are applicable not only to the arrest of associated ships, but also to claims for security under the 1983 Act.

The first of these issues was whether, for the purposes of section 3(7)*(c)* of the Act, a slot charter was a charter. Section 3(7)*(c)* states:

> If at any time a ship was the subject of a charter-party the charterer or subcharterer, as the case may be, shall for the purposes of subsection (6) and this subsection be deemed to be the owner of the ship concerned in respect of any relevant maritime claim for which the charterer or subcharterer, and not the owner, is alleged to be liable.

It is trite that the provision extends to both time and voyage charters, but does it extend to slot charters? To answer this question, Wallis JA (who delivered the unanimous judgment of the Supreme Court of Appeal) considered the genesis and amendment of the provision, article 3.4 of the International Convention for the Arrest of Sea-Going Ships concluded in Brussels on 10 May 1952, and the leading cases under English law (*The Tychy* [1999] 2 Lloyd's Rep 11 (CA) 18-22; MSC Napoli [2009] 1 Lloyd's Rep 246 (AC)); Australian law (*Laemthong International Lines Co Ltd v BPS Shipping* [1997] 149 ALR 675 681)); Canadian law (*Canada Moon Shipping Co Ltd & another v Companhia Siderurgica Paulista-Cosipa & another* 2012 FCA 284 para 53); and the law of the United States (*International Marine Under-*

writers v MV Patricia S & others (2007) 713 LMLN 1). Wallis JA then held:

> [27] I do not think it desirable to approach a statute such as the Act, which is concerned with events in the dynamic field of international trade and shipping, on the basis that the meaning of expressions used in the statute are fixed in stone at a point in time, and are incapable of being adapted to accommodate new developments. When the Act speaks of charterparties it is concerned to refer to contracts of a type developed by and familiar to those engaged in maritime trade. It is not concerned to restrict the category of such contracts. In other words it requires a court to give a construction to the expression that is, so far as possible, consistent with the commercial understanding of its meaning.
>
> [28] Slot charters have evolved as the container revolution in maritime transport has evolved. They meet a perceived commercial need and their terms are largely adapted from the established time and voyage charters that are in daily use in maritime trade. The objection to treating them as charters appears to be based principally on the fact that the slot-charterer does not charter the entire vessel, but only a part thereof. But I can perceive nothing in that fact that should operate to preclude slot-charterers from being characterised as charterers.
>
> [29] A final point that seems to me relevant is the purpose of s 3(7)*(c)*. It is to enable claims to be pursued by way of proceedings against an associated ship in circumstances where no claim lies against the ship concerned and its owner. The deeming provision simply enables the first requirement for an associated-ship arrest to be satisfied without affecting the commercial relationships underpinning the slot charter. If the owner of the ship concerned is liable on the claim the deeming provision cannot be invoked. A construction of the word 'charterer' that includes a slot-charterer will serve the purpose of promoting the ability of creditors to recover maritime claims. That is the underlying purpose of permitting proceedings to be instituted by the arrest of an associated ship. So that construction is consistent with the statutory purpose.

The decision is to be welcomed. It brings South African law into broad agreement with the law of other developed admiralty jurisdictions that have accepted that a slot-charterer is a charterer. And it is also a pragmatic decision since it recognises that slot-charters are very well established in international business practice and frequently affect the liabilities of ships.

The second legal issue concerned the scope and ambit of section 5(2)*(b)* and *(c)* of the Act. The provisions stipulate:

> A court may in the exercise of its admiralty jurisdiction –
>
> . . .
>
> *(b)* order any person to give security for costs or any claim;
> *(c)* order that any arrest or attachment made or to be made or that

> anything done or to be done in terms of the Act or any order of the court be subject to such conditions as to the court appears just, whether as to the furnishing of security or the liability for costs, expenses, loss or damage caused or likely to be caused, or otherwise . . . .

After considering the general meaning of the provisions, Wallis JA added:

> [54] . . . In *The Paz* [1984 (3) SA 261 (N) at 268B–C] it was said that an applicant for a security arrest should say why it needed security; that it had not already obtained security; and that it could not obtain security in the other actual or contemplated proceedings. I would add the following glosses. If some security has been obtained there should be an explanation of the need for further security, for example, by explaining that it is insufficient or of no real value. If it would be feasible to obtain security elsewhere, or in the other or contemplated proceedings, there needs to be an explanation for invoking the jurisdiction of a South African court for that purpose. In other words, as Didcott J said in *The Paz* [at 270A–B] the applicant must explain that 'no alternative and less disruptive opportunity for obtaining such has been or is likely to become available to him and, if one has already been lost, that this was not his fault or, I should rather say, not his fault to such a degree as to be fairly held against him'. Whether security should be ordered when a reasonable and genuine need therefor has been established will depend upon the circumstances of the particular case.
>
> [55] It will usually be convenient in considering an application for security to address these questions sequentially.

The judgment has made the scope and ambit of section 5(2)*(b)* and *(c)* much more precise. It will help to ensure the continued reputation and use of the South African Admiralty Court by international maritime claimants as one of the most favoured forums for the security arrest of ships.

Safety of Fishing Vessels

On 23 January 2017, a Court of Marine Enquiry (convened pursuant to s 266 of the Merchant Shipping Act 57 of 1951) handed down an unreported judgment (the writer presided over the court) concerning the loss of the *MVF Kingfisher* and fourteen members of her crew. The findings and recommendations of the court are of some significance given that fishing at sea is a very dangerous occupation, especially in South African waters.

The procedure followed by a Court of Marine Enquiry, as well as its jurisdiction, are, however, little known. It is not often understood that a Court of Marine Enquiry sitting in South Africa today reflects – in all material respects – the procedure that was followed and the jurisdiction that was exercised by the Court of Formal Inquiry (established under s 466 of the Merchant Shipping Act, 1894, of the United Kingdom) that investigated the loss of the *Titanic* with 1490 lives in 1912.

A Court of Marine Enquiry is enjoined to make findings in respect of a list of questions formulated by the Director-General of the Department of Transport. Section 269 of the 1951 Act provides:

> (1) If a court of marine enquiry finds that any master or member of the crew is incompetent or has been guilty of any act of misconduct, or that loss, abandonment or stranding of or serious damage to any ship or loss of life or serious injury to any person has been caused by the wrongful act or default of any master or member of the crew, it may . . . cancel the certificate of competency or service of the master or member of the crew or suspend it for a stated period or, whether or not the master or member of the crew holds a certificate of competency or service, prohibit his employment in any stated capacity in a ship for a stated period or impose a fine not exceeding R2 000 upon him or reprimand him.
>
> (2) Subsection (1) shall apply in respect of masters or members of the crew of all ships which are registered or licensed in the Republic or which are in terms of this Act required to be so licensed, and in respect of masters or members of the crew of ships registered in a country other than the Republic only if those ships are wholly engaged in plying between ports in the Republic.

Although a Court of Marine Enquiry may thus cancel or suspend the certificate of a seafarer, it has no jurisdiction to hear and determine any maritime claim, while the imposition of a fine does not result in a criminal conviction. But the findings of a Court of Marine Enquiry frequently lead to subsequent criminal or civil proceedings in other courts. And the recommendations of a Court of Marine Enquiry generally carry great weight. In England, for example, the recommendations made by Lord Mersey (who presided over the Formal Inquiry into the foundering of the *Titanic)* led directly to the International Convention for the Safety of Life at Sea in 1914, which is today the major convention providing for the safety of ships.

Some of the major findings of the Court of Marine Enquiry into the *MVF Kingfisher* was that the skipper of the fishing vessel should not have relied on his own assessment of the weather; that

he did not properly heed the weather warning; and that after hearing the weather warning he should not have stopped and delayed the voyage of his vessel to the nearest place or port of safety. The Court of Marine Enquiry held:

> Since a weather warning from the South African Weather Service is almost certain to occur (requiring disaster management agencies to be on standby), it is required of skippers – and it is their duty – to navigate to the safety of the nearest lee before the arrival of the bad weather, always leaving a clear margin for safety, free of commercial considerations.

In the result, the certificate of the skipper of the *MFV Kingfisher* was suspended and he was prohibited from taking employment as a skipper or master for a period of five years.

The Court of Marine Enquiry also found that some other fishing vessels in the vicinity of the *MFV Kingfisher* similarly failed properly to heed the weather warnings. Consequently, the recommendation was made by the Court of Marine Enquiry that the Director-General of the Department of Transport should direct SAMSA to issue a marine notice advising skippers of fishing vessels of their duty to heed weather warnings, and that failure to do so could result in severe criminal and civil liabilities. A marine notice was very quickly issued by SAMSA (Marine Notice 12 of 2017: Heeding of Marine Weather Forecasts), which stated in part that

> [t]he importance of heeding weather forecasts by skippers and preparing the vessel and crews for inclement weather was highlighted during findings in a recent Court of Marine Enquiry that deliberated on the contributing factors that led to the loss of lives off a fishing vessel. This notice endeavours to advise all operators. Masters and skippers should keep themselves informed on weather forecasts in order to have sufficient time to avoid any weather conditions that could threaten the safety of his/her vessel and crew and take the appropriate safety precautions.

It is understood, at the time of writing, that the marine notice is continuing to have a beneficial effect regarding the safety of fishing vessels, and that skippers are in the main aware of their inescapable duty to heed weather warnings, notwithstanding that fishing vessel owners might sometimes implicitly encourage skippers to run risks with the weather in order to maximise fish catches.

CIVIL AND CONSTITUTIONAL PROCEDURE AND JURISDICTION

Estelle Hurter*

LEGISLATION

Primary Legislation

The Courts of Law Amendment Act 7 of 2017, was assented to on 31 July 2017 (GN 769 *GG* 41017 of 2 August 2017). This Act amends the Magistrates' Courts Act 32 of 1944 by inserting definitions of 'court day' and 'National Credit Act' (s 1); amending section 36 to regulate the rescission of judgments where the judgment debt has been paid in full; amending section 45 to further regulate jurisdiction by consent; inserting section 55A to enumerate the factors a court must consider when making a just and equitable order; substituting section 57 to further regulate the payment of debt in instalments or otherwise; substituting section 58 to further regulate consent to judgments and orders for the payment of judgment debts in instalments; substituting section 65(1) and section 65E to further regulate debt collection proceedings; substituting section 73 to regulate the suspension of execution of a debt and the abandonment of judgments; substituting section 65J to provide for emoluments attachment orders and inserting section 106C to provide for certain offences and penalties relating to judgments, emoluments attachment orders and instalment orders; and by substituting section 65M to provide for the enforcement of certain judgments by divisions of the High Court or regional courts.

The Act also amends the Superior Courts Act 10 of 2013 by inserting section 23A to regulate the rescission of judgments by consent, or where the judgment has been paid in full.

The Judicial Matters Amendment Act 8 of 2017 was also assented to on 31 July 2017 (GN 770 *GG* 41018 of 2 August 2017). This Act amends, inter alia, sections 9 and 12 of the Magistrates' Courts Act 32 of 1944 to further regulate the benefits of magistrates who are required to dispose of proceedings not

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disposed of on vacation of the office of a magistrate, and to provide for the appointment of magistrates of regional divisions, respectively; section 3 of the Attorneys Act 53 of 1979 to further regulate the engagement of candidate attorneys; section 25 of the Small Claims Courts Act 61 of 1984 to empower the Rules Board for Courts of Law to make rules regulating various matters relating to small claims courts; section 44 of the Superior Courts Act 10 of 2013 to further regulate the electronic transmission of summonses, writs, and other processes.

Subordinate Legislation

Legal Aid South Africa Act

The Regulations for Legal Aid South Africa were published (R745 *GG* 41005 of 26 July 2017), and came into operation on 22 August 2017. The Regulations were published under section 23(1) of the Legal Aid South Africa Act 39 of 2014, and regulate the process relating to the provision of legal aid and matters connected therewith.

CASE LAW

Advocate

In *General Council of the Bar of South Africa v Jiba & others* 2017 (2) SA 122 (GP) the court considered the test to be applied in an application under section 7(1)*(d)* of the Admission of Advocates Act 74 of 1964 for the removal of an advocate from the roll of advocates. The matter stems from the conduct of the three respondents in the handling of certain cases (referred to as the *Booysen* case; the spy-tapes case; and the *Mdluli* case respectively – paras [7] [8]).

As in the case of attorneys, advocates may be removed from the roll if they cease to be 'fit and proper' persons to practise as advocates, and the same three-stage inquiry in determining the outcome of this test applies (para [9]). Consequently, the court's first enquiry was whether the alleged conduct complained of had been established on a preponderance of probabilities (this is a factual enquiry); secondly, whether the person, in the court's discretion, is not a fit and proper person to continue to practise (this entails a weighing up of conduct); and thirdly, whether, in light of all of the circumstances, the person should be removed from the roll.

After a thorough and detailed analysis of the complaints against the respondents, the court held that there was insufficient information against the third respondent to justify the relief sought against him (paras [174] [176]), but made scathing remarks concerning the conduct of the first two respondents, Jiba and Mrwebi. The court could not believe that two officers who held such high positions in the prosecuting authority (Acting National Director of Public Prosecutions and Special Director in terms of the NPA Act, respectively) could 'stoop so far' for the protection and defence of one individual who had been implicated in serious offences (para [165]), and held that through their conduct they had brought not only the prosecuting authority and the legal profession into disrepute, but also the office of the President of the Republic (para [166]). Having thus established the outcome of the enquiry regarding the first two stages, the court consequently held that the first two respondents were not considered fit and proper persons to remain on the roll of advocates. In the case of Jiba, the following led to this conclusion by the court: she had failed to comply with Uniform Rule 53 in respect of the timeous filing of the record relating to the decision to withdraw charges against Mdluli, and the reasons advanced for the delay were held to be unreasonable and indicated bad faith (para [114.2.7]); she had further failed to supply a complete record with no proper explanation, and thus acted contrary to her oath of office (para [118]); she had also failed to comply with a directive by the Deputy Judge President (para [119]); and failed to heed the advice of counsel briefed to defend her, and acted contrary to that advice (paras [135]). Jiba had done everything in her power to ensure charges against Mdluli were permanently withdrawn, despite *prima facie* evidence against him (para [135.9.5]); and she deliberately attempted to mislead the review court by failing to disclose that a memo by a prosecutor in the Mdluli case had been submitted to her and then lied about it (paras [136.2.2] [136.2.3]).

In the case of Mrwebi, the following led to this conclusion: he had lied about a consultative document he had prepared regarding the Mdluli prosecution (para [141.4]); he had deliberately failed to disclose a memorandum and note regarding the reasons for discontinuing the Mdluli prosecution (paras [144]–[146]); he was an unreliable and dishonest witness (para [151.3.3]); together with the first respondent, he had ignored the advice of counsel (para [152.3.1]); he had refused to reinstate charges against Mdluli (para [159]); and he had given 'patently' dishonest evidence

regarding the alleged consultation with the third respondent as to the withdrawal of charges against Mdluli (paras [163] [164]).

Appeal

The lodging of an application for leave to appeal against a judgment of a High Court has the effect of suspending the operation and execution of that judgment in terms of section 18 of the Superior Courts Act 10 of 2013. However, a party aggrieved by a section 18(1) order has an automatic right of appeal 'to the next highest court' under section 18(4)(ii) of the Act. In *MEC for Co-operative Governance & others v Mogalakwena Municipality & another* 2017 (2) SA 464 (GP), a single judge granted an order reinstating the second respondent as the municipal manager of the first respondent, whereupon the appellants sought leave to appeal against this order to the Supreme Court of Appeal. The effect of this was that the reinstatement order was suspended under section 18(1) of the Act, and, as a consequence, the second respondent applied for an order for execution of the reinstatement order pending the appeal (claiming 'exceptional circumstances' under s 18(3)). However, on the same date, appellants two to 37 served notice of appeal under section 18(4)(ii) of the Act, appealing against the order for leave to appeal to the Supreme Court of Appeal, which resulted in the suspension of the enforcement order.

The question for determination was whether the Supreme Court of Appeal was 'the next highest court'. The respondent argued that the 'next highest court' in this instance did not refer to the Supreme Court of Appeal, but to the full court of the Gauteng Division. After a submission to the registrar of the Supreme Court of Appeal to this effect, that court directed that the matter be dealt with by the present full court. The present court, after considering the construction of the relevant legislation (paras [11]–[18]), held that the phrase was found in section 16(1)*(a)* and *(b)*, as well as in section 17(6)*(a)*, which set out clearly the hierarchy of courts of appeal. The court concluded that the context of section 18(4) dictated that the appeal had to follow the so-called 'default route', that is, from single judge to full court of the same division as the 'next highest court' (para [16]). It would then logically flow that in the event of an order under section 18(1) to put the decision of a court constituted of more than one judge into operation, an automatic right of appeal would lie to the Supreme Court of Appeal, being the next highest court in such instance (para [16]).

For general noting, the court also commented on the use of the phrases 'full bench' and 'full court'. It pointed out that although often used interchangeably, section 1 of the Act clearly provides that 'full court' (in relation to any division of the High Court) means a court consisting of three judges. It followed that a court of a division consisting of two judges was a 'full bench' (paras [20]–[21]). This matter illustrates clearly that terminology should be used consistently and accurately at all times.

In *Fidelity Security Services (Pty) Ltd v Mogale City Local Municipality & others* 2017 (4) SA 207 (GJ), the crisp question for decision was whether an application for leave to appeal a decision had to be *lodged* before an application to execute that decision could be brought; in other words, whether an application to execute may precede an application for leave to appeal.

The court held that there was 'nothing in the plain language of s 18 of the Act' (the Superior Courts Act, above) that required this (para ([14]), and that 'an expression of an intention to seek leave to appeal was sufficient' (para [16]). The outcome of a contrary interpretation could, according to the court, not have been intended by the legislature, and would have been 'inflexible and formalistic in the extreme', thus prohibiting the courts from taking appropriate measures to ensure that justice is done during the interim period (the period between the granting of an order and the filing of an application for leave to appeal) (paras [19] [25]), whereas the court's approach would result in the successful litigant not being left without a remedy in the interim period. At the same time, the unsuccessful litigant would be prevented from frustrating the operation of the order, especially where the successful litigant may find itself in dire circumstances.

In the sequel to this matter, the full court in *Mogale City Local Municipality & others v Fidelity Security Services (Pty) Ltd* 2017 (4) SA 516 (GJ) dismissed the appeal by Mogale City under section 18(4) of the Act, but held that on the facts of the matter, it was unnecessary for the court to conclude that such pre-emptive action was necessarily contemplated by section 18, properly interpreted, and thus that the result arrived at by the court below was correct (para [11]). The court instead considered whether the application to execute by Fidelity had been premature, and held that this was in fact so (para [14]). Consequently, this amounted to an irregular step which could have been set aside on application in terms of the rules of court (para [15]). Instead, Mogale City embarked on different courses of action which, in effect, amounted

to a 'further step' as contemplated by Uniform Rule 30. These actions resulted in Mogale City forfeiting its right to complain about the premature application to execute (paras [15] [16]).

In *Ntlemeza v Helen Suzman Foundation & another* 2017 (5) SA 402 (SCA), an appeal was lodged against an execution order made by a full court (a three-judge High Court), which had ruled that its order setting aside the appointment of the appellant as head of the so-called 'Hawks' (the Directorate for Priority Crime Investigation) on the ground of his unfitness for the position would remain operational and be executed in full during the appeal process.

In assessing the ruling of the court below, the Supreme Court of Appeal found it necessary to restate the law regarding various aspects of the appeal process. In the first instance, it pointed out that the primary purpose of section 18(1) of the Act is to restate the common-law position in relation to the ordinary effect of appeal processes, namely that the order being appealed is automatically suspended, not nullified (paras [28] [29]).

Secondly, while section 18(1) of the Act entitles a court to order the execution of an order 'under exceptional circumstances', a party seeking such an order is required 'in addition' to prove on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order, *and* that the other party will not suffer irreparable harm if the court so orders (s 18(3)). Consequently, in considering whether the High Court in the present matter had had due regard to this further controlling measure in section 18(3) and had applied it correctly, the Supreme Court of Appeal held that the High Court could not be faulted in finding that the respondent had proved exceptional circumstances. The factors constituting exceptional circumstances in this particular matter were the necessity that the foremost crime-fighting unit in the community should be untainted; the earlier adverse judicial pronouncements in respect of its head; and the place that the South African Police Service holds in the constitutional scheme (para [45]). The court further held that the High Court could also not be faulted for its approach to irreparable harm to the appellant – the damage he suffered arose not from the main application, but from earlier judicial findings against him. In respect of the respondents, it held that they had proved, on a balance of probabilities, that the public would suffer irreparable harm if the court were not to grant the order (and the appellant remained in his position) (para [47]). This matter offers a good illustration of the practical import of section 18.

Applications

A deponent to a founding affidavit must set out enough facts to demonstrate personal knowledge of the essential allegations contained therein. Issues in this regard often arise in applications by financial institutions relating to the National Credit Act 34 of 2005 (NCA). Consequently, in *Firstrand Bank Ltd v Kruger & others* 2017 (1) SA 533 (GJ), the key issue was whether the deponent, a 'commercial recoveries manager' at the bank, had set out enough facts to demonstrate personal knowledge of the facts in the affidavit in an application for outstanding debt in terms of a credit agreement.

The founding affidavit suffered from various defects. First, it was clear from the attached credit facility agreement, in which the bank was represented by two named bank officials, that these officials had made a mistake when inserting the applicable interest rate. However, they filed no confirmatory affidavit relating to the conclusion of the agreement or the mistake, while clearly only they could provide evidence supporting these matters. Secondly, the individuals from whom the deponent obtained the information on which he relied were not identified. As a consequence, the court found that it was not possible to ascertain which parts of the evidence presented by the deponent were within his own knowledge, and which were conveyed by his unnamed sources (para [7]).

The court emphasized that a factual allegation in an affidavit which amounts to no more than information that another party could have provided (thus hearsay evidence) could not be 'elevated to real evidence' simply because the deponent, under a 'standardised statement at the commencement of the affidavit,' believed it to be true and correct (para [10]). In fact, relying on others to provide the information called into question whether any of the essential facts had indeed been gathered by him through 'personally accessing and considering the bank's records' relating to all aspects of the principal debtor's loan account (para [17]).

In practice, the inherent difficulties in producing every individual who dealt with the credit receiver and made each entry reflected in a particular account are manifest. Consequently, in considering whether circumstances existed in which hearsay was admissible, it became necessary to consider the impact of section 3(1)*(c)* of the Law of Evidence Amendment Act 45 of 1988 (which describes the circumstances in which hearsay evidence is admissible). The court explained that this section had at its

core, for the reception of what would otherwise constitute hearsay, the reliability and probative value of the evidence sought to be tendered (para [24]). In determining the extent to which hearsay evidence ought to be admitted in the present type of application (ie, unopposed applications under s 3(1)*(c)*(i) of the Act), the court drew on summary judgment case law in which it is now accepted that where a person was in control of the relevant files and was directly involved in the matter at hand (eg, by engaging directly with the defendant, or by correspondence without comeback), that person qualifies to depose to an affidavit verifying the facts (para [20]).

Consequently, the court held that an applicant credit grantor seeking judgment in an unopposed matter would be able to rely on *(a)* the evidence of a person who exercised control over the documents in issue (usually a bank manager or a recoveries manager) to introduce them into evidence through the founding affidavit, provided such allegation is made, or appears from the contents of the affidavit as a whole, and the agreements are attached and alleged to be true copies; *(b)* the evidence of a person who has personal knowledge of the current status of the credit receiver's account by reason of having access to the account and being involved in the present management of the account or collection process in respect of the allegations contained in the founding affidavit regarding the current outstanding balance (if the agreement permits a certificate of indebtedness to constitute *prima facie* proof, it must be signed by a designated official at the financial institution, and the court must be satisfied that such person would ordinarily have personally accessed the respondent's records, accounts, and other relevant records, and that the certificate is otherwise reliable); *(c)* the evidence of a person who positively attests that notice was properly sent to the respondent under either section 129(1) or section 86(10) of the NCA (para [25]).

In the present matter, the deponent did not claim to have been personally involved in the process or in recovering the debt, or to have personally accessed the bank's records (para [26]). As a consequence, the court correctly held that the papers were not in order and requested the filing of supplementary affidavits from relevant persons (para [27]).

Attorney

Admission

In an application for admission as an attorney, the determining factor is whether the applicant is a 'fit and proper person' to be

admitted, as required by section 15(1) of the Attorneys Act 53 of 1979. As stated in *Summerley v Law Society, Northern Provinces* 2006 (5) SA 613 (SCA) para [21], the attorneys' profession demands complete honesty and integrity from its members, and therefore the court, when considering such an application, must weigh up the conduct that is alleged to disqualify the applicant against the conduct expected of an attorney.

Against this background, the court in *Ex parte Mdyogolo* 2017 (1) SA 432 (ECG) had to decide whether the applicant, who disclosed three previous convictions for criminal offences, was a fit and proper person to be admitted. One of these convictions – robbery with aggravating circumstances – was central to the court's judgment. In his application, the applicant explained that the robbery was politically motivated and that he had applied for amnesty for it. The court requested the Cape Law Society to appear before the court and to make its view known in this regard. However, the Cape Law Society did not appear, but filed an affidavit in which it simply noted that the offence had been 'politically motivated' and endorsed the application without further ado. As the court had concerns about the applicant's explanation, and in view of the Law Society's attitude, it requested the Eastern Cape Society of Advocates to appear as *amicus curiae* in the matter to assist the court.

From the facts before court, it transpired that the applicant's account of the robbery was not only 'both bizarre and nonsensical', but also false, and was 'indicative of a person who is unwilling to take responsibility for his actions, and of a person who is willing to fabricate a version in the hope that it [will] benefit him' (paras [27] [28]). The court also found that the applicant's participation in the robbery (during which he was armed with a semi-automatic rifle), was indicative of a 'grave character flaw' (para [32]). The court further held that the version of the events that he placed on oath before the Truce and Reconciliation in 1998 was 'clearly mendacious' and also indicative of an unfit person. Finally, in his current application before court more than 22 years later, he had lied about why he committed the robbery, thereby illustrating the same character defects. Consequently, the court held that apart from being dishonest and completely 'at odds with the ethical probity expected of an attorney', the applicant had also attempted to mislead both the Law Society and the court. As the applicant's conduct clearly fell short of what was required of an attorney, his application for admission failed (paras [34] [35]).

Unfortunately, the Cape Law Society's handling of the matter was also less than could be expected and did not escape the court's censure. The court pointed out that those handling the application could not have applied their minds properly to the matter. Even the most perfunctory reading of the founding affidavit should have raised a red flag, as the robbery occurred nearly two months *after* the iconic 27 April 1994, and alleging that it had been committed in the course of the armed struggle was unlikely to be true.

Contingency fee agreement

At issue in *Nash & another v Mostert & others* 2017 (4) SA 80 (GP) was the interpretation of the clause in a remuneration agreement which provided that the curator, appointed under section 5 of the Financial Institutions (Protection of Funds) Act 28 of 2001, would be entitled to a curator's remuneration of '16,33% (exclusive of VAT) of . . . assets recovered' (para [19]). Critical to this interpretation was the paragraph in the judgment in terms of which the curator had been appointed, which provided that the curator would be entitled to 'periodic remuneration in accordance with the norms of the attorneys' profession' (para [9]). The applicant contended that the remuneration agreement was invalid and void *ab initio* by virtue of its being a contingency fee agreement outside of the parameters of the Contingency Fees Act 66 of 1997 (CFA) (para [28]).

As the court order did not merely govern the periodicity of the remuneration but also its *nature*, it was held that the remuneration had, therefore, to be in accordance with the norms of the attorneys' profession (paras [63] [64]) – ie, in accordance with the 'ethical norms applicable to legal practitioners' (para [82]). It followed that the curator was constrained to conclude an agreement which accorded with the norms of the attorneys' profession. In this case, the applicable norm was a general prohibition against contingency fee agreements (para [85]). As far as the court was concerned, there was no reason why an agreement that complied in substance with the CFA should not have been concluded – had he done so, the curator could have brought himself within that norm (para [86]).

Despite the matter not being a *non-litigious matter*, the court had no difficulty in finding that contingency fee agreements in respect of non-litigious matters are against public policy and for broadly the same reasons as those that apply to litigious matters,

that is, that they subvert the interests of justice. The respondents were incorrect in their assertion that there is case law to the effect that the common law allowed contingency fee agreements in respect of non-litigious matters. The position is rather that the issue has not yet been expressly decided (para [71]). Hence, the court decided the matter according to first principles (para [72]).

In yet another incident of attempted overreaching in respect of a contingency fee agreement, the court in *Mfengwana v Road Accident Fund* 2017 (5) SA 445 (ECG) had no difficulty in finding that the particular agreement was in breach of section 2(2) of the CFA, and therefore invalid. In this matter, the parties reached a settlement before the matter went to trial, and requested the court to make the settlement agreement an order of the court as required by section 4(3) of the CFA. While the plaintiff's attorney averred in his affidavit (in which he claimed compliance with the Act) that he would charge, as a fee, '25% from the client or (double my fees and take whichever is lesser which would not be more than 25% agreed fees)' (para [22]), a reading of clauses 5 and 6 of the contingency fee agreement clearly indicated that he would in fact charge '25% of the total of damages awarded' (paras [17] [18]). As these clauses were clearly in conflict with section 2(2) of the CFA, the contingency fee agreement as a whole was invalid, and the plaintiff's attorney was held to be entitled only to a reasonable fee in relation to the work performed under common law (paras [20] [21] and [25] [26]). To compound matters, the court further held that in respect of the amount of work involved in this matter, the 'fee of 25%' that the plaintiff's attorney attempted to charge was 'grossly disproportionate' and amounted to 'overreaching on an outrageous scale' (para [19]). Due to the widespread abuse of contingency fee agreements, the court indicated that it would request the registrar of the court to deliver a copy of the judgment to the Cape Law Society for consideration (paras [28] [29]).

Class Action

In *National Union of Metalworkers of South Africa v Oosthuizen & others* 2017 (6) SA 272 (GJ), the timing of a certification application was considered. In this matter the applicant, as a class action representative, approached the court for leave to continue a *pending* action as a class action. This approach by the applicant deviated from the customary approach in class action proceedings in both South Africa and most foreign juris-

dictions, which requires a certification process *prior* to a matter proceeding in terms of class action proceedings. As a consequence, the applicant submitted that even if the prior application was a requirement, it was not a fixed rule, and the ultimate criterion for certification was whether the interests of justice justified it (para [46]).

As a starting point, the court correctly held that the Supreme Court of Appeal in *Children's Resource Centre Trust & others v Pioneer Food (Pty) Ltd & others* 2013 (2) SA 213 (SCA) had laid down as a requirement for a class action that a party seeking to represent the class should first apply to court for authority to do so. This requirement was endorsed by the Constitutional Court in *Mukaddam v Pioneer Foods (Pty) Ltd & others* 2013 (5) SA 89 (CC) (para [45]). It then correctly (and importantly) pointed out that the question of whether the interests of justice require certification was determined with reference to the *content* of the certification application, not its timing (para [47]). Consequently, the pending action could not be certified as a class action *ex post facto* (para [53]).

It is submitted that the logic of this approach is clear in light of the objective of certification in most Commonwealth class action regimes. Certification is generally described as the first hurdle to be overcome in class action proceedings, and plays an important role in ensuring that courts are able to make an informed decision on whether a matter is appropriate for class treatment, and should be allowed to proceed. This is illustrated by the Ontario Law Commission's reference to certification as a 'special judicial filter to weed out' cases not suited for class action proceedings (see *Report on class actions* (1982) 281). (See also *Mahaeeane & another v Anglogold Ashanti Ltd* 2017 (6) SA 382 (SCA) para [23], in which certification was described as a 'necessary precursor' to class action proceedings.)

Costs

An interesting question regarding costs on the attorney-and-client scale in respect of a secret settlement offer was considered in *AD & another v MEC for Health and Social Development, Western Cape* 2017 (5) SA 134 (WCC). Essentially, the question for consideration was whether a settlement offer made without prejudice could be produced in support of a specific costs order.

In this matter, judgment was granted in respect of the plaintiffs' claim for damages, but the court ordered the determination of

costs to stand over. During the subsequent proceedings, the plaintiffs sought, among other things, a punitive costs award on the attorney-and-client scale against the defendant. In support of this the plaintiffs indicated that they had made a secret offer of settlement prior to the trial on the basis that the defendant pay them a specified lump sum, plus interest, plus party-and-party costs, plus the qualifying and preparation expenses of 25 listed experts. The plaintiffs contended that this offer had been unreasonably rejected by the defendants, and that the defendants had also unreasonably failed to make their own global counter-offer. As a consequence, the plaintiffs had had to run a lengthy and enormously expensive trial (para [40]).

In general, the privilege attaching to without-prejudice communications bars their production. However, over time exceptions have been allowed based on the public policy concept of encouraging settlements and discouraging costly litigation (paras [43] [47]). Consequently, in respect of the secret offer, the present court had to decide whether the principles involved in a so-called 'Calderbank offer' (so named with reference to the judgment in the English Court of Appeal *Calderbank v Calderbank* [1975] 3 All ER 333 (CA)) should be recognised in our law. (In *Calderbank,* the court held that, in cases not covered by the rules of court permitting secret offers, a litigant could be permitted to produce, in support of a particular costs order once judgment has been granted, a settlement offer expressly made without prejudice 'except in relation to costs'.) The court pointed out that in England and other Commonwealth jurisdictions, it has been held that the privilege attaching to without-prejudice communications does not bar the production of Calderbank letters in relation to costs, provided the offer explicitly stated that it was made without prejudice 'except in relation to costs' (or words to similar effect), thus qualifying 'without prejudice' (para [43]).

The court saw no reason why our law of evidence, based as it is on English law (para [47]), should not recognise the same exception recognised in England and other Commonwealth jurisdictions (para [50]), and therefore held that Calderbank offers are admissible in relation to costs, and may be disclosed to the court for that purpose once judgment has been given (para [60]).

In the present case, the plaintiffs' secret offer complied with the principles laid down for a Calderbank offer and the court held it to be admissible (para [62]). However, the court held that the

circumstances of the case did not warrant a punitive costs order against the defendant, as it had not behaved unreasonably in rejecting the offer (paras [61]-[82]). Importantly, the court pointed out as regards a Calderbank offer, that it did not entitle a plaintiff to attorney-and-client costs simply because he or she had made a secret offer which was lower than the court awarded. In line with Commonwealth cases, the court consequently listed the following factors that could be considered in determining whether or not the rejection of the offer was reasonable: whether the defendant had engaged reasonably in attempting to settle; whether the plaintiff was offering a fair discount based on a realistic assessment of the case rather than holding out for the best conceivable outcome; whether the plaintiff had allowed the defendant a reasonable time to consider the offer; the extent of the difference between the amount of the offer and the amount of the award; and the nature of the litigants' proceedings and resources (para [6]).

In *De Sousa & another v Technology Corporate Management (Pty) Ltd & others* 2017 (5) SA 577 (GJ), a matter dealing with an action by minority shareholders for relief in terms of section 252 of the Companies Act 61 of 1973, the court also had to consider whether the conduct of the defendants warranted a costs award against them on a punitive scale of attorney-and-client. The court unhesitatingly held that this was the case (para [338]), and on the facts of the matter, listed the following factors that justified the finding: the defendants' approach to the litigation had been obstructive, thus prolonging the hearing and delaying the finalisation of the trial; they had raised groundless objections; they had brought abortive interlocutory applications; the cross-examination of witnesses had been excessively long; declared dividends had been wrongfully withheld from the applicants; the defendants had refused to engage in *bona fide* discussions or negotiations to permit the plaintiffs to dispose of their shares at a fair value and without resort to litigation; and wrongful use had been made of company funds made by the plaintiffs to resist the present proceedings (paras [340]–[351]). As a mark of its disapproval of the defendants' conduct, the court directed that costs on the attorney-and-client scale be borne by the second to fifth defendants (para [355]).

Courts

Judicial authority

It is an entrenched principle that no one should be judge in his or her own case. Consequently, in *MEC for Health, Gauteng v*

Lushaba 2017 (1) SA 106 (CC) the Constitutional Court set aside an order for costs issued by the Gauteng Local Division of the High Court. In this matter, the High Court issued a rule *nisi*, calling on the MEC to show cause why he should not be held liable for costs *de bonis propriis* in his personal capacity, alternatively, to indicate those officials in the Department of Health and the Office of the State Attorney who should be held liable. The High Court subsequently confirmed the rule, and ordered four officials whom it deemed liable to pay such costs jointly and severally with the defendant.

Although the Constitutional Court showed understanding for the High Court's concern and frustration over the 'staggering' increase in claims against the health service providers and the resultant mounting litigation costs, it pointed out that a court, as in the present instance, should nevertheless not apply 'inapposite implements' in response and in order to bring accountability to those responsible for this tragic state of affairs (para [11]). The Constitutional Court held that the order issued by the High Court was incompetent on two grounds. In the first instance, instead of determining liability, the court impermissibly authorised one of the parties before it to exercise a judicial power by leaving it to the MEC to decide whether he was personally liable (and if he was not of such a view, to identify persons who were, giving reasons for this view). Also, by its order the court in effect sought to join parties not involved in the litigation (para [13]). The parties referred to (the officials) were clearly at no stage properly joined in the matter, and the mere fact that they deposed to affidavits in support of the MEC did not in any way provide a legal basis upon which the court could exercise its judicial authority over them. Therefore, the approach of the High Court failed to accord not only with section 165 of the Constitution, which declares that judicial authority is vested in the courts (para [14]), but also with the entrenched principle that no one should be a judge in his or her own case. Secondly, the High Court also violated the four officials' right to a fair hearing guaranteed by section 34 of the Constitution (paras [18] [19]): no rule *nisi* was issued calling upon them to show cause why they should not be held liable, and this failure denied them the opportunity to make representations.

Judge

It is settled law that not only actual bias, but also the *appearance* of bias disqualifies a judicial officer from presiding (or

continuing to preside) over judicial proceedings. Furthermore, continuing to preside after a recusal should have occurred renders the further proceedings a nullity (see, eg, *Take and Save Trading CC & others v Standard Bank of South Africa Ltd* 2004 (4) SA 1 (SCA) para [5]). Consequently, in *Mulaudzi v Old Mutual Life Assurance Company (South Africa) Ltd & others* 2017 (6) SA 90 (SCA), the Supreme Court of Appeal held that there was a reasonable apprehension that the particular judge in question 'did not bring an open and impartial mind to bear on the adjudication of the matter' (para [68]), for the following reasons: the appellant's attorney was the presiding judge's longstanding attorney; the judge was not a duty judge on the return day, yet assigned himself to the matter; the judge discharged a restraint order without reading reports by the National Director of Public Prosecutions and Old Mutual opposing such discharge; the judge's reasons for his order only ran to some six pages in respect of a matter that was 'neither easy nor clear'; his findings in support of discharge were untenable; and he misapplied the relevant principles in denying leave to appeal (paras [49]-[67]). As a consequence, the proceedings before that judge amounted to a nullity and the matter was remitted to the High Court (differently constituted) to be properly adjudicated.

Judgment and Orders

Rescission

Under Uniform Rule 42(1)*(c)*, a judgment granted 'as the result of a mistake common to the parties' may be rescinded. The question for decision in *Botha v Road Accident Fund* 2017 (2) SA 50 (SCA) concerned a settlement which had been made an order of court. In this matter, the appellant's attorneys ascertained, subsequent to the court order and the respondent's payment in terms of that order, that the amount claimed and paid in respect of the appellant's past hospital and medical expenses in fact only represented a portion of the actual expenses incurred. The mistake occurred as a result of source documents having been placed in another client's file, and they were consequently not presented to the respondent when the settlement was negotiated. When the appellant's attorney informed the respondent of this 'mutual error' and proposed a rescission of the court order (which was to be replaced by an order reflecting the correct amount), the respondent predictably refused to agree. The

respondents argued that the appellant (or his attorney) had misrepresented the facts on which the settlement had been rendered (paras [3]–[7]). The court below dismissed the application for rescission, and held that the mistake relied upon by the appellant was a 'retrospective mistake by means of fresh evidence' (para [7]).

After hearing the matter, the Supreme Court of Appeal correctly dismissed the appeal (para [14]). In the first instance, when seeking relief under Uniform Rule 42(1)*(c)*, it must be shown that the settlement agreement had been concluded as a result of a mistake as to the correct facts *common to both* the appellant and the respondent – this was not the case here, as the mistake in this instance could be described as a 'unilateral mistake' made by the appellant's attorney who, through his misrepresentation, induced the respondent to contract on the terms it did [para 9]. Under the so-called 'reliance theory', if there is no actual concensus due to a material mistake by one party, the contract remains valid if the other party reasonably relied on the impression that there was consensus [para 10]. In this regard, the court pointed out that it had not been suggested that a reasonable man would not have accepted the facts presented to the respondent's attorneys, or would have realised that there had been a real possibility of a mistake in the amount requested to be paid (para [11]). Consequently, this misrepresentation on the part of the appellant had misled the respondent and resulted in the conclusion of the settlement agreement (para [11]). Clearly the appellant could not have relied on his own mistake to avoid the contract.

In *Moraitis Investments (Pty) Ltd & others v Montic Dairy (Pty) Ltd* 2017 (5) SA 508 (SCA), the court also considered whether a settlement agreement which had been made an order of court could be set aside. The appellants contended that the settlement agreement was invalid, because the fifth appellant had not been authorised to conclude the agreement. The court restated certain important principles pertaining to rescission. First, the starting point for the enquiry is the court order (in this instance the order obtained by consent). A court order, for so long as it stands, cannot be disregarded, regardless of being a consent order – such an order has the same standing and qualities as any other court order and is *res iudicata* as between the parties in regard to the matters it covers. Also, the Constitutional Court has repeatedly stated that a court order may not be ignored, because to do so would be inconsistent with section 165(5) of the Constitution of

the Republic of South Africa, 1996 (the Constitution), which provides that an order issued by a court binds all people to whom it applies (para [10]). Secondly, until the judgment has been set aside, the compromise agreement cannot be attacked.

Consequently, the starting point in this matter was whether there were any grounds upon which rescission might be sought (para [16]). As the appellants had failed to prove that concluding the agreement had not been authorised (paras [33]–[35]) and the doctrine of unanimous assent applied, the agreement was held to be lawful (paras [36]–[38]), as no grounds for rescission had been established.

Jurisdiction

In *Snyders & others v De Jager & others* 2017 (3) SA 545 (CC), the Constitutional Court considered whether, in a case where a magistrate's court had granted an eviction order under the Extension of Security of Tenure Act 62 of 1997 (the ESTA) which was subsequently confirmed by the Land Claims Court (the LCC) under section 19(3) of that Act, an appeal lay to the Supreme Court of Appeal or to the Land Claims Court (LCC).

This question was previously considered by the Supreme Court of Appeal in *Snyders & others v De Jager & others* 2016 (5) SA 218 (SCA), where it was held that where the LCC has confirmed the eviction order of the magistrate's court, there is only one decision, namely that of the magistrate's court. An appeal would consequently lie to the LCC, and not to the Supreme Court of Appeal. In reaching its conclusion, the Supreme Court of Appeal had followed a line of decisions of the LCC to the same effect (paras [45] [46]). However, the Constitutional Court disagreed and held that there was no basis in law for such an approach (para [47]) – when a judge of the LCC confirms a decision of a magistrate's court under section 19(3), it confirms that the decision is correct and free from irregularities that could render it susceptible to being set aside on review. Such a decision is in fact a decision or order of the LCC (para [48]), and therefore a decision of a court 'of a status similar to that of the High Court' under section 16(1)*(c)* of the Superior Courts Act, 2013, with the result that appeal lies to the Supreme Court of Appeal (para [47]). The court pointed out that this approach was also consistent with section 37(2) of the Restitution of Lands Rights Act 22 of 1994, but that the Supreme Court of Appeal had not considered this section (para [40]). Consequently, an appeal against a section 19(3)

confirmation of an eviction order issued by a magistrate under the ESTA was an appeal against an order of the LCC, and not against an order of a magistrate's court, and the appeal lay to the Supreme Court of Appeal, and not to the LCC (paras [47]–[50]).

The administrator in respect of a debtor under administration is tasked with the fair distribution of monthly payments among creditors, and to this end, has a duty to prepare an emoluments attachment order against a debtor and his or her employer to ensure payment under the administration order. In the event of a debtor defaulting, the administrator may, in terms of section 74I of the Magistrates' Courts Act 32 of 1944, obtain an emoluments attachment order from the clerk of the court. Consequently, in *Smith NO v Clerk, Pietermaritzburg Magistrate's Court* 2017 (5) SA 289 (KZP), the Pietermaritzburg magistrate's court granted an administration order against the debtor who resided in the district of the court, and also authorised an emoluments attachment order. However, the debtor's employer's head office and paymaster's office were situated in Durban, and therefore, when the appellant (the administrator) at a later date requested the respondent to issue the attachment order, the respondent refused to do so on the ground that section 65J(1)*(a)* provided that the order had to be authorised by the clerk of the court which had jurisdiction over the employer (paras [9] [10]).

On appeal the court held that since the provisions of section 65J were very clear, the court below correctly held that only the court of the district in which the *employer* 'resides, carries on business or is employed' had jurisdiction to issue such an attachment order (para [22]). The emoluments attachment order had, therefore, been correctly refused as it was the Durban magistrate's court that was vested with jurisdiction. Despite the clear wording of section 65J(1)*(a)*, the administrator had contended that only specified subsections applied in administrations, that he was not required to enforce the emoluments attachment order, but that the employer was obliged in terms of section 74I to pay emoluments over to him. However, the court rejected this contention and held that subsections did not operate in isolation or exclusively from the rest of the section – all the provisions of section 65J applied in the present case, and legal force is only given to emoluments attachment orders that have already been authorised, issued, and/or served and suspended on certain conditions (paras [38]–[40]).

PRACTICE

Contempt of court

In *Kenton-on Sea Ratepayers Association & others v Ndlambe Local Municipality & others* 2017 (2) SA 86 (ECG), the court considered, among other things, what constituted contempt of court. The court explained that, in accordance with the *locus classicus, Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para [48], disobedience of a court order constituted contempt if committed deliberately and in bad faith (para [52]). Therefore, a deliberate disregard would be insufficient, because the non-complier might 'genuinely, albeit mistakenly, believe him- or herself entitled to act in the way claimed to constitute the contempt'. The court in *Fakie* further held that once the applicant had proved the order, service, or notice, as well as non-compliance, an evidential burden in relation to wilfulness and *mala fides* was borne by the respondent, and failure to advance evidence established contempt beyond reasonable doubt (para [53]). Consequently, in the present matter, the order, service, notice and non-compliance with the court order had been proved by the applicants, and, therefore, the only remaining question for consideration was whether the respondents had advanced evidence that established a reasonable doubt as to whether non-compliance had been wilful and *mala fide*. The court held that there was more than sufficient evidence on the affidavits to establish that the local municipality and the municipal manager's failure to comply with the interdict regarding the closure of a dumping site and the commissioning of a new site were beyond a reasonable doubt wilful and *mala fide* (paras [62] [67]).

In *Readam SA (Pty) Ltd v BSB International Link CC & others* 2017 (5) SA 184 (GJ), an application to commit the first and second respondent for contempt of court was brought, because they had failed to comply with an order of the Supreme Court of Appeal to demolish an unlawfully erected building.

The form of contempt in evidence in this matter may usefully be labelled 'defiance of a court order', to which the leading authority, *Fakie NO* (above), applies. As stated above, *Fakie* requires that a wilful and *mala fide* defiance be established beyond a reasonable doubt. Should a respondent fail to advance evidence that establishes such reasonable doubt, contempt will have been established beyond reasonable doubt. In this particular matter, the respondents did no such thing, but, as Sutherland J (para

[10]) remarked, frankly confessed 'to taking no steps towards compliance'. Moreover, the respondents confessed 'to doing so deliberately', leading inescapably to the conclusion that the respondents were indeed in contempt (para [17]). Instead of taking steps to comply with the order of the Supreme Court of Appeal, the respondents devised a strategy which was expected to render that order moot, and to legitimise their unlawful enterprise (para [13]). To this end, the respondents acquired a stand adjacent to the one on which the unlawfully erected building stood, consolidated the stands, and then applied to the City of Johannesburg for the rezoning of the consolidated stand to allow for a greater building height, greater floor area coverage, and more parking facilities (paras [4] [12]–[15]).

Unsurprisingly, the court rejected the respondents' argument that this course of events had the effect of 'regularising' their unlawful conduct, and held that the strategy pursued was 'inconsistent with any fair meaning to be attributed to the SCA order' – properly interpreted, a demolition of the unlawful building was not optional, but had to have occurred, and therefore, it was not open to the respondents to take steps that excluded a demolition (para [18]). Moreover, as a matter of principle, accepting the respondents' evasive conduct would have been inappropriate and would have militated against the doctrine of legality (paras [19] [22] [23] [29]). Consequently, the court held that the respondents were clearly in contempt (para [43]) and committed the second respondent to incarceration for a period of 30 days, conditionally suspended (para [54]).

Trial

The general principle laid down in Uniform Rule 38(2) is that unless special circumstances exist, a witness must give evidence *viva voce* and in open court. In *Uramin (Incorporated in British Columbia) t/a Areva Resources Southern Africa v Perie* 2017 (1) SA 236 (GJ), the question for decision was whether an application to lead evidence of witnesses based abroad using a video link should be granted.

The court indicated that the test to be applied by the court in exercising its discretion to vary the above general principle was whether or not it was 'convenient or necessary for the purposes of justice' to do so (para [25]). In this matter the defendant, an ex-employee of the applicant, sued the applicant for payment of a sum of money on an alleged oral agreement. Both the appli-

cant's employee who allegedly concluded the agreement, and the employee who had executed a settlement agreement relating to the claim, were no longer in its employ, and neither lived or worked in South Africa.

These facts clearly established special circumstances and persuaded the court to hold that there was sufficient reason to allow the witnesses to testify by video link (para [30]). The court's general support for the use of technology in court proceedings is certainly to be welcomed, as it can play a significant role in broadening access to justice and improving judicial economy.

Pretrial Judgments

Summary judgment

In *ABSA Bank Ltd v Expectra 423 (Pty) Ltd & others* 2017 (1) SA 81 (WCC), the defendants, in their capacity as sureties and co-principal debtors, opposed an application for summary judgment. Shortly before the hearing date, they filed a notice in terms of Uniform Rule 35(12), requiring the plaintiff to produce certain documents. In addition, they filed what they termed a 'provisional affidavit'; applied for leave to file a 'supplementary answering affidavit' coupled with a request for an extension of the date set by Uniform Rule 32(3)*(b)* for the filing thereof to a date after the production of the said documents; and also applied for the postponement of the summary judgment application *sine die*.

In support of their taking this rather unusual approach, the defendants relied on a *dictum* in *Business Partners Ltd v Trustees, Riaan Botes Family Trusts & another* 2013 (5) SA 514 (WCC) paragraph [11], that it was 'of course open to the defendants to invoke Rule 35(12) and (14)'. (Paradoxically, both parties relied on this judgment in argument before court (para [10]).) This matter, therefore, raised the question of whether the discovery procedures provided for in Uniform Rule 35(12) and (14) applied to summary judgment applications.

In considering whether Uniform Rule 35(12) and (14) could defer an application for summary judgment, Bozalek J analysed the *Business Partners* judgment. He pointed out that after the court in *Business Partners* had set out at length the procedure involved in an application for summary judgment and its rationale, as well as the interplay between Uniform Rule 32 (governing summary judgment) and Uniform Rule 35 (governing discovery and inspection of documents), it came to the conclusion that it

could never have been the intention of the drafters of the rules to allow a defendant to invoke Uniform Rule 35(12) or (14) in order to delay summary judgment proceedings (paras [11] [12]). As far as the above *dictum* is concerned, the court opined that it therefore had to be seen in the context of the immediately subsequent remarks of the court (para [13]), and that it meant, at most, that a defendant might, 'for what it is worth', issue a notice in terms of the said rules, but that this 'cannot defer an application for summary judgment' on the basis that no reply had been forthcoming. Failure to produce any document so sought would at best put a defendant in the position to aver in its opposing affidavit that, in its evaluation of the nature and grounds of its defence and the material facts upon which it was based, the court had to take into account that the defendant had not been able to gain access to such documentation, and no more (para [14]).

The court further held that should it be incorrect in its interpretation of the *dictum,* and Uniform Rule 35(12) and (14) could indeed be used to defer an application for summary judgment, then it was in disagreement with such a view, and that such a view would be 'incompatible with the purpose and nature of summary judgment proceedings' (para [15]). The court consequently dismissed all the applications by the defendants as they were without merit (para [16]).

Because the defendants had assumed that Uniform Rule 35(12) was applicable to the summary judgment proceedings, they argued that since the plaintiff had failed to respond to the notice in terms of this rule, and in the absence of leave of the court having been sought, the plaintiff was disqualified from using the relevant documents, and that the deponent in respect of the supporting affidavit was consequently precluded from relying thereon in order to acquaint himself with the facts not in his personal knowledge for purposes of the affidavit. The court made short shrift of this argument by pointing out that it was without merit, as it rested squarely on an incorrect assumption regarding the applicability of Uniform Rule 35(12) to summary judgment proceedings (paras [17] [18]). The court also correctly reiterated the general position regarding the requirement of personal knowledge of the facts in a matter for purposes of the supporting affidavit as set out in *Maharaj v Barclays National Bank Ltd* 1976(1) SA 418 (A) and *Rees & another v Investec Bank Ltd* 2014 (4) SA 220 (SCA), namely that personal knowledge of every fact which goes to make up the applicant's cause of action

was not required. Indeed, it should not be required of the deponent, because to do so would not be consistent with the principles espoused in *Maharaj*. The application for summary judgment was upheld (para [49]).

Provisional sentence summons

In *Wile & another v MEC, Department of Public Works, Gauteng & others* 2017 (1) SA 125 (WCC), the plaintiffs used provisional sentence proceedings initially to seek an order directing the Department to give effect to a foreign judgment. This was later amended to an order directing the Department to give effect to the judgment only to the extent of changing the plaintiff's name and surname in its records.

It is trite that the provisional sentence procedure provides a creditor with a speedy remedy for the recovery of money based on a liquid document. Consequently, the court had little trouble in holding that the plaintiffs' use of this procedure was clearly inappropriate in the circumstances of the case (paras [7] [27]). However, the defendants did not escape censure in the matter, and their conduct was criticised by the court. The court held in particular that it had been inappropriate for them to have engaged with the plaintiffs on the merits, and also not to have raised any objections or taken any steps beyond contending in their heads of argument that the action failed to meet the requirements for provisional sentence. As a foreign judgment clearly did not constitute a liquid document, the defendants should at least have used Uniform Rule 30 and applied to court to have the summons set aside as an irregular step.

In considering whether to dismiss the claim on the basis of an inappropriate procedure having been followed, the court adopted a pragmatic approach and took into consideration that all the issues between the parties had been fully ventilated in the existing papers. It held that to dismiss the claim would, in the circumstances of the case, 'elevate form over substance and would ill serve the interests of justice' (para [28]). Consequently, in the interests of justice and of the parties, the court ruled that the present proceedings should simply be treated as application proceedings (para [30]), thus obviating the need for the plaintiffs to start proceedings afresh (para [28]).

(See the chapter *Conflict of Laws* for a more comprehensive analysis of this matter.)

REVIEW

Applicability

It is trite that Uniform Rule 53 provides for the review of a 'decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions'. A magistrate, presiding officer, chairperson, or officer (as the case may be) may be required either to file the reasons and record sought to be reviewed with the registrar or to furnish it to the applicant. Consequently, in *Democratic Alliance v President of the Republic of South Africa* 2017 (4) SA 253 (GP), the interesting question for decision was whether this rule also applies to executive decisions of the President. This question stemmed from the former President's shock decisions to dismiss and replace a minister and a deputy minister. The application, which was brought on an urgent basis, in essence amounted to an application for the review of these decisions.

In response to this application, the President merely filed a notice of intention to oppose, but did not respond to the main application, or file or furnish the record relating to the making of the decisions or the reasons for those decisions (paras [7]-[10]). Despite the respondent having been granted a limited extension to file the record and reasons (para [11]), the failure to comply continued, and resulted in the present urgent application to compel the President to furnish the applicant with the record and reasons.

In the answering affidavit filed on behalf of the President, the urgency of the main and current interlocutory applications was disputed. Importantly, it was contended that Uniform Rule 53 was not applicable, because the decisions sought to be reviewed constituted executive decisions taken in terms of section 91 of the Constitution (para [16]), and also because the rule did not include a reference to 'executive decision' within its ambit (para [21]).

In considering the power vested in the President to take decisions under section 91 and section 83*(b)* and *(c)* of the Constitution, which compel the President to 'uphold, defend and respect the Constitution as the supreme law' and to promote the 'unity of the nation and that which will advance the Republic', these provisions respectively act as a starting point. The court pointed out that this section had to be read with section 91 in this regard. Having done so, the court concluded that while the

executive power to appoint and dismiss ministers and deputy ministers was wide-ranging, it was not unfettered – the executive power was circumscribed by 'the bounds of rationality' as well as by section 83*(b)* and *(c)* (para [18]). Consequently, irrational or arbitrary executive decisions may be set aside as unlawful and contrary to the doctrine of legality (para [19]).

As far as the applicability of Uniform Rule 53 was concerned, the court first placed the rule in its proper context, and pointed out that it had been promulgated at a time when executive decisions were not subject to review, but that this is no longer the case (as in fact acknowledged by the President) (para [21]). Furthermore, this rule had not only served applicants well over the years, but also the courts, as a court 'cannot perform its constitutionally entrenched review function' without the record (paras [22]-[25], quoting Navsa JA in *Democratic Alliance & others v Acting National Director of Public Prosecutions & others* 2012 (3) SA 486 (SCA)). Therefore, its applicability had to be subjected to a 'purposive interpretation', and, relying on such interpretation, the court held that there was no logical reason not to utilise it *mutatis mutandis* in respect of executive decisions such as in the present matter. Uniform Rule 53 consequently applied (paras [29]-[31]), and it followed that the applicant in the main application was entitled to call for the furnishing of the reasons for the decisions, as well as of the record that formed the basis upon which the decisions had been taken (paras [3] [37]).

Record of proceedings

In *Helen Suzman Foundation v Judicial Service Commission & others* 2017 (1) SA 367 (SCA), the core issue on appeal was whether the deliberations held in a closed session by the Judicial Service Commission (JSC) in connection with the appointment of judges formed part of the record of its proceedings for purpose of Uniform Rule 53(1)*(b)* and had to be made available. The court below dismissed the applicant's application for an order directing the JSC to deliver the full record of the proceedings sought to be reviewed, including the audio recording and any transcript of the JSC's private deliberations after the interview of judicial candidates on a particular date.

Although the JSC delivered a record of its proceedings, which consisted of (a) the reasons for the JSC's decision which included its considerations in respect of each candidate; (b) the transcripts of the interview with each of the candidates; (c) each

candidate's application for appointment; (d) comments on the candidates from various professional bodies and interested individuals; and (e) related research, submissions, and correspondence (para [3]), the applicant was of the opinion that the JSC had furnished an incomplete record by failing to furnish the recording, and consequently contended that the JSC was in breach of Uniform Rule 53(1)*(b)* (para [4]). These contentions did not change on appeal, and the applicant then contended that the deliberations (captured on the recording) constituted the 'very basis from which that reasoning was drafted and were therefore indispensable to the exercise of review rights and clearly relevant' (para [8]). The applicant also challenged the comparison of the deliberations to private judicial deliberations by the court below, and argued that the JSC did not perform judicial functions in this instance.

Before reaching its conclusion, the Supreme Court of Appeal considered the primary purpose of the uniform rule and its constitutional link (s 34 of the Constitution relating to access to court (para [13])), and pointed out that it was only those portions of a record relevant to the decision in issue that should be made available (para [18]). It therefore followed that an applicant did not have an unqualified right of access to the record, and that the key enquiry was the relevance of the portion to the decision sought to be reviewed.

Furthermore, in considering the effect of a decision-maker's deliberations, the court considered the well-known *dictum* by Marais J in *Johannesburg City Council v Administrator, Transvaal & others* 1970 (2) SA 89 (T) (91G-92A), in which that court likened a record of proceedings to the record of court proceedings which 'quite clearly does not include a record of the deliberations subsequent to the receiving of the evidence and preceding the announcement of the court's decision'. However, the court pointed out that it was clear from recent constitutional jurisprudence that this *dictum* had to be qualified insofar as it excluded 'all and any deliberations' of a decision-maker from the ambit of Uniform Rule 53, since a disclosure thereof may be warranted in 'appropriate circumstances' (para [15]). This means that while a decision-maker's deliberations do not automatically form part of the record of proceedings envisaged by this rule, the decision-maker may in certain circumstances be required to produce a record of proceedings which would include its deliberations.

Finally, turning to the deliberations of the JSC in the present matter, the court pointed out that the confidentiality of the JSC's

processes was recognised in legislation: first, in sections 38(1) and 35 of the Judicial Service Commission Act 9 of 1994 (which relate to the non-disclosure of confidential information or documents, and require deliberation in private); and secondly, section 12*(d)* of the Promotion of Access to Information Act 2 of 2000, which exempts the JSC's processes relating to judicial appointments from its operation (paras [22]–[24]). The court ultimately concluded that the JSC was set apart from other administrative bodies by its unique features, which provide sufficient safeguards against arbitrary and irrational decisions (para [39]). In the present instance, the court held that confidentiality considerations warranted non-disclosure of the said deliberations, and the relief sought by the applicants would undermine the JSC's 'constitutional and legislative imperatives by, inter alia, stifling the rigour and candour of the deliberations, deterring potential applicants, harming the dignity and privacy of candidates who applied with the expectation of confidentiality of the deliberations and generally hamper effective judicial selection' (para [39]). The court held that in order to determine whether disclosure was warranted in a particular matter, what had to be weighed was, inter alia, the nature and relevance of the information sought; the extent of the disclosure; the circumstances under which the disclosure was sought; and the potential impact upon anyone if disclosure were to be ordered or refused (as the case may be) in a manner that would enable the JSC to conduct a judicial selection process that did not violate its positive obligations of accountability and transparency (para [21]).

CONSTITUTIONAL PRACTICE AND PROCEDURE

Costs

In *Lawyers for Human Rights v Minister in the Presidency* 2017 (1) SA 645 (CC), the costs order granted by the High Court against LHR as the unsuccessful litigant claiming to enforce the Constitution was at issue.

Although in *Ferreira v Levin NO & others; Vryenhoek v Powell NO & others* 1996 (2) SA 621 (CC), the Constitutional Court endorsed the long-standing principles that costs orders are in the discretion of the court, and that, in general, the unsuccessful party bears the costs, it was, however, held in *Biowatch Trust v Registrar, Genetic Resources & others* 2009 (6) SA 232 (CC) para [24] that the general rule was *not* to award costs against

unsuccessful litigants when litigating against state parties and the matter was of genuine constitutional import. This rule applies both to a costs order on the merits in constitutional cases, and to ancillary issues and points.

In the present matter, the court confirmed these principles, and pointed out that the *Biowatch* rule did not mean risk-free constitutional litigation, but that the court, in its discretion, might order costs if the constitutional grounds of attack were 'frivolous or vexatious, or if the applicant acted from improper motives or if circumstances made it in the interests of justice to do so' (para [18]). Therefore, after a 'close and careful examination' of all the circumstances of the case (para [21]), the court held that it could not fault the High Court's exercise of its discretion to award costs against LHR (para [26]), and that the High Court had made an order it deemed appropriate to protect its process (para [23]). (The High Court considered the extreme delay in bringing the proceedings only six weeks after search-and-arrest operations had taken place in Johannesburg, *and* of only then placing the matter on the urgent roll, inappropriate and uncalled for (para [23]).) Leave to appeal against the adverse costs order was consequently dismissed.

Rescission

Two justices of the Constitutional Court brought an application for the rescission of an order in terms of which they were refused leave to appeal against a judgment of the Supreme Court of Appeal in *Nkabinde & another v Judicial Service Commission & others* 2017 (3) SA 119 (CC). The applicants brought this application under Uniform Rule 42(1)*(a)*, arguing that the order had been 'erroneously . . . granted in [their] absence' (para [14]). The applicants contended that the practice of the Constitutional Court to deal with applications for leave to appeal at a conference or a meeting of the justices (thus not in open court) (para [4]) deprived them of an opportunity to make presentations, and that while some of the court members were disqualified, they had nevertheless taken part in the decision to dismiss their application (para [15]).

The Constitutional Court held that Uniform Rule 42(1)*(a)* did not apply when this court considered and decided applications for leave to appeal at a judges' conference – the requirement in this particular rule was based on the assumption that a litigant was entitled to be present *in court* when its matter was heard, but that

it happened in its absence. However, no litigant (which included the applicants) had a right to be present at a conference of the judges (para [20]). Furthermore, the contention that the order had been erroneously granted was also rejected, because Rule 19(6) of the Constitutional Court Rules made it clear that when the court dealt with applications for leave to appeal, it could do so summarily and without oral argument or additional written submissions (para [21]). Not only were the applicants, as justices of the Constitutional Court, familiar with the conference procedure (paras [4] [5]), they were also aware of the disqualification of their colleagues and familiar with the principle established in *Judge President Hlope v Premier, Western Cape; Judge President Hlope v Freedom Under Law & others* 2013 (6) SA 13 (CC), which compelled the court to refuse leave to appeal should the court be rendered inquorate. The appeal was consequently dismissed.

CONFLICT OF LAWS

ELSABE SCHOEMAN*

LEGISLATION

International Arbitration Act 15 of 2017

After many years in the making (starting in 1994), the International Arbitration Act 15 of 2017 (the IAA, 2017) was assented to on 19 December 2017 and commenced on 20 December 2017. This Act brings about significant changes to the arbitration landscape in South Africa. It incorporates the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (the UNCITRAL Model Law) into South African law, gives full effect to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (the New York Convention), and amends the Protection of Businesses Act 99 of 1978 (the PBA, 1978). From a private international law perspective, the IAA, 2017, impacts on a number of aspects relating to cross-border commercial dispute resolution.

Section 4(1) of Chapter 1 (General Provisions) of the IAA, 2017, provides that the Arbitration Act 42 of 1965 (the AA, 1965) no longer applies to international arbitration. This means that the AA, 1965, which previously applied to both domestic and international arbitration, now applies only to domestic arbitration. Strangely, while the AA, 1965, no longer applies to international arbitration, section 4(2) of the IAA, 2017, provides that section 2 of the AA, 1965, will continue to apply for the purposes of Chapter 3 of the IAA, 2017, which deals with the recognition and enforcement of arbitration agreements and foreign arbitral awards. Section 2 of the AA, 1965, excludes matrimonial and related causes, and matters relating to status, from arbitration. It is odd that the IAA, 2017, refers to the AA, 1965, which no longer applies to international arbitration, with the sole purpose of excluding specific subject matter from international arbitration. A simpler course would have been specifically to exclude the subject matter identified in section 2 of the AA, 1965, from the IAA, 2017, without having to refer to the AA, 1965.

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The IAA, 2017, incorporates the UNCITRAL Model Law into South African law. In terms of section 7(1)*(a)* of Chapter 2 (International Commercial Arbitration) of the IAA, 2017, any international commercial dispute submitted to arbitration under an arbitration agreement may be determined by arbitration, unless the subject matter of the dispute cannot be determined by arbitration under South African law. In addition, any arbitration agreement that is contrary to the public policy of South Africa (s 7(1)*(b)* of the IAA, 2017) will have no effect. Section 7 of the IAA, 2017, gives effect to party autonomy (allowing parties to determine the method of dispute resolution by agreement) while endorsing the private international law exclusionary doctrine of public policy that operates as a check on party autonomy.

Article 28 of the UNCITRAL Model Law provides for certain rules to apply in respect of the substance of a dispute submitted to arbitration. For private international law purposes, the provisions of article 28(1) and (2) are important.

Article 28(1) endorses party autonomy by allowing the parties to choose the law that will govern their dispute. Presumably, this also allows for a tacit or implied choice of law. In terms of article 28(3), parties may expressly authorise the arbitral tribunal to decide the dispute *ex aequo et bono* or as '*amiable compositeur*'. Where the parties have chosen the legal system of a particular country, *renvoi* is excluded. This means that reference will be made only to the internal law of the designated country, excluding its private international law rules.

Article 28(2) deals with the situation where the parties have failed to choose the law applicable to their dispute. In such a situation the tribunal 'shall apply the law determined by the conflict of laws rules which it considers applicable'. This article does not lend itself to easy interpretation. It is not clear how the tribunal will identify the conflict of law rules that will determine the applicable law. As the arbitral tribunal is not an extension of a South African court, South African conflict rules are not automatically applicable. (For a recent exposition of approaches to this issue, see Soterios Loizou 'Revisiting the ''content-of-laws'' enquiry in international arbitration' (2018) 78/3 *Louisiana Law Review* 811.) In this regard, see *https://www.hcch.net/en/instruments/conventions/full-text/?cid=135*).

The IAA, 2017, repeals the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977 (the REFAAA, 1977) which originally implemented the New York Convention in South Africa.

The REFAAA, 1977, did not incorporate the full text of the New York Convention. This resulted in inadequate effect being given to the Convention. In contrast, the IAA, 2017, now incorporates the entire New York Convention into South African law via Schedule 3 to the IAA, 2017. The IAA, 2017, therefore, gives full effect to South Africa's obligations under the New York Convention. Section 16(1) of Chapter 3 (Recognition and Enforcement of Arbitration Agreements and Foreign Arbitral Awards) of the IAA, 2017, requires, subject to section 18, that an arbitration agreement and a foreign arbitral award be recognised and enforced in South Africa (see the discussion below). Moreover, section 16(4) of the IAA, 2017, makes article 8 of the UNCITRAL Model Law, which provides for a stay of proceedings and referral to arbitration in situations where a dispute is the subject of an arbitration agreement, applicable to arbitration agreements referred to in section 16(1).

There are a number of provisions across the IAA, 2017, the UNCITRAL Model Law (Schedule 1 to the IAA, 2017), and the New York Convention (Schedule 2 to the IAA, 2017), that contain similar grounds for the refusal of recognition and/or enforcement of arbitration agreements and arbitral awards, as well as for recourse to a court of law in order to have an arbitral award set aside. In this contribution the focus is on those grounds that relate to private international law matters. For ease of comparison, the relevant provisions are set out in Tables 1 and 2 below. Table 1 sets out the provisions related to, and contained in, the New York Convention, while Table 2 sets out the provisions contained in the UNCITRAL Model Law.

Table 1

CHAPTER 3 (RECOGNITION AND ENFORCEMENT OF ARBITRATION AGREEMENTS AND FOREIGN ARBITRAL AWARDS) of **IAA 2017**, section 18: Grounds for the *refusal of recognition or enforcement of a foreign arbitral award*:	**NEW YORK CONVENTION** (Schedule 2 to the IAA 2017), article V: Grounds for *refusal of recognition and enforcement of a foreign arbitral award*:
• Where *a party* to the arbitration agreement did not have contractual capacity under the *law applicable to that party* (s 18(1)*(b)*(i)); or	• Where *the parties* to the arbitration agreement were under some incapacity under the *law applicable to them* (art V(1)*(a)*); or

• Where the arbitration agreement is invalid under the chosen governing law or, in the absence of a choice by the parties, under the law of the country where the award was made (s 18(1)*(b)*(ii)); or	• Where the arbitration agreement is invalid under the chosen governing law or, in the absence of a choice by the parties, under the law of the country where the award was made (art V(1)*(a)*); or
• Where recognition or enforcement of the award is contrary to the public policy of South Africa (s 18(1)*(a)*(ii)).	• Where recognition or enforcement of the award is contrary to the public policy of the country where recognition and enforcement is sought (ie South Africa) (art V(2)*(b)*).
No clarification regarding public policy	No clarification regarding public policy

Table 2

CHAPTER VIII (RECOGNITION AND ENFORCEMENT OF AWARDS) of the **UNCITRAL Model Law** (Schedule 1 to the IAA 2017), article 36: Grounds for *refusal of recognition or enforcement of an international arbitral award*:	**CHAPTER VII (RECOURSE AGAINST AWARD)** of the **UNCITRAL Model Law** (Schedule 1 to the IAA 2017), article 34: Grounds for *an application for setting aside as an exclusive recourse against an arbitral award*:
• Where a party to the arbitration agreement was under some incapacity (art 36(1)*(a)*(i)); or	• Where a party to the arbitration agreement was under some incapacity (art 34(2)*(a)*(i)); or
• Where the arbitration agreement is invalid under the chosen governing law or, in the absence of a choice by the parties, under the law of the country where the award was made (art 36(1)*(a)*(i)); or	• Where the arbitration agreement is invalid under the chosen governing law or, in the absence of choice, South African law (art 34(2)*(a)*(i)); or
• Where recognition or enforcement of the award is against the public policy of South Africa (art 36(1)*(b)*(ii)).	• Where the award is against the public policy of South Africa (art 34(2)*(b)*(ii)).
Article 36(3), while not limiting the generality of art 36(1)*(b)*(ii), determines that an award *will be regarded as contrary to South African public policy* if: • The arbitral tribunal breached its duty to act fairly and this has caused or will cause substantial injustice to the party resisting recognition or enforcement (art 36(3)*(a)*; or • There was fraud or corruption involved (art 36(3)*(b)*).	Article 34(5), while not limiting the generality of art 34(2)*(b)*(ii), determines that an award *will be regarded as contrary to South African public policy* if: • The arbitral tribunal breached its duty to act fairly and this has caused or will cause substantial injustice to the applicant (art 34(5)*(a)*; or • There was fraud or corruption involved (art 34(5)*(b)*).

It is important to note, so far as the recognition and enforcement of arbitral awards are concerned, that the correct terminology is 'recognition and/or enforcement' as it is possible for an award to be recognised but not enforced. However, recognition is always a prerequisite for enforcement.

It is clear from Table 1 above, which deals with the New York Convention, that section 18 of the IAA, 2017, differs from article V of the New York Convention in at least one respect as far as

"contractual capacity is concerned: whereas article V(1)*(a)* of the New York Convention refers to 'the parties' to the arbitration agreement being under some incapacity, section 18(1)*(b)*(i) of the IAA, 2017, refers to 'a party'. Section 18(1)*(b)*(i) is to be preferred in this regard as the contractual incapacity of only one party should suffice in order to prevent the recognition and/or enforcement of the award.

When comparing the provisions dealing with lack of contractual capacity in Tables 1 and 2, it appears that the New York Convention (and the corresponding s 18 of the IAA, 2017) subjects contractual capacity to the 'law applicable' to the 'party/parties', while the UNCITRAL Model Law is silent on the issue. Two points should be made in this regard. First, it is not clear what the 'law applicable' to a party is in order to determine contractual capacity. It is not clear whether the 'law applicable' to a party is a party's personal law (*lex domicilii* or, perhaps, the law of his/her habitual residence, as habitual residence is used as a connecting factor elsewhere (art 1(4)*(b)* of the UNCITRAL Model Law)), or the *lex loci contractus*. Secondly, it must be assumed that the same legal system will apply to the same issue in respect of the UNCITRAL Model Law.

Table 2 above shows that the grounds for refusal of recognition and/or enforcement of, and for setting aside an arbitral award are *mutatis mutandis* the same. Interestingly, both article 34 and article 36 of the UNCITRAL Model Law provide some clarification as to what would be regarded as against the public policy of South Africa. Even though article 36(3) and article 34(5) do not provide an exclusive definition of the public policy exclusion, the definition set out in these articles will certainly assist in determining public policy issues. The question arising is whether the meaning of public policy in articles 36(3) and 34(5) of the UNCITRAL Model Law, albeit not exclusive or definitive, will also be used for purposes of the New York Convention.

Finally, it must be pointed out that there are currently three sets of provisions regarding the recognition and/or enforcement of arbitral awards: section 18 of the IAA 2017; article V of the New York Convention; and article 36 of the UNCITRAL Model Law. Although these provisions largely correspond to one another, there are minor differences (as pointed out above). As these provisions are intended to promote recognition and/or enforcement of a wide range of arbitral awards (both international and foreign), consistency in interpretation will be key to the success of the IAA, 2017.

The IAA, 2017, also amends the PBA, 1978, by deleting the expression 'arbitration award/awards' from its long title as well as from sections 1, 1D, and 1G of the PBA, 1978 (s 21 as read with Shed 4 to the IAA, 2017). Previously, ministerial permission was required for the enforcement of certain foreign arbitral awards (as well as judgments, orders, etc) relating to 'mining, production, importation, exportation, refinement, possession, use or sale of or ownership to any matter or material, of whatever nature, whether within, outside, into or from the Republic' (ss 1(1)*(a)* and 1(3) of the PBA, 1978). Furthermore, section 1D of the PBA, 1978, provided that, despite the requisite Ministerial consent having been obtained in regard to these matters, no foreign arbitral award (or judgment, order, etc),

> connected with any liability which arises from any bodily injury of any person resulting directly or indirectly from the consumption or use of or exposure to any natural resource of the Republic, whether unprocessed or partially processed or wholly processed, or any product containing or processed from any such natural resource, unless the same liability would have arisen under the law of the Republic, as it existed at the time of the occurrence of the event which gave rise to the liability, would be recognised and/or enforced in the Republic. (Section 1G provided for the application of s 1D to arbitral awards issued before or after the commencement of the PBA, 1978.)

Although the PBA, 1978, has been interpreted restrictively by the courts (Christopher Forsyth *Private International Law* 5 ed (2012) 466-68), its provisions severely curtailed the effectiveness of the New York Convention by allowing for executive interference in respect of the matters referred to above instead of leaving them to judicial determination by the courts. The IAA, 2017, excludes international arbitral awards from the scope of the PBA, 1978. Consequently, ministerial consent is no longer required for the recognition and/or enforcement of arbitral awards.

CASE LAW

Jurisdiction: Interdict in divorce matter

In *V v V* (5881/17) [2017] ZAGPPHC 324 (6 July 2017), a husband (pilot) and wife, both born in South Africa, had been living in Dubai, United Arab Emirates, for eight or nine years. They never acquired permanent residence in Dubai and their residence was dependent on the husband's working visa which allowed him to remain in Dubai until the end of his contract of

employment in 2021 (when he would be 60 years of age). After that he would have to leave Dubai.

On 27 January 2017 the wife instituted divorce proceedings against the husband in the Gauteng Division of the High Court of South Africa. The husband commenced a divorce action against the wife in a Dubai court on 27 February 2017. The divorce action in the Dubai court was set down for 16 March 2017 'or any other date' (para [1]). However, on 15 March 2017 the wife brought an urgent application in the South African court for an interdict to prevent the husband from proceeding with his divorce action in Dubai. According to the wife, the application of Sharia divorce law in Dubai would be 'highly prejudicial to her as a woman' (para [9]).

Under South African law (s 2(1) of the Divorce Act 70 of 1979),

> [a] court shall have jurisdiction in a divorce action if the parties are or either of the parties is–
> *(a)* domiciled in the area of jurisdiction of the court on the date on which the action is instituted; or
> *(b)* ordinarily resident in the area of jurisdiction of the court on the said date and have or has been ordinarily resident in the Republic for a period of not less than one year immediately prior to that date.

As neither party had been ordinarily resident in any part of South Africa for the year preceding the institution of proceedings, the wife relied on domicile as the jurisdictional connecting factor. In order to prove that the South African court did not have jurisdiction to hear the matter, the husband had to prove that the wife was not domiciled in South Africa. He was unable to do this. The court held that there was no evidence that the wife had established a domicile of choice in Dubai and, as a result, she retained her original South African domicile. This meant that the Gauteng Division of the High Court had jurisdiction to hear the matter. Presumably, this was the area in South Africa in which the wife (and her husband) resided before they left for Dubai, although the address provided in the particulars of claim was that of her brother. No issue can be taken with Mabuse J's decision that the wife was indeed domiciled in South Africa (and, more specifically, in the area of the Gauteng Division of the High Court). There was simply insufficient evidence to establish a change of domicile in favour of Dubai, United Arab Emirates.

However, the case of *V v V* touches on a number of aspects relating to an individual's domicile. It is considered essential to address these aspects for purposes of clarification.

First, the wife had indicated in the combined summons (para [5]) that although both parties were temporarily resident in Dubai, each party had a 'chosen domicile' in South Africa. The wife had also indicated in the combined summons that she regarded Pretoria as her place of domicile. It should be clarified here that an individual cannot decide where he or she is domiciled; it is the law (applied by a court) that determines where an individual is domiciled. Statements by an individual regarding his/her domicile are of no effect whatsoever. This point was confirmed by Mabuse J, albeit indirectly, when referring to the principle that nobody can be without a domicile (para [13]) Mabuse J cited, in this regard, *Smith v Smith* 1970 (1) SA 146 (R) 147G, where it was stated that

> [i]t has been frequently laid down that no person can be without a domicile because the law will attribute a domicile to him.

Secondly, no reference was made to the definition of a domicile of choice as set out in section 1(2) of the Domicile Act 3 of 1992 (the Domicile Act) which provides that

> [a] domicile of choice shall be acquired by a person when he is lawfully present at a particular place and has the intention to settle there for an indefinite period.

This omission is remarkable, considering that the case turned on whether the wife had abandoned her South African domicile and established a new domicile of choice in Dubai. This depended on whether she intended to settle in Dubai for an 'indefinite period'. Instead, throughout the judgment, the court referred to English and South African authority that pre-dated the Domicile Act. A number of these older authorities emphasised 'permanently' as the touchstone for the requisite *animus*. Indeed, Mabuse J stated

> [i]n order to acquire a domicile of choice, such a person . . . must have formed the intention to reside permanently at that place (para [14]).

This statement is contrary to the requirement of intention to settle 'for an indefinite period' in terms of section 1(2) of the Domicile Act. Fortunately, this had no effect on the outcome of the case. Nevertheless, the courts should not rely on outdated authority, especially where there is a clear statutory provision to the contrary.

Thirdly, although this may seem like splitting hairs (and it had no effect on the outcome of the case), the distinction between private-law *status* and *capacity* is worth noting – capacity is in fact one of the incidences of status. Mabuse J stated:

> Quite evidently a person's domicile plays a major role in determining his or her capacities (para [11]).

The above statement may be true in relation to purely domestic matters, but the distinction between status and capacity is of great significance on the private international law level. While an individual's status in private international law is determined by his/her *lex domicilii*, the incidences of such status (which include capacity to marry or capacity to enter into contracts) may be determined by a different legal system. For example, a person married according to South African law (his/her *lex domicilii*), will, in another country, say England, have the capacities accorded to a married person under English law. According to Ulrich Huber:

> [P]ersonal qualities impressed upon a person by the law of a particular place surround and accompany him everywhere with this effect that everywhere persons enjoy and are subject to the law which persons of the same class enjoy and are subject to in that other place . . . (Ulrich Huber *De Conflictu Legum* s 12, as translated by Ernest G Lorenzen *Selected Articles on the Conflict of Laws* (1947) 176).

Of course, public policy or mandatory rules may play a role in recognising a 'foreign' status.

As far as jurisdiction was concerned, the combined summons (para [5]) stated that the parties had agreed to the jurisdiction of the court. This was disputed by the husband and not addressed by the judge at all. It, therefore, does no harm to reiterate that mere submission by the parties cannot found jurisdiction in status-related matters such as divorce actions (Christopher Forsyth *Private International Law* 5ed (2012) 217) in the absence of a recognised ground of jurisdiction (s 2(1) of the Divorce Act 70 of 1979 and, previously, the domicile of the parties with all the attendant problems of the wife's domicile of dependence at the time).

The court granted an interdict restraining the husband from proceeding with the divorce action in Dubai. This looks like an anti-suit injunction – an equitable remedy well-known in Anglo common-law jurisdictions. Such an injunction is binding on an individual (not the foreign court) and, if breached, may result in the imposition of the sanction of contempt of court in the jurisdiction that issued the injunction. Anti-suit injunctions are not normally used in matrimonial or divorce matters. In addition, anti-suit injunctions have been criticised for interfering with access to justice and comity (Richard Fentiman *International Commercial Litigation* 2ed (2015) 537ff).

The case of *V v V* should, however, be viewed as an instance of *lis alibi pendens* (two sets of proceedings pending in different jurisdictions) – a doctrine known to South African law (Forsyth *Private International Law* 189ff). In solving such a case of *lis alibi pendens* in respect of a divorce matter, the Anglo common-law doctrine of *forum non conveniens* may be useful. This doctrine, which is of Scottish origin (Scotland, like South Africa, being a hybrid legal system), is slowly finding its way into South African law (Forsyth *Private International Law* 184ff). Where two sets of proceedings are pending in different jurisdictions, the doctrine of *forum non conveniens* allows the court to determine the appropriate forum for the proceedings, instead of simply preferring the forum where proceedings were first commenced.

A number of factors may be relevant to the *forum non conveniens* inquiry, namely where the parties reside, where the evidence is located, the speed at which the proceedings will be concluded in the different jurisdictions, the cost of litigation in the respective jurisdictions, the legal system applicable to the merits of the dispute, where a judgment will need to be enforced, etcetera. Once the defendant or respondent has proven that there is another, distinctly more appropriate and competent forum where the case can be heard, the plaintiff or applicant has a final opportunity to prove that he or she will not receive justice in the foreign court. (For a detailed exposition of the *forum non conveniens* doctrine, see *Spiliada Maritime Corp v Cansulex Ltd* [1986] UKHL 10, [1987] AC 460). Although this does not relate to the content of substantive law or the merits of the case, it could probably be argued that applying Sharia law to a non-Muslim couple would result in an injustice.

Recognition and/or enforcement of foreign judgment

International Fruit Genetics LLC v Redelinghuys NO & others (24870/16) [2017] ZAWCHC 6 (7 February 2017) concerned the recognition and enforcement of Californian court orders in South Africa. The applicant (International Fruit Genetics LLC) and the respondents (known as AMT) had concluded various licensing agreements in terms of which AMT was licensed to plant, grow, and market certain varieties of table grape, owned by the applicant, in South Africa. The applicant subsequently cancelled the agreements when it discovered that the respondents had breached the licensing agreements by exceeding the quantities of grapes specified in the agreements and growing a variety of

grapes that was not authorised by the agreements. (The unauthorised variety was grown from a cutting that one of the respondents had smuggled into South Africa.)

The applicant successfully sought a declaration that the cancellation of the licensing agreements was lawful, as well as consequential injunctive relief, in the United States (the US) (Central District Court of California). The order granted by the Central District Court of California required, amongst other things, the respondents to cease all use of the applicant's organic material and confidential information. The California court further ordered the respondents to destroy all the organic material in their possession so that the proprietary plant material could not be used for propagation of the applicant's proprietary cultivars. In addition, it granted the applicant two orders for costs. The respondents appealed against the order for injunctive relief as well as one of the costs orders. These appeals were still pending in the US when the applicant applied for recognition and enforcement of the orders in South Africa. The order for injunctive relief, though appealed, had not been suspended in the US and the respondents had not applied for a suspension of enforcement (subject to appeal) of the costs order.

There were two important issues so far as private international law is concerned. The first related to whether the provisions of the Protection of Businesses Act 99 of 1978 (the PBA, 1978) requiring ministerial permission for the recognition and enforcement of foreign orders applied to this matter. The second issue was whether recognition and enforcement could be withheld on the basis of the pending appeal against the court orders in the US.

Regarding the first issue, Rogers J held that the vines and grapes were not 'matter or material' as envisaged by section 1 of the PBA, 2017, and, therefore, no ministerial consent was required for the recognition and enforcement of the Californian order for injunctive relief (paras [24] [25]).

In relation to the second issue, Rogers J referred to *Jones v Krok* 1995 (1) SA 677 (A) and reiterated that an appeal pending against a judgment in a foreign jurisdiction did not affect the finality of that judgment for purposes of recognition and/or enforcement in South Africa. However, a court in South Africa has a discretion whether or not to recognise and/or enforce the judgment. In exercising its discretion, a court could stay the proceedings pending the final determination of the appeal in the foreign jurisdiction. As a rule, the court will not assess the merits of a pending appeal (para

[45]). However, in this case it was abundantly clear that the prospects of a successful appeal by the respondents against the Californian orders were slim – the respondents were appealing as of right and not with the leave of the court (para [46]). In addition, two US courts (the District Court and the Court of Appeals) had refused to suspend the order for injunctive relief pending the appeal (para [46]). On the other hand, destruction of the vines in terms of the Californian court order would render a successful appeal against the order completely nugatory (para [47]).

In the final analysis, Rogers J decided to recognise the Californian orders as a whole but to enforce only part of them as far as the injunctive relief was concerned. He ordered that grapes on the vines, as well as harvested grapes under the respondent's control, be destroyed immediately, and that the respondents immediately stop using the applicant's confidential information (paras [50] [51]). It is not often that the distinction between 'recognition' and 'enforcement' plays out in this fashion. Rogers J's appreciation and application of this theoretical distinction in order to achieve a workable, practical solution in this case is to be welcomed.

Recognition and/or enforcement of foreign arbitral award

Balkan Energy Ltd & another v Government of Ghana 2017 (5) SA 428 (GJ) concerned the recognition and enforcement of a foreign arbitral award under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards,1958 (the New York Convention) in terms of the provisions of the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977 (the REFAAA, 1977). Although the REFAAA, 1977, was recently repealed by the International Arbitration Act 15 of 2017 (the IAA, 2017), some of the issues raised in this case will still arise under the IAA, 2017.

The first and second applicants were companies registered in the United Kingdom and Ghana, respectively. The respondent was the Government of Ghana. The applicants sought to have an arbitral award, issued in London, recognised and enforced in South Africa. The two main issues that arose from the facts related to: (a) whether the respondent as a sovereign state was immune from the jurisdiction of the South African courts; and (b) whether the South African court had jurisdiction, as the litigants were all *peregrini*. Kuny AJ also addressed a third issue, namely, (c) the potential applicability of the Protection of Businesses Act 99 of 1978 (the PBA, 1978).

In regard to the first issue, the court found that the respondent had waived immunity in any jurisdiction and from any legal process when it entered into the electricity-supply contract with the applicants. Had this not been the case, the applicants would have had to make out a case for the commercial exception to apply under section 4, or the arbitration exception under section 10 (depending on the terms of the arbitration agreement), of the Foreign States Immunity Act 87 of 1981.

Regarding the second issue, the parties were all *peregrini* and the cause of action had arisen outside South Africa. The issue of the South African court's jurisdiction therefore arose. Following *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* 1984 (3) SA 233 (D), the court held that jurisdiction could be established through the attachment of the shares held by the respondent in a South African company.

Notably, the court further considered the potential applicability of the provisions of the PBA, 1978 even though the applicants had not raised this issue. Kuny AJ held that the electricity-supply contract did not involve the manufacture of any products from raw materials and, as a result, section 1(3) of the PBA, 1978, was not applicable (para [24]). Following the reforms brought about by the IAA, 2017 (see above), the PBA, 1978, no longer applies to foreign arbitral awards.

CONSTITUTIONAL LAW

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CASE LAW

Structures and Principles of Government

Executive

Reviewing executive decisions: Rule 53 record

Should a decision-maker provide the prior documents and communications which informed a decision (as required by Rule 53 of the Uniform Rules of Court) during proceedings to review an executive rather than an administrative decision? The High Court in *Democratic Alliance v President of the Republic of SA; In re: Democratic Alliance v President of the Republic of SA & others* (9 May 2017) (24396/2017) [2017] ZAGPPHC 148, [2017] 3 All SA 124 (GP), 2017 (4) SA 253 ruled that a decision maker may be compelled to deliver such documents even when it is an executive decision that is subject to review.

The facts of the case related to a decision by former President Zuma summarily to dismiss the former Finance Minister, Mr Pravin Gordhan, and his Deputy Finance Minister, Mr Mcebisi Jonas. The Democratic Alliance (DA) brought an application challenging the rationality of this decision. In the course of communications exchanged between the parties, the applicant demanded that a full Rule 53 record be provided, including all documents and electronic records related to the decision (para [10]). The former President contested the obligation to do so on the basis that the language of Rule 53 only concerns judicial, quasi-judicial, or administrative decisions, and excludes executive decisions of this nature (para [16]). This led to an inter-

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locutory hearing. The issue before the court, therefore, was an interpretive challenge.

The court viewed the matter as making a choice between a literal and a purposive interpretation of Rule 53. It rejected the former President's argument that Rule 53 does not apply to executive decisions, as these decisions are not expressly included in the text. This was bolstered by the fact that when Rule 53 was adopted, executive decisions were not reviewable, and that the ushering in of our current constitutional dispensation requires the extension of the Rule 53 process to executive decisions in order to ensure 'the proper and convenient administration of justice' (para [28]). This was apparently the appropriate 'purposive' approach to the problem (para [29]).

While the court's conclusion is sound, its reasoning is open to criticism. First, it is controversial whether 'purposive' interpretation which ignores the particular wording of a statute and inserts text without declarations of constitutional invalidity or inadequacy, is a sound approach to resolving the types of interpretive problem posed by pre-constitutional legislation. For instance, some argue that a contextual approach which seeks to reconcile literal meaning and purpose is more appropriate (*Natal Joint Municipal Pension Fund v Endumeni Municipality* (920/2010) [2012] ZASCA 13, [2012] 2 All SA 262 (SCA), 2012 (4) SA 593 paras [17]–[26]). Indeed, as Wallis JA argues:

> Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or business-like for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation (*Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para [18]).

On this view, the purpose of a provision or of legislation is only one among several factors to consider, including the wording, background, and context. As to the argument that when Rule 53 was adopted executive decisions were not reviewable, the obvious answer is that this is a call for this *lacuna* to be subjected to a direct constitutional challenge. In fact, this particular approach by the court is even more confusing considering the rather easy 'out' available to it to rely directly on its inherent power in terms of section 173 of the Constitution of the Republic of South Africa, 1996 (the Constitution), to develop the common law in the interests of justice. This could provide for an equivalent Rule 53 process (an argument submitted in the alternative by the appli-

cant) for the review of executive decisions. Therefore, while it is correct that the administration of justice calls for documents of the sort contemplated by Rule 53 to be disclosed in executive reviews, the reasoning of the court may be questioned.

Impeachment: Duty of Parliament to hold executive to account

In *Economic Freedom Fighters v Speaker of the National Assembly & others; Democratic Alliance v Speaker of the National Assembly & others* (CCT 143/15; CCT 171/15) [2016] ZACC 11, 2016 (5) BCLR 618 (CC), 2016 (3) SA 580 (*EFF 1*), the Constitutional Court held that the President had violated the Constitution by not complying with the Public Protector's report on upgrades to his home at Nkandla. Further, the court held that the National Assembly (NA) had failed both in its duty to the Public Protector and in its duty to hold the President accountable.

What followed were several attempts by opposition parties to remove the President. On 5 April 2016, the DA brought an impeachment motion in terms of section 89(1) of the Constitution. It failed. That motion did not include a request for the establishment of an *ad hoc* committee to consider whether the requirements for impeachment were present. There were several further motions of no confidence in terms of section 102 of the Constitution. But those, too, failed.

During 2016, the Economic Freedom Fighters (EFF) wrote several letters to the Speaker requesting her to establish a fact-finding inquiry into whether the President should be impeached. The Speaker refused, claiming that the request had not been properly made. The EFF – together with the United Democratic Movement and the Congress of the People – then brought an application directly to the Constitutional Court in terms of its exclusive jurisdiction. In essence – and as supplemented by the DA, which intervened in the matter – the applicants sought declarations (a) that the NA had failed to put in place the necessary mechanisms to hold the President accountable in terms of section 89 of the Constitution; and (b) that the NA had in fact failed to hold the President to account because it had failed to scrutinise his violations of the Constitution as set out in *EFF 1*.

In a judgment by Jafta J (Cameron, Froneman, Mhlantla, Theron JJ, and Kathree-Setiloane and Kollapen AJJ, concurring), the majority held for the applicants on both issues (*Economic Freedom Fighters & others v Speaker of the National Assembly & another* [2017] ZACC 47; 2018 (2) SA 571 (CC); 2018 (3) BCLR

259). There were two dissenting judgments, one by Zondo DCJ (Mogoeng CJ, Madlanga J, and Zondi AJ concurring), and one by Mogoeng CJ (writing for himself). Froneman J wrote a further concurring judgment (with the support of all the majority judges) responding to the Chief Justice's dissent. The case raises a number of issues and reveals very different understandings among members of the court on the separation of powers and the judiciary's relationship with the legislature. We consider each issue in turn, and then consider the more general issue of the separation of powers, particularly in relation to the Chief Justice's dissent.

Mechanisms

The issue was whether the Constitution mandated the NA to establish a special procedure to deal with impeachment motions brought in terms of section 89(1).

The provision reads:

> (1) The National Assembly, by a resolution adopted with a supporting vote of at least two thirds of its members, may remove the President from office only on the grounds of –
> *(a)* a serious violation of the Constitution or the law;
> *(b)* serious misconduct; or
> *(c)* inability to perform the functions of office.

The court pointed out how impeachment under section 89(1) differs from removal through a motion of no confidence under section 102. It explained as follows:

> [T]he Constitution does not prescribe any conditions for the exercise of the power to remove by means of a motion of no confidence. All that is required is a motion of no confidence supported by a simple majority (para [137]). By contrast, impeachment is only permitted on the grounds clearly set out in section 89(1)*(a)–(c)*. The difficulty is that none of those grounds is defined in the Constitution (para [176]).

Nonetheless, Jafta J held that the drafters of the Constitution 'could not have contemplated that members of the Assembly would individually have to determine what constitutes a serious violation of the law or the Constitution' or serious misconduct (para [177]). That would result in divergent views as to whether the basis necessary for an impeachment existed. The only way to avoid that outcome is to require 'an institutional pre-determination of what a serious violation of the Constitution or the law is. The same must apply to serious misconduct and inability to perform

the functions of the office' (para [178]). Jafta J summarised the position in these terms:

> Therefore, any process for removing the President from office must be preceded by a preliminary enquiry, during which the Assembly determines that a listed ground exists. The form which this preliminary enquiry may take depends entirely upon the Assembly. It may be an investigation or some other form of an inquiry. It is also up to the Assembly to decide whether the President must be afforded a hearing at the preliminary stage (para [180]).

The consequence is that, '[w]ithout rules defining the entire process, it is impossible to implement section 89' (para [182]).

In sum, the Constitution 'implicitly imposes an obligation on the Assembly to make rules specially tailored for an impeachment process contemplated in that section' (para [196]). The NA must first determine, through that process, whether the conditions in section 89(1) are present. Only having reached that conclusion, can it vote on whether or not to remove the President. The NA was in breach of that obligation because it had failed to establish such a process.

Indeed, if the NA had voted to remove the President without first determining that one of the facts in section 89(1)*(c)* was present, its decision would have been unlawful. The court was unanimous on this question (para [103] – judgment of Zondo DCJ). The only difference was that the majority held that a formal process must be followed in making that determination. The minority held that, while 'in many, if not most, cases it will be necessary or convenient that a Committee conducts an inquiry . . . there may be cases where no such Committee may be necessary' (para [106]). That would be the case where the facts were common cause.

The Chief Justice had the same complaint with the majority. For him, it made no sense always to require an inquiry. He wrote:

> An inquiry has a clear purpose to serve. It is to unearth the unknown or ascertain the unclear. When all the information or evidence necessary to resolve any issue is already well-established or available or well-known to decision-makers, embarking on an investigation or inquiry, just because the evidential material is documented or recorded, would be an absurdity or a sheer waste of resources (para [225]).

The remainder of Chief Justice's judgment explains why, in his view, an inquiry would not always be necessary. Drawing an analogy with action and motion proceedings before courts, he argued that the existence of the impeachment grounds could, in

some circumstances, be determined on the papers. Mandating an inquiry in those circumstances was unnecessary.

In our view, the disagreement between the judgments is exaggerated. We agree with the minority that a full-blown inquiry with witnesses and cross-examination will not always be necessary. But that is not what the majority required. It demanded a process – what that process entails, is for the NA to decide. It may be that the NA decides that the process can, in some circumstances, be resolved simply on documents or on common-cause facts. We see nothing in the majority judgment that removes that power from the NA. The key finding is merely that it must have some sort of process designed to determine whether the grounds for impeachment exist.

Returning to the case at hand, the question was whether the existing rules adequately performed the required purpose of section 89(1) for a prior determination. The majority found that the existing rules were inadequate for the task. The closest possibility was Rule 253, which permits the NA to establish an *ad hoc* committee to investigate any matter. But the rule does not comply with the constitutional demand. Because the initiator determined whether the President had committed a serious violation (para [189]), there was no set procedure for the committee to follow (para [190]), and the committee could be dominated by the majority party, which would defeat the purpose (paras [191]–[194] citing *Mazibuko v Sisulu & another* (CCT 115/12) [2013] ZACC 28, 2013 (6) SA 249 (CC), 2013 (11) BCLR 1297).

In his dissent, Zondo DCJ saw the matter differently. In his view the mechanisms of a motion of no confidence and question-and-answer sessions were adequate accountability mechanisms (paras [36] [37]). In any event, the rules providing for an *ad hoc* committee to investigate impeachment were adequate (para [39]).

Much of the dispute between the majority and minority on this score comes down to pleadings, and the conduct of the applicants. The minority focused carefully on exactly how the case had been pleaded and held that the applicants had not properly presented the case for the relief they sought. It also criticised the applicants for not exhausting internal mechanisms within the NA before approaching the court (para [82]). The majority took a far more flexible approach to the pleaded case. It was willing to

overlook 'inelegant' (para [130]) pleading in order to get to the heart of the complaint.

Failure to hold President accountable

The majority disposed of this issue fairly easily. It rejected the applicants' claim that 'the Assembly did nothing to hold the President accountable' (para [199]). It had debated motions of no confidence and required the President to answer questions. But it was 'self-evident that both these steps were not actions taken in terms of section 89(1)' (para [200]). They could not, therefore, fulfil the NA's duty under that section.

That left the motion brought by the DA under section 89(1) in the immediate aftermath of *EFF 1*. Jafta J held that the EFF should rightly be criticised for supporting that motion when it was brought, and then arguing in its founding papers that the motion was premature because it was not preceded by a fact-finding inquiry (para [202]). However, the issue was not the conduct of the applicants, but whether the motion complied with the requirements of section 89(1).

It did not. It had not been preceded by the 'institutional determination' that the President was guilty of serious misconduct. The court held as follows:

> The Assembly did not approach the processing of the motion on the footing that the President had indeed committed a serious violation of the Constitution. This was a necessary condition for commencing a section 89 process. Without accepting that one of the listed grounds existed, the Assembly could not authorise the commencement of a process, which could result in the removal of the President from office. Moreover, it does not appear from the papers that the President was afforded the opportunity to defend himself. Without knowing whether the Assembly holds the view that the President has committed a serious violation of the Constitution, it would be difficult for him to mount an effective defence. The procedure followed by the Assembly here does not accord with section 89 (para [205]).

Zondo DCJ took the view that the applicants' case was that the NA had 'done nothing' to hold the President accountable, and they were only entitled to relief if that was true. It was not. Various motions to impeach him and remove him had been debated. Those motions 'prove that the National Assembly did not just sit idle and do nothing as the applicants claim but that it acted upon the President's conduct and held him accountable. The fact that those motions were defeated does not detract from the fact that the National Assembly did hold the President accountable' (para

[89]). The Deputy Chief Justice also held that the applicants – as parties with representatives in the NA – could themselves take steps within the NA to hold the President to account (para [97]). And as he had found that the *ad hoc* committee was a permissible means by which to determine whether the factors in section 89 were present, there was no obstacle to that process being used; the court did not need to intervene at this stage.

Most interestingly, the minority concluded that there was no need for a fact-finding investigation in this case. The facts had already been determined by the court in *EFF 1*, as had the question of whether or not the former President had violated the Constitution – he had. The court declared the following:

> Therefore, there is no room for the proposition that some fact-finding process was required to establish whether the President had violated the Constitution by failing to implement the Public Protector's remedial action (para [111]).

The NA only had to decide whether this violation was serious. But that 'is not a question of fact that needed to be investigated . . . [it] is a question of a value judgement' (para [113]).

Separation of powers

The Chief Justice's judgment used extremely strong language. It begins:

> The [majority] judgment is a textbook case of judicial overreach – a constitutionally impermissible intrusion by the judiciary into the exclusive domain of Parliament (para [223]).

He described the majority judgment as 'an unprecedented and unconstitutional encroachment into the operational space of Parliament by judges' (para [254]). Later, he spoke of his 'deep-seated agony and bafflement about the second judgment's refusal to recognise the discretion the Assembly obviously has' to decide whether or not to hold an inquiry (para [267]).

These are fighting words. And they elicited a fighting response. Jafta J emphasised that he merely interpreted section 89(1) of the Constitution and had happened to disagree with the Chief Justice. As he pointed out, this happens frequently in courts presided over by panels of judges. But what was unprecedented was the suggestion that the construction of the section embraced by the majority here constituted 'a textbook case of judicial overreach' (para [218]). The suggestion was misplaced and unfortunate. He found it 'conceptually difficult' to understand 'how

the interpretation and application of a provision in the Constitution by a court may amount to judicial overreach' (para [219]).

Froneman J, joined by the six other majority judges, took the highly unusual step of writing separately solely to address the tenor of the Chief Justice's criticisms. He pointed out that the majority merely instructed the NA to make rules; it did not 'prescribe the content of those rules' (para [284]). It sought to give the NA 'guidance on the tools necessary to enable it to fulfil its constitutional duty', not 'to tell the National Assembly how to use those tools' (para [285]). In his view, the strong language used by the Chief Justice was unhelpful: 'The respective merits of opposing viewpoints should be assessed on the basis of the substantive reasons advanced for them. There is nothing wrong in that substantive debate being robust, but to attach a label to the opposing view does nothing to further the debate' (para [280]).

We agree. The Chief Justice and Deputy Chief Justice made strong substantive points. At least some of the authors agree with them as to the proper interpretation of section 89(1) and how the case ought to have been resolved. But there is nothing unusual about disagreement on constitutional interpretation.

There are different views about how the language used by the Chief Justice might affect the legitimacy of the court in the future. On the one hand, it could be used by those seeking to undermine the court as evidence that the court does not respect the separation of powers. On the other hand, the possibility for strongly-worded dissent may well be a sign of institutional health. Such language may also have implications for collegiality and relations within the court. Time will tell.

As a general commentary on cases involving the executive and holding the executive accountable, 2017 was a year where courts clearly believed it justified and constitutionally necessary for there to be greater scrutiny and clearer bright-line limits on executive power. This, of course, cannot be divorced from the political context of the time and the twilight of the Zuma presidency. However, upon reflection, the expanding role of the courts in this area may warrant caution. Perhaps now, without the inflamed public discourse, such concerns may begin to be seriously considered by commentators and, it is hoped, by the courts themselves.

LEGISLATURE

Notice of withdrawal: International treaties

May the national executive submit a notice of withdrawal from an international treaty without the prior approval of Parliament before submission? In *Democratic Alliance v Minister of International Relations and Cooperation & others (Council for the Advancement of the South African Constitution Intervening)* (83145/2016) [2017] ZAGPPHC 53, 2017 (3) SA 212 (GP), [2017] 2 All SA 123, 2017 (1) SACR 623, a full bench of the North Gauteng High Court found that the national executive may not do so without parliamentary approval.

The facts of the case are the tail-end of the earlier controversy surrounding the failure to execute the arrest warrant issued against President Omar al-Bashir by the South African government as outlined in *Minister of Justice and Constitutional Development & others v The Southern African Litigation Centre* [2016] ZASCA 17, 2016 (4) BCLR 487 (SCA), [2016] 2 All SA 365, 2016 (3) SA 317. Following this controversy, the government submitted a notice of withdrawal from the Rome Statute of the International Criminal Court (Rome Statute) on 19 October 2016 (para [4]). Importantly, the withdrawal only takes effect a year after the notice of withdrawal has been deposited with the Secretary General of the United Nations (art 127(1) of the Rome Statute). The government, through the Minister of Justice, then informed Parliament of the decision to withdraw, and began a process to repeal the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002. The applicant, the official national opposition party, challenged this decision in the High Court. The broad basis related to: alleged violations of section 231 of the Constitution; the apparent irrationality of the decision to withdraw; allegations related to violations of section 7(2) state obligations; and procedural failures concerning the process of repeal related to a lack of public participation (paras [30] [31]).

The High Court accepted the applicant's first two arguments but declined to answer the third and fourth. The court's reasons broadly were: (a) the separation of powers; and (b) a proper conception of how such powers ought to be exercised in light of rationality considerations flowing from the rule of law. As to the first issue, the court found that a close interpretation of section 231 requires that withdrawals of this kind be approved by Parliament prior to actual notification to the relevant international

body. In the main, the court emphasised that although the power to negotiate and sign a treaty was allocated to the executive, the power to ratify treaties was allocated to Parliament in terms of section 231(2) of the Constitution (paras [43]–[46]). This, in the court's view, indicated that there was a careful scheme in the Constitution appropriately to allocate distinct powers in the process of acquiring international obligations to distinct branches of government (para [45]). Withdrawal, therefore, was the opposite of ratification, a power properly allocated to Parliament (para [47]). This is because, unlike un-signing, withdrawal has the effect that the international treaty obligations of a state are terminated (para [47]). Therefore, notionally the body which has the power to ratify must have the power to withdraw, unless otherwise stated (para [53]). In our law, that body is Parliament.

The second issue was whether it was procedurally irrational for the executive to be allowed to deposit a notice of withdrawal and afterwards to seek parliamentary approval, provided the withdrawal had not yet come into effect. The court found that allowing such a process is irrational in that it creates the potential for South Africa to send confused messages and signals to the international community about its position on particular international treaty obligations (para [70]). For instance, while internationally the International Criminal Court (ICC) would give effect to the notice of withdrawal, domestically, the government would be obliged, amongst other obligations, to arrest and surrender the indicted leaders while the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 remained in force (para [66]). In the present case, the imposition of a timeline on Parliament by the executive was a further impermissible violation of the separation of powers and the rule of law (para [67]). Parliament retains the power to control its own internal processes (para [67] read with ss 57(1)*(a)* and 70(1) of the Constitution). Therefore, the processes under this scheme would be 'clumsy' and 'piecemeal' with what the court deemed 'undesirable' and 'embarrassing' outcomes (para [70]). According to the court, the ICC and the international community deserve South Africa speaking with a 'united, final and determinative' voice on such matters (para [70]). Aside from all of this, the court opined that the government's haste in withdrawing itself constituted procedural irrationality (para [70]).

On reflection, the court's reasoning is, in the main, correct. It is certainly true that it is difficult to reconcile the exclusion of

Parliament from the withdrawal process with a proper reading of section 231 of the Constitution. This is a straightforward interpretive question not readily open to objection, especially when one considers the distinction between signing and ratifying an international agreement. It is reasonable, therefore, to assume the distinction between un-signing and withdrawal tracks similar ground.

However, whether it then follows that parliamentary approval of withdrawal must necessarily *precede* a formal notification of withdrawal is slightly more complex. The court declared that 'although the withdrawal does not take effect until after a year, that notice constitutes, at international level, a binding, unconditional and final decision of withdrawal from the Rome Statute' (para [47]). However, there may be cause to be wary of the court's emphatic position.

It is vital to recall that the question in this instance is how we reconcile what a notice of withdrawal is understood to be at international law, with our own domestic constitutional scheme in order to determine the correct domestic constitutional processes for withdrawal. The court's reasoning on our constitutional processes, therefore, depends to a large degree on what international law understands to be the effect of a notice of withdrawal. Fortunately, foreign courts have faced similar questions. In the case of *R (Miller) v Secretary of State for Exiting the European Union* 2017 UKSC 5, the majority of the Supreme Court of the United Kingdom colourfully described depositing a notice to withdraw from the European Union as 'pulling the trigger which causes the bullet to be fired, with the consequence that the bullet will hit the target and the Treaties will cease to apply' (para [36]).

However, the Scottish Court of Session subsequently referred the question of whether the UK can still unilaterally revoke withdrawal from the European Union between the period when notice is given and actual effective withdrawal, to the European Court of Justice (*Wightman & others v Secretary of State for Exiting the European Union* 2018 CSIH 62). The Advocate General of the European Court of Justice issued an opinion stating that the UK may indeed unilaterally revoke the notice for withdrawal before actual effective withdrawal takes place *(Advocate General Sanchez-Bordona's Opinion in Case C-621/18 (2018) Wightman & others v Secretary of State for Exiting the European Union* para [89]). The Advocate General asserted that because withdrawal is a unilateral act, so too is revocation – at least until the 'cooling off' period has lapsed (ibid para [98]).

This leaves two possible interpretations as to what a notice of withdrawal accompanied by a cooling off period may be: (a) either it is a suspensive condition with little legal effect at international law save as a formal requirement to set the process of withdrawal in motion (ibid para [92]); or (b) it is a trigger that has serious effects and may later be confirmed (*R (Miller)* above para [36]). This means that the exact effects of a notice of withdrawal are unclear at international law. There are reasons, therefore, to think the High Court may have been precipitous in finding the effects of such a notice to be 'unequivocal, final and determinative' (para [47]). This also means that the weight placed by the High Court on the precise nature of a notice of withdrawal in determining our own constitutional process requirements is also less determinative of the issue than initially thought.

This possibility is made more plausible by a consideration of the language of the Rome Statute itself. While article 127(1) provides that withdrawal is through a notice which takes effect after one year from deposit with the Secretary General, article 127(2) addresses the actual effect of withdrawal. Article 127(2) states that a state is not released from obligations incurred, particularly investigations and proceedings, 'prior to the date on which withdrawal became effective'. The aim of this article is to clarify that only future obligations post-withdrawal are terminated. However, read with article 127(1) it reinforces the view that obligations are terminated through effective withdrawal and not the notice of withdrawal. Therefore, it is strange that the High Court focused on effects other than *substantive obligations* as opposed to administrative procedures relevant to the ICC only, especially as section 231 of the Constitution deals with South Africa's obligations, and not administrative burdens on international signatories.

Secondly, the court argued that the constitutional text does not address withdrawals because it specifically only ever envisaged the executive acting with prior Parliamentary approval when withdrawing (paras [54]–[56]). Notably, the court did not provide any specific authority for this position but relied instead on an understanding of the constitutional scheme as a whole and the separation of powers. That may very well be ideal. However, one can equally argue that there is an exception for cases where a cooling-off period is granted by an international agreement properly to evaluate, at a domestic level, the reasons for withdrawal, as we do not have a strict separation-of-powers doctrine

of the kind assumed by this view (*Ex Parte Chairperson of the Constitutional Assembly; In re Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26, 1996 (4) SA 744 (CC) para [109]).

This brings us to the court's finding of procedural irrationality. The question is whether the process envisaged would be able to realise the constitutional aims of proper negotiation of withdrawal from treaty obligations. The argument here is that if government did not first acquire parliamentary approval, a 'piecemeal', 'clumsy' process would be initiated which would lead to embarrassing results, thus defeating the averred government aims of proper diplomatic negotiation *qua* withdrawal. However, if certain treaties such as the Rome Statute and European Convention allow for a specific cooling-off period, it could easily be argued that the potential for revocation during such a period allows for the kind of 'clumsy' and 'piecemeal' process for continued reconsideration and revaluation until withdrawal is effected. What matters for our domestic law is that Parliament take the final decision on the matter before this 'clumsy' period elapses. Nonetheless, perhaps the rationality standard can be expanded to include an increased likelihood or risk of embarrassment and irrationality. That remains to be considered by a court.

Parliamentary motion of no confidence: Secret ballot

Can the Speaker of the NA permit a motion of no confidence in a President to be conducted by secret ballot? The Constitutional Court in *United Democratic Movement v Speaker of the National Assembly & others* (CCT89/17) [2017] ZACC 21, 2017 (8) BCLR 1061 (CC), 2017 (5) SA 300 answered in the affirmative. (We disclose that one of the present authors, Meghan Finn, appeared for one of the *amici curiae* in this matter.)

The call for a secret ballot in a motion of no confidence arose from the removal of Messrs Pravin Gordhan and Mcebisi Jonas, members of President Zuma's cabinet from office, which apparently led to South Africa's credit rating being downgraded to junk status (para [13]). Allegedly, threats of physical violence and dismissal were directed at any member of the NA who should be discovered to have voted in favour of the motion (para [15]). The Constitutional Court held that a motion of no confidence aims to ensure regular government accountability, and thus serves the public interest (paras [43]–[48]). It follows that the Speaker has the discretion to allow either a secret or an open ballot (para

[29]). This flows from Parliament's constitutional powers to regulate its own process under section 57 of the Constitution (paras [58] [59]).

Further, the court found that the Speaker must exercise this discretion taking several factors into account. The first is whether the chosen voting procedure would allow members of the NA to vote by their conscience and in the public interest (para [74]). The second is whether the prevailing circumstances are peaceful or toxic and potentially hazardous (para [88]). The third is the Speaker's impartiality (para [87]); while the fourth is that the effectiveness of a motion of no confidence as an accountability and consequence-management tool must be supported by the chosen voting procedure (para [44]). Fifth is the possibility of corruption or bribes in the event of a secret ballot (para [88]); and sixth, the need for the value of transparency to find expression in the passing of the motion (para [80]). Finally, the decision must be rationally connected to the purpose of a motion of no confidence and should not be made arbitrarily (para [86]).

These factors are broad and wide-ranging. It is perhaps inadvisable at the moment to pronounce on their soundness or effectiveness in assisting the Speaker to decide when secret or open ballots ought to be held in motions of no confidence. Following this judgment, a vote of no confidence was held against President Zuma by secret ballot, but failed to secure the majority required. This process was not judicially challenged, and to date no court has considered an actual decision by the Speaker on this sort of issue. Time will tell.

Generally, courts appear to have seized every opportunity properly to empower Parliament in its oversight and original powers *qua* the executive. Of course, this is not necessarily negative, nor can it be understood outside of the context of this tumultuous year. However, the court's reasoning in both these cases may be even more open to criticism than cases of direct executive review. Time will tell whether these moves to extend and strengthen parliamentary powers will share the fate of cases on the exercise of judicially-created remedial powers faced by the Public Protector.

Rule of Law

Collateral challenges and reactive reviews

May an organ of state disregard an administrative action which it regards as invalid? May it raise a defensive or collateral

challenge to the action in subsequent enforcement proceedings? These were the main questions in issue in *Merafong City v AngloGold Ashanti Ltd* [2016] ZACC 35, 2017 (2) SA 211 (CC), 2017 (2) BCLR 182.

The administrative action in question was a ruling by the Minister of Water Affairs and Forestry in terms of the Water Services Act 108 of 1997. Section 8(4) of the Water Services Act allows a person who applies for access to water services and is dissatisfied with the outcome to appeal to the Minister. Section 8(9) empowers the Minister to confirm, vary, or overturn the decision. The Minister had exercised this power to uphold an appeal by AngloGold Ashanti Ltd against a decision by Merafong City Local Municipality (Merafong) to impose increased tariffs for the supply of water. Merafong contested the validity of the Minister's decision, arguing that section 156(1) of the Constitution gives local government exclusive competence over '[w]ater and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems' (para [2]). Both the High Court and the Supreme Court of Appeal had held that the Minister's decision was effective until set aside and enforced it (paras [14] [15]).

The majority of the Constitutional Court, in a decision by Cameron J, reaffirmed the decisions in *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) (*Oudekraal*) and *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* [2014] ZACC 6, 2014 (3) SA 481 (CC), 2014 (5) BCLR 547 (*Kirland*), that organs of state may not ignore purportedly invalid administrative action. However, overturning the categorical approach that would have limited such challenges to private actors, the majority held that organs of state may, in principle, be permitted to raise a collateral or 'reactive' challenge to administrative action sought to be enforced against it (para [55]). This would depend on the specific facts, and the court declined to lay down any hard and fast rules (para [55]). The majority found that the constitutional challenge to section 8 of the Act (on the basis that it intrudes on exclusive municipal competence) was not properly before the court (para [82]). They accordingly upheld the appeal, but remitted the matter to the High Court to consider the merits, including Merafong's explanation of its delay in challenging the Minister's decision (para [83]).

Jafta J dissented, joined by Bosielo AJ and Zondo J. For the minority, the point of departure was that invalid administrative

action is void. The minority also held that the constitutional challenge was ripe for determination. They would have upheld the challenge and declared section 8 of the Water Services Act unconstitutional.

There appears to have been a similar division between the justices on the question of whether an organ of state may refuse to follow a court order enforcing its own allegedly invalid administrative decision. The court in *Department of Transport & others v Tasima (Pty) Limited* 2017 (2) SA 622 (CC) found that an organ of state cannot do so. This case is a further episode in the series of fundamental disagreements between the justices on how properly to construe the rule of law and its relation to invalid administrative decisions. At its centre was the validity of the court's judgment in *Kirland* (above), which found that purportedly invalid administrative decisions continue to have legal effect until set aside by a court.

The facts of this case are somewhat convoluted. Tasima (Pty) Limited (Tasima) contracted with the Department of Transport (the Department) to provide traffic management services and functions. In 2010, the Department's Director-General extended the contract for a period of five years. After internal investigation, the Department established that the tender contract had been unlawfully concluded and sought to transfer the associated software and services to the Road Traffic Management Corporation, another state-owned entity. Tasima then approached the High Court for an order enforcing the extension pending the outcome of a dispute resolution mechanism agreed to in the contract. This order was granted by Mabuse J.

In early 2015, the Department again attempted to begin the transfer process. This resulted in Tasima seeking a further interdict from the High Court. Tasima also sought declarations of contempt of court and imprisonment for Department officials. In reaction the Department contested the validity of the initial extension of the contract.

The High Court agreed with the Department and set aside the extended contract. It followed that the various court orders should not have been granted. Tasima was ordered to hand over the running of the software and associated services.

On appeal, the Supreme Court of Appeal disagreed. It concluded that reactive challenges were not open to organs of state, and that in any event, the counter-application had been brought too late to be considered. It found, further, that even if the

extension could be set aside by way of a reactive challenge, this would not absolve the Department from complying with the court orders enforcing the contract.

In a subsequent appeal, the Constitutional Court – much like the lower courts – was divided on the issue. Khampepe J, writing for the majority, argued that an organ of state may bring a reactive challenge provided there has not been an unwarranted delay in doing so (para [150]). Although there had been a serious delay in raising this reactive challenge, there were several circumstances explaining and justifying the delay (paras [170] [171]). It follows that the delay was warranted, and the reactive challenge could be considered. The majority found in favour of the Department's argumenet that the extended contract be set aside. However, until the contractual extension had been set aside by a court, it still had legal effect. The Department, therefore, could not ignore Mabuse J's orders enforcing the contract (para [198]) – a failure to implement them would undermine the authority of the court and the rule of law (para [199]). Consequently, Khampepe J upheld the orders of contempt for the period until the extension had been set aside by the court *a quo*, but found that committal of Department officials was unnecessary.

Jafta J, writing for the minority, disagreed. He was of the view that, as an organ of state, the Department was entitled to bring a reactive challenge and that this should succeed. However, he rejected the argument that any period of delay in bringing the challenge could preclude a party from raising a reactive challenge (paras [95] [96]). Further, because the court orders depended on the validity of the contract itself, if the contract was invalid, so were the court orders (paras [116]–[120]). The Department could, therefore, not be held in contempt of court.

Once again we see a sharp divide in the court's understanding of the rule of law's implications for such cases. One view, following *Kirland* (abve), is that allowing any authority to ignore the legal effects of an invalid administrative act without the approval and finding of a court that the decision was unlawful, would threaten the very of authority of the court itself. This, by implication, violates the rule of law as notionally it would result in self-help and thwart the predictability of government decisions promised by the rule of law. The danger is that certain justices argue that this justifies tolerating the legal effects of even the most patently unconstitutional and unlawful decision until a court has ruled the decision unlawful. Naturally, other justices disagree.

They contend that an unconstitutional decision has no force in law, and that outside of the narrow set of circumstances described in *Oudekraal* (above) such decisions have no legal effect. They do not consider it particularly dangerous to allow citizens and authorities to ignore the purported effects of an unlawful decision without court intervention. The burden would notionally be on the party arguing for the enforcement of the purportedly unlawful decision to bring the matter to court. This disagreement is exacerbated by court orders enforcing the unlawful decision.

Should citizens be held in contempt for failing to abide by court orders granted on the basis of a previously unlawful decision? Answering in the affirmative is not without its problems. For instance, should orders granted by courts that patently lacked jurisdiction to make them still have legal effect? Imagine a High Court that decides an issue involving exclusive Constitutional Court jurisdiction. Does it undermine the authority of a court and the rule of law for a party to ignore that High Court order when a lower court is arguably the one undermining the apparent authority of another court in the first place? A reasonable case can be made that the party aiming to rely on this dubious order can be expected to institute litigation in order to enforce it. On the other hand, the Constitutional Court's majority expressly considered this possibility in *Kirland* (above) and drew a sharp distinction between an invalid court order on the basis of absence of jurisdiction (which is void *ab initio*), and apparently invalid administrative action. As the court then noted, this distinction 'seems paradoxical but is not. The court, as the font of legality, has the means itself to assert the dividing line between what is lawful and not lawful. For the court itself to disclaim a preceding court order that is a nullity therefore does not risk disorder or self-help' (n78).

Further, it is not necessarily clear that the stakes are quite that high, considering that in practice this would be a disagreement as to who has the obligation to approach a court in the event of a purportedly unlawful case. As this case illustrates, the nature of litigation is such that the party with interests to protect is likely to seek court assistance in any event. Therefore, if an administrator seeks to impose an unlawful decision and is rebuffed by an affected party, the apocalyptic predictions of self-help and undermining the court's authority would not necessarily follow. Far more worrying, however, is the possibility of a state entity bypassing the need to seek to review its own decision, and instead

proceeding as if the decision is *pro non scripto* (see the discussion in L Boonzaier 'Good reviews, bad actors: The Constitutional Court's procedural drama' (2015) 7/1 *Constitutional Court Review* 1ff). Whatever one's position on this debate, it is certain that – notwithstanding *Kirland* – this disagreement is not settled and will re-emerge in several guises.

Retrospective taxation: Rule of law

Is it constitutional to impose a tax retrospectively? This is a vexed question for which different countries have offered different answers. Some, like Canada, place no limits on retroactive taxing. Others, such the United States, impose only a minimal burden of rationality. Still others, including Germany, presume that retroactive taxation is unlawful.

The Constitution provides no clear guidance. While it prohibits retroactive criminal laws, it says nothing directly about retroactive civil laws. Our law has always had a presumption against interpreting legislation to apply retrospectively, but the courts have not held that laws could be unconstitutional because they apply retrospectively. That is, until *Pienaar Brothers (Pty) Ltd v Commissioner for the South African Revenue Service & another* [2017] ZAGPPHC 231, 2017 (6) SA 435 (GP), [2017] 4 All SA 175.

The case concerned a change in tax law which made the shareholders of Pienaar Brothers liable to pay secondary tax on companies (STC). Before the change in the law, payments made to shareholders were not subject to STC. The details of the change in the tax law are not important for our purposes. What is important is the chronology of events.

In his budget speech on 20 February 2007, the Minister of Finance announced that he intended to make changes to STC. On 21 February 2007, the Commissioner of the South African Revenue Service (the SARS) issued a press statement which, depending on how it is interpreted, removed the exemption that would have applied to Pienaar Brothers with immediate effect. On 27 February 2007, the National Treasury published a Draft Taxation Laws Amendment Bill which included the amendment that would render Pienaar Brothers liable for STC. The transaction that led to the STC liability was concluded in early May 2007. On 7 June 2007, the Taxation Laws Amendment Bill was published. It differed from the Draft Bill, but still sought to remove the exemption. The explanatory memorandum to the Bill explained that the government saw transactions like that of Pienaar Brothers

as improperly exploiting a loophole in the legislation. The Bill was promulgated as the Taxation Laws Amendment Act 8 of 2007 on 8 August 2007. It applied retrospectively to 21 February 2007 and therefore covered Pienaar Brothers' transaction.

In addition to an interpretive argument that the Amendment Act did not apply to the transaction (which we do not address), Pienaar Brothers argued why the retrospective nature of the law was unconstitutional. First, it argued that retrospectivity was contrary to the principle of legality and the rule of law. Secondly, it contended that the retroactive application of the tax law constituted an arbitrary deprivation of property contrary to section 25(1) of the Constitution. Given the absence of any domestic law to guide the court, all the parties made detailed submissions based on comparative law. The court ultimately rejected both challenges. We address each in turn.

Retrospectivity and rationality

All the parties accepted that the retrospective application of a law could be challenged on the basis that it violated the rule of law. So, too, did the court. This is an important finding, and *Pienaar Brothers* is the first court to make such a finding. After considering the different standards applied in other jurisdictions, the court held that 'the basic ''rationality'' standard applies' to challenges to retroactive laws (para [82]). Fabricius J held that this was the same standard applied by the United States Supreme Court in *United States v Carlton* 114 S Ct 2018, 512 US 26 (1994).

He then held that, applying that standard, there was nothing constitutionally problematic in the retrospective application of the Amendment Act. That was because Pienaar Brothers had in fact been notified of the intention to close the loophole and make the transaction subject to STC. As the High Court explained:

> What this means is that even on Applicant's own test, it cannot succeed. It contended there had been no adequate warning, but this not so in the context of the budget speech of 21 February 2007 and the Draft Bill published on 27 February 2007. All tax payers were thus given ample notice that, to put it at its lowest, they could not safely rely on Section 44 (9) of the Income Tax Act after 21 February 2007. The question of whether the Applicant and its advisors actually made themselves aware of the budget speech or Draft Bill is in the present context not relevant (para [85]).

In our view, the court reached the correct result, but the adoption of the rationality standard is open to criticism. Rationality is already a requirement for all law, even laws that are purely

prospective. Using it to evaluate retroactive laws fails to take account of the additional violation resulting from the retroactive application of a law. The correct constitutional standard should acknowledge that retroactivity is in itself inherently inconsistent with the rule of law and demands greater justification than similar non-retroactive laws. In our view, the court should have adopted a standard similar to those adopted by the Indian Supreme Court (see, eg, *National Agricultural v Union of India* (2003) 5 SCC 23, 260 ITR 548; *Ujagar Prints v Union of India & others* 1989 AIR 516, 1988 SCR Supl (3) 770; *Empire Industries Limited & others v Union of India & others* 1986 AIR 662, 1985 SCR Supl (1) 292); the European Court of Human Rights (*MA & others v Finland* (2003) 37 EHRR CD 210, [2003] ECHR 712; *NKM v Hungary* Application no 66529/11); the United States Ninth Circuit Court of Appeal (*Carlton v United States* 972 F 2d 1051 (1992)); or the German Supreme Court (the German position is summarised in *Pienaar Brothers* para [78]). While these standards differ in their detail, they all recognise that mere rationality is insufficient to justify retroactive taxation.

The key reason why these, and other countries, limit the legislature's ability to pass retrospective laws, is that they defeat the expectations of citizens formed in reliance on the existing state of the law. This undermines a central element of the rule of law – that laws must be known in advance, and people's reliance on those laws should (generally) be protected. Where the reliance is rational (there was good reason for it) and legitimate (it was consistent with the underlying intent of the law), it is difficult to see how defeating that reliance could be consistent with the rule of law.

Applying that standard, the Amendment Act would still have been constitutional. From 21 February 2007 when the press statement was released, all taxpayers should have been on notice that the STC regime would change and could impose tax liabilities for transactions like those of the Pienaar Brothers that had previously been exempted. Reliance at that stage was neither rational nor legitimate. It was an impermissible attempt to take advantage of a loophole before the legislature could close it. Indeed, Fabricius J's reasoning appears to apply a reliance standard, rather than a rationality standard.

In addition, the High Court appears to have misinterpreted the US Supreme Court's decision in *Carlton* (above), and ignored the compelling dissenting opinions. While the Supreme Court did set

rationality as the primary standard by which to judge retroactive laws, it also held that laws that retroactively imposed 'wholly new taxes' or that reached too far back into the past would also be unconstitutional. Fabricius J does not mention these elements of the decision.

Moreover, as both Scalia and O'Connor JJ pointed out in their minority opinions in *Carlton*, an ordinary rationality standard will mean that retroactive taxation will never be unconstitutional. In Scalia J's words:

> The reasoning the Court applies to uphold the statute in this case guarantees that all retroactive tax laws will henceforth be valid. To pass constitutional muster the retroactive aspects of the statute need only be 'rationally related to a legitimate legislative purpose.' . . . Revenue raising is certainly a legitimate legislative purpose . . . and any law that retroactively adds a tax, removes a deduction, or increases a rate rationally furthers that goal (*US v Carlton* para [40]).

For a constitutional standard prohibiting retroactive taxation to be meaningful, it must be higher than mere rationality. A reliance-based standard best fits with the purpose of the rule of law.

An appeal against the High Court's ruling was abandoned, so *Pienaar Brothers* sets the law for now. But there are likely to be many more such challenges now that the door has been opened. Future courts will, it is hoped, follow the High Court in permitting these challenges, but set a more appropriate test.

Arbitrary deprivation of property

The High Court also rejected the challenge based on section 25(1) of the Constitution. It held, first, that 'it cannot be argued that all taxes involve a ''deprivation'' of property'' (para [110]) as intended in section 25(1). Fabricius J explained this view as follows:

> A State cannot exist without taxes. Society receives benefits from them. Taxes are not penalties. Neither can they be, without any qualification, be regarded as unjust deprivation of property use (para [110]).

This passage does not appear to exclude the possibility that some taxes may constitute deprivations of property, but merely that in the ordinary course a tax should not be treated as a deprivation. This is confirmed by the High Court's second reason for rejecting the challenge. It held that '[s]ufficient reason was established and the process was fair in the present context' (para [110]). This was because all taxpayers had been given adequate

notice of the upcoming change, and the fact that it would apply retrospectively.

Again, we agree with the High Court's outcome, but have difficulty with its reasoning. The Constitutional Court has never directly considered whether taxes constitute deprivations of property. Indeed, it has expressly avoided the question on two occasions *(First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services & another; First National Bank of SA Limited t/a Wesbank v Minister of Finance* (CCT19/01) [2002] ZACC 5, 2002 (4) SA 768 (CC), 2002 (7) BCLR 702 and *Law Society of South Africa & others v Minister for Transport & another* [2010] ZACC 25, 2011 (1) SA 400 (CC), 2011 (2) BCLR 150. Other High Courts have agreed that taxation does not constitute deprivation (see, eg, *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services & another* 2001 (7) BCLR 715 (C), 2001 (3) SA 310 (C); *Eskom v Thabo Mofutsanyana Distriksraad* [2004] ZAFSHC 17). Academics, on the other hand, have criticised these judgments and universally reasoned that taxation does amount to a deprivation (AJ Van der Walt 'Negating Grotius – the constitutional validity of statutory security rights in favour of the state: *First National Bank of SA t/a Wesbank v Commissioner for the South African Revenue Service* 2001 (7) BCLR 715 (C)' (2002) 18 *SAJHR* 86; I Rautenbach 'Overview of Constitutional Court decisions on the bill of rights – 2010' 2011 *TSAR* 342; D Visser 'Unjustified enrichment' 2004 *Annual Survey* 280).

This is a sticky issue. But in our view taxes should be treated as deprivations of property. They are laws that oblige people to pay money to the state and allow the state to employ civil enforcement mechanisms to collect that money. This does not mean that courts will second-guess every tax. Almost all taxes will easily clear the arbitrary threshold set by section 25(1). But if the legislature seeks to abuse its taxing power, the courts will be able to step in. As Van der Walt has explained:

> On a purely conceptual and logical level, one has to disagree with the view that taxation is neither a deprivation nor an expropriation of property. *In so far as taxation results in property being transferred from private hands to the fiscus, it must qualify as either a deprivation or an expropriation of that property.* Of course, the property clause does not render all deprivations or expropriations of property per se unlawful – the property owner is only protected against unlawful deprivations and expropriations. . . . However, taxation can be unlaw-

> ful, just as deprivation and expropriation of property can be unlawful. . . . [A] tax that is demonstrably overbroad or oppressive is subject to judicial and constitutional challenge and scrutiny, and part of that scrutiny may well include the question whether the tax conflicts with the property clause (Van der Walt (2002) 18 SAJHR 86, 97) (emphasis added).

That seems consistent with our constitutional scheme.

Bill Of Rights Jurisprudence

Children

Is it constitutional that the Children's Act 38 of 2005 requires that, in surrogacy agreements, there must be a genetic link between a parent and the child who is born? In *AB & another v Minister of Social Development* [2016] ZACC 43, 2017 (3) BCLR 267 (CC), 2017 (3) SA 570, a majority of the Constitutional Court said yes. In a challenge to section 294 of the Children's Act – which is a gatekeeper to surrogacy agreements, requiring a genetic link between a commissioning parent and the child who is subsequently born – Nkabinde J's majority judgment found that the provision must be upheld as it prioritises the best interests of the child. Astonishingly, the majority judgment denied that the countervailing right to bodily and psychological integrity – including, most crucially, the right to make reproductive decisions – arises at all. The majority also struck a blow against empirical research in interpreting legislation, roundly rejecting the role of credible data in determining whether a law is constitutional.

Ms AB had long wished to become a parent, but struggled with infertility. In 2011, after a decade of unsuccessful *in vitro* fertilisation (IVF) treatments and a divorce, she was told to consider surrogacy – to enter into an agreement with another woman to carry her baby to term. The Children's Act permits surrogacy, but strictly regulates just how surrogacy arrangements come about – only altruistic, and not commercial, surrogacy is allowed. A surrogate mother can be reimbursed for her loss of income during the pregnancy and her medical expenses, but cannot ask for payment for carrying the child. Some are skeptical of whether a clear line can be drawn between these two forms of surrogacy (Sharyn L Roach Anleu 'Reinforcing gender norms: Commercial and altruistic surrogacy' (1990) 33/1 *Acta Sociologica* 63). Nevertheless, the law across various jurisdictions preserves the distinction, and there are few countries that permit commercial surrogacy.

This is based on the notion that the market has 'moral limits' (Michael J Sandel 'What money can't buy – The moral limits of markets' *Tanner Lectures on Human Values* (1998)), and on the sheer inequality in bargaining power that can accompany such agreements.

This is not the only way in which the Children's Act regulates surrogacy. Section 294 does not allow a surrogacy arrangement where there is no direct genetic link between a prospective parent and the child who is to be born as a result. What this means is that if a prospective mother is, like AB, both conception infertile and pregnancy infertile (ie, she can neither conceive a foetus nor carry it term), surrogacy is not an option for her. For men who are infertile, surrogacy is also precluded, unless they have a partner who contributes genetic material to the foetus.

AB could not understand this restriction: when she underwent IVF treatment, it was with both donor *ova* and sperm. Why, then, should there be any difficulty with her also using double donors, this time within a surrogacy arrangement? Supported by the Surrogacy Advisory Group, a non-governmental organisation working in this area, AB launched a constitutional challenge to section 294 in the High Court, arguing that it violates a number of her rights including her rights to equality and to reproductive autonomy.

The Minister of Social Development and the Centre for Child Law (admitted as a friend of the court) resisted these arguments, instead placing weight on the importance of a child's knowing his or her genetic origin, in line with the constitutional injunction that a child's best interests are of paramount importance. Importantly, the genetic link requirement, said the Minister, also ensures that prospective parents do not use surrogacy to circumvent adoption processes, and also safeguards against the creation of designer babies and the perils of commercial surrogacy.

In the High Court (*AB & another v Minister of Social Development as Amicus Curiae: Centre for Child Law* [2015] ZAGPPHC 580, 2016 (2) SA 27 (GP)), AB was successful, and the matter was referred to the Constitutional Court to confirm the lower court's finding of unconstitutionality. The Constitutional Court declined to do so. A majority of seven justices found that none of AB's rights had been violated by the legislation (para [240]), not even her right to make reproductive decisions under section 12 of the Constitution. In a compelling minority judgment Khampepe J thoughtfully fleshed out the content of this right, and would have

found for AB. The majority, however, construed the section 12 right extremely narrowly as concerning only decisions for one's own anatomy: it is not engaged in any parental choice that does not encompass brute bodily facts (paras [315]–[318]).

On the majority's take AB's rights were not infringed at all. Instead, at centre stage are children's rights, with Nkabinde J asserting that section 294 and its requirement of a genetic link serve the purpose of creating a bond between child and parent, which is 'important to the self-identity and self-respect of the child' (para [294]).

Overall, there are some troubling aspects to the majority's reasoning. First, the question of 'clarity' regarding a child's origins is a difficult one because, although it is certainly the norm that most children born to their parents are biologically linked to them, it is quite different to suggest: (a) that the lack of such a link necessarily constitutes harm to a child; and (b) that this harm requires *legal* prohibition of reproduction without a genetic link. For instance, it is not clear that a 'self-identity' aim such as this could not be achieved by informing a child of its genetic origins and surrogate mother's background if necessary. It appears the majority is not merely relying on a child being genetically informed of its origins, but believe a genetic tie between child and parent is a *constituent* part of forming a child's self-identity. Although this is not necessarily implausible as a psychological phenomenon, further reasons ought to be provided as to the weight of such a genetic tie and its impact on early childhood development – especially if we are to claim that the state may intervene in the reproductive choices of consenting and sober-minded adults who appear fully capable of discharging parental duties to children.

Further, it is one thing to accept that, all things being equal, a child has an interest in having a genetic link with its parents. It is another thing entirely to find that this interest trumps all others, including those of a prospective parent. The majority, however, found that this purpose is so important that it appears better for a child not to be born at all, than to be born with no genetic link to his or her parents. This is a dangerous implication, not least because it casts aspersions on the value of the lives of adopted children who do not share genes with their adoptive parents, and elevates biological parental-child relationships over others.

Compounding this, Nkabinde J actively held AB responsible for being single, offering her the solution of either finding a partner

who is able to donate a gamete for surrogacy, or simply living with the choices she had made (para [302]). The negative effects of infertility do not have anything to do with legislative measures, said the majority judgment: what disqualifies AB from surrogacy is not legislation, but her own biology, paired with her choice to remain single.

This argument by the majority judgment falls short. As Khampepe J's cogent minority points out, it fails to recognise the value of diverse family formations and single parenthood (para [96]). Worrying, too, is that it does not take seriously that technological progress can reshape what is possible (para [113]). And here, as the minority pointed out, AB and the Surrogacy Advisory Group argued not that the state should be responsible for paying for her surrogacy arrangement, but only that it not impede her choices.

Perhaps, one might quibble, it is no bad thing, in a country with almost 3,5 million orphans, that surrogacy is closely regulated so that prospective parents like AB opt rather to adopt. After all, one of the purposes of section 294's genetic-link requirement is to ensure that the rigours of the adoption process are not circumvented. However, this argument does not quite hold water: first, adoption in South Africa is notoriously difficult, even for willing prospective parents; and secondly, even if one thinks that adoption is a morally good or even preferable decision, it simply does not follow that this is the state's decision to take. This is especially so because those who *can* choose to fall pregnant do not have the state informing their parental choices.

Nkabinde J's judgment also renounced the usefulness of facts in informing constitutional interpretation. She faulted the High Court judgment for finding that credible data must be put forward showing that the absence of a genetic link is detrimental to a surrogate child: '[t]hat approach', she objected, 'elevates the importance of empirical research above the purposive construction of the challenged provision' (para [291]). It is true that the courts, and not expert opinion, have the last say on constitutional interpretation, and rightly so. But the majority judgment set up an entirely false dichotomy between empiricism on the one hand, and interpretation on the other, not least because the judiciary has a rich track record of drawing on empirics – be this pointed data or more sweeping societal context – to inform a constitutional interpretation of legislation (*Teddy Bear Clinic for Abused Children & another v Minister of Justice and Constitutional*

Development & another [2013] ZACC 35, 2014 (2) SA 168 (CC), 2013 (12) BCLR 1429; *Minister of Health & others v Treatment Action Campaign & others (No 2)* [2002] ZACC 15, 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033).

A final comment on the reproductive rights question: The majority argues that the reproductive rights of the particular individual must be impugned, and this was not the case before us. However, it is somewhat strange to uncouple the concept of reproductive rights from parenting so cleanly. Certainly, 'reproduction' is not exhausted by parenting but includes a myriad of other interests such as autonomy and access to contraception. It is, however, something else entirely to suggest that the decision to become a parent and assume parental responsibilities cannot, in the circumstances before the court, be regarded as a question of reproductive rights. This is because it is entirely about how a child is brought into the world and who will assume parental responsibilities.

The primary initiator of that decision is AB. She is therefore the main agent of the entire pregnancy. The surrogate mother and the sperm and gamete donors would not have participated in this particular form of reproduction had it not been understood that AB would assume parental responsibilities. This reproductive process was thus triggered and directed by AB. Therefore, it logically involves her right to reproduce in *this* particular manner. It is perplexing that this obvious causal relationship between initiating agent and reproductive process could be ignored when deciding the reproductive rights of the individuals involved. On many fronts, then, it is regrettable that the majority judgment held sway.

Surrogacy was also the concern of the Pretoria High Court in *Ex Parte HPP & others; Ex Parte DME & others* (45037/2016) [2017] ZAGPPHC 70, [2017] 2 All SA 171 (GP), 2017 (4) SA 528, which was charged with determining whether a surrogacy facilitation is unlawful in terms of the Children's Act.

Two applications before the court sought the confirmation of surrogate motherhood agreements. Ms Strydom, who had herself six times acted as a surrogate, performed the services of a surrogacy facilitator – or surrogacy coordinator – for both surrogate motherhood agreements. She was joined in the proceedings, and the Centre for Child Law was admitted as a friend of the court at the court's request.

Strydom argued that she was entitled to act as a surrogacy

coordinator as an exercise of her right to practice a trade or occupation of her choosing under section 22 of the Constitution.

Tolmay J disagreed. Surrogacy facilitation in effect constitutes a form of commercial surrogacy and is, accordingly, unlawful. Section 301 of the Children's Act limits the valid payments for surrogacy to costs directly related to conception, pregnancy, birth, and the confirmation of the agreement, in addition to professional medical and legal expenses. This does not include payment to a surrogacy coordinator.

The court emphasised the importance of the prohibition of commercial surrogacy:

> The reason why s 301 prohibits payments other than those provided for is to prevent commercial surrogacy. As already pointed out the limitations' purpose is to prevent commercial surrogacy, which is ultimately enacted to protect the public interest. Important issues of public policy arise which justify a limitation of Ms Strydom's right to ask payment for her services. Surrogacy is strictly regulated, not only here but also internationally, and the reason for this regulatory framework is ultimately to protect the public against unscrupulous people who may abuse vulnerable people (para [51]).

Tolmay J found that Strydom's right to exercise her chosen profession had not been limited: all that had been limited was her right to ask for payment, and this was a justifiable limitation in terms of section 36 of the Constitution. This reasoning is strained, and is difficult to square with *South African Diamond Producers Organisation v Minister of Minerals and Energy & others* [2017] ZACC 26, 2017 (6) SA 331 (CC), 2017 (10) BCLR 1303, which found that where a law puts in place a legal barrier to choice, or makes 'the practice of that trade of profession so undesirable, difficult or unprofitable that the choice to enter it is in fact limited', then the choice element of section 22 is impaired (para [68]).

It would have been had Tolmay J found that section 22 of the Constitution expressly contemplates the regulation of professions (and so Strydom did not fall within the ambit of the right), or that the prohibition imposed by section 301 effectively limits not only her right to claim payment for services rendered, but, more principally, her freedom to render those services (for, if one follows the logic of the judgment, she would be permitted to render those services voluntarily, and without seeking remuneration, but if so the services would not truly constitute a trade, occupation, or profession).

Far from Strydom's having a right to demand payment for her surrogacy facilitation services, the agreements to pay her consti-

tuted a criminal offence, and the surrogacy facilitation agreements were unlawful and unenforceable.

The court did, however, confirm the underlying surrogacy agreements which were not similarly tainted by unlawfulness (paras [70] [71]).

Class Actions

In recent years, this chapter has discussed the significant development of court-made rules to govern class actions, and the certification and success of the first class actions under this regime (for a discussion of this jurisprudence, see J Brickhill & J Bleazard 'Bill of Rights class actions' in M Du Plessis et al (eds) *Class Action Litigation in South Africa* (Juta 2017)). In the year under review, a narrow question relating to class action procedure arose in *National Union of Metal Workers of South Africa (NUMSA) v Oosthuizen & others* (36016/2015) [2017] ZAGPJHC 56, 2017 (6) SA 272 (GJ) *(Numsa v Oosthuizen)*. The applicant, the NUMSA, applied for leave, as a class representative, to continue a pending action it had already instituted as a class action. This raised the issue of the timing of a certification application: whether a party seeking to represent a class must apply to court for authority to act as a class representative before summons is issued.

The High Court answered in the affirmative (para [47]), drawing on the decisions in *Children's Resource Centre Trust & others v Pioneer Food (Pty) Ltd & others* [2012] ZASCA 182, 2013 (2) SA 213 (SCA), 2013 (3) BCLR 279; *Mukaddam v Pioneer Foods (Pty) Ltd & others* [2013] ZACC 23, 2013 (5) SA 89 (CC), (2013 (10) BCLR 1135. However, even assuming that *ex post facto* certification in the interests of justice were permissible in principle, the court held that the circumstances of the present case did not justify the relaxation of the requirement of prior certification. Therefore, prior class certification was required, and the already pending action could not be certified *ex post facto* as a class action (paras [48] [53]).

Dignity: Euthanasia

Who decides what kind of a life is valuable, or is worth living, and on what basis? In *Minister of Justice and Correctional Services & others v Estate Late James Stransham-Ford & others* [2016] ZASCA 197, [2017] 1 All SA 354 (SCA), 2017 (3) BCLR

364, 2017 (3) SA 152, the Supreme Court of Appeal found that, in the absence of further facts or legal argument, an individual should not be the arbiter of his or her own fate by choosing to end his or her life – at least, not before the wheels of legislative consideration or cautious common-law development creak into action. The Supreme Court of Appeal declined to recognise that voluntary euthanasia or assisted suicide is lawful, even when it is requested by a terminal cancer patient.

Stransham-Ford had terminal cancer. He sought an order that a doctor could lawfully help him end his life, and would be exempted from criminal or disciplinary proceedings, and to develop the common law to allow for voluntary euthanasia or assisted suicide.

Fabricius J in the High Court, in *Stransham-Ford v Minister of Justice and Correctional Services & others* [2015] ZAGPPHC 230, 2015 (4) SA 50 (GP), [2015] 3 All SA 109 (GP), 2015 (6) BCLR 737 granted the order on an urgent basis, without knowing that Stransham-Ford had died just two hours earlier. The High Court judgment canvassed domestic and comparative law and stressed that the current legal position prohibiting euthanasia was forged in a pre-constitutional era. Fabricius J also found that no principled distinction can be drawn between passive euthanasia – where life-sustaining medical treatment is withdrawn – and active euthanasia.

The Ministers of Justice and Health, the National Director of Public Prosecutions, and the Health Professions Council of South Africa appealed to the Supreme Court of Appeal.

Wallis JA wrote the court's unanimous and carefully considered judgment, overturning Fabricius J's order in strong terms and castigating the High Court at various points for its approach. Once Stransham-Ford had died, there was no cause of action to be adjudicated by the court (para [20]), notwithstanding the constitutional issues his claim raised. This alone, Wallis JA held, was sufficient to set aside Fabricius J's order.

However, given that the High Court had delivered a reasoned judgment, the Supreme Court of Appeal proceeded to address the merits and to obviate any precedential effects that the High Court judgment would otherwise have (para [26]). This was particularly important, Wallis JA found, because the High Court based its findings on an incorrect approach to the existing legal position (para [57]). As to comparative law, that must not be too readily 'transplanted to South African soil' (para [58]).

In any event, found the court, the factual basis for the order had not been established: there was no evidence confirming Stransham-Ford's prediction of the manner of his death, or his mental capacity or willingness to go through with either assisted suicide or voluntary euthanasia. There was also no evidence that there was a doctor willing to assist. The factual basis that would have grounded the order was missing. So too, the court found, was a '*full and proper examination*' of contemporary domestic, foreign, and international law (para [5]).

The Supreme Court of Appeal judgment thus hewed closely to the unfortunate line drawn by the Constitutional Court in *H v Fetal Assessment Centre* [2014] ZACC 34, 2015 (2) SA 193 (CC), 2015 (2) BCLR 127: no matter how abstract or principled a legal question may seem, where a party advocates the development of the common law, that party must do so on the basis of all relevant facts and circumstances (para [26]). This is crucial in South Africa, Wallis JA found, because a court

> would need to be satisfied that a proper regulatory framework was, or could be put, in place and that the framework would not be a pious hope designed in a bureaucrat's or idealist's office, but one the functional operations of which had been tested and not found wanting (para [98]).

This is not least, the court held, because any court considering the matter must not only be animated by the individualistic impulses that motivate one sector of society, but also must account for more communitarian attitudes to life. The court stated:

> A court addressing these issues needs to be aware of differing cultural values and attitudes within our diverse population. It needs to consider the impact of its decision beyond our affluent suburbs into our crowded townships, our informal settlements and in the vast rural areas that make up South Africa. It is in that context that it must determine whether its decision will further undercut the foundational value of the right to life or be supportive of it. The notion of a dignified death must be informed by a rounded view of society, not confined to a restricted section of it. This was not done in this case and could not have been done because of the inadequacies of the evidence and the haste with which it was decided (para [100]).

Wallis JA did not, however, exclude the possibility of a person applying to a court for an order such as the one Stransham-Ford sought – provided that the requirements of legal standing are met, and that both the facts and the law (including comparative law) are fully canvassed. However, while this possibility is open

in theory, Wallis JA indicated that it would be welcomed if Parliament would rather resolve the issue through legislation (para [101]).

Equality

Intestate inheritance rights for same-sex permanent partners

In *Laubscher NO v Duplan & another* (CCT234/15) [2016] ZACC 44, 2017 (2) SA 264 (CC), 2017 (4) BCLR 415, the Constitutional Court affirmed the rights of same-sex partners in permanent relationships to inherit intestate – notwithstanding the enactment of the Civil Union Act 17 of 2006.

Mr Duplan and Mr Laubscher had been in a permanent partnership for twelve years when Laubscher died. The two had never solemnised or registered their same-sex partnership under the Civil Union Act, and Laubscher died without leaving a will. His brother was the executor of his estate. Duplan argued that he was entitled to inherit intestate, in line with an earlier decision of the Constitutional Court in *Gory v Kolver* [2006] ZACC 20, 2007 (4) SA 97 (CC), 2007 (3) BCLR 249, which found that the definition of 'spouse' in the Intestate Succession Act 81 of 1987 includes permanent same-sex partners who bore reciprocal duties of support. But *Gory v Kolver* was decided before the Civil Union Act came into effect, and the court had previously found in *Volks v Robinson* [2005] ZACC 2, 2005 (5) BCLR 446 (CC), that where a heterosexual couple can choose to regulate their relationship by law but do not, the surviving member of that couple cannot then benefit from the estate.

Did the enactment of the Civil Union Act analogously mean that same-sex couples are precluded from inheriting intestate if they failed to solemnise or regularise their relationship by law? The Constitutional Court found that it did not. Mbha AJ's majority judgment found that all the Civil Union Act does is create a new – but not exhaustive – category of beneficiaries, that is, same-sex partners who have entered into civil unions. *Gory v Kolver* is still in effect, and so surviving permanent same-sex partners who failed to enter into registered unions can still inherit intestate. The enactment of the Civil Union Act has not changed this – not least because it must be presumed that new legislation does not alter existing law more than is necessary (para [39]).

More controversial for the court was whether to overturn its earlier decision in *Volks v Robinson*, one of the court's most

vigorously criticised judgments (n73). There, a heterosexual permanent partner was found not to be entitled to claim any maintenance from the estate of her deceased partner. The court held:

> By opting not to marry, thereby not accepting the legal responsibilities and entitlements that go with marriage; a person cannot complain if she [or he] is denied the legal benefits she [or he] would have had if she [or he] had married. Having chosen cohabitation rather than marriage, she [or he] must bear the consequences (*Volks v Robinson* para [154], Sachs J criticising the majority judgment).

Mbha AJ found that *Volks v Robinson* was distinguishable in that it concerned maintenance rather than intestate succession (para [46]), and that, in any event, overturning *Volks v Robinson* would have no effect on relief to same-sex permanent partners. While this preserves the anomalous position – that same-sex partners, but not heterosexual partners, can inherit intestate even if they have not legally regularised their relationships – Mbha AJ reasoned that the legislature could always change this position (para [31]).

Froneman J's separate concurring judgment confronted *Volks v Robinson* head-on (para [60]). *Gory v Kolver* must be understood as targeting the unconstitutionality of same-sex partners' not being entitled to marry (para [63]). The Civil Union Act removed this impediment. And so, in Froneman J's view, the right of same-sex partners in permanent relationships to inherit intestate must be established independently of *Gory v Kolver*. To do this, *Volks v Robinson* needs to be tackled, for it relied on the general principle that 'the law may distinguish between married people and unmarried people' (*Volks v Robinson* para [54]).

Instead of marriage or legal regularisation being the significant determinant, Froneman J stated that 'the existence of a reciprocal duty of support' (para [77]) should give rise to legal protection after one partner has died. This is consistent with the constitutional prohibition of discrimination on the ground of marital status (para [81]). He reasoned that a departure from *Volks v Robinson* was justified as, with the benefit of hindsight, that judgment was clearly wrong as it sought to eradicate one form of unfair discrimination by creating another (para [86]). Both unmarried same-sex and heterosexual partners who bear reciprocal duties of support should fall within the ambit of the Intestate Succession Act and be entitled to inherit intestate.

Both Constitutional Court judgments correctly resist a 'levelling-down' approach, that would establish equality between same-sex

and heterosexual couples at the expense of depriving same-sex partners of their extant rights. But Mbha AJ's judgment means that differentiation and disparate treatment of unmarried heterosexual partners persists, and this raises clear equality concerns. In our view, Froneman J's approach takes the next logical step: ensure equality by recognising that just as same-sex partners in permanent relationships with reciprocal support duties can inherit intestate, so can heterosexual partners. This recognition is crucial, especially for ensuring the financial security of marginalised partners – often women – who may not always be able to exercise the choice to marry, but who are in relationships with *de facto* reciprocal duties of support.

Polygamous Muslim marriages: Wills Act

Moosa NO & others v Harnaker & others [2017] ZAWCHC 97, [2017] 4 All SA 498 (WCC), 2017 (6) SA 425 is the latest in a line of decisions extending the word 'spouse' to include persons married under Islamic law. The definition of 'surviving spouse' was extended to include women in monogamous and polygynous Muslim marriages under the Maintenance of Surviving Spouses Act 27 of 1990 in *Daniels v Campbell NO & others* [2004] ZACC 14, 2004 (5) SA 331 (CC), 2004 (7) BCLR 735; and to inherit in terms of the Intestate Succession Act 81 of 1987 in *Hassam v Jacobs NO & others* [2009] ZACC 19, 2009 (5) SA 572 (CC), 2009 (11) BCLR 1148. *Moosa NO & others v Harneker & others* concerned the same issue in relation to the Wills Act 7 of 1953 as it applies to spouses in Muslim marriages.

Section 2C(1) of the Wills Act 7 of 1953 provides that '(i)f any descendant of a testator, excluding a minor or a mentally ill descendant, who, together with the surviving spouse of the testator, is entitled to a benefit in terms of a will renounces his right to receive such a benefit, such benefit shall vest in the surviving spouse'. The term 'surviving spouse' did not include spouses in monogamous and polygynous Muslim marriages solemnised under Islamic law.

Le Grange J held that to that extent, section 2C(1) of the Wills Act was in breach of section 9 of the Constitution, as it was unfairly discriminatory on the grounds of religion and marital status (paras [30]–[33]). The court accordingly declared the provision unconstitutional and ordered that the following words be read in at the end of section 2C(1): 'For purposes of this sub-section, a ''surviving spouse'' includes every husband and

wife of a *de facto* monogamous and polygynous Muslim marriage solemnised under the religion of Islam' (para [39]).

Transgender persons; alteration of sex description

The applicants in *KOS & others v Minister of Home Affairs & others* [2017] ZAWCHC 90, [2017] 4 All SA 468 (WCC), 2017 (6) SA 588 were three transgender women who had been born male, but had subsequently undergone sex/gender realignment and wished to have their sex altered in the birth register. This is the first reported judgment to deal with transgender rights and importantly recognises them as gender rights.

Each of the applicants had a female spouse, whom they had married before their sex/gender realignment under the Marriage Act 25 of 1961. The Department of Home Affairs initially delayed and handled the applications incorrectly, before refusing the applications of KOS and GNC. It said that the registration would have the effect of reflecting persons in same-sex relationships as married under the Marriage Act, which it considered impermissible (paras [13] [14]). KOS, GNC and their spouses were advised to divorce and remarry under the Civil Union Act, but they could not do so because none of the grounds for divorce applied to them (para [12]). As regards the third applicant, WJV, the Department recorded her sex/gender realignment but deleted the particulars of her marriage recorded in the population register (para [15]).

The applicants, represented by the Legal Resources Centre, approached the Western Cape High Court to review and set aside the decisions of the Department of Home Affairs and to direct the Department to register their sex/gender changes. They also sought relief in the interests of similarly situated persons. Binns-Ward J distinguished transgender persons from homosexuals, noting the 'all too common tendency to conflate sex, gender and sexuality, which is misconceived' (para [21]). Regarding the nature of marriage, the court firmly rejected the argument that marriage requires the 'capacity for natural heterosexual intercourse'. Binns-Ward J quoted with approval from the following *dictum* of the European Court of Human Rights:

> Marriage is far more than a sexual union, and the capacity for sexual intercourse is therefore not essential for marriage. Persons who are not or are no longer capable of procreating or having sexual intercourse may also want to and do marry. That is because marriage is far more than a union which legitimates sexual intercourse and aims at

> procreating: it is a legal institution which creates a fixed legal relationship between both the partners and third parties (including the authorities); it is a societal bond, in that married people (as one learned writer put it) 'represent to the world that theirs is a relationship based on strong human emotions, exclusive commitment to each other and permanence'; it is, moreover, a species of togetherness in which intellectual, spiritual and emotional bonds are at least as essential as the physical one (para [20], citing *Cossey v United Kingdom* [1990] ECHR 21 ((1991) 13 EHRR 622) para [4.5.2], footnotes omitted).

Binns-Ward J ultimately upheld the application and granted an order that not only granted relief to the individual applicants, but also provided direction to the Department on its obligations in all such cases. The court declared that the Department of Home Affairs had violated the applicants' rights to just administrative action, equality, and dignity. It further declared that the Department is obliged to determine applications submitted in terms of the Alteration of Sex Description and Sex Status Act 49 of 2003 for the alteration of the sex description on a person's birth register, regardless of his or her marital status. The court set aside the refusal or failure of the Department to decide the applications of the individual applicants and remitted those decisions to it for determination.

Although Binns-Ward J did not grant substitution and expressly direct the Department to register the sex/gender realignments of the first and second applicants but merely directed it to reconsider its refusal to do so, the judgment lays a strong foundation for the review proceedings to follow.

Expression

Dismissal: Racial slurs: Reasonableness of arbitration awards

Is an arbitration award ordering the reinstatement of an employee who made a racial slur unreasonable? If so, is this sufficient to have the award set aside? The Constitutional Court in *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration & others* [2016] ZACC 38, 2017 (1) SA 549 (CC), 2017 (2) BCLR 241 answered both questions in the affirmative.

Kruger, an employee of the South African Revenue Service (the SARS), called his team leader a 'kaffir'. As required by the collective agreement which binds the SARS, a disciplinary hearing was convened. Kruger pleaded and was found guilty. He

received a final written warning, suspension without pay for ten days, and was referred for counselling. Dissatisfied with that sanction, the Commissioner of SARS (the Commissioner) altered the sanction to dismissal.

Kruger then referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) arguing procedural and substantive unfairness. He contended that the Commissioner did not have the power to alter the sanction imposed by the chairperson of the disciplinary enquiry. The CCMA arbitrator held that the collective agreement did not allow the Commissioner to replace the sanction imposed by the chairperson of the disciplinary enquiry. The arbitrator then ordered Kruger's reinstatement.

The SARS approached the Labour Court, and in a subsequent appeal, the Labour Appeal Court, found in favour of Kruger. The Constitutional Court, however, highlighted the seriousness of the use of the word 'kaffir' (paras [9] [39] [44]). The court held that this amounts to hate speech, and, to contribute to the eradication of racism in line with the foundational values of our Constitution, courts are obliged to act fairly but firmly against those who use it (paras [43] [48]). It found that the CCMA arbitrator had acted unreasonably by ordering Kruger's reinstatement.

A few brief comments on this judgment. No matter how laudable the sentiments and outrage at derogatory and racially abusive language is, there are points worth criticising in its reasoning. The court admonished the arbitrator in this case for failing to take proper account of the seriousness of this slur. This is not necessarily either fair or deserved on an analysis of the basis for the award. Implied in the court's reasoning is that the Labour and Labour Appeal Courts also failed in a similar manner. This is an astonishing accusation. Especially in light of the *obiter* observation by Mogoeng CJ when he stated that 'another factor that could undermine the possibility to address racism squarely would be a tendency to shift attention from racism to technicalities, even where unmitigated racism is unavoidably central to the dispute or engagement' (para [10]). It appears that the fatal flaw in the reasoning of the arbitrator, the Labour Court, and the Labour Appeal Court was that they inappropriately focused on technicalities so asto avoid dealing with the gravity of the racist slur. This is strange, as none of these lower *fora* denied or excused the slur. The issue on which they disagreed with the court was who had the power to punish Kruger for his abusive

language. Unfortunately for the SARS, there was a collective bargaining agreement which precluded the Commissioner from replacing a decision made by the disciplinary process set up in terms of that agreement. This was the question before the arbitrator.

This, it appears in the Constitutional Court's view, was an overly technical approach to the dispute at hand. Once it was proven that the word 'kaffir' had been said, it appears that there is a change in the normative and legal position that is somewhat unclear. It cannot be that the court argues that all legal reasoning must be suspended as this slur is an overriding, pre-emptive reason that defeats any and all other rights and considerations in a dispute. Technical impediment certainly will seem less important in a dispute such as this, but violating or flouting a collective agreement, or violating competing labour law rights, is not merely a technical but a substantive matter. These rights flow from labour legislation and the Constitution itself. Furthermore, procedural rights are not necessarily technical. A question as to whether a certain person has the power to make a decision is as crucial a 'procedural' question as not being a judge in one's own case or being offered the chance to plead one's case. So, it cannot be the case that the arbitrator or the lower courts were seized inappropriately with technicalities.

The simple truth is that the court disagreed with the moral judgment that these lower *fora* had made when they were asked to decide the reasonableness of the arbitral decision in weighing the procedural impediments of the collective agreement, the provisions of the Labour Relations Act 66 of 1995 (s 193), and the constitutional rights of non-discrimination (s 9 of the Constitution), dignity (s 10 of the Constitution) and fair labour practices (s 23 of the Constitution). This, of course, the court is entitled to do when it provides the reasons why it sees the matter differently. However, it appears that the rhetoric peppering the judgment distracts from the fact that this was, in fact, what it was doing, rather than morally condemning all lower courts that could reasonably disagree with it considering technicalities rather than substantive principles.

Housing

The right to housing, and in particular the protection against eviction, has been probably the most active and fruitful area of socio-economic rights jurisprudence. The year under review saw

this level of activity continue with some incremental developments building on existing principles. Three cases strengthened the principle that under section 26(3) of the Constitution, no one may be evicted without an order of court made after considering all relevant circumstances. The single Constitutional Court decision that we review – *Occupiers, Berea v De Wet NO* [2017] ZACC 18, 2017 (5) SA 346 (CC), 2017 (8) BCLR 1015 – emphasised the active and protective role required of courts in eviction proceedings even when there is alleged consent to eviction.

However, two High Court decisions in the year under review clawed back on established protection. *Chapelgate Properties 1022 CC v Unlawful Occupiers of Erf 644 Kew & another* 2017 (1) SA 403 (GJ) (*Chapelgate*) represents an attempt to disqualify foreign nationals from temporary emergency accommodation if they have not regularised their status. *Mtshali & others v Masawi & others* [2016] ZAGPJHC 291, 2017 (4) SA 632 (GJ) (*Mtshali*) endorsed the practice of the state charging for the provision of temporary emergency accommodation.

In *Occupiers, Berea v De Wet* (above) the Constitutional Court considered whether, where an occupier has consented to eviction, the court is absolved from the obligation to consider all relevant circumstances before ordering eviction. The secondary question was whether an eviction order may be rescinded at the instance of occupiers who purportedly consented to it (para [1]). The matter arose after the High Court granted an order for the eviction of the 184 occupiers of a block of flats in Berea, Johannesburg (paras [2] [3]). After service of the application, the occupiers met and mandated four of their number and a local ward committee member, Ngubane, to appear at court and seek a postponement (para [7]). When the matter came before court, the appearer applicants, Ngubane, and the property owner's legal representatives were present. The owner's representatives handed up a draft order of eviction and Ngubane confirmed the order (para [8]).

The Constitutional Court delivered a unanimous judgment penned by Mojapelo AJ. At the outset, the court considered the issues of consent, waiver, and mandate. Mojapelo AJ held that while the occupiers may have factually consented to the eviction order (para [31]), their consent was not legally effective as it was not given with full appreciation of their constitutional and statutory rights (paras [32] [33]). The court held further that Ngubane had no mandate to represent them (para [36]).

Mojapelo AJ held that courts are not absolved from their duties under section 26(3) of the Constitution and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (the PIE Act) where parties have consented to an eviction order. The court further held that courts must take an active role in adjudicating eviction matters, taking into account all relevant circumstances, and that the application of the PIE Act is mandatory. The nub of the judgment appears in paragraph 33, where the court held:

> An agreement to an eviction order in the circumstances would entail the waiver of, at a minimum, the constitutional and statutory rights: (a) to an eviction only after a court has considered all the relevant circumstances; (b) to the joinder of the local authority and production by it of a report on the need and availability of alternative accommodation; (c) to a just and equitable order in terms of PIE; and (d) to temporary alternative accommodation in the event that eviction would result in homelessness. The applicants and the amicus curiae contended, with some force, that the rights are therefore incapable of being waived because they are for the benefit of the public at large. Even if they were capable of waiver, such waiver would need to be free, voluntary and informed. It has not been disputed that the applicants were not informed of any of these rights. It must therefore be accepted that they were not aware of any such rights. Given that the applicants were not aware of their rights, the factual consent that they gave was not informed. Their consent is therefore not legally valid. It is not binding on them. It is therefore not necessary in these circumstances to decide whether these rights are capable of waiver [footnotes omitted].

Accordingly, the eviction order fell to be set aside in terms of Rule 42. As for remedy, the court indicated that without the local authority being part of the proceedings, it was unable to grant a just and equitable remedy that would bring finality to the matter. Therefore, the court joined the local authority to the proceedings and remitted the matter to the High Court to deal with it on an expedited basis.

Whether a municipality may exclude foreign nationals who are not legally in the country from the provision of temporary emergency accommodation, in the absence of any law excluding them, was the question raised by Spilg J in the High Court in *Chapelgate* (above). The issue was raised by the court, not having been relied upon initially by any of the parties.

In this case the applicant had applied to evict the occupiers of a factory building it owned in downtown Johannesburg. The court had ordered the occupiers to vacate, and also called on the City

of Johannesburg (the City) to show why it should not provide them with temporary emergency accommodation. This prompted the court to ask whether occupiers who were 'illegal foreigners' were eligible for such accommodation (see paras [3]–[5] [9] [14]).

The court designed a process which required the City to verify the immigration status of occupiers seeking temporary emergency accommodation before the eviction. Its order directed that

- the occupiers' attorneys were to give the City a list of occupiers who would require temporary emergency accommodation after eviction, including details of their age, income, family circumstances, and residence status;
- the City was to then file a report on which occupiers were eligible for the accommodation;
- hereafter, the occupiers or landowners could file comments on the report, and occupiers found eligible who were illegal foreigners were to provide the City with proof that they were entitled to remain in South Africa;
- the City could then apply for an order that any eligible illegal foreigners who had not produced proof were not entitled to the accommodation;
- the occupiers were to vacate the factory building; and
- the sheriff was to remove any occupiers who had not left.

Chapelgate represents a retrogressive step in our housing jurisprudence in which the court effectively legislated a limitation of rights which appears nowhere in statute. The legal position in relation to the socio-economic rights of foreign nationals is clear. Section 26 of the Constitution, in language similar to the other socio-economic rights in the Bill of Rights, guarantees the right to housing to 'everyone'. In *Khosa & others v Minister of Social Development & others; Mahlaule & others v Minister of Social Development & others* 2004 (6) SA 505 (CC), the Constitutional Court held that 'everyone' means everyone, and includes foreign nationals (paras [46] [47]). The court in *Khosa* recognised that the right could potentially be justifiably limited, including to exclude foreign nationals, but only in a law of general application that passes muster under section 36 (paras [79]–[85]). In the context of housing, the relevant legislation does not refer to immigration status as a criterion for eligibility for temporary emergency housing. The Housing Code promulgated under

section 4 of the National Housing Act 107 of 1997 simply refers to all persons threatened with eviction. Spilg J sought to plug this gap by holding that 'the provisions of the Immigration Act [13 of 2002] as qualified by the Refugees Act [130 of 1998] are limiting laws of general application and the respondents did not seek to challenge their constitutionality in these proceedings' (para [69]).

Rights cannot be limited by indirect implication, reading across different statutes. Where a law gives effect to a right, the limitation must be expressly made in that law. The High Court's approach is incorrect and ought not to be followed. If a restriction excluding illegal immigrants is ever to be implemented, it would need to be expressly incorporated into the Housing Code or the National Housing Act by way of an amendment. The provision could then be tested against section 36 of the Constitution. Absent such an amendment, there is no basis for courts to apply immigration status as a new criterion for eligibility for temporary emergency accommodation.

The principle against eviction without a court order was also broadly in issue in *Residents of Setjwetla Informal Settlement v Johannesburg City* [2016] ZAGPJHC 202, 2017 (2) SA 516 (GJ). The applicants had built shacks on Johannesburg City (the City) land. Claiming illegal land invasion, the City demolished the shacks without a court order. The applicants claimed that they had been living in the shacks when they were demolished, and were entitled to protection under the PIE Act. The City claimed that the shacks were half-built and unoccupied when demolished. Given the dispute over the facts, the court enquired whether, even on the City's version, a court order was needed. It issued a rule *nisi* calling on the City to show cause why an interdict should not be confirmed. On the return day, Van der Linde J held that although the applicants had, in beginning construction, unlawfully acquired possession of the City's land sufficient to constitute spoliation, the subsequent demolition constituted unlawful self-help by the City (para [13]). The court held that the PIE Act was not applicable because the shacks had not yet been completed or occupied (para [14]). It nevertheless held that local authorities should not be permitted, without court sanction, to move in with heavy equipment whenever people moved onto their land (see [19]). The court confirmed the rule *nisi* interdicting the City from demolishing the shacks.

May a property developer include a clause in an agreement for the sale of unimproved land that, should the purchaser not build a

residential dwelling on the property within a specified period, the developer may claim repurchase and transfer? In *Bondev Midrand (Pty) Ltd v Madzhie & others* {2016] ZAGPPHC 1097, 2017 (4) SA 166 (GP), CR Jansen AJ held *obiter* that such a clause is inconsistent with the right to housing in section 26(1) of the Constitution, and contrary to public policy at common law. These are merely *obiter dicta* because the developer, Bondev, had applied to withdraw its application. The court nevertheless considered it appropriate to express a view, in case Bondev decided to renew its application.

The court noted that for many people the purchase of land is the first step in the realisation of their right to adequate housing. Access to housing through the market mechanism falls squarely within the ambit of section 26(1), and the acquisition of land also falls within the broader concept of housing (para [27]). It follows that developers must desist from preventing or impairing a person's attempts to gain access to adequate housing (para [28]). Considering the overall context of planning legislation and the relationship developers have with housing finance, developers also have a positive duty under section 26(1). In the present case, the purchaser was for all intents and purposes forced to build immediately (para [36]). Many people simply cannot afford to do this. In this way the developer breached both the negative aspect of section 26(1) – the obligation not to infringe the purchaser's quest for access to adequate housing – and the positive duty (para [37]). The court held further that the enforcement of such a repurchase clause would be contrary to public policy (para [61]). Albeit *obiter*, the judgment is a considered contribution to the constitutionality of repurchase clauses requiring purchasers of land to build homes or sell back the purchased land.

The second judgment with which we take issue is *Mtshali* (above). (We disclose that one of the present authors, Jason Brickhill, appeared for the occupiers in this matter.) This, too, was a judgment by Spilg J in the Gauteng Local Division of the High Court. The case arose as an appeal to the full bench (Spilg, Coppin, and Moshidi JJ) against Molahlehi AJ's refusal to rescind an eviction order granted by Kathree-Setiloane J. The full bench dismissed the appeal. The original eviction order, granted as a default judgment, had been sought to be rescinded on the basis that there had not been proper notice and that no case for an eviction had been made out.

While the judgment is open to criticism on those issues too, the novel questions that arose concerned whether it was lawful for the City to provide temporary alternative accommodation to those occupiers left homeless by the eviction, subject to payment of a monetary charge, and by out-sourcing to a private entity. The full court answered both questions in the affirmative. The court held that it was lawful for the City to charge for temporary emergency accommodation, provided the amount was affordable (paras [115] [118] [120] [134]). The essence of the court's reasoning here was that it was lawful for the City to do so unless a law prohibited it from charging. In our view, this turns the principle of legality on its head. The City is not empowered to make such a charge without an empowering provision authorising it to do so. In addition, to the extent that charging for the provision of a constitutional right constitutes a limitation of the right, such a limitation must be contained in a law of general application that passes muster under section 36. The court also held that the amount itself – R10 per person per day – was reasonable. Given that the occupiers had tendered to pay the building's owners more than this if restored to their original homes, this conclusion by the court is more plausible. The bigger principle is whether it is permissible in the first place to charge for emergency accommodation in the absence of a law (or at least a generally applicable policy) prescribing the charge in advance. In our view, it is not.

The related question is whether it was permissible for the City to outsource its obligation to provide temporary emergency accommodation to Ekhaya House, a private shelter. Spilg J held that it was lawful, emphasising the lack of alternatives available to the City, and suggesting that the City should be afforded a wide discretion in deciding how to discharge its obligations (paras [146] [147]). The outsourcing issue is a difficult one, which may arise again in future. Emergency situations following messy eviction proceedings do not generate the ideal factual basis on which to decide this issue of principle.

As with the issue of charging, in our view, both the right to housing in section 26 and the principle of legality require that there should be express legislative provision for a municipal power to outsource the provision of temporary emergency accommodation. However, provided that such a framework is laid, outsourcing ought to be permissible. It may result in the private entity assuming constitutional obligations in addition to the relevant municipality, as the Constitutional Court has concluded in

the context of the right to social assistance, in *Allpay Consolidated Investment Holdings (Pty) Ltd & others v Chief Executive Officer of the South African Social Security Agency & others (No 2)* [2014] ZACC 12, 2014 (6) BCLR 641 (CC), 2014 (4) SA 179 (*Allpay 2*) para [58]. Importantly, such outsourcing does not enable the organ of state to divest itself of its constitutional obligations (para [59]).

Land

The year 2017 was significant for land rights in the courts, and against the backdrop of the unquestionable imperative of land reform. The Constitutional Court, in particular, has affirmed the role that private persons can be called on to play in the context of land rights in two significant judgments: *Daniels v Scribante & another* [2017] ZACC 13, 2017 (4) SA 341 (CC) (*Daniels*); and *Baron & others v Claytile (Pty) Ltd & another* [2017] ZACC 24, 2017 (5) SA 329 (CC), 2017 (10) BCLR 1225.

The horizontal application of land rights

In *Daniels* (above), a majority of the Constitutional Court found that in terms of the Extension of Security of Tenure Act 62 of 1997 (the ESTA), where the landowners have refused to make improvements, occupiers have the right to make the improvements to their accommodation that are necessary for living in acceptable conditions, without the consent of the landowners.

Ms Daniels lived in a dwelling on a farm as an occupier in terms of the ESTA. The farm is owned by a private company. Daniels's dwelling required basic, fundamental improvements (including the levelling of floors, installation of indoor water supply, a window, a ceiling, and partial outdoor paving). Daniels requested consent from the company, indicating that she was happy to bear the costs of the improvements. When she received no response, she approached a builder to make the improvements and once the builder had arrived, received a letter demanding that the improvements stop.

Daniels approached the courts, seeking a declarator that she was entitled to make improvements to the dwelling without the owner's consent, at her own cost. Both the Stellenbosch Magistrates' Court and the Land Claims Court refused the declarator, finding that the ESTA does not provide the right to make those improvements. The Supreme Court of Appeal refused Daniels

leave to appeal. Daniels approached the Constitutional Court, arguing that the improvements were consistent with her right to human dignity, and in any event would not seriously impinge on the property owners' common-law rights. The company resisted these arguments on the basis that nowhere does the ESTA provide for the right, and that because the ESTA does envisage that an owner may be ordered to compensate an occupier for improvements, if Daniels' right to make improvements absent the company's consent were to be asserted, this would effectively impose a positive duty on a private individual. The Trust for Community Outreach and Education was admitted as a friend of the court, making the argument that the ESTA must be interpreted not only according to the right to property in section 25 of the Constitution, but also in light of the section 26 provision of the right to access adequate housing.

Madlanga J wrote for the majority of the court, finding that Daniels had the right, in terms of the ESTA read with section 25(6) of the Constitution, to make improvements without necessarily obtaining the owner's consent; only meaningful engagement, and not consent, is required (para [62]). His judgment includes an extensive discussion of South Africa's history of dispossession, informing the urgent imperative for land reform:

> Dispossession of land was central to colonialism and apartheid. It first took place through the barrel of the gun and 'trickery'. This commenced as soon as white settlement began, with the Khoi and San people being the first victims. This was followed by 'an array of laws' dating from the early days of colonisation. The most infamous is the Native Land Act (subsequently renamed the Black Land Act) (Black Land Act). Mr Sol Plaatje, one of the early, notable heroes in the struggle for freedom in South Africa who lived during the time this Act was passed, says of it, 'Awaking on Friday morning June 20, 1913, the South African native found himself, not actually a slave, but a pariah in the land of his birth' (para [14]).

The majority links the right to security of tenure to the right to human dignity by stating that 'there can be no true security of tenure under conditions devoid of human dignity' (para [2]). Sections 5 and 6 of ESTA are to be read purposively; while they do not explicitly provide that an occupier has a right to make improvements to her dwelling to a standard suitable for human habitation, an occupier's right to human dignity must be given effect to (paras [27]–[34]).

This, in turn, may have legal consequences for the private owner. Section 8(2) of the Constitution provides for the horizontal

application of the Bill of Rights, taking into account the nature of the right and duty in question. While private persons do not bear the exact same obligations as the state (para [40]), in this case the private company did bear a positive obligation. This is notwithstanding the fact that the possibility of an owner being ordered to compensate an occupier is 'tenuous at best' (para [51]).

But Madlanga J's judgment is premised on the assumption that permitting an ESTA occupier to make improvements to her home, at her own expense, is a positive obligation imposed on the landowner. This cannot be – instead, it is a negative obligation, in that its content is effectively that a landowner is prohibited from interfering in an occupier's exercise of her right to make improvements – at her own expense. Given that Daniels was to bear the costs of the improvements herself, any putative positive obligations borne by the owner were not in question.

On horizontal obligations, Jafta J's dissent (written solely to express his disagreement on the effect of section 8(2) of the Constitution) is even more startling. Jafta's dissent expresses skepticism that horizontal obligations can ever be positive in nature. He held:

> Apart from the general positive obligation imposed upon the state by section 7(2), where the Bill of Rights imposes a positive duty, it does so in express terms. There is no provision that expressly imposes a positive obligation on a private person in the entire Bill of Rights. It does not appear to me that any of the relevant provisions may be interpreted as imposing a positive duty on a private person. It would be odd for the Constitution to be express when it imposes a positive duty upon the state and choose to be obscure when imposing such a duty upon a private person (para [162]).

This difference in jurisprudential approach would not have affected the outcome, however, as Jafta J would have found that the owner has a negative obligation not to interfere with Daniels' rights, including to effect necessary improvements (para [194]).

Froneman J (with Cameron J concurring) wrote separately, in both English and Afrikaans, to express his 'sense of shame' (para [109]) at the living conditions of farmworkers, and the race and class discrimination that engender these conditions. Any substantial progress in realising the Constitution's ideals requires an honest and deep recognition of past injustice; a re-appraisal of how we conceive ownership and property; and an acceptance of the consequences of constitutional change (para [115]). His

judgment engages with a historical account of those living on farms, and how poor white people benefited immensely from concentrated social and political effort, which entirely excluded black and coloured people (para [132]). Froneman J questioned the paradigm governing property in South African law, pointing out that 'the absolutization of ownership and property . . . confirmed and perpetuated the existing inequalities' (para [136]). For this reason, constitutional change – and its necessary consequences – must be accepted, including a move away from privileging economic efficiency: 'The right to dignity does not easily fit into the subject of a market exchange' (para [140]).

Cameron J concurred in both Madlanga and Froneman JJ's judgments, not least because those judgments 'remind us all – and remind white people in particular . . . that the past is not done with us; that it is not past; that it will not leave us in peace until we have reckoned with its claims to justice' (para [155]). Cameron J, however, also wrote separately to make the limited point that while South Africa's history is 'omnipresent when one applies the Constitution and the reparative legislation that flowed from it' (para [148]), nevertheless 'it is not within the primary competence of judges to write history' (para [149]).

Finally, Zondo J wrote separately, emphasising that the occupier's rights must be balanced against the owner's (paras [213] [214]) and that in this case, the owner was not prejudiced by the improvements Daniels sought (para [217]).

Evictions and horizontal application of the right to property

Does a private landowner have a duty to provide alternative accommodation to evicted occupiers where the state is unable to? In *Baron & others v Claytile (Pty) Ltd & another* [2017] ZACC 24, 2017 (5) SA 329 (CC), 2017 (10) BCLR 1225 the Constitutional Court held that, in principle, a private landowner may bear this duty.

Muldersvlei farm was occupied by employees of a brick manufacturing business, who had their employment terminated. The company instituted eviction proceedings in terms of the ESTA, but during the eviction proceedings the City of Cape Town indicated that no alterative accommodation was available, and so the eviction order would have the effect of rendering the occupiers homeless. The Land Claims Court confirmed the eviction order granted by the magistrate's court, notwithstanding the absence of any arrangements for suitable alternative accommo-

dation. Both the Land Claims Court and the Supreme Court of Appeal refused leave to appeal.

Shortly before the matter was to be heard by the Constitutional Court, the City of Cape Town secured alternative accommodation at Wolwerivier, which the occupiers rejected as the accommodation was too far from their places of employment and the school in which their children were enrolled.

The majority of the Constitutional Court, in a judgment by Pretorius AJ, held that the City of Cape Town could not escape its duty to provide suitable alternative accommodation. However, as the court had found in *Daniels* (above), private landowners can bear positive obligations – even if these are not identical in content or scope to those borne by the state. However, the court clarified that a private landowner bears a positive obligation to provide suitable alternative accommodation only very exceptionally.

Here, there was suitable accommodation available at the City of Cape Town's instance: the occupiers had already twice rejected accommodation offers made by the City. The private landowner could not be expected to continue to provide housing to the occupiers in this context. The Constitutional Court disagreed with the applicants' contentions that the alternative accommodation offered was unacceptable, given that it is far from their places of employment and their children's schools and so would undermine their wellbeing and livelihoods (para [50]). The court's approach, which affirms that evictions should not render anyone homeless, is nevertheless open to criticism, as the legislation provides that alternative accommodation must be 'suitable', and in accordance with section 28 of the Constitution, that children's best interests are of paramount importance.

However, the court stressed that when a private landowner seeks the eviction of occupiers, it may bear a duty to help to find suitable alternative accommodation or, exceptionally, to continue to provide housing. Ultimately, the determination of when this positive obligation is justified is fact-sensitive, and 'cannot be approached in a binary, all-or-nothing fashion . . . the result is often found on a continuum that reflects the variations in the respective weight of the relevant considerations' (para [36]).

Zondo J wrote a qualified concurrence, differing with the majority on the basis that the City of Cape Town ought not to be liable to pay the applicants' costs, and would have found that it

was unnecessary for the court to express any view on private persons' obligations (para [56]).

Evictions and suitable alternative accommodation

Whether a report by a local authority on the suitability and availability of alternative accommodation must necessarily be considered by a court when granting an eviction order was debated, but not decided, by the High Court in *Jacobs v Communicare NPC & another* [2017] ZAWCHC 24, 2017 (4) SA 412 (WCC). A non-profit company which provides affordable, low-cost housing to tenants rented out a flat to Jacobs and his family from 2002. The rent increased from time to time, and in 2014 the company again increased the rent payable. Jacobs approached the Rental Housing Tribunal, but a default ruling was made against him. He had not been present for the hearing, because the correspondence sent to him by the Tribunal had been incorrect. Despite this clear error, the Tribunal refused to reconsider the matter, and Jacobs in turn failed to seek to review its decision. Jacobs fell behind with his rent, and the company cancelled the lease and sought to evict Jacobs. The magistrate granted the eviction, but failed to consider a report from the City of Cape Town regarding Jacob's prospects of finding suitable alternative accommodation. On appeal, the High Court found that this procedural defect tainted the eviction proceedings, but declined to find whether this defect was fatal. Instead, the High Court ordered that the Jacobs family vacate the flat.

Termination of employment and evictions

The Constitutional Court considered the consequences of termination of employment on the right to reside on property in terms of the ESTA in *Snyders & others v De Jager & others* [2016] ZACC 55, 2017 (3) SA 545 (CC), 2017 (5) BCLR 614.

Snyders, an employee on the Stassen Farm in the Western Cape, and Ms De Jager, the manager of that farm, became embroiled in a dispute when De Jager dismissed Snyders from the farm where he had been living and working since 1992. De Jager only sought to evict Snyders and his family a year later. The eviction order in terms of the ESTA was granted by the magistrate's court and confirmed by the Land Claims Court. Snyders's attempted appeal to the Supreme Court of Appeal was struck off the roll on the basis that the proper appeal lay to the Lands Claim Court. Once the Supreme Court of Appeal had done so, De Jager

evicted the Snyders family without any notice and in their absence. De Jager quickly moved a third party, Breda, into the house.

Rather inexplicably, this dispute gave rise to a suite of four related judgments, all handed down on the same day. We discuss only the fourth judgment, on the merits – *Snyders & others v De Jager & others (Appeal)* [2016] ZACC 55, 2017 (5) BCLR 614 (CC), 2017 (3) SA 545. Zondo J's majority granted leave to appeal to Snyders, finding that where a magistrate's court has granted an eviction order under the ESTA which the Land Claims Court has subsequently confirmed, an appeal lies to the Supreme Court of Appeal and not to the Land Claims Court. This is because when the Land Claims Court chooses whether to confirm the magistrate's court's judgment, it exercises wide powers which are not limited, as review powers would be (para [36]).

On the merits, while Snyders had been dismissed from employment, his right to reside on the farm had not been terminated. In addition to the requirement of substantive fairness, Snyders had the right to procedural fairness which had not been complied with by De Jager. It was just and equitable, Zondo J found, that an eviction order be granted against Breda and his family to give effect to the Constitutional Court judgment, and so Breda was ordered to vacate the house within fourteen days.

Froneman J wrote separately, finding that no eviction order against the Breda family was necessary, because they would be bound by the outcome of the appeal and, in any event, had not acquired rights of occupation in respect of the property prior to the eviction proceedings against the Snyders family.

Contrary to the majority approach, Froneman J's judgment also would have found that, once the Land Claims Court has confirmed an order of eviction granted by a magistrate's court, the next step is to appeal to the Land Claims Court and only then to the Supreme Court of Appeal.

Development of the common law: Extension of a lease agreement and the right of pre-emption

In another judgment penned by Madlanga J, *Mokone v Tassos Properties CC & another* [2017] ZACC 25, 2017 (5) SA 456 (CC), 2017 (10) BCLR 1261, the Constitutional Court considered whether a right of pre-emption in a written lease agreement is automatically renewed on the extension of the lease, and additionally,

whether a right of pre-emption must comply with the formalities for a sale in the Alienation of Land Act 68 of 1981. The majority of the court answered the first question affirmatively, and the second negatively. In doing so, the court developed the common law in three significant ways: first, that an extension of an agreement ordinarily renews all the terms of that agreement; second, that courts have an equitable discretion to stay proceedings until determination of a material legal point in another matter; and third, that a right of pre-emption need not satisfy the formalities required by legislation for the alienation of land.

Ms Mokone had entered into a written lease with a company in 2004 for a one-year period. The agreement gave her a right of pre-emption. At the end of the year period, the parties extended the lease orally. But the company later sold the property to a third party, without first offering Mokone the opportunity to exercise her right of pre-emption. It did so on the argument that the right of pre-emption had not been part of the extended lease, and so was not enforceable. The High Court agreed with the company, finding that the right of pre-emption is a collateral term and so was not renewed by the extension of the lease. In the meantime, the third-party purchaser of the property applied to evict Mokone.

The majority of the Constitutional Court found that the common-law rule that precludes collateral terms from operating on the extension of a lease unduly favours the lessor (para [35]). A lay person cannot be expected to distinguish between collateral and incidental terms (paras [28] [29]), and in this case, in extending the lease the parties renewed all the terms of the lease.

Turning to whether a right of pre-emption must comply with section 2(1) of the Alienation of Land Act, the majority overturned *Hirschowitz v Moolman & others* 1983 (4) SA 1 (T) paragraph [63], which was authority for the view that a *pactum de contrahendo* – or agreement to agree – must comply with the requirements applicable to the main agreement. Instead, the court held that a right of pre-emption does not constitute alienation of land and so need not comply with formalities.

In the result, the court held the appeal regarding Mokone's eviction in abeyance, pending the High Court's determination of the pre-emption dispute.

Froneman J wrote a concurring judgment, agreeing with the majority's first two developments of the common law, which preferred substance over form in legal agreements. However, he stressed that the common law already embodies notions of

fairness and justice (para [80]). Froneman J differed from the majority in that he would not have overturned *Hirschowitz v Moolman,* on the basis that that judgment was in any event distinguishable (paras [81] [82]).

Restitution of land rights

The Restitution of Land Rights Act 22 of 1994 sets out that persons – or their descendants – and communities who were dispossessed of land after 1913 can lodge claims for the restitution of their rights, but must do so before 31 December 1998. Thousands of claims were made, but finalising the claims has been incredibly slow. The Restitution of Land Rights Amendment Act 15 of 2014 revived the right to submit claims, which could be lodged for a further five years until mid-2019. But in 2016 (in *Land Access Movement of South Africa & others v Chairperson of the National Council of Provinces & others* [2016] ZACC 22, 2016 (5) SA 635 (CC)) the Constitutional Court declared the Amendment Act invalid, on the basis that the National Council of Provinces had conducted insufficient consultation and public participation processes. However, the Constitutional Court found that this did not extinguish claims that had been submitted in good faith since 2014; instead, those new claims would still exist pending a re-enactment of the legislation or judicial intervention. During this period, the Commission on Restitution of Land Rights was interdicted from processing any new claims.

This complicated matters: how should a court adjudicate competing land claims, brought under these two respective legislative regimes? And can the Land Claims Court determine any new claims, given the interdict granted against the Commission? In *In re Amaqamu Community Claim (Land Access Movement South Africa & others as Amici Curiae)* 2017 (3) SA 409 (LCC), the Land Claims Court found that where a land claim was made before the end of 1998 (under the Restitution of Land Rights Act), a later new claim made under the Amendment Act (which re-opened the land-claims process) cannot be considered. New claimants who contest old claims cannot be awarded compensation or land but can be admitted as interested parties to make submissions calling for the rejection of the old claim.

The Land Claims Court judgment has brought welcome certainty to the process of competing land claims. The judgment also sounded a clarion call to urgent action to resolve existing land claims, and disparaged the Commission's sluggish processes:

> Thousands of claimants have gone to their graves without having seen the fulfilment of the hope the Constitution created by the establishment of the right to restitution. The countless failures on the part of the Commission to honour its constitutional obligations as a result of a combination of insufficient funding, delay, procrastination and inefficiency are a blot on the country's democratic dispensation and a stark example of justice delayed causing justice to be denied (para [4]).

However, in *Macassar Land Claims Committee v Maccsand CC & another* [2016] ZASCA 167, 2017 (4) SA 1 (SCA) the court found that mining rights in terms of the Mineral and Petroleum Resources Development Act 28 of 2002 are independent of land ownership, and cannot be restored via a restitution claim.

A voluntary association representing members of the community of Sandvlei, Macassar, sought restitution of a right in land. The community is descended from a group of freed slaves who enjoyed rights of commonage over land, and who were dispossessed when Macassar was declared a coloured group area in terms of the Group Areas Act 41 of 1950. Maccsand holds a mining right over the land in terms of the Mineral and Petroleum Resources Development Act. The association approached the Land Claims Court for restitution, and to have Maccsand's mining right expropriated and expunged. The Land Claims Court, however, declined to expropriate this right, upholding arguments made by Maccsand and the government that its powers of expropriation could not extend to the expropriation of a mining right.

On appeal, the Supreme Court of Appeal, in a unanimous judgment by Wallis JA, agreed. While section 35(1)*(a)* of the Restitution of Land Rights Act provides that the Land Claims Court can order expropriation of land or a right in land, this power can only be exercised to restore land or a right in land to a claimant – and cannot extend to the restoration of the mining right. This was not least because the association could not claim more than the right of which it had been dispossessed (para [20]). Instead, the association was bound by Maccsand's mining rights. The Constitutional Court dismissed the association's application for leave to appeal.

Labour tenants and the appointment of a Special Master

The Land Reform (Labour Tenants) Act 3 of 1996 provides for security of tenure of labour tenants. The Minister and Director-General of Rural Development and Land Reform have a critical

role to play in processing applications by labour tenants for awards in land. In *Mwelase & others v Director-General, Department of Rural Development and Land Reform & others* [2016] ZALCC 23, 2017 (4) SA 422 (LCC), the Land Claims Court rebuked the government for its widescale failure to process these claims, and described the system as 'chaotic' (para [6]). Settling the outstanding claims would take an estimated 40 years, which is startling and constitutes an 'unacceptable burden on labour tenants' (para [25]).

As a result of this dysfunction, an application for the appointment of a Special Master to process labour tenants' claims was launched in the Land Claims Court. A Special Master is an independent person and agent of the court, appointed to assist the court in processing and adjudicating claims. The appointment of a Special Master is a novel remedy in South African law, aimed at securing systemic relief, but has been used in other jurisdictions, mostly notably the United States of America and India.

Ncube AJ, animated by the need for effective relief, drew on the court's extensive remedial powers and ordered the appointment of a Special Master. This remedial resourcefulness is extraordinary but welcome. Nonetheless, a majority of the Supreme Court of Appeal has subsequently overturned Ncube AJ's order appointing a Special Master, predominantly on the basis of the separation of powers.

Privacy

Does the prohibition against the use of cannabis in one's private home impermissibly violate an individual's right to privacy? The Western Cape High Court found in *Prince v Minister of Justice and Constitutional Development & others; Rubin v National Director of Public Prosecutions & others; Acton & others v National Director of Public Prosecutions & others* [2017] ZAWCHC 30, 2017 (4) SA 299 (WCC), [2017] 2 All SA 864 that such a violation was indeed constitutionally impermissible.

The facts of the case are straightforward. Several challenges were made to South Africa's current prohibition against the possession, use, or transportation of cannabis in private or public. The High Court focused its inquiry mainly on the private possession and use of cannabis. After exploring the ambit of the general right to privacy, the court found that particular limitations impacting on one's body are an especially egregious violation

since privacy 'becomes more powerful and deserving of greater protection the more intimate the personal sphere of the life of a human being which comes into legal play' (para [22]).

When exploring whether this was a justified limitation on privacy rights, the issue turned on the evidence provided on behalf of either side. The evidence provided by the state's expert evidence was found insufficiently convincing when compared to the evidence provided by Professor Mark Shaw, a criminologist at the University of Cape Town. Mainly, the Shaw Report showed that the apparent risks and harm posed by cannabis did not necessarily require the criminal law to pursue such goals (paras [48]–[63]). The court accepted this argument. We will review the confirmation of this case by the Constitutional Court in the 2018 *Annual Survey*.

Property

Definition of constitutional property: Trading licences

Does the right to property include the right to conduct activities and trading strategies in which a person was previously entitled to engage under an earlier licensing regime? In *South African Diamond Producers Organisation v Minister of Minerals and Energy & others*, 2017 (10) BCLR 1303, [2017] ZACC 26, 2017 (6) SA 331 (CC) the Constitutional Court said 'no'.

The Diamonds Act 56 of 1986 regulated the diamond trade in South Africa. In 2007, the Act was amended: section 20A was introduced. It provides that '[n]o licensee may be assisted by a non-licensee or holder of a permit . . . during viewing, purchasing or selling of unpolished diamonds at any place where unpolished diamonds are offered for sale in terms of this Act, except at a diamond exchange and export centre'. In terms of this provision, any unlicensed persons are prohibited from being present at diamond trading centres while unpolished diamonds are being viewed or purchased. The purpose of this is to promote local beneficiation and to ensure that unpolished diamonds are appropriately monitored and recorded.

The South African Diamond Producers Organisation – a voluntary association – approached the High Court for an order declaring section 20A inconsistent with the Constitution and invalid, on the basis that it constitutes an arbitrary deprivation of property (prohibited by s 25 of the Constitution), and unjustifiably limits section 22 of the Constitution, providing for freedom of

trade. The association contended that the effect of the provision was a 30 per cent drop in the price of diamonds and that, prior to the legislative amendment, a number of its members (who are licensed diamond dealers) had developed a mode of operation in terms of which unpolished diamonds from local producers were offered at tender houses on an anonymous tender basis to other licensed dealers, with non-licensed experts assisting the licensed purchasers (often on behalf of prospective foreign buyers).

Khampepe J, in a unanimous decision, refused to confirm the declaration of invalidity, finding that there was no deprivation of property, as the association's members did not suffer any legally cognisable loss, nor was the interference with their property rights sufficiently substantial to be legally relevant. The alleged price drop tracked lost commission opportunities, and not the fair market value of the diamonds. Nor did the provision limit the right to choose a trade, profession, or occupation: all it did was prohibit licensees from being assisted by unlicensed persons except at a diamond exchange and export centre.

While diamonds – and the powers and entitlements associated with their ownership – do constitute property for the purposes of section 25 (para [39]), there is no generally legally protectable interest in conducting the sale of diamonds in a particular way (para [52]). Accordingly, Khampepe J found that there was no deprivation:

> The limitation on the manner in which producers and dealers may alienate their diamonds is not sufficiently substantial to constitute a 'deprivation' of property in those diamonds. Producers and dealers do not generally have a legally protectable interest in conducting a sale according to a particular practice. And, a market is an inherently regulated space, and prices obtainable in that market are necessarily impacted by government regulation. A property holder does not generally have a legally protectable interest either in obtaining a specific value for his goods, or in valuing his goods according to a particular method (para [53]).

However, the argument that a property holder has no legally protectable interest in valuing his property, and that when a particular form of valuation is barred by the state this does not amount to deprivation, is strained. It is not implausible that the ability to value your property using a method and process of your choice, realising greater value for your own good, could either directly entail an interest in a thing of value, or entail your ability to realise your self-fulfilment (S*hoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development,*

Environmental Affairs And Tourism, Eastern Cape & others [2015] ZACC 23, 2015 (6) SA 125 (CC), 2015 (9) BCLR 1052 (Madlanga and Froneman JJ's judgments respectively). The court was perhaps too hasty in finding there to be no justifiable interest worthy of constitutional protection in the matter.

Nor, Khampepe J found, was there any violation of section 22 of the Constitution, which protects the right freely to choose a trade, occupation, or profession. The provision simply regulates the practice of a trade, occupation, or profession, which is permitted by the constitutional provision. It does not act as a legal barrier to the choice of a profession or act as an 'effective limit on choice' (para [69]). Further, section 20A has a rational basis: promoting the local beneficiation of unpolished diamonds (and so regulating the diamond trade in the public interest), and ensuring that the movement of unpolished diamonds can be properly monitored and recorded (para [77]).

Arbitrary deprivation: Transmissibility of municipal debts

Is it constitutionally permissible for a debt for rates and charges previously owed to a municipality by a prior owner of a property to be transmitted to a new owner? The Constitutional Court in *Jordaan & others v City of Tshwane Metropolitan Municipality & others; City of Tshwane Metropolitan Municipality v New Ventures Consulting and Services (Pty) Limited & others; Ekurhuleni Metropolitan Municipality v Livanos & others* [2017] ZACC 31, 2017 (6) SA 287 (CC), 2017 (11) BCLR 1370 found that it is in fact not constitutionally permissible.

The applicants were the new owners of property with debts attached to it from rates and charges incurred by previous owners of the property. They argued that on a proper interpretation of section 118(3) of the Local Government: Municipal Systems Act 32 of 2000 and section 25 of the Constitution, these charges were: (a) not permitted by the section concerned; and (b) were arbitrary deprivations of property unreasonably and unjustifiably imposed by the state. The North Gauteng High Court accepted these arguments. The Constitutional Court did the same on confirmation. In a unanimous opinion penned by Cameron J the court carefully considered both grounds.

As to statutory interpretation, the court found that a careful study of the history of the provision concerned, and the common-law terms which it codified, could only be interpreted in favour of the applicants. Cameron J argued that the earlier versions of

what became section 118(3) show that two distinct mechanisms were incorporated into the statute to assist municipalities in collecting debts. They are: an embargo on the resale of the property that would be lifted on condition that all rates and charges are paid; and a preferential claim in the event of insolvency to recover municipal debts incurred (paras [15] [16]). Therefore, it is important to understand that what the relevant municipalities were arguing for in this case was a further mechanism where debts were transferable to subsequent owners. The court found that there was no evidence at all that before section 118(3) was enacted, any enactment had ever sought to impose responsibility for a previous owner's debts on a new owner (para [26]). This is especially apparent once one considers the common-law position which required some kind of formal aspect or condition to be met for a debt to be transmissible to subsequent holders of real rights (para [33]). This later became common practice in legislative schemes through registration of such a transmissible claim in the Deeds Office (para [40]). Because there was no such formal requirement of registration, or anything akin to it, in the alleged process of transmissibility in this case, it is doubtful that transmissibility was ever intended to vest a right in favour of municipalities.

The court proceeded to consider the claim of arbitrary deprivation under section 25(1) of the Constitution. After finding this to be a deprivation, it applied the requisite test for arbitrariness: whether there is sufficient reason for the deprivation. Crisply, the court found that the imposition of un-prescribed debts on a new owner of municipal property, without historical limit, would constitute an arbitrary deprivation of property (para [72]).

Overall, this is a superbly reasoned and characteristically lucid judgment from Cameron J. It carefully contextualises the constitutional enquiry exploring proper limits to the legitimate means of securing payment for public utilities available to municipalities. What is remarkable about the judgment is the ease with which the court's reasoning carefully unearths the purpose of formal requirements for transmissibility at common law and how these, when viewed in the light of the sufficient reason test, give effect in various ways to concerns of municipal overreach and the public good. In short, the judgment considers the entire *corpus iuris* concerning the legal question before it, and carefully demonstrates why seeming tensions and anomalies are, upon closer inspection, illusory.

Refugees

In the year under review, the courts saw renewed attempts to protect the rights of refugees against arbitrary detention, the right to have an asylum seeker permit extended pending finalisation of review proceedings regarding that person's refugee status, the 'crime' exclusion from refugee status, and whether asylum seekers are barred from applying for other visas and permits from within South Africa.

In *Lawyers for Human Rights v Minister of Home Affairs & others* [2017] ZACC 22, 2017 (10) BCLR 1242 (CC), 2017 (5) SA 480 the Constitutional Court upheld a challenge to the provisions enabling detention of 'illegal foreigners' under the Immigration Act 13 of 2002. Lawyers for Human Rights (LHR) directed its challenge at section 34(1)*(b)* and *(d)* of the Immigration Act. LHR contended that, by omitting to provide for automatic judicial oversight before the expiry of 30 calendar days, section 34(1)*(b)* and *(d)* was inconsistent with sections 12(1), 35(1)*(d)* and (2)*(d)* of the Constitution. The challenge against section 34(1)*(d)* was based on the contention that it did not permit a detainee to appear in person before a court and impugn the lawfulness of his or her detention. The state opposed the constitutional challenge, arguing that the impugned provisions were not unconstitutional, alternatively that the constitutional rights relied upon do not apply to foreign nationals. The High Court upheld the challenge and the matter was referred to the Constitutional Court for confirmation.

In a unanimous judgment by Jafta J, the court first confirmed that the rights to freedom and security of person and protection against arbitrary detention in sections 12 and 35(2) do indeed apply to illegal foreigners (paras [30] [42]). After an analysis of the impugned provisions, the court was satisfied that the they do in fact limit the constitutional rights enshrined in sections 12(1) and 35(2) of the Constitution. Section 34(1)*(b)* limited these rights because it fails to provide for automatic judicial review of the detention of foreign nationals, and because it allows detention for up to 48 hours even without valid grounds (paras [52]–[54]). Section 34(1)*(d)*, which empowers a court to extend detention for up to 90 days beyond an initial period of 30 days, limits sections 12(1) and 35(2) because it does not afford detainees the right to appear in person to make representations to the court on whether such an extension should be granted (paras [57] [58]).

On the issue of justification, the court found that the reasons advanced by the state fell woefully short of justifying the limitation

(para [63]). The court was not convinced that tinkering with the wording of the impugned provisions, through severance and reading-in, would sufficiently address the defects (para [67]). In the result, the court held that a suspension of the declaration of invalidity was appropriate. According to the court, this would enable Parliament to correct the defects (para [69]). However, in line with the principle that a successful litigant must be afforded appropriate relief, the suspension was accompanied by conditions which would protect the detainees' rights in the interim (para [70]), in the following terms:

> 4. Pending legislation to be enacted within 24 months or upon the expiry of this period, any illegal foreigner detained under section 34(1) of the Immigration Act shall be brought before a court in person within 48 hours from the time of arrest or not later than the first court day after the expiry of the 48 hours, if 48 hours expired outside ordinary court days.
> 5. Illegal foreigners who are in detention at the time this order is issued shall be brought before a court within 48 hours from the date of this order or on such later date as may be determined by a court.

The court confirmed the order of invalidity made by the High Court and dismissed the appeal by the state. The judgment is an important reaffirmation of the principle that rights in the Bill of Rights generally apply to foreign nationals, even those in the country illegally, unless the right in question expressly limits itself to citizens. The judgment reasserts the strict limits on the detention of foreign nationals for the purpose of deportation – in particular their right to challenge such detention in court.

The second refugee rights decision that we consider here concerns the right of asylum seekers to the extension of their asylum status pending the finalisation of proceedings challenging the refusal to recognise them as refugees. When an asylum seeker is granted a permit in terms of section 22 of the Refugees Act 130 of 1998, the Refugee Reception Officer (RRO) has the power to extend the permit. If an asylum seeker has exhausted internal review and appeal routes under the Refugees Act, but seeks judicial review of the refusal of refugee status, does the RRO have the power to extend his or her section 22 permit? Yes, the Supreme Court of Appeal confirmed in *Minister of Home Affairs v Saidi* [2017] ZASCA 40, 2017 (4) SA 435 (SCA), [2017] 2 All SA 755.

In a unanimous decision by Gorven AJA, the Supreme Court of Appeal analysed the Refugees Act and confirmed (para [31]) that

an RRO indeed has the power to extend a section 22 permit pending the outcome of judicial review. The court declined to go further and find a duty to grant such an extension. The court dismissed the appeal, with the effect that the individual cases before it were remitted to the RRO to consider the grant of extensions (para [44]). The matter subsequently went on appeal to the Constitutional Court. In *Saidi & others v Minister of Home Affairs & others* [2018] ZACC 9, 2018 (7) BCLR 856 (CC), 2018 (4) SA 333, the Constitutional Court went further and held that the RRO indeed has the power and the obligation to extend section 22 permits pending the outcome of a review.

Okoroafor v Minister of Home Affairs & another [2016] ZAECPEHC 85, 2017 (3) SA 290 (ECP) concerned the exclusion of a person believed to have committed a crime from refugee status. Section 4(1)*(b)* of the Refugees Act provides:

> A person does not qualify for refugee status for the purposes of this Act if there is reason to believe that he or she –
>
> . . .
>
> (b) has committed a crime which is not of a political nature and which, if committed in the Republic, would be punishable by imprisonment; . . .

The applicant had been convicted of two offences under the Immigration Act, and was sentenced to a fine or imprisonment, and to imprisonment which was suspended. He was subsequently arrested and detained pending deportation as an illegal foreigner. He then indicated his intention to apply for asylum, and asked to be released and issued with a permit to enable him to approach a refugee reception office in order to do so. However, the immigration officers refused, apparently on the basis that he did not qualify as a refugee under the section 4(1)*(b)* exclusion set out above. He applied for a declaration that his detention was unlawful; for a direction that second respondent issue him with a permit to approach a refugee reception office; and for certain other relief. Two key questions arose. The first issue was whether the 'crime' referred to in section 4(1)*(b)* was restricted to a crime committed outside of South Africa, or whether it covered a crime committed either outside or inside the country. Eksteen J held that it was restricted to crimes committed *outside* South Africa (paras [13] [20]). The second question was who could decide that there was 'reason to believe' an individual did not qualify for refugee status. Here, the court held that only the Minister of Home Affairs or his delegee could do so (paras [23]–[26]). The applica-

tion was accordingly granted (para [33]). This decision, too, protects the procedural rights of asylum seekers to seek refugee status.

The final case under review, *Minister of Home Affairs & another v Ahmed & others* [2017] ZASCA 123, 2017 (6) SA 554 (SCA), also concerned eligibility to apply for a particular immigration status. The narrow question was whether asylum seekers in South Africa are entitled to apply from within the country for a visa or permit under the Immigration Act. The High Court had held that they are. On appeal, the Supreme Court of Appeal reversed the decision. It held that it was a precondition, in applying for a visa or permit under the Immigration Act, that the application be made from outside of South Africa (s 10(2) read with reg 9(2) of the Immigration Regulations). The applications were accordingly invalid (paras [9] [10] [14]). The court therefore upheld the appeal (para [17]).

That was not the end of the story, however. In a case to be reviewed in 2018, the Constitutional Court again reversed the Supreme Court of Appeal (*Ahmed & others v Minister of Home Affairs & another* [2018] ZACC 39, 2018 (12) BCLR 1451 (CC), 2019 (1) SA 1). The Constitutional Court declared provisions of Immigration Directive 21 of 2015 invalid to the extent that they impose a blanket ban on asylum seekers applying for visas under the Immigration Act, and to the extent that it prohibited them from applying for permanent residence while inside the country.

Social Grants

Black Sash v Minister of Social Development & others (Freedom Under Law NPC Intervening) [2017] ZACC 8, 2017 (3) SA 335 (CC), 2017 (5) BCLR 543 is the next instalment in the saga created by the Department of Social Development's dysfunction, dereliction of duty and intransigence.

In brief, in *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* [2013] ZACC 42, 2014 (1) SA 604 (CC), 2014 (1) BCLR 1 (*Allpay 1*), decided in September 2013, the Constitutional Court declared the decision by the South African Social Security Agency (the SASSA) to award a tender to administer the payment of social grants to Cash Paymaster Services (CPS) unlawful and invalid. In April 2014, in *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency*

[2014] ZACC 12, 2014 (4) SA 179 (CC), 2014 (6) BCLR 641 *(AllPay 2)*), the Constitutional Court suspended its order of invalidity, and ordered SASSA to run a fresh tender process and CPS to continue to pay social grants. Critically, the court exercised its supervisory jurisdiction by requiring the SASSA to report back to it at various stages. In *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* [2015] ZACC 7, 2015 (6) BCLR 653 (CC) (*Allpay 3*), decided in March 2015, the court granted the parties time to reach a settlement, and monitored the timetable for the finalisation of the tender process and the resolution of any further disputes.

In November 2015 the SASSA filed a progress report with the court. The SASSA stated it would not award a new contract but, rather, would itself take over grant payments after 31 March 2017 (when the suspension of invalidity, ordered by the court in *AllPay 2*, was set to lapse). The court accepted this assurance and discharged its supervisory order on the strength of it.

But by at least April 2016, various officials of the SASSA realised that the SASSA could not comply with the undertaking to take over the payments of social grants. Neither the SASSA nor the Minister of Social Development (charged with the political oversight of the SASSA) informed the court, or approached it for authorisation to regularise the situation. On the contrary, the SASSA attempted to enter into a new contract with CPS. On 28 February 2017 – only a month before the suspension of invalidity was due to lapse – the SASSA's chief executive officer made an urgent application to the Constitutional Court for an order authorising the SASSA to take steps to ensure the payment of social grants from 1 April 2017. The very next day, under mysterious circumstances, the SASSA sought to withdraw the urgent application on the Minister's instruction and, a few days later, filed a 'follow up' report.

Against this backdrop, the Black Sash urgently applied to the court for direct access, seeking that the court exercise its supervisory jurisdiction over an interim contract between CPS and the SASSA for the payment of social grants. Freedom Under Law sought leave to intervene, and both Corruption Watch and the South African Post Office (which contended that it was capable of facilitating the payment of social grants) successfully applied to be admitted as friends of the court.

Froneman J (who had penned the three prior judgments) held the majority of the court's vote. He granted direct access and in

trenchant terms castigated the state officials' 'extraordinary' conduct (para [1]) and 'continued recalcitrance' (para [57]), emphasising that as the country's social assistance programme was imperiled, the matter was urgent on a national scale (para [36]).

Froneman J's judgment is also notable for its robust criticism of the Minister and the SASSA's wholesale failure to inform the court of its inability to meet the deadline, notwithstanding various legal opinions recommending that it do so. This breached the 'reciprocal comity' owed to the judiciary (para [13]), and called for public accounting. The court held:

> This Court and the country as a whole are now confronted with a situation where the executive arm of government admits that it is not able to fulfil its constitutional and statutory obligations to provide for the social assistance of its people. And, in the deepest and most shaming of ironies, it now seeks to rely on a private corporate entity, with no discernible commitment to transformative empowerment in its own management structures, to get it out of this predicament (para [8]).

Reasserting the finding of *AllPay 2* – that, for the purposes of the administration of the social grants system, CPS is an organ of state with concomitant positive duties – Froneman J concluded that the SASSA and CPS shared an ongoing constitutional obligation to pay grants after 31 March 2017 (paras [41] [48]). He also reasserted the no-profit rule: 'No party has any claim to profit from the threatened invasion of peoples' rights. At the same time no one should usually be expected to be out of pocket for ensuring the continued exercise of those rights' (para [50]).

Froneman J also found that, given the 'very real threatened breach of the right of millions of people to social assistance' (para [43]), the court was empowered in terms of section 172(1)*(b)*(ii) of the Constitution, to grant a just and equitable order that would enforce these positive obligations. The majority judgment ordered that the contract would extend beyond 31 March 2017 for an additional year, thereby also extending the suspension of the declaration of the contract's invalidity, originally ordered in *AllPay Remedies* (para [44]).

Madlanga J wrote separately, concurring with Froneman J's majority save for its finding that the court ought first to extend the contract that was to expire on 31 March 2017, and only then to extend the suspension of the declaration of invalidity. Madlanga J would, instead, have made a direct order to the effect that, under

the court's wide remedial powers and given its status as an organ of state, CPS was to continue to pay social grants (para [79]). Froneman J's judgment observes that this is 'another valid way of arriving at an identical outcome' (para [45]).

In the meantime, the court reasserted its supervisory jurisdiction, given the SASSA's irregular conduct and the risks posed to grant beneficiaries (paras [55]–[62]). The Minister and the SASSA were ordered to file affidavits on a quarterly basis detailing their plans to ensure the payment of social grants; steps taken in that regard; further steps still to be taken; and a timeline for when these steps would be taken. The court also provided for the Auditor-General's involvement to evaluate the implementation of the interim contract. Finally, Froneman J ordered the Minister – as the 'office-holder ultimately responsible for the crisis and . . . required in terms of the Constitution to account to Parliament' (para [74]) – to file an affidavit explaining why she ought not be joined in the proceedings in her personal capacity, and mulcted, personally, in costs (paras [72]–[75]).

Right To Vote

My Vote Counts NPC v President of the Republic of South Africa [2017] ZAWCHC 105, 2017 (6) SA 501 (WCC) is the High Court sequel to the Constitutional Court's judgment in *My Vote Counts NPC v Speaker of the National Assembly* [2016] ZACC 31, 2016 (1) SA 132 (CC), 2015 (12) BCLR 1407. There, the majority of the Constitutional Court took a startlingly obtuse approach to the principle of subsidiarity. The Constitutional Court was sharply divided on whether the Promotion of Access to Information Act 2 of 2000 (the PAIA) is the only legislation envisaged by the Constitution to give effect to the right of access to information, with the majority of the court holding that the PAIA is intended to cover the field. For this reason, the majority directed My Vote Counts, a non-profit voluntary association, to go back to square one and to initiate a frontal challenge seeking to impugn the constitutionality of the PAIA's failure to provide for a mechanism to compel political parties to disclose the sources of their private funding.

My Vote Counts advanced its argument in the High Court on the following premises: first, that the right to access the private funding information of political parties is not only safeguarded by section 32 of the Constitution, but is also reasonably required

effectively to exercise the right to vote and to make political choices; second, that the effective prevention and detection of corruption further requires that such information be accessible; and third, that a number of international agreements, ratified by South Africa, bolster this requirement.

This argument was resisted by two respondents: the Minister of Justice and Correctional Services, and the Democratic Alliance (DA). The DA argued that My Vote Counts failed to join the Independent Electoral Commission, and that its application was therefore defective, because this body is responsible for overseeing political parties and promoting voter education. Meer J quickly disposed of this preliminary argument: the Independent Electoral Committee has little to do with information concerning private political party funding, and so lacks any direct and substantial interest in the relief sought.

On the merits, Meer J delineated three enquiries for determining whether the Constitution requires the disclosure of private funding (para [12]):

(1) Does the right of access to information in section 32 of the Constitution, read with the right to vote in section 19 of the Constitution, require the disclosure of private funding?
(2) Is private funding information required for the exercise of the right to vote, given the role political parties play in South Africa's constitutional democracy?
(3) Is private funding information required for the state to vindicate its duty to prevent corruption, in terms of sections 7(2) and 1*(d)* of the Constitution, as well as a number of international agreements?

The judgment answered the first enquiry in the affirmative: section 32 is cast broadly. While it is true that section 32 qualifies the right to access information held by non-state entities (and political parties are not organs of state), this is no obstacle to My Vote Counts, as the right to access information should not be read in isolation. Instead, that right is engaged where information is required to exercise or protect any other right, and so must be read together with the right to vote (para [22]).

Endorsing the minority judgment's approach in the Constitutional Court, Meer J found that political parties play a unique role in vindicating the right to vote. Given this, information about political parties' private funding is required for the exercise of an informed right to vote (para [29]). This would not have the effect of retrospectively casting a pall over the validity of elections to date.

The state has a duty to prevent corruption. Secret funding of political parties thwarts this duty because it fosters the prospect

of political parties making themselves beholden to donors and so enables corruption to be concealed. For this reason, the state's corruption-busting duties require that political parties' private funding be disclosed (para [42]).

The PAIA does not allow for the disclosure of private funding and, Meer J noted, in light of the majority's approach in the Constitutional Court, was the correct legislative target (para [45]). Moreover, the PAIA fails to provide for access to the private funding records of political parties. This is, in part, because political parties do not fall comfortably within the PAIA's definition of either a public or a private body (para [52]). For this reason, Meer J endorsed Cameron J's minority finding in the Constitutional Court that political parties fall outside the PAIA's ambit: '[w]here political parties should be, there is a gaping hole' (para [53], quoting the Constitutional Court's minority judgment in para [116]).

The PAIA clearly falls short of what is constitutionally required. It requires that information be available only on request, and only in respect of a specific entity. This has the effect that 'disclosure under [the] PAIA is thus not a continuous process affording citizens equal access to information' (para [55]) and so sits uncomfortably with the requirement for the continuous disclosure of private-funding information. The PAIA's terms would also impose an onerous and expensive burden on citizens, and allow a body to refuse to give access to information on the basis that it only requires that access be given to recorded information. A requester would not be entitled to any unrecorded information on funding (para [58]). Even worse, a body could delete or destroy records before an application for disclosure is made, without this contravening the PAIA (para [59]). The PAIA also provides an array of grounds on which a body may validly refuse to disclose information (paras [60] [61]). The PAIA's wholesale inadequacy for the purpose of providing access to political party funding information was demonstrated by My Vote Counts' unsuccessful attempts to obtain such information through the PAIA's mechanisms.

For these reasons, the PAIA infringes sections 32 and 19 of the Constitution (para [64]). This infringement is not saved by a limitations analysis, nor can political parties seek refuge in the right to privacy, given 'the public nature of political parties and the fact that the private funds they receive have a distinctly public purpose' (para [67]).

Meer J, therefore, declared that information regarding the private funding of political parties is reasonably required for the effective exercise of the right to vote and to make political choices, and that the PAIA is inconsistent with the Constitution. Constrained by findings made by the majority judgment in the Constitutional Court, she declined to order continuous and systematic disclosure of political party funding. Instead, the declaration of invalidity was suspended for eighteen months to allow Parliament to remedy the PAIA's defects.

The High Court judgment shows signs of strain within the straightjacket imposed by the majority judgment of the Constitutional Court. Indeed, Meer J's careful analysis, which largely tracks Cameron J's minority judgment in the Constitutional Court, demonstrates just how misguided the majority's approach was: the PAIA is simply not the natural legislative mechanism for regulating access to political parties' funding. The challenge could and should have been directed at, for example, the Electoral Act 73 of 1998, or any other statute dealing with political parties. The clear and obvious structure of the PAIA is that the obligations to create records, keep them, and make those records proactively available, lie in subject-specific statutes, not the PAIA. The PAIA is a backstop which relies on other record-creation and record-keeping obligations (T Van Wyk '"Don't blame the librarian if no one has written the book": My Vote Counts and the information required to exercise the franchise' (2016) 8 *Constitutional Court Review* 97).

Meer J's declaration of invalidity has subsequently been confirmed by the Constitutional Court in *My Vote Counts NPC v Minister of Justice and Correctional Services & another* [2018] ZACC 17, 2018 (5) SA 380 (CC), 2018 (8) BCLR 893 – a judgment which could not sidestep the substantive questions.

CONSTITUTIONAL PROPERTY LAW

ZT Boggenpoel*

LEGISLATION

No legislation relating to this topic was enacted during the period under review.

CASE LAW

Section 25(1): Deprivation of Property

Regulatory restrictions that amount to arbitrary deprivation of property

In *Jordaan & others v City of Tshwane Metropolitan Municipality & others; City of Tshwane Metropolitan Municipality v New Ventures Consulting and Services (Pty) Limited & others; Ekurhuleni Metropolitan Municipality v Livanos & others* 2017 (6) SA 287 (CC), the Constitutional Court was required, in line with section 167(5) of the Constitution, to confirm or deny a High Court decision declaring section 118(3) of the Local Government: Municipal Systems Act 32 of 2000 (the Municipal Systems Act) unconstitutional. The North Gauteng High Court, Pretoria, in *Jordaan & another v City of Tshwane Metropolitan Municipality & others; New Ventures Consulting & Services (Pty) Ltd & others v City of Tshwane Metropolitan Municipality & another; Livanos & others v Ekurhuleni Metropolitan Municipality & another; Oak Plant Rentals (Pty) Ltd & others v Ekurhuleni Metropolitan Municipality* 2017 (2) SA 295 (GP), had held that in so far as section 118(3) of the Municipal Systems Act is a charge on the land that can be enforced against subsequent (or new) owners for debts incurred by previous owners, the provision was unconstitutional. The High Court assumed that section 118(3) can be interpreted in such a way that it is enforceable against new owners, and, on that basis, it was declared unconstitutional. The Constitutional Court was, therefore, required to provide finality concerning, first, the

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correct interpretation of section 118(3), and secondly, the constitutionality of the provision.

Cameron J, writing the unanimous judgment, pointed out that the legal question to be decided was whether section 118(3) could, or should, be interpreted to permit a municipality to hold new owners liable for debts incurred by previous owners. Furthermore, if such an interpretation were at all plausible, it had to be determined whether section 118(3) would pass constitutional muster. The applicants on appeal were owners and corporations acting on behalf of owners, who were recent transferees of property to whom the respective municipalities suspended or refused to provide services on the basis of unpaid municipal debts owing on the properties (para [4]). The Constitutional Court held that whether the applicants could be held liable for the debts of their predecessors in title, was 'large and pressing' (para [9]). The question is important because the interpretation of section 118(3) was not clear from previous cases such as *City of Tshwane Metropolitan Municipality v Mathabathe* 2013 (4) SA 319 (SCA) and *City of Tshwane Metropolitan Municipality v Mitchell* 2016 (3) SA 231 (SCA), and because the constitutional implications of the statutory provision remain largely uncertain (para [10]).

In order to answer the legal question, the judgment is divided into two parts. In the first part the court contextualised section 118(3) to determine the 'true meaning' of the provision by providing insight into its history and the language used. The court also considered the phrase 'charge on the land' in its common-law meaning as a purported real security right. In the second part, the court analysed the provision from a constitutional perspective, especially in the context of section 25(1) of the Constitution.

The court began by highlighting that when considering the meaning of section 118(3), it is important to determine the meaning of 'charge upon the property' in terms of the history of the phrase in South African statute law. Section 118(3) of the Act provides that

> [a]n amount due for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties *is a charge upon the property* in connection with which the amount is owing and enjoys preference over any mortgage bonds registered against the property (emphasis added).

Section 118(1) – the so-called embargo provision – is also relevant to an understanding of the appropriate context of section 118(3), and, in turn, provides that

> [a] registrar of deeds may not register the transfer of property except on production to that registrar of deeds of a prescribed certificate – (a) issued by the municipality or municipalities in which that property is situated; and (b) which certifies that all amounts that become due in connection with that property for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties during the two years preceding the date of application for the certificate have been fully paid.

The embargo provision was the first mechanism to ensure that municipalities were paid by potential transferors before they were permitted to transfer their properties. The second mechanism, section 118(3), was a preferent claim in favour of the municipality to ensure that if historical debt existed in relation to the property, the municipality could execute against the property and enjoy a preferent claim against other creditors, such as mortgagees (para [17]). Therefore, the second mechanism ensured preference in the debt-collecting process and was never intended to serve as a mechanism that could be enforced once the property had been transferred to a subsequent transferee. It was always an instrument to determine where the preference lay *before* execution. This is clear from the legislative history leading up to the enactment of section 118(3) (para [22]). Its predecessor, section 50(3) of the Transvaal Local Government Ordinance 17 of 1939, however, differed materially.

In this regard, section 50(3) and section 50(1) (the embargo provision's predecessor) of the Ordinance were conjoined, which meant that the preferent claim creating the charge on the land existed only while the embargo provision operated, which was initially two, and later three, years. Any question of whether the right survived transfer was consequently not an issue. Therefore, unlike its predecessor, section 118(3) does not have an explicit link with the embargo provision in section 118(1). The major implication is that it becomes difficult to determine the consequences of section 118(3) for subsequent owners. It is on this basis that the proposition is made that the charge survives transfer. The court suggested that if the meaning ascribed to the section, as provided by the municipalities, is followed, it would be a radical departure from the statute law before 1 March 2001, which is when section 118(3) of the Act came into effect. From an historical perspective, it seems unlikely that section 118(3) is a stand-alone provision which could survive the transfer of property to another owner.

The court then analysed the meaning of 'charge upon the land'

under the common law (paras [28] [43]). Here it considered a 'charge upon the land' as a real security right. In this regard, it is a common-law phrase which was incorporated into legislation purportedly to create a statutory real security right. The court reiterated that on its own the charge does not create a right which can survive transfer of the property to another owner (para [30]). Therefore, the right is not automatically enforceable against subsequent owners. This does not mean that the provision does not have value. Its value lies in the fact that if the property is declared executable by an order of court, the municipality can enforce the charge, presumably in preference to other mortgagees (para [30]).

For the charge to constitute a transmissible right of security, it must satisfy the requirement of publicity (paras [31] [34]). In the context of real security rights, the purpose of the right is to secure the payment of the debt, and the court pointed out that 'if that debt could be satisfied by execution upon the property before the debtor disposes of the property – or even later – why should it be enforceable against innocent third parties who are unconnected with the debt and may not even know of its existence?' (para [38]).

In the case of section 118(3) there is no indication that the legislature requires the publicity function to apply, and no express indication that the Act is enforceable against subsequent owners. The court compared another piece of legislation, the Land and Agricultural Development Bank Act 15 of 2002, which uses similar wording to the Municipal Systems Act. Sections 31(2) and 31(3) are important in this regard. They provide:

> 31(2) Before any payment is made in respect of the advance referred to in subsection (1), the Bank must transmit in writing to the Registrar of Deeds concerned information . . . and on receipt of that information the Registrar of Deeds must cause a note thereof to be made in his or her registers in respect of the property.
>
> 31(3) The making of a note in terms of subsection (2) has the effect of creating in favour of the Bank a charge upon the property until the amount of the advance together with interest and costs has been repaid.

Transmissibility is secured by the registration in the register of deeds, which does not take place in the context of section 118(3) of the Municipal Systems Act (para [41]). Therefore, it is likely that the charge created by section 118(3) only applies to the actual debtor and not subsequent owners. The court concluded that the unregistered charge is enforceable against the property only

while the debtor owns the property. Therefore, without registration, it seems unlikely that debts will be enforceable against subsequent owners. In this regard, it cannot be assumed that the legislation itself fulfils the publicity requirement (para [43]). The court reiterated that the legislation simply indicates the potential debt in relation to the property, but does not state the value of that debt. Presumably, if registration in the deeds registry were a requirement in the context of the charge created in terms of section 118(3), the deeds registry would provide the detail relating to the value of the debt.

The court then examined the constitutionality of section 118(3) as an indicator of whether the provision would survive transfer of the property to a successive owner (para [44]). The municipalities contended that the provision was constitutional in so far as it survives transfer to new owners. In this regard, they argued that municipalities have a peculiar responsibility to provide municipal services and, therefore, the provision is constitutionally valid. In order to resolve the problem of the new owner buying the property without knowledge of existing historical debt, they argued that the court could oblige the municipality to make that information available.

The court highlighted the fact that it is not unthinkable to imagine that new owners of property could be saddled with certain responsibilities by virtue of their newfound status as property owners. However, this does not mean that section 118(3) can or should be interpreted as compelling new owners to accept responsibility for the payment of historical debt owing by previous owners. Other information regarding this specific provision must be considered. First, the *municipality* has the peculiar responsibility to recover debts (para [53]). In this regard, the provision creates mechanisms which ensure that the debts can be recovered from existing owners who incurred the debts. Therefore, all outstanding debts can, in principle, be recovered before the property is transferred (para [56]). On this basis, the court emphasised the debt-collection mechanisms the municipality had at its disposal which would negate the need to question the unconstitutionality of section 118(3).

In the final part of the judgment, the court questioned whether section 118(3) results in an arbitrary deprivation of property. The court accepted that the new owner has a property interest for purposes of section 25(1). Furthermore, bond-holders had interests that qualified as property for purposes of section 25(1). For

purposes of deprivation of property, the court accepted that the deprivation must be substantial in the sense that it has a legally significant impact on property owners. In this regard, the court equated 'legally significant impact' with a 'substantial' deprivation.

The court examined the extent of the deprivation resulting from the enforcement of section 118(3) on both the new owner and bond-holders. It held that the provision results in a cognisable (and significant) deprivation (paras [64] [68]). In determining whether section 118(3) permits arbitrary deprivation of property, the court compared *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) and *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (1) SA 530 (CC), where the constitutionality of statutory provisions (albeit different provisions) was also at stake. More specifically, in *FNB* and *Mkontwana* the Constitutional Court had to decide on the constitutionality of provisions in legislation which held third parties liable for debts incurred by someone other than the third parties.

In *FNB*, the court found section 114 of the Customs and Excise Act 91 of 1964 unconstitutional because it allowed the commissioner of the South African Revenue Service to seize vehicles belonging to someone other than the tax debtor. This meant that there was an insufficient nexus or link between the owner, the property, and the debt. In *Mkontwana*, the court held that section 118(1) of the Municipal Systems Act, which resulted in holding the owner liable for debts incurred in relation to the property even when he or she was not responsible for incurring the debt, was not unconstitutional, in that there was a sufficiently close link between the owner, the property, and the debt.

The court in *Jordaan* held that in the context of section 118(3), a new owner will have no control, or even knowledge, of the manner in which the debt arose. 'This is because it is intrinsically arbitrary to impose responsibility for payment of a debt on a property [owner] who has no connection with it and who had no control at all over the property or those occupying the property when the debt was incurred' (para [73]). In this respect, the court found that *Jordaan* was similar to *FNB*, but differed from *Mkontwana*. Therefore, if the new owner were to be held liable for historical debts in relation to the property, it would constitute arbitrary deprivation of property (para [74]). Furthermore, it was unnecessary to engage in a section 36(1) analysis (para [76]).

In the end, the court highlighted, in line with section 39(2) of the Constitution, that, in order to prevent arbitrary deprivation in terms of section 25(1), section 118(3) should be interpreted as not surviving transfer of the property. The appeal succeeded and, although the court did not confirm the High Court's declaration of invalidity, it granted a declaratory order that section 118(3) does not survive transfer to the new owner (para [78]).

The *Jordaan* decision clarifies whether section 118(3) of the Municipal Systems Act creates a charge on the land enforceable against subsequent new owners who played no part in incurring the debt. It appears that this outcome applies no matter how the transfer of property takes place, an issue that was previously contested (para [75]; see the earlier cases of *Mathabathe*, *Mitchell,* and *Jordaan HC*).

The court in *Jordaan* relied heavily on the work of Brits (R Brits 'Why the security right in section 118(3) of the Local Government: Municipal Systems Act 32 of 2000 is not enforceable against successors in title – A follow-up occasioned by the SCA's *Mitchell* judgment' (2017) 1 *Stell LR* 47–67). Brits argues that from an historical (and logical) perspective, section 118(3) should be interpreted as not surviving transfer (Brits (2017) *Stell LR* 52). This appears to be in line with the provision's predecessor, which was linked to the embargo provision making it impossible for new owners to be liable for debts incurred by previous owners. Brits also suggests – and this is endorsed by the court – that the only way in which this provision could in any way be enforced against subsequent owners would be if it were coupled with some form of publicity, like all other limited real rights (Brits (2017) *Stell LR* 52-3). The court strongly supported the idea that, without publicity, the legislative provision would apply only to current owners who actually incurred the debt, and would have no third-party effect. In this regard, the earlier decisions of *Mathabathe* and *Mitchell* created the impression that the right could be enforced against subsequent owners. In *Mathabathe* the Supreme Court of Appeal held that the municipality does not lose its right to enforce the municipal debt when the property is transferred to successors in title. Therefore, the right survived transfer and the municipality did not have to enforce the right before such transfer (*Mathabathe* para [12]). Similarly, although in a more limited sense, in *Mitchell* the Supreme Court of Appeal had to determine whether the right created in favour of the municipality in terms of section 118(3) of the Municipal Systems Act had been terminated

when the property was sold in execution, thereby implying that the right was not enforceable against subsequent owners. It confirmed that historic debt relating to a specific property will transfer to a new owner after a sale in execution has taken place (*Mitchell* para [16]).

Brits rejects the arguments made in both these decisions, and contends that this is not how real security rights operate (Brits (2017) *Stell LR* 53). He compares some examples of other real security rights and statutorily created real security rights before concluding that in most cases real security rights are accompanied by publicity. When there has been no publicity, there are good policy reasons for dispensing with the requirement (Brits (2017) *Stell LR* 53–5). Consequently, Brits asserts that 'creating publicity through such a mechanism would certainly lead to greater fairness, but the fact that formal publicity is currently lacking without good reason, contributes to the irrationality of rendering the section 118(3) charge enforceable against successors in title' (Brits (2017) *Stell LR* 56). This is the same line of reasoning adopted by the court in *Jordaan* and the main reason for the finding that the charge is not enforceable against subsequent owners.

As regards the constitutional property analysis, the court finally provided clarity in line with arguments raised by a number of academics, that, if section 118(3) were interpreted to hold new owners liable for debts incurred by previous owners, it would result in a violation of section 25(1). This case finally confirms that without a direct link between the debt and the person incurring the debt, it is virtually impossible for the statutory provision to pass constitutional muster.

In 2016 *Annual Survey* 217ff, the same arguments were made in relation to the purported consequences of section 118(3). It was argued that if the provision is interpreted to allow for new owners to be held liable for the historical debt of their predecessors, the outcome would arguably amount to an arbitrary deprivation of property for purposes of section 25(1) of the Constitution. A number of academic authors have made similar arguments (see R Brits 'The statutory security right in section 118(3) of the Local Government: Municipal Systems Act 32 of 2000 – Does it survive transfer of the land? [Discussion of *City of Tshwane Metropolitan Municipality v Mathabathe* 2013 (4) SA 319 (SCA)]' (2014) 25 *Stell LR* 536 544–47; LM du Plessis 'Observations on the (un)-constitutionality of section 118(3) of the Local Govern-

ment: Municipal Systems Act 32 of 2000' (2006) 17 *Stell LR* 505 520–9; Brits (2017) *Stell LR* 59-64). This decision should therefore be welcomed in so far as it (purportedly) puts an end to any doubt regarding the consequences of section 118(3) for the constitutional property clause.

Section 25(1): Deprivation of Property

Regulatory restrictions that amount to arbitrary deprivation of property

South African Diamond Producers Organisation v Minister of Minerals and Energy NO & others 2017 (6) SA 331 (CC), raises the important constitutional property law question of what constitutes deprivation of property for purposes of section 25(1) of the Constitution. The judgment also addresses section 22 of the Constitution, which deals with the right to choose one's own trade, occupation, or profession. The focus here will, however, be on the court's analysis of section 25(1) – the deprivation issue. In this regard, it is necessary to consider whether the decision shifts the boundaries in terms of the law applicable in the context of deprivation of property, and what the implications are of such a shift for constitutional property law.

This decision came to the Constitutional Court as an appeal against the High Court decision *South African Diamond Producers Organisation v Minister of Minerals and Energy NO & others* [2016] ZAGPPHC 817 (6 September 2016), where Van der Westhuizen AJ held that section 20A of the Diamonds Act 56 of 1986 (the Diamonds Act) was unconstitutional for infringing sections 22 and 25 of the Constitution. The Constitutional Court was called upon, in terms of section 172(2)*(a)* of the Constitution, to confirm the order of constitutional invalidity.

The facts that gave rise to the dispute are briefly the following: The respondents were various state departments and their Ministers, including the Department of Minerals and Energy (and its Minister), the Department of Finance (and its Minister), the South African Diamond, Minerals and Precious Metals Regulator, and the State Diamond Trader. The respondents opposed the application in so far as it would confirm the declaration of invalidity of section 20A of the Diamonds Act. The applicant was a voluntary association known as the South African Diamond Producers Organisation (the SADPO). The primary objective of the SADPO is to streamline the diamond producing industry. To that end, diamond producers and diamond dealers constitute its

main members and its aim is to see to the needs of the members. The Diamonds Act regulates the trade in diamonds in South Africa. The main purposes of the Act are to regulate 'the possession, sale, purchase, import and export of unpolished diamonds; the premises where the sale and purchase of unpolished diamonds may take place; and the processes to be followed in order to export unpolished diamonds' (para [7]). The Act was amended by the First and Second Diamonds Amendment Acts 29 and 30 of 2005, which came into effect in July 2007. Section 20A, the impugned provision, was included under the second amendment to the Act, and led to the SADPO approaching the High Court to have it declared unconstitutional and set aside (paras [11] [12]). Section 20A provides as follows:

> (1) No licensee may be assisted by a non-licensee or holder of a permit referred to in section 26*(e)* during the viewing, purchasing or selling of unpolished diamonds at any place where unpolished diamonds are offered for sale in terms of this Act, except at a diamond exchange and export centre.
> (2) No holder of a diamond trading house licence referred to in section 26*(f)* or any person authorized in terms of the Act to sell unpolished diamonds may allow the assistance prohibited in subsection 1.

It should be noted that prior to the amendment of the Diamonds Act some of the SADPO's members had developed a practice regarding the mode of operation at their licensed business premises which entailed offering unpolished diamonds on an anonymous tender basis. The licensed South African dealers ordinarily made use of foreign non-licensed experts. Therefore, these non-licensed experts acted as the middle-men between the South African licensed dealers and the licensed buyers, who were in the main prospective foreign buyers. Although the sale was concluded between the licensed dealer and the purchaser, this practice was used to determine the international market value of the unpolished diamonds. The practice was conducted in so-called 'tender houses', although this term, or even the general practice highlighted above, was never provided for in the Act.

The SADPO asserted that even though the practice was not specifically provided for in the Act, it was lawful in terms of the pre-amendment version of the Act (para [9]). This assertion was based on the fact that the Act did not specifically prohibit such a practice, or provide for a predetermined manner in which the trade in unpolished diamonds should take place.

It is clear that section 20A of the Act has the effect of precluding the business practice developed in the diamond trade industry, which is why SADPO approached the High Court raising the argument that various provisions of the Amendment Act were unconstitutional. The High Court narrowed down the enquiry to the question of the constitutionality of section 20A only, specifically seeking the basis of such potential unconstitutionality. The SADPO argued that the grounds for unconstitutionality of section 20A were sections 22 and 25 of the Constitution. In relation to section 25 the SADPO argued that the prohibition against allowing the assistance of unlicensed experts in securing an international market value contravened section 25 as it prevented SADPO members from obtaining the full proceeds of the diamonds they owned (*Diamond Producers HC* para [38]). The respondents, in turn, claimed that section 20A did not result in an infringement of section 25 because there was no deprivation of property through the alleged loss of income, and even if there were a deprivation of property, it was not an arbitrary deprivation (*Diamond Producers HC* para [45]).

The High Court held that section 20A of the Act was unnecessary because the mischief it purportedly sought to address could be addressed adequately by other provisions in the Act (*Diamond Producers HC* paras [29] [40]–[42]). In relation to whether section 20A resulted in an arbitrary deprivation of property, the High Court held that the provision authorised deprivation and that the deprivation was 'irrational, arbitrary and disproportional' (*Diamond Producers HC* para [49]). On this basis, it declared section 20A unconstitutional in so far as it infringed sections 22 and 25 of the Constitution (*Diamond Producers HC* para [51]). Consequently the Constitutional Court had to determine whether the declaration of constitutional invalidity should be confirmed.

As already mentioned, it is necessary to establish whether the Constitutional Court's analysis of whether section 20A of the Diamonds Act contravenes the constitutional property clause can be faulted or provides an accurate reflection of the law. The thrust of the argument based on section 25(1) was that by virtue of the prohibition against the use of unlicensed assistance, the SADPO's members had been deprived of the right to the realisation of the full market value, which purportedly forms part of the right to alienate property, or the *ius disponendi*, because they were permitted to market the diamonds only to holders of local licences. Moreover, the Amendment Act required previous hold-

ers of diamond exchange certificates to apply for a trading licence, because previous certificates were abolished by section 26*(f)* of the Act. The new 'trading house certificates' purportedly gave fewer rights than the initial diamond exchange certificates in the sense that they were focused on encouraging the South African diamond trade as opposed to selling to the export market (para [20]). It was on this basis that the SADPO asserted that section 20A permitted deprivation of property which was not justified and therefore arbitrary.

In response, the respondents contended that the practice followed by the SADPO members was not expressly endorsed by any legal right in the legislation. In fact, the respondents submitted that the practice was illegal and that is why the legislature enacted section 20A (para [24]). The respondents specifically argued that the purpose of section 20A is 'to promote the local beneficiation of South African diamonds; to tighten the regulation of the diamond trade; and to comply with the Kimberley Process Certification Scheme' (para [26]). Therefore, there was a justifiable reason for the enactment of the provision.

The Constitutional Court demarcated the issues to be decided into two principal aspects: first, whether section 20A contravened the constitutional property clause; and second, whether section 20A infringed the right to choose one's own trade, occupation, or profession as enshrined in section 22 of the Constitution. An analysis of the enquiry into the effect of section 20A on section 25 of the Constitution follows.

Khampepe J began the section 25 enquiry by reiterating the wording of the provision, which, in short, states that no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property. She then considered the test set out in *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Service & another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC), emphasising that the section 25(1) part of the analysis rests on three questions. These are: whether there is an interest worthy of protection under section 25; whether there has been deprivation of property; and if so, whether the deprivation was in line with the requirements in section 25(1) – most notably the requirement proscribing arbitrary deprivation of property (para [34]).

The SADPO maintained that, in this case, two property rights were affected by the legislative amendment to the Diamonds

Act. In the first place, it had an impact on ownership of the diamonds, and more specifically, section 20A had an impact on the entitlement of *ius disponendi*. Secondly, the SADPO argued that their members had been deprived of 'ownership of the diamond dealer licences', which were abolished under the Act with the prerogative (or obligation) on the previous holders of the licences to apply for the tender house certificates. The court dealt systematically with these two property rights to determine whether section 20A authorised deprivation of either of them.

Khampepe J stated that the *FNB* enquiry can be approached from two perspectives. The first approach assumes that diamonds and licences are property for purposes of section 25(1), and only during the deprivation stage is the impact on the property interest (the *ius disponendi* and the licences) considered to establish whether the interference is significant enough to constitute deprivation of property. The second approach sets the bar for determining what constitutes property quite high. It begins by examining whether that which has been taken away – 30 per cent of the ownership of the diamonds and the right to engage in terms of the previous licence in a particular manner – actually constitutes property for purposes of section 25(1). Only if these entitlements constitute property can one proceed to the next stage in the enquiry, which assesses the deprivation issue. Khampepe J preferred the first approach, and accepted that the 'property' in the two cases was ownership of the diamonds and ownership of the licences. She assumed that ownership of diamonds and ownership of the licences brought with them various entitlements (para [39]).

With regard to ownership of the diamonds, the SADPO argued that 30 per cent of the full market value was lost due the inability of diamond producers and traders to use unlicensed experts, as they had in the past. It is this loss of the full proceeds from the sale of unpolished diamonds, due to the lack of assistance from the middle-men, that the SADPO argued limited the right of its members to alienate the diamonds (or the *ius disponendi*). The court accepted that ownership of the diamonds constituted property for purposes of section 25 (para [41]). The important question was whether section 20A resulted in deprivation of ownership of the diamonds (para [42]). The court began by considering the definition of deprivation in *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset & others v Buffalo City Municipality; Transfer Rights Action Campaign & others v Mem-*

ber of the Executive Council for Local Government and Housing, Gauteng & others 2005 (1) SA 530 (CC). It emphasised that whether there has been a deprivation of property depends on the extent of the deprivation (para [42], relying on para [32] of *Mkontwana*). The loss must be 'beyond the normal expected restrictions on property' for the interference to constitute deprivation under section 25(1) (para [43]). Khampepe J then considered *Offit Enterprises (Pty) Ltd v Coega Development Corporation (Pty) Ltd* 2011 (1) SA 293 (CC), where the court again emphasised that deprivation requires a *substantial interference* in property rights (*Offit* para [41]). The court in *Offit* stated that although 'direct or physical interference is not necessary, the impact must be of sufficient magnitude to warrant constitutional engagement'. Courts must, according to the Constitutional Court in *Offit,* determine the extent to which property rights have been diminished (*Offit* para [41]). Khampepe J also relied on the judgment in *Tshwane City v Link Africa* 2015 (6) SA 440 (CC), where a similar approach to determine deprivation of property was followed (*Link Africa* para [167]). In *Link Africa*, the court referred to the 'extent of the intrusion' in establishing whether deprivation of property had occurred. Moreover, *Link Africa* highlighted that the deprivation must be sufficiently significant to have a legally relevant impact on the rights of the property holder (*Link Africa* paras [163]-[173]). Therefore, a substantial or significant interference was held as the measure by which to determine whether the intrusion constituted deprivation of property in *Diamond Producers CC* (para [47]).

On the basis of the definition of deprivation (above), the court, in *Diamond Producers,* questioned whether the SADPO's members had been deprived of 30 per cent of the market value of the diamonds they sold. The court accepted that the deprivation lies in the limitation of, or interference with, the right to alienate the diamonds, especially as the members are not able to obtain the highest possible market value for the diamonds in terms of section 20A. Khampepe J held that section 20A does not interfere with the producers' and dealers' rights to any significant or legally relevant extent (para [50]). This is because, in terms of the extent of the interference, it is impossible to link the use of the unlicensed foreign experts directly to the quantifiable loss suffered as a direct result of section 20A. Therefore, it is not clear that the drop of 30 per cent in the market value was a direct result of the prohibition against the use of unlicensed persons in section 20A.

The court consequently held that no loss could be proved as it was impossible for the court to assess the extent of the interference and so to determine whether it was sufficient to constitute deprivation. The court also emphasised the difficulty, in this particular case, of establishing when the loss should be assessed, especially given the ever-changing market conditions which make it very difficult to decide whether there has been a sufficiently substantial deprivation of property (para [51]).

Interestingly, the court then reverted to what resembles an enquiry into whether there was a legally protectable interest or entitlement in this particular case. Here, the court in essence linked the deprivation issue to (and even made it dependent on) arbitrariness (where the extent of the deprivation determines whether there has in fact been deprivation), and the property question (where the existence of a legally protectable interest or entitlement determines whether there has in fact been a deprivation of property). Therefore, in this part of the judgment the court renders the question of deprivation dependent on whether there is a legally protectable interest or entitlement. In this regard, the court made a number of interesting remarks. There would be no deprivation because section 20A does not remove any 'protectable' legal interest or entitlement. Although producers and dealers are limited in the sense of realising full market value, section 20A does not actually prohibit the sale of diamonds or compel the members to donate the diamonds to the state – which would presumably have constituted deprivation. The limitation lies in the way in which the producers and dealers operate or conduct the sale, so it is the manner of conducting sales that is affected by the legislation. This limitation is not substantial enough to constitute deprivation for purposes of section 25(1). The court held that '[a] property holder does not generally have a legally protectable interest either in obtaining a specific value for his goods, or in valuing his goods according to a particular method' (para [53]). In the final analysis, the court concluded that there had been no deprivation of property in their diamonds in accordance with the *FNB* analysis (para [55]).

The court then examined whether there had been deprivation of 'ownership of the licences' (paras [56]-[61]). It accepted, in line with the judgment in *Shoprite Checkers (Pty) Ltd v MEC of Economic Development, Eastern Cape* 2015 (6) SA 125 (CC), that licences constitute property for purposes of section 25(1). (For analyses of the *Shoprite* judgment, see IM Rautenbach

'Dealing with the social dimensions of property' (2015) 4 *TSAR* 822; EJ Marais 'Expanding the contours of the constitutional property concept' (2016) 3 *TSAR* 576; PJ Badenhorst & C Young 'The notion of constitutional property in South Africa: An analysis of the Constitutional Court's approach in *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* 2015 (6) SA 125 (CC)' (2017) 28 *Stell LR* 26.) It did so without going into the differences in the approaches of Froneman J and Madlanga J in establishing whether licences are in fact property. Khampepe J simply assumed that the licences are property, because 'even assuming they are property for the purposes of section 25 of the Constitution, there is no deprivation' of property (see specifically para [51] n51). She then considered whether there had been a deprivation of these licences in terms of the definition outlined in *Mkontwana*, *Offit,* and *Link Africa* (above). In this regard, it must be determined whether the extent of the intrusion is such that it has a legally relevant impact on the rights of the affected party (para [58]).

The court stressed that in the context of these licences, holders of the licence can buy, sell, import, and export unpolished diamonds. Section 20A has not actually *removed* any of these entitlements. It simply removes the practice of using unlicensed foreign experts. This differs from the licences in *Shoprite*, where the licence was withdrawn and the entitlement subsequently lost. On this basis, '[t]here can be no deprivation in a change of regulation that alters the strategies licensees are entitled to pursue in the course of conducting licensed activities' (para [60]). Therefore, if the government makes a regulation that alters a particular business strategy, or makes that strategy unlawful, it cannot be argued that it amounts to deprivation of property. Consequently, the court held that '[t]o the extent that the licences in issue are in fact property, the limitation imposed by section 20A is not substantial, as it does not have a legally relevant impact on the rights of the affected party' (para [61]).

The SADPO also argued that holders of diamond exchange certificates had been deprived of property in that those certificates had been replaced by trading house licences (para [62]). These trading house licences purportedly afforded fewer rights than the previous certificates. However, the court held that it is unclear how the rights of licensees have been reduced by section 20A – as this section stands, it does not abolish diamond exchange certificates in favour of trading house licences.

Consequently, the order of the constitutional invalidity of section 20A of the Diamonds Act on the basis of section 25(1) of the Constitution was not confirmed by the Constitutional Court. The court also, for reasons provided in paragraphs [64] to [80] of the judgment, refused to confirm the constitutional invalidity of section 20A on the basis of section 22 of the Constitution. Therefore, the court declined to confirm the declaration of constitutional invalidity as ordered by the High Court, and the appeal succeeded (para [83]).

A number of interesting remarks can be made about the *Diamond Producers* judgment, especially as regards the extent to which it confirms existing principles relating to constitutional property law. The most obvious point of discussion is around the definition of deprivation as outlined by the Constitutional Court. It is clear, from the court's analysis of the meaning of deprivation, that the bar is set very high in terms of establishing whether a particular regulatory interference amounts to deprivation of property. In other words, this case reiterates that in order for the interference in property rights to amount to deprivation of property, it must be sufficiently significant to make a legally relevant impact on the property holding. This is in line with the cases referred to by the court as authority. In this regard, cases such as *Mkontwana*, *Offit* and *Link Africa* (above) are instructive. There are also other cases which the court failed specifically to mention, but which could equally have been used to support the point. For instance, in *Jordaan & another v City of Tshwane Metropolitan Municipality & others; New Ventures Consulting & Services (Pty) Ltd & others v City of Tshwane Metropolitan Municipality & another; Livanos & others v Ekurhuleni Metropolitan Municipality & another; Oak Plant Rentals (Pty) Ltd & others v Ekurhuleni Metropolitan Municipality* 2017 (2) SA 295 (GP), reference is made to 'severe deprivation' in determining whether an interference amounts to deprivation of property (para [24]). Similarly, in *AgriSA* (*Agri South Africa v Minister for Minerals and Energy* [2013] ZACC 9 (18 April 2013)) the court referred to 'substantial interference' (para [67]) in assessing the extent to which the intrusion into property rights amounted to deprivation. *Chevron* (*Chevron SA (Pty) Ltd v Wilson t/a Wilson's Transport & others* [2015] ZACC 15 (5 June 2015)) is another decision where the Constitutional Court found that a deprivation must be 'substantial' if it is to be open to scrutiny under section 25(1) (para [18]). All these cases provide authority for setting the standard in defining deprivation of property very high.

It should be noted that on face of it, the determination of deprivation of property under this approach is not in line with the definition in *FNB*, where the bar was arguably set very low. In *FNB* the court interpreted 'deprivation' widely (para [57]), when it stated that any interference in the use, enjoyment, or exploitation of private property involves some deprivation in respect of the person having title or right to, or in, the property concerned. Courts will quite readily accept that a deprivation has occurred and proceed to consider the requirements in section 25(1), being the third question in the section 25 analysis (see T Roux 'Property' in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* vol 3 2ed (OS 2003) Ch 46 2–5, 18, 23–25). This is also in line with Van der Walt's reasoning that a more acceptable solution to the definition of deprivation is that 'every restriction that has a perceptible effect on the property holder's use and enjoyment of property, no matter how small or insubstantial, constitutes deprivation in terms of section 25(1) and is therefore subject to its requirements' (AJ van der Walt *Constitutional Property Law* 3ed (2011) 209). In this respect, Van der Walt explains that 'it seems odd that deprivation should be limited to that which exceeds restrictions that are ''normal in an open and democratic society'' when all regulatory ([or] ''police power'') restrictions on the use and enjoyment of property are normal in society' (AJ van der Walt 'Retreating from the *FNB* arbitrariness test already? *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC for Local Government and Housing, Gauteng*' (2005) 122 *SALJ* 79–80). He argues further that

> it serves no useful purpose to associate deprivation with substantial or abnormal – in other words excessive – regulatory deprivation when the purpose of s 25(1) is to legitimize the imposition of regulatory deprivation generally. In the framework of s 25(1), any regulatory restriction on the use and enjoyment of property, however small or insignificant, can be classified as deprivation without placing an additional burden on the state because deprivation does not in general require compensation and regulatory state action is subject to constitutional review in terms of the general legality requirement in any event (Van der Walt (2005) 122 *SALJ* 80).

Therefore, the extent of the deprivation should be considered in the step to determine whether the deprivation is arbitrary, and not whether the limitation results in deprivation of property. All that should be necessary to prove the first step in the deprivation

inquiry is that the deprivation is significant enough to have a legally relevant impact on the rights of the affected party. Therefore, although one could probably arrive at the same conclusion from *FNB*'s analysis of a generally wide approach and the approach adopted in *Diamond Producer*s in determining deprivation, it is important to be aware that assessing the extent of deprivation in *FNB* was essentially undertaken to determine the degree to which the deprivation was arbitrary, and not whether the interference amounted to deprivation at all. There is a subtle distinction between the two approaches which arguably could benefit from further attention in future cases.

Section 25(2)–(3): Compensation for Expropriation

Determining just and equitable compensation under section 25(3)

In *Uys & another v Msiza & others* [2017] ZASCA 130 (29 September 2017), the Supreme Court of Appeal heard an appeal against a Land Claims Court judgment decided in 2016 (*Msiza v Director-General, Department of Rural Development and Land Reform* 2016 (5) SA 513 (LCC)). The Land Claims Court judgment was discussed in some depth in 2016 *Annual Survey* 235ff and it is relevant here to establish the extent to which the Supreme Court of Appeal's reasoning differs from that of the Land Claims Court on the determination of compensation for expropriation under section 25 of the Constitution.

In the Land Claims Court, Ngcukaitobi and Canca AJJ ordered that an amount of R1 500 000 compensation be paid to the owner of the property expropriated in terms of section 23(1) of the Land Reform (Labour Tenants) Act 3 of 1996 (the LTA). A brief outline of the facts is provided to the extent necessary to show why the Supreme Court of Appeal deviated from the approach adopted in the Land Claims Court to the determination of compensation for expropriation for land reform purposes.

The property of Dee Cee Trust was expropriated and awarded to Msiza, a labour tenant in terms of the LTA. The claim was lodged for a portion of the land in November 1996, and the land was awarded in November 2004. The expropriation was authorised as outlined in *Msiza & others v Uys & others* [2004] ZALCC 21 (16 November 2004). However, the negotiations around compensation could not be settled, and in August 2012, Msiza launched the application in the Land Claims Court for the determination of compensation in line with section 23(2) of the

LTA. Consequently, in *Msiza LCC* the Land Claims Court had to determine an appropriate amount of compensation for purposes of section 16 of the LTA, read with section 25 of the Constitution. It is against this judgment – and specifically the award of R1 500 000 compensation for the expropriation – that the appellants appealed.

The main thrust of the appellants' appeal was that the Land Claims Court had miscalculated the amount of compensation in line with the use of the property as agricultural land, instead of its potential future use for development. Moreover, they argued that the amount of compensation had been erroneously reduced simply on the basis that Msiza was a labour tenant (para [1]). Agri SA was granted an opportunity to make submissions as to what would constitute 'just and equitable' compensation for purposes of section 25.

The court began its analysis by having regard to the extent of the land and tenancy agreement expropriated in favour of Msiza, in order to contextualise the determination of compensation. Regarding the amount of land expropriated, the court highlighted that the entire property consisted of 352 hectares, of which approximately 45,8522 hectares had been awarded to Msiza (para [2]). The labour tenancy in favour of Msiza (and his family) had been concluded in terms of the Native Service Contract Act 24 of 1932, and it was clear that the family had exercised the right since at least 1936.

The Supreme Court of Appeal began by setting out the wording of section 23(1) of the LTA, which, where land is expropriated under the LTA, simply refers, for the most part, to 'just and equitable' compensation in line with the Constitution (paras [7] [8]). The court identified what should be taken into account in determining 'just and equitable' compensation for purposes of sections 25(2) and 25(3) of the Constitution. In this regard, it should be remembered that section 25(2) provides the general requirements for expropriation, which include that the expropriation must be in terms of law of general application, effected for a public purpose or in the public interest, and subject to compensation. The amount of compensation, and the time and manner of payment, must either be agreed upon by those affected, or decided or approved by a court. Furthermore, section 25(3) of the Constitution provides that

> [t]he amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having

> regard to all relevant circumstances, including (a) the current use of the property; (b) the history of the acquisition and use of the property; (c) the market value of the property; (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and (e) the purpose of the expropriation.

Having regard to these constitutional provisions, the court considered the judgment in *Du Toit v Minister of Transport* (2006 (1) SA 297 (CC)), where the Constitutional Court reiterated the general principles relating to the requirement of just and equitable compensation. As a starting point, the Constitution provides the appropriate standard (meaning 'just and equitable') even in cases where legislation – such as the LTA (as in *Msiza*) or the Expropriation Act (as in *Du Toit*) – applies (para [11]). Therefore, the first step is to consider the list of factors in section 25(3), even if there is direct legislation which regulates the specific type of expropriation in the case and includes compensation provisions of its own.

Having regard to all the factors listed in section 25(3), the court conceded that market value is usually the one objectively quantifiable factor. This reasoning endorses that of the Land Claims Court in *Msiza LCC*, and the two-stage approach followed in *Du Toit*. In terms of this approach, market value is used as a starting point in the application of section 25(3), after which an amount is deducted (or added) depending on the other factors listed in the provision. The court in *Du Toit* stressed that this approach may not work in all instances, but in most cases it appears to be the most practical approach. According to the court in *Du Toit*, this approach can only truly reflect just and equitable compensation if all the factors (where applicable) are accorded equal weight and due consideration (*Du Toit* para [84]).

In *Msiza* the dispute was whether the compensation should be assessed according the actual use of the property (which as agricultural land was valued at R1 800 000), or the development potential of the land (as residential property estimated at R4 000 0000). An expert on behalf of the state estimated the current value of the property at R1 800 000 (para [15]). However, according to the 'Pointe Gourde' principle (see paras [18] [19] for the origins of the principle), Msiza's claim for compensation should not be taken into account in determining the market value of the property (para [16]). In this respect, the court considered whether 'a known impediment to the property's development potential when the property was purchased which ha[s] a direct

bearing on the price that a willing buyer in the Trust's position would have been prepared to pay for the property' (para [19]) should be considered when determining compensation. However, the court relied on the earlier decision in *Port Edward v Kay* 1996 (3) SA 664 (A) 678, to conclude that the Pointe Gourde principle does not apply in this case and that the accepted market value of the property should be R1 800 000 (para [20]). Nonetheless, the question arises whether there were any cogent reasons to reduce the compensation to below market value in this particular case.

The Supreme Court of Appeal considered the approach adopted in *Msiza LCC* and the reasons for the Land Claims Court deducting R300 000 from the market value of R1 800 0000. The Land Claims Court provided a number of reasons for its decision:

> The reasons for making the deduction were listed as being: that there was a 'disproportionate chasm' between the amount paid by the trust and the market value it sought to claim; that the trust made no significant investment in the land; that the use of the land had not changed since it was acquired; that when the land was acquired there was a land claim and the Msiza family were residing on the land; that the land had been awarded to the Msiza family in 2004 and had not been transferred; that as the object of compensation is land reform the fiscus should not be saddled with extravagant claims for financial compensation when the object of expropriating the land is to address the pressing public concern for such reform; that the Msiza family had lived and worked on the farm since 1936 as Labour tenants and should receive compensation. The LCC also found that there has been no direct State investment or beneficial capital improvement of the land (*Msiza LCC* para [80]).

The Supreme Court of Appeal found these reasons unconvincing (para [20]). It held that most of the factors listed by the Land Claims Court had in any event been accounted for in the determination of the market value of the property (para [25]). There was also no indication that the amount claimed by the appellants was extravagant or that it could not be paid by the state. Moreover, the court commented that the R300 000 had been arbitrarily arrived at as there was no indication of its basis. (See 2016 *Annual Survey* 235ff, for a similar argument.) In the end, the Supreme Court of Appeal held that R1 800 000 constituted just and equitable compensation (para [28]).

The determination of what constitutes just and equitable compensation (as required by the Constitution) has always been contentious, especially in the context of land-reform expropria-

tions. In 2017, the hype around compensation for expropriation was elevated in the wake of a motion passed by the National Assembly calling for expropriation without compensation, and the extent to which it is necessary to amend section 25 of the Constitution to enable expropriation of property without compensation. The Supreme Court of Appeal decision in *Msiza* highlights that courts essentially still follow a predominantly 'market value centred' approach when determining compensation for expropriation, and find it difficult to deviate from that standard. Stated differently, when considering the factors (other than market value) in section 25, courts struggle to find adequate justification for reducing market value, and almost instinctively revert to market value. This is especially interesting considering the recent debate around expropriation without compensation. If the practice is to award market value, even in land-reform expropriations, it becomes difficult to accept the theoretical arguments asserting that compensation below market value is possible within the current legal framework of section 25(2).

A pertinent question arising from the Supreme Court of Appeal *Msiza* judgment is: Is there a missing link between the rhetoric that expropriation below market value is possible, and the actual practice playing itself out in courts? More specifically, the Supreme Court of Appeal decision calls into question the theoretical argument that compensation below market value is possible. It has been argued that just and equitable compensation may necessitate an inquiry which a narrow market-driven determination of compensation would disregard (Van der Walt (2011) 509). There are various considerations in the just and equitable requirement for compensation under the new constitutional dispensation (WJ du Plessis *Compensation for Expropriation under the Constitution* (LLD thesis Stellenbosch University (2009) 299-300). Therefore, determining the *quantum* of compensation necessitates a contextualised judgment, which should be sensitive to the facts in the particular case – it cannot be an abstract analysis. In this regard, while consideration should be given to the factors listed in section 25, courts are not limited to those factors. They should pay special attention to land-reform aspirations (Van der Walt (2011) 509). *Msiza LCC* could possibly have been seen as a sensible approach to the application of the section 25(3) factors in determining compensation for expropriation in the land-reform context. It certainly purports to be a different approach from the one which singles out market value

as the determining factor, especially since the Land Claims Court ordered compensation at below market value (see 2016 *Annual Survey* 235ff). This decision was overturned by the Supreme Court of Appeal, raising serious doubts regarding the contention that compensation below market value is possible.

Therefore, this judgment raises questions about the extent to which land-reform expropriations justify a lesser amount of compensation as argued in the literature. One observation that is apparent from the Land Claims Court decision in *Msiza* is that a distinction exists between land-reform and non-land-reform expropriations (2016 *Annual Survey* 235ff). Du Plessis argues that in the context of non-land-reform expropriations, the payment of market value may reflect just and equitable compensation in that market value may strike the most appropriate balance between the interests of the public and those of the landowner affected by the expropriation. However, in land-reform expropriations, where there may be other considerations at play, and the protection of existing property rights must be assessed in the light of the promotion of social justice and transformation, a different interpretation of public purpose when calculating just and equitable compensation may be needed. Reconciling the opposing claims in a just and equitable manner may require a more contextual balancing approach which is sensitive to the task of promoting the spirit, purport, and object of the Bill of Rights (WJ du Plessis 'The public purpose requirement in the calculation of just and equitable compensation' in B Hoops et al (eds) *Rethinking Expropriation Law I: Public Interest in Expropriation* (2015) 387).

Arguably, the outcome reached by the Supreme Court of Appeal shows that courts still appear to award compensation at market value, even in the context of land-reform expropriations. Perhaps this judgment presents a missed opportunity for the courts definitively to provide clarity on the question of whether expropriation below market value, or even minimal compensation, can be justified in the land-reform context, and if so, how such an adjustment from market value should take place within the current legal framework. The case certainly proves that it is difficult to justify why a reduction in market value is possible even though, in theory, the law allows for such a possibility. The same argument is made by Marais, where he submits that *Msiza SCA* appears to suggest that a downward adjustment of compensation at market value, purely on the basis of land reform, is impermissible (EJ Marais 'Is onteiening sonder vergoeding werk-

lik die antwoord?' (2018) *Litnet Akademies*). The *Msiza* judgment by the Supreme Court of Appeal has been taken on appeal to the Constitutional Court, which will, it is hoped, provide clarity on this matter once and for all.

CONTRACT: GENERAL PRINCIPLES

ROBERT SHARROCK*

LEGISLATION

There was no relevant legislation enacted during the period under review.

CASE LAW

AGREEMENT

Mistake

In *Botha v Road Accident Fund* 2017 (2) SA 50 (SCA), the court erroneously applied the reliance theory, in particular, the principle that A may hold B bound to contractual terms if B has led A reasonably to believe that B assented to the terms.

The appellant (Botha) and his wife, who had both sustained injuries in a motorcycle accident, instituted separate High Court actions for damages against the Road Accident Fund (the RAF). The RAF accepted liability for any damages Botha and his wife were able to prove. After negotiating with Botha, the RAF agreed to pay Botha R1 million in respect of general damages, and R236 922,70 in respect of past hospital and medical expenses. Botha had claimed only R150 000 for these expenses, but the RAF was persuaded to accept liability for the higher amount because of vouchers and documentation presented by Botha's attorney. The RAF furnished an undertaking in respect of Botha's future hospital and medical expenses, and the parties agreed to postpone the determination of Botha's loss of future earnings to a future date. The settlement agreement was made a court order, and the RAF paid Botha the sum of R1 236 922,70 in respect of his past medical expenses and general damages.

Botha's attorney then discovered that some of the documents relating to Botha's hospital and medical expenses were in his wife's file, and the correct amount of the expenses that Botha had incurred was R784 278,78. The attorney proposed that the con-

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sent order be rescinded and replaced with an order reflecting the correct amount. The RAF refused to do this, because the agreement was *res judicata* as it had been made an order of court. Botha's attorney approached the High Court seeking rescission or variation of the court order under uniform rule 42(1)*(c)*, contending 'there had been a mistake common to the parties' which rendered the settlement agreement void. The High Court dismissed the application. The Supreme Court of Appeal (Leach and Dambuza JJA with Saldulker JA and Fourie and Victor AJJA concurring) confirmed the High Court's order.

The Supreme Court of Appeal reasoned as follows. To obtain relief under rule 42(1)*(c)*, Botha had to show that the settlement agreement was concluded because of a 'common mistake' between him and the RAF as to the correct facts (para [8]). Botha had relied on *Tshivhase Royal Council & another v Tshivhase & another; Tshivhase & another v Tshivhase & another* 1992 (4) SA 852 (A) 863, in which Nestadt JA described a mistake envisaged by the rule as a 'common mistake' as understood in the field of contract, which occurs where both parties are of one mind and share the mistake. The judges held that *Tshivhase's* case was clearly distinguishable from the present matter because there both parties had acted in error on the strength of a misrepresentation by a third party. In the present matter, the error was best described as a 'unilateral mistake', because it was made by Botha's attorney who, through his misrepresentation, induced the RAF to contract on the terms that it did (para [9]).

The court pointed out that under the so-called reliance theory, if there is a material mistake by one party to a contract and, therefore, no actual *consensus*, the contract will be valid if the other party reasonably relied on the impression that there was *consensus* (para [10]). This was recognised in *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (3) SA 234 (A) 239. In *Sonap Petroleum* Harms AJA expressed the test as to whether reliance on a mistake entitles a party to resile from a resultant agreement (which is an adaptation of a *dictum* by Blackburn J in *Smith v Hughes* (1871) LR 6 QB 597 607) as follows:

> [D]id the party whose actual intention did not conform to the common intention expressed, lead the other party, as a reasonable man, to believe that his declared intention represented his actual intention? . . . . To answer this question, a three-fold enquiry is usually necessary, namely, firstly, was there a misrepresentation as to one party's

> intention; secondly, who made that representation; and, thirdly, was the other party misled thereby? . . . The last question postulates two possibilities: Was he actually misled and would a reasonable man have been misled?

In the present case, there was no suggestion that a reasonable person would have realised that there was a possibility of a mistake in the amount of past expenses. Botha's misrepresentation had misled the RAF and this had resulted in the conclusion of the settlement agreement. Botha could not rely on his own mistake, which was solely his fault, to avoid a contract (para [11]). As stated by Christie (RH Christie & GB Bradfield *Christie's the Law of Contract in South Africa* 6 ed (2011) 329–30):

> However material the mistake, the mistaken party will not be able to escape from the contract if his mistake was due to his own fault. This principle will apply whether his fault lies in not carrying out the reasonably necessary investigations before committing himself to the contract, that is, failing to do his homework; in not bothering to read the contract before signing; in carelessly misreading one of the terms; in not bothering to have the contract explained to him in a language he can understand; in misinterpreting a clear and unambiguous term, and in fact in any circumstances in which the mistake is due to his own carelessness or inattention (para [11]).

Botha's argument was that both parties had assumed that the relevant documentation reflected the figure agreed upon for past hospital and medical expenses and, consequently, the compromise was based on an incorrect assumption. The court was not persuaded. Leach and Dambuza JJA cited the case of *Van Reenen Steel (Pty) Ltd v Smith NO & another* 2002 (4) SA 264 (SCA), where it was pointed out that this was 'no more than an assumption based on a unilateral mistake'. As Harms JA said in that case (para [7]): 'The first problem facing the appellants is that they are unable to rely on a unilateral mistake because, as mentioned, the respondents were not the cause of the mistake in the sense discussed in *Sonap Petroleum* . . .'. The Supreme Court of Appeal concluded that the argument that there was a common mistaken assumption was 'no more than an attempt to clothe a unilateral mistake in another garb' (para [12]). While the court had a discretion whether or not to grant an application for rescission under rule 42(1)*(a)*, where, as in the present case, the court's order recorded the terms of a valid settlement agreement, there was no room for the court to do so (para [13]).

The court's reasoning has two fundamental flaws. First, the classification of the mistake as 'unilateral' rather than 'common' is

clearly incorrect. The reliance theory is applied where A and B fail to reach agreement on terms and B leads A reasonably to believe that he or she (B) agrees to the terms intended by A. *In casu*, the parties both knew what the relevant terms were and both agreed to those terms. The parties, however, both mistakenly assumed that the amount agreed upon for past hospital and medical expenses was correct, whereas the actual amount was a higher sum. The agreement was, in fact, based on an incorrect common assumption. This assumption was brought about by the action or inaction of Botha or his attorney, but it was common to both parties. Therefore, the question, which the court had to decide, was whether the common assumption was sufficient to invalidate the agreement. This depended on whether the assumption embodied a tacit term providing that if the facts were not as assumed, the agreement would be invalid.

The second flaw in Leach JA's reasoning is its acceptance of the proposition advanced by Christie that '[h]owever material the mistake, the mistaken party will not be able to escape from the contract if his mistake was due to his own fault'. This proposition ignores the purpose of the reliance theory. The law applies the reliance theory and upholds a contract without agreement to protect the reasonable expectations of the party seeking to uphold the contract (A); in particular, the reasonable impression of assent formed in A's mind as a result of the words or conduct of the other party (B). The fundamental issue in each case is whether B, by his or her words or conduct, led A reasonably to believe that he or she (B) agreed to A's terms (see, for example, *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* above 238–9; *Steyn v LSA Motors Ltd* 1994 (1) SA 49 (A) 61–4; *Unit Inspection Co of SA (Pty) Ltd v Hall Longmore & Co (Pty) Ltd* 1995 (2) SA 795 (A) 800; *Hlobo v Multilateral Motor Vehicle Accidents Fund* 2001 (2) SA 59 (SCA) 65-6; *HNR Properties CC & another v Standard Bank of SA Ltd* 2004 (4) SA 471 (SCA) paras [22]–[25]; *Constantia Insurance Co Ltd v Compusource (Pty) Ltd* 2005 (4) SA 345 (SCA) paras [16]–[18]; *Pillay & another v Shaik & others* 2009 (4) SA 74 (SCA) para [55]; *Slip Knot Investments 777 (Pty) Ltd v Du Toit* 2011 (4) SA 72 (SCA) para [9]; *Spenmac (Pty) Ltd v Tatrim CC* 2015 (3) SA 46 (SCA) para [30]; Dale Hutchison & BJ van Heerden 'Mistake in contract: A comedy of (*justus*) errors' (1987) 104 *SALJ* 523 525). The reliance theory does not exist to penalise B for his or her stupidity or carelessness. In fact, whether B acted culpably in

some way is irrelevant. Unreasonable conduct by the mistaken party at the time of formation of the contract may, of course, create the reasonable impression of assent in the mind of the other party, but it may not do this and, if not, there is no good reason for imposing contractual liability on the mistaken party.

One of the questions considered in *K2012150042 (South Africa) (Pty) Ltd v Zitonix (Pty) Ltd* [2017] 2 All SA 232 (WCC) was whether the respondent (Zitonix) could rely on mistake to avoid liability under a number of written contracts it had concluded. Zitonix, part of a group of companies (the Platinum Group), had concluded five written lease agreements with the applicant. The sole director of the Platinum Group (Joubert) had signed a deed of suretyship in favour of the applicant in respect of all five leases. Clause 16.1*(e)* of each lease provided that 'should any surety of the tenant be sequestrated or placed in liquidation, then and in any such event the landlord shall have the right . . . forthwith to cancel the lease and . . . resume possession of the premises . . .' (para [11.15]). Joubert, who signed for Zitonix, contended that he was unaware of this provision when he signed the leases and, accordingly, the contracts were void for mistake.

Holderness AJ rejected the contention. She pointed out that in *Slip Knot Investments 777* (*Pty*) *Ltd v Du Toit* 2011 (4) SA 72 (SCA) paragraph [12], Malan JA held that a contracting party is not bound to inform the other party of the terms of the proposed agreement apart from where there are terms that could not reasonably have been expected in the contract. The inclusion of clause 16.1*(e)* – which had featured in previous agreements that the respondent had signed – was neither unexpected nor surprising (para [68]). In the light of the financial hardships that the Platinum Group had experienced, and the fact that previous tenants had defaulted leaving millions of rands owing, one would have expected the applicant to have a safeguard in place, such as the clause in question, entitling it to cancel the agreement forthwith if its security was compromised (para [69]).

Certainty

RM v BM 2017 (2) SA 538 (ECG) concerned an antenuptial contract (ANC) with conflicting clauses. Plasket J concluded that because of the conflicting clauses, the contract was void for vagueness.

Clauses 1 and 2 excluded community of property and profit and loss and clause 3 made the marriage subject to the accrual

system in terms of the Matrimonial Property Act 88 of 1984. Clause 4 listed the assets comprising the intended spouses' estates for purposes of calculating the accrual.

> That for the purpose of proof of the net value of their respective estates at the commencement of the intended marriage the intended spouses declared the net value of their respective estates to be as follows:
>
> 4.1 That of BM [Mr M] is R810 105.00 consisting of
>
> | | | |
> |---|---|---|
> | 4.1.1 | Farm 656 Monte Rosa | 480 000, 00 |
> | 4.1.2 | Elliot Brothers Loan Account | 100 000, 00 |
> | 4.1.3 | Elliot Brothers Shares | 100, 00 |
> | 4.1.4 | Tomlinson & Wootton Loan Account | 30 000, 00 |
> | 4.1.5 | Tomlinson & Wootton Shares | 5, 00 |
> | 4.1.6 | Livestock and Implements | 60 000, 00 |
> | 4.1.7 | Motor Vehicle | 40 000, 00 |
> | | | 810 105, 00 |
>
> 4.2 That of the said RJ [Mrs M]) is R20 000,00 in respect of cash on hand.

Clause 5 directly contradicted clause 4 by excluding from the accrual the husband's listed property (or a substantial part of that property). Plasket J held that clauses 4 and 5 were 'irreconcilably' contradictory, and this rendered the contract 'void on account of its vagueness'. In the result, the marriage of the spouses was in community of property (para [8]).

The judge pointed out that in *JK v RK* [2014] ZAGPPHC 242 (paras [10] [13]), Louw J held that where two clauses in an ANC contradicted each other materially and irreconcilably, the ANC was void for vagueness (para [9]). Louw J reached the same conclusion in *Bath v Bath* GNP 8681/10 (5 November 2012) unreported, in respect of an ANC structured in the same way as the one in the present case. He pointed out that assets cannot both be included in and excluded from the accrual and, consequently, the clauses which provided for this could not be implemented (para [10]). This judgment was upheld by the Supreme Court of Appeal (*Bath v Bath* [2014] ZASCA 14 (24 March 2014)). Lewis JA remarked (paras [19]–[21]) that the relevant clauses were 'so contradictory and incoherent' that they vitiated the contract as a whole. The contract did not embody terms that enabled the court to give effect to the intention of the parties. The High Court had correctly concluded that the contract was void for vagueness (para [11]).

Plasket J pointed out that there was 'no material difference' between the ANC in the *JK* case and that in the present matter. In

Bath, the only difference in the ANC was that no values were ascribed to the assets listed in clause 4, but the assets were all excluded in clause 5 (para [12]). For the reasons set out in those cases, clauses 4 and 5 were 'contradictory, and irreconcilably so' and, being material, they were incapable of being severed from the rest of the ANC. The result was that the ANC was void for vagueness (para [13]).

The husband had argued that the assets listed in clause 4.1 were not to be taken into account in the calculation of the accrual. Plasket J disagreed. He pointed out that there was 'no solution to the problem created by the conflict between clauses 4 and 5.' Inconvenient provisions could not be ignored. The document had to be interpreted as a whole and given meaning. If that could not be done, the contract, subject to the possibility of severance, would be void (para [14]).

In *Roazar CC v The Falls Supermarket CC* [2017] 2 All SA 665 (GJ), the court of first instance accepted that an agreement to negotiate in good faith is enforceable, even if it does not include a deadlock-breaking mechanism. On appeal (*Roazar CC v The Falls Supermarket* (232/2017) [2017] ZASCA 166 (29 November 2017)), the court held that an agreement to negotiate is binding only if it contains a deadlock-breaking mechanism. The view of the lower court is preferable.

The respondent (The Falls) was a supermarket that hired its premises from the respondent (Roazar) in terms of a five-year lease concluded in May 2011. The relevant clauses in the lease provided as follows:

> 3 *Lease Period and Right of Renewal*
> 3.2 The lease shall be for the period stated in Section 4 of the Schedule.
> 3.3 The Tenant shall . . . be entitled to renew this lease for the period set out in item 5 of the Schedule ('the renewal period') on the same terms and conditions as herein contained, save that the rental for the renewal period shall be set out in item 5 of the Schedule and to be negotiated at the stipulated time.
> 3.5 The renewal period is to be negotiated and discussed at least 1 (one) calendar month prior to the expiry of the lease period stated in Section 6 of the Schedule. The Landlord and Tenant shall endeavor to reach agreement on the monthly rental which shall apply during the renewal period and the escalation in respect of such rental.
> 3.6 In the event that the renewal of the lease is not negotiated prior to the expiry of the lease, the Lessee will be liable for the rental on the same terms and conditions of this lease.

3.7 In event of the situation envisaged in 3.5 above, the lease will then continue on a month to month basis, subject to 1 (one) calendar months written notice by either party for the cancellation thereof.

Schedule
Item 5 Fixed date: 1 March 2011
Item 6 Renewal period: 5 (five) years (To be agreed in writing and negotiated between Tenant and Landlord 1 (one) month prior to the expiration of the lease period).

As early as 2014, The Falls notified Roazar that it wished to renew the lease when it expired. After expiry of the lease on 29 February 2016, Roazar gave The Falls a month to vacate the premises. The Falls argued that it was entitled to remain in occupation because it had a right to negotiate a renewal of the lease.

The parties were in agreement that clause 3.3 of the lease granted the lessee an option to renew. Roazar contended that the exercise of the option needed to be in writing and had to take place one month before the expiry of the lease. It sourced these two requirements from Item 6 of the Schedule to the main lease agreement, read with clauses 3.5 and 3.7. The result was that the lease agreement would terminate at the end of February 2016 if the option to renew were not exercised at least one month before expiry of the lease period.

The Falls argued that the lease agreement did not expressly prescribe when and how it had to exercise its right of renewal. It was instead implied that the option to renew would have to be exercised no less than one month prior to expiry of the lease. This was implied from clause 3.5, which stipulated that the renewal period was to be 'negotiated and discussed' one month prior to expiry of the lease, and from item 6, which stated that the renewal period was to be agreed in writing and negotiated one month prior to expiry of the lease. Once the option to renew had been exercised, the parties would then have to negotiate the renewal period and the rental and escalation during the renewal period. During this negotiation period, the lease would continue, on a month-to-month basis, in terms of clause 3.7.

Klaaren AJ agreed with The Falls' interpretation (para [16]). Adopting this interpretation, the question was whether an agreement to negotiate in good faith is enforceable. Klaaren AJ concluded that it is and, accordingly, that Roazar's eviction application was premature (paras [33] [34]).

The acting judge reasoned as follows. In *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256

(CC), the Constitutional Court indicated its thinking on the enforceability of agreements to negotiate. Moseneke DCJ said (para [72]):

> Were a court to entertain Everfresh's argument [that agreements to negotiate are enforceable], the underlying notion of good faith in contract law, the maxim of contractual doctrine that agreements seriously entered into should be enforced, and the value of *ubuntu*, which inspires much of our constitutional compact, may tilt the argument in its favour. Contracting parties certainly need to relate to each other in good faith. Where there is a contractual obligation to negotiate, it would be hardly imaginable that our constitutional values would not require that the negotiation must be done reasonably, with a view to reaching an agreement and in good faith (para [18]).

Yacoob J, writing for the four dissenting judges, was 'even more positively inclined towards such a development' and would have sent the issue back to the High Court for 're-interpretation and potential development' (para [29]). Klaaren AJ noted that legal academic opinion favours the development of the common law to recognise a duty to negotiate in good faith, especially in the context of renewal options. The judge referred to Graham Glover *Kerr's Law of Sale and Lease* (2014) 4ed 546-7; Andrew Hutchison, 'Agreements to agree: Can there ever be an enforceable duty to negotiate in good faith?' (2011) 128 *SALJ* 273) (para [30]).

The issue foreshadowed in *Everfresh* arose 'squarely' for decision in the present case (para [31]). The Falls argued that an objective standard such as 'the *arbitrium boni viri*' could be applied where a party undertakes an obligation to negotiate a further agreement. The party 'would be obliged to act honestly and reasonably in the conduct of the negotiations and a court would be able to determine whether it complied with such standards' (*Indwe Aviation (Pty) Ltd v The Petroleum Oil and Gas Corporation of South Africa (Pty) Ltd & another* 2012 (6) SA 96 (WCC) para [28]) (para [32]).

The Falls argued that this was an appropriate case for developing the common law by invoking section 39(2) of the Constitution. Klaaren AJ found that it was unnecessary to take this step because in the recent case of *South African Broadcasting Corporation Soc Limited v Via Vollenhoven and Appollis Independent CC & others* [2016] ZAGPJHC 228 (GJ), the court had ordered parties to negotiate in good faith as required by the terms of a contract. In that case, the enforceability of agreements

to negotiate was not extensively canvassed. However, the decision was not clearly wrong and, accordingly, was binding on the present court (para [33]).

In the Supreme Court of Appeal, Tshiqi JA agreed with The Falls' interpretation of the lease. The judge came up with the following 'sensible interpretation' of the agreement. The Falls had to notify Roazar at least one month before the expiry of the current lease period that it wished to exercise its right of renewal. It did not have to do so in writing. In that event, and whilst the parties were negotiating the renewal terms, the provisions of clause 3.7 would be invoked if necessary and the lease agreement would continue on a month-to-month basis until an agreement was reached or negotiations failed and one of the parties gave notice (para [11]).

Tshiqi JA reasoned that, as a general rule, an agreement that the parties will negotiate to conclude another agreement is not enforceable because of the absolute discretion vested in the parties to agree or disagree (*Premier, Free State & others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) para [35]; *Southernport Developments (Pty) Ltd v Transnet Ltd* 2005 (2) SA 202 (SCA) para [17]). However, the courts have been prepared to enforce the terms of a contract that require parties to negotiate in good faith in instances where there is a deadlock-breaking mechanism (para [13]). The main agreement had no deadlock-breaking mechanism and, accordingly, there was no obligation on Roazar to continue to negotiate with The Falls (para [15]).

The Falls submitted that the common law should be developed to recognise the validity of an agreement to negotiate in circumstances where there is no deadlock-breaking mechanism. For this contention it relied on section 39(2) of the Constitution of the Republic of South Africa, 1996 (the Constitution), and it referred to *Paulsen & another v Slip Knot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC) and *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* above (para [16]). Tshiqi JA dealt with the argument as follows:

> A development of the common law in order to compel parties to negotiate in good faith even in circumstances where there are no deadlock-breaking mechanisms is not without complications. In *Bredenkamp & others v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) this court found it difficult to countenance the fairness of imposing on a Bank the obligation to retain a client simply because other banks are not likely to accept that entity as a client. The appellants were unable to find a constitutional niche or other public

> policy consideration justifying their demand. It found that there was no 'unjustified invasion of a right expressly or otherwise conferred by the highest law in our land'. The court said that the Bank had a contract, which was valid, and that gave it the right to cancel. It further said that the termination did not offend any identifiable constitutional value and was not otherwise contrary to any other public policy consideration. The court highlighted important considerations that militate against tampering with the notion of sanctity of a contract between two parties (para [19]).

Carole Lewis in 'The uneven journey to uncertainty in contract' (2013) 76 *THRHR* 80 highlighted some of the fundamental difficulties that a High Court would have to deal with if asked to determine whether a party has negotiated in good faith. She said:

> What would a high court, faced with parties who cannot agree on a material term of their contract, do to determine the dispute? It cannot make a contract for them. It cannot decide what future rental should be. Can it even decide whether their bargaining power is equal, given that they may be large corporate entities? And does equality of bargaining power depend on the parties' monetary worth or their negotiating skills or their political or business influence?

With reference to *Everfresh,* Lewis said:

> How could a court develop the common law in this regard? How would it enforce a duty to negotiate in good faith and precisely what does that mean? Does a failure even to discuss future rental amount to bad faith? I think not. If a court were to order parties to agree on a term, and they could not, would they be in contempt of court? And how would one determine who, if anyone, was at fault? How could *Everfresh*, in this matter, even rely on the expectation of renewal of the lease where there was no basis upon which to proceed? If it means simply talking, what is the point, given that Shoprite had decided that it did not wish to renew its lease with *Everfresh*? And that it had commercial reasons not do so, including a necessary renovation of the premises (para [20]).

Tshiqi JA concluded that the facts of the matter before it were a clear illustration of the complications highlighted by this court in *Bredenkamp* and by Lewis in her article (para [21]). The Falls had not stated how long negotiations were required to take place and the contract was silent on this issue. The contract also did not state the criterion that would be used to determine whether either of the parties was negotiating in good faith (para [22]). Tshiqi found herself in agreement with Roazar that it would be against public policy for a court to coerce a lessor to conclude an agreement with a tenant whom it no longer wishes to have as a tenant (para [24]).

Tshiqi JA's judgment does not fully take into account what the

Constitutional Court said in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* (above) regarding the enforceability of agreements to negotiate. In addition, the following pertinent remarks were made by Jafta J in *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) paragraph [102], regarding the enforceability of agreements to negotiate:

> [I]t is not only difficult in the present circumstances but also undesirable to lay down an objective standard of good-faith bargaining which the parties must undertake. Suffice it to say that what the parties are precluded from doing is to negotiate in bad faith. They are not allowed to enter into those negotiations just to go through the motions. For that would not be what they have agreed to do, but a charade. Both sides must enter into negotiations with serious intent to reach *consensus*.

It is clear from this passage that the parties to an agreement to negotiate are not permitted to negotiate in bad faith: they must enter into negotiations with a serious intention to reach *consensus*. This principle accords with the view adopted in *Indwe Aviation (Pty) Ltd v Petroleum Oil and Gas Corporation of South Africa (Pty) Ltd (No 1)* (above) paragraph [28], that a party who undertakes an obligation to negotiate an agreement is compelled to act honestly and reasonably in the conduct of the negotiations. Dishonest or unreasonable conduct in breach of this duty would clearly amount to negotiation in bad faith or, to use Jafta J's words, merely 'going through the motions' with no 'serious intent to reach *consensus*'.

The facts of *Basson & others v Hanna* 2017 (3) SA 22 (SCA), [2017] 1 All SA 669 are set out under 'Damages' (below). One of the arguments raised was that the alleged agreement between Hanna and Basson had not come into being because the parties had failed to reach *consensus* on the rate of interest applicable to their agreement. The parties had, in fact, agreed that the interest rate would be prime plus 1 per cent, but they had not reached agreement on whether the rate would be fixed or variable.

The appeal court held that the failure to reach *consensus* on interest did not matter. Zondi JA pointed out that the parties' failure to agree on the rate of interest does not render the agreement invalid. If no rate has been agreed on, expressly or impliedly, and the rate is not governed by any other law, the rate of interest is that prescribed from time to time by notice in the *Government* Gazette by the relevant Minister in terms of the Prescribed Rate of Interest Act 55 of 1975 (para [16]).

Illegality

Statutory illegality

Mfengwana v Road Accident Fund 2017 (5) SA 445 (ECG) confirms that a contingency fee agreement which does not comply with section 2(2) of the Contingency Fees Act 66 of 1997 (the Act) is invalid and may constitute overreaching.

Mfengwana and his attorney, Rubushe, entered into a contingency fee agreement for his claim against the Road Accident Fund (the RAF). The claim was settled before it went to trial. As required by section 4(3) of the Act, the parties requested a judge (Plasket J) to make the settlement agreement an order of court. At the first hearing, Plasket J postponed the matter so that a copy of the contingency fee agreement could be made available to him and affidavits required by section 4(1) and section 4(2) of the Act could be filed (one by Rubushe stating the information specified in section 4(1)*(a)–(g)*, and another by Mfengwana stating the information required in section 4(2)*(a)–(c)*). Before the second hearing, Plasket J was supplied with a copy of the contingency fee agreement and Rubushe filed an affidavit in which he said: 'I will charge [a] fee of 25% from the client or . . . double my fees and take whichever is lesser which would not be more than 25% [of the] agreed fees'. Mfengwana did not file an affidavit.

Clause 5 of the contingency fee agreement entitled Rubushe to 25 per cent of the damages awarded by the RAF to Mfengwana. Plasket J found that the agreement was contrary to the Act and invalid, and that Rubushe's attempt to claim 25 per cent of the award constituted overreaching. The judge further ordered that a copy of his judgment be delivered to the Cape Law Society.

The main points made in the judgment were as follows. The basic idea behind a contingency fee agreement is that the attorney takes on the risk of financing his client's litigation. If the litigation is not successful, the attorney will not be paid; if the litigation is successful, the attorney will be entitled to a success fee that is higher than his or her normal fee (paras [5] [6]). Section 2 is the core of the Act. It makes provision for contingency fee agreements and for the higher than normal fee that an attorney may charge. It provides:

> (1) Notwithstanding anything to the contrary in any law or the common law, a legal practitioner may, if in his or her opinion there are reasonable prospects that his or her client may be successful in any proceedings, enter into an agreement with such client in which it is agreed –

> *(a)* that the legal practitioner shall not be entitled to any fees for services rendered in respect of such proceedings unless such client is successful in such proceedings to the extent set out in such agreement;
> *(b)* that the legal practitioner shall be entitled to fees equal to or, subject to subsection (2), higher than his or her normal fees, set out in such agreement, for any such services rendered, if such client is successful in such proceedings to the extent set out in such agreement.
>
> (2) Any fees referred to in subsection (1)*(b)* which are higher than the normal fees of the legal practitioner concerned (hereinafter referred to as the success fee), shall not exceed such normal fees by more than 100 per cent: Provided that, in the case of claims sounding in money, the total of any such success fee payable by the client to the legal practitioner, shall not exceed 25 per cent of the total amount awarded or any amount obtained by the client in consequence of the proceedings concerned, which amount shall not, for purposes of calculating such excess, include any costs (para [11]).

The case law indicates that contingency fee agreements that do not comply with the provisions of the Act are invalid (*Price Waterhouse Coopers Inc & others v National Potato Co-operative Ltd* 2004 (6) SA 66 (SCA) para [41]; *Tjatji v Road Accident Fund & two similar cases* 2013 (2) SA 632 (GSJ) para [13]). Strict compliance with the Act is necessary to prevent abuse by unscrupulous legal practitioners (para [12]). It was clear that a 'fee' of 25 per cent of R904 889,17 (R226 222,30) was grossly disproportionate and amounted to overreaching on an outrageous scale (para [19]).

The contingency fee agreement *in casu* provided for a fee of '25% of the total of damages awarded' (para [17]). This was in conflict with section 2(2) of the Act, which allowed an attorney, who was party to a contingency fee agreement, to recover a success fee based on the work done at a maximum of twice his or her usual fee. That amount could not, however, exceed 25 per cent of the award (para [20]). Rubushe sought in his affidavit to amend the agreement unilaterally and retrospectively. This could not avail him. The contingency fee agreement as a whole was invalid for its failure to comply with section 2(2) of the Act (paras [23]–[25]). Therefore, the common law applied, meaning that Rubushe was only entitled to a reasonable fee in relation to work performed (para [26]).

The judge summed up the position:

> This is yet another case in which an attorney – an officer of the court who is supposed to act with integrity and comply with the highest

> ethical standards – is guilty of an attempt to grossly overreach his client, of rapacious and unconscionable conduct. Unfortunately, in this jurisdiction, this is a problem that is all too common. That said, however, it seems to me that the problems in relation to contingency fee agreements that come to the attention of the courts are, in all likelihood, but the tip of the iceberg. . . . Anecdotal evidence within the legal profession points towards widespread abuses. In a matter I heard recently, counsel contended that s 2(2) of the Act was ambiguous because many attorneys he had spoken to interpreted it to mean that they were entitled to take 25% of their client's award . . . This is all cause for grave concern and, if I am correct, a manifestation of endemic corruption embedded in the attorneys' profession. For this reason I intend requesting the registrar of this court to deliver a copy of this judgment to the Cape Law Society so that it, as custodian of the ethical standards of the profession in the public interest, may consider ways and means of stopping the rot (paras [27]–[29]).

Nash & another v Mostert & others 2017 (4) SA 80 (GP) concerned the validity of a contingency fee agreement relating to a non-litigious matter. Tuchten J noted that the thread running through the judgments and commentary is that 'making a legal practitioner a partner in his client's enterprise tends to subvert the interests of justice' (para [79]). With this in mind, there could be no justification for allowing legal practitioners to conclude contingency fee agreements for non-litigious work. The judge concluded that contingency fee agreements in relation to non-litigious work are against public policy for broadly the same reasons that such agreements are contrary to public policy in relation to litigious work (para [80]).

Section 26 of the Estate Agency Affairs Act 112 of 1976 provides that no person can perform an act as an estate agent unless a valid fidelity fund certificate has been issued to him or her, and to every person employed by him or her as an estate agent. The section goes on to state that if the person in question is a company, a valid fidelity fund certificate must also have been issued to each of its directors. Section 34A of the Estate Agency Affairs Act provides that if an estate agent is a company, the company will only be entitled to remuneration for acts performed as estate agent if at the time of the performance of the acts, a valid fidelity fund certificate has been issued to the company and to every director of the company. One of the issues in *Crous International (Pty) Ltd v Printing Industries Federation of South Africa* [2017] 1 All SA 146 (GJ) was whether there are circumstances in which an estate agent, which is not in possession of a

valid fidelity fund certificate as required by the Act, is entitled to recover commission on sales that it has brought about.

The plaintiff, an estate agency company, claimed an amount of commission from the defendant for bringing about the sale of the defendant's property. It was common cause that for the period in which the plaintiff was engaged in arranging this sale, it was not in possession of a fidelity fund certificate, although certificates had been issued to its directors. The plaintiff's case was that, although it was not in physical possession of the certificates, they ought to have been issued to it because it had complied with the requirements for their issue and the failure to issue was due purely to a technical difficulty experienced by the Estate Agents Board (the Board) in printing certificates. The plaintiff contended that this was a unique situation and that, essentially, it ought to be assumed that it had been issued with certificates for the period in question. The plaintiff relied on *Cape Killarney Property Investments* (*Pty*) *Limited v Mahamba & others* 2001 (4) SA 1222 (SCA) and *Theart & another v Minnaar NO*, *Senekal v Winskor 174 (Pty) Ltd* 2010 (3) SA 327 (SCA) for its submission that form should not be elevated above substance. The defendant maintained, on the other hand, that section 34A requires strict compliance and this means that certificates had to have been produced and given to the plaintiff.

The court found for the plaintiff, reasoning as follows. Section 39(2) of the Constitution requires every court when interpreting any legislation to promote the spirit, purport, and objects of the Bill of Rights. In terms of section 22 of the Constitution 'every citizen has the right to choose their trade, occupation or profession freely' but '[t]he practice of a trade, occupation or profession may be regulated by law' (para [88]). Sections 26 and 34A of the Estate Agency Affairs Act regulate the practice of the profession of an estate agent. A court is constitutionally obliged, when interpreting these sections, to promote the right freely to choose a trade, occupation, or profession, rather than to restrict that right. The approach contended for by the defendant, being a 'strict, narrowly textual, or literal approach', was not apposite to achieving that objective. 'A more purposive, or substantive, approach was called for' (para [89]).

In *Liebenberg NO & others v Bergrivier Municipality (Minister for Local Government, Environmental Affairs and Development Planning, Western Cape intervening)* 2013 (5) SA 246 (CC) paragraphs [22]–[26], the Constitutional Court held that the

approach or test to be applied is 'whether there has been compliance with the relevant precepts in such a manner that the objects of the statutory instruments concerned have been achieved' (para [91]). Consequently, the court had to determine the purpose of sections 26 and 34A and whether, on the facts, that purpose has been achieved (para [92]). The purpose of sections 26 and 34A is to ensure that those performing acts as estate agents are registered with the Board and meet the requirements for the issue, by the Board, of a licence permitting them to perform those acts lawfully for remuneration (para [95]). The uncontested evidence was that the plaintiff had complied with all of the provisions of the Estate Agency Affairs Act and that there was no reason at all why certificates for the relevant years could not have been issued to the plaintiff, save for inability of the Board to print the certificates (para [97]). Moreover, the directors of the plaintiff had been issued with certificates for the requisite periods and this would not have happened if the plaintiff had not complied with the requirements of the Act and regulations (para [98]). The consequence of this was that the plaintiff's claim to be remunerated for the acts it performed as estate agent during the years when it had not itself been issued with certificates, had to succeed (para [99]).

Illegal enforcement

In *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* 2017 (4) SA 243 (GJ), the court refused to enforce a cancellation clause on the ground that implementing the clause would be contrary to the constitutional value of fairness implicit in the concept of *ubuntu*.

The lease between the applicant landlord (Leisure Holdings) and the respondent tenant (Southern Sun) provided that 'the lessee shall make monthly. . .rent payments to the lessor by not later than the seventh day of each month'. Clause 20 stated that if lessee failed to any month's rent by its due date, the landlord would be entitled to cancel the contract and repossess the property. In June 2014, Southern Sun failed to pay rental on the due date. Leisure Holdings sent a letter to Southern Sun demanding payment of the rent within five days, failing which the lease would be cancelled. The letter added that in the event of any future failure to pay rental on due date, no notice to remedy would be given and cancellation of the lease would immediately follow. The June rental was immediately transferred into Leisure

Holding's bank account in compliance with the demand. On the same day, Southern Sun's bank, Nedbank, accepted responsibility for the late payment, stating in a letter addressed to Leisure Holdings that the non-payment of rental was 'caused as a result of a change in Nedbank processes which impacted the payment run for 1 June 2014 and by no omission of the client' (para [9]).

The payments in respect of July, August, and September rent, were all made before the due date. The October 2014 rent was taken from Southern Sun's bank account on 6 October 2014, but it was not transferred to Leisure Holdings. Leisure Holding's attorneys informed Southern Sun of its breach of the agreement and further advised it that Leisure Holdings had 'elected to exercise its right . . . to cancel the lease agreement with immediate effect' (para [12]). On the 21 October 2014, Southern Sun transferred the amount of the October rental into Leisure Holding's bank account, including an amount of interest to compensate for the late payment. Southern Sun was informed by Nedbank that an investigation had revealed and the 'non-payment occurred as a result of a technical administrative error' (para [13]). In a further letter, Nedbank reported on 'the time line events' leading up to the October non-payment. The report revealed a plethora of blunders and inadvertence in administering Southern Sun's stop-order instruction. This was a result of Nedbank's implementation of a 'corporate payment system' in May 2014, in replacement of the existing stop-order system.

Van Oosten J held that Leisure Holdings was not entitled to enforce the cancellation clause. He reasoned that in *Juglal NO & another v Shoprite Checkers (Pty) Ltd t/a OK Franchise Division* 2004 (5) SA 248 (SCA) paragraph [12], Heher JA said that a 'creditor who implements the contract in a manner which is unconscionable, illegal or immoral will find that a court refuses to give effect to his conduct but the contract itself will stand'. In *Combined Developers v Arun Holdings & others* 2015 (3) SA 215 (WCC) paragraph [36], Davis J understood this *dictum* to mean 'that a contractual provision may not itself run counter to public policy but that the implementation may be so objectionable that it is sufficiently oppressive, unconscionable or immoral to constitute a breach of public policy' (para [23]). In *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* (above) paragraph [71], the majority of the justices held that in the development of the common law it is 'highly desirable and in fact necessary to infuse the law of contract with constitutional values,

including values of *ubuntu*, which inspire much of our constitutional compact'. The majority considered that the concept of *ubuntu* emphasises the communal nature of society and 'carries in it the ideas of humaneness, social justice and fairness'. It also envelopes 'the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity' (para [26]).

Van Oosten J reasoned that in the present case, it was the implementation of the cancellation clause that had to be subjected to constitutional scrutiny (para [27]). The court was required to make a value judgement based on constitutional concepts and values. In particular, the concept of *ubuntu* was paramount. The final test was whether the circumstances of the case constituted sufficient cause for relaxation of the *pacta sunt servanda* principle (para [28]).

Van Oosten J furnished the following information regarding the nature of the hotel business conducted by Southern Sun:

> The five-storey building in which the hotel is housed comprises 292 rooms, a restaurant, a bar, 5 meeting rooms, a 'team' room, an outdoor pool, a gymnasium and parking. The premises have been utilised for the conducting of the business as a hotel since 1982. The nature of the business, primarily, is hotel accommodation across all market segments, including corporate, government, leisure, standard tour operators, conferencing and food and beverage services. Guests from abroad are primarily from Europe, especially France and Germany. . . . [Southern Sun's] hotel is operated and managed as part of a total of 18 Garden Court-branded hotels, which is a well-known, established brand in the hospitality industry. Employment is provided to 91 permanent members of staff, additional casual staff as well as indirectly to secondary staff and service providers The annual turnover of the respondent's hotel division in South Africa runs into millions of rands (paras [29] [30]).

The prejudice either party would suffer from an order for eviction was of crucial importance (para [31]). Southern Sun had pointed out that its ejection would cause 'untold damages, both patrimonial and reputational'. Further, it would effectively sound the death knell for the hotel, which Southern Sun would be unable to replace in Cape Town. In short, an order to vacate the premises would cause Southern Sun irreparable harm (para [32]). Leicester Holdings had not shown that it would suffer any prejudice if the eviction order were not granted (para [33]).

Van Oosten J pointed out that in the present case, Southern Sun's bank was 'wholly responsible for the predicament' in which

the hotel now found itself. The bank had acted as Southern Sun's agent, but the hotel had not placed unjustified trust in the bank. After the June non-payment of rental, Southern Sun had taken steps to avoid a repetition thereof. For the next three months, the bank processed the payments timeously. In relation to October payment, Southern Sun had been led to believe that payment had been made in time once the debit entry appeared on its bank statement (para [34]).

Van Oosten J concluded as follows:

> In a nutshell the court is required to balance the late payment of the October rental, on the one hand, juxtaposed with the bank solely having to bear the blame for the late payment, and the prospect of [Southern Sun] . . . suffering disproportionate prejudice in the event of eviction. The determinant criterion is the demonstrable unfairness in the implementation of clause 20, in granting an order for eviction as sought by the applicant. . . . Applying the value of *ubuntu*, 'carrying with it the ideas of humaneness, social justice and fairness', to the facts of this matter, finally leads me to conclude that an order for the eviction of [Southern Sun] . . . would offend the values of the Constitution I have alluded to, and that the application accordingly must fail' (para [35]).

Accepting that enforcement of a contract may, in certain circumstances, be so unfair as to be contrary to the value of *ubuntu*, what specific principles are to be applied to ensure that the outcome in any particular case does not 'depend on the personal idiosyncrasies of the individual judge', and to prevent unfair enforcement from becoming a 'last resort' defence of the 'recalcitrant and otherwise defenceless' debtor (cf *Donelly v Barclays National Bank Ltd* 1990 (1) SA 375 (W) 381; *Standard Bank of SA Ltd v Wilkinson* 1993 (3) SA 822 (C) 828; *Pangbourne Properties Ltd v Nitor Construction (Pty) Ltd & others* 1993 (4) SA 206 (W) 210)? If no principles are recognised, this in all likelihood will have the effect of introducing a large measure of uncertainty into contract enforcement, with judges deciding cases according to their personal sense of fairness and reasonableness.

A practical solution, immediately available, is for the courts to follow the principles that they have adopted in relation to substantive unfairness of terms (see *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) 8–9; *Botha (now Griessel) & another v Finanscredit (Pty) Ltd* 1989 (3) SA 773 (A) 781–4, and *Standard Bank of SA Ltd v Wilkinson* above 828) suitably tailored or modified to deal with unfair enforcement. In *Brisley v Drotsky* 2002 (4) SA 1 (SCA) paragraph [32], the majority of the court foresaw that the courts

would have to take this approach if the '*Sasfin* principle' were broadened to prevent the enforcement of contractual provisions not *per se* contrary to public policy. See also Gerhard Lubbe 'Taking fundamental rights seriously: The Bill of Rights and its implications for the development of contract law' (2004) 121 *SALJ* 395 412, 418-19, cf Graham Glover 'Lazarus in the Constitutional Court: An exhumation of the *exceptio doli generalis*?' (2007) 124 SALJ 449 457.

Following this approach, certain general principles may be formulated. A court may refuse to enforce a valid contractual provision based on unfairness only if the enforcement would be manifestly inimical to the interests of the community. A judge must avoid finding that enforcement would be contrary to public policy merely because it would offend his or her individual sense of fairness (cf *Sasfin (Pty) Ltd v Beukes* above 8). The power to refuse enforcement must be exercised sparingly. This should be resorted to only in cases in which the element of public harm is manifest (*Botha (now Griessel) & another v Finanscredit (Pty) Ltd* above 783; *Standard Bank of SA Ltd v Wilkinson* above 827; *Mufamadi v Dorbyl Finance (Pty) Ltd* 1996 (1) SA 799 (A) 804; *Price Waterhouse Coopers Inc v National Potato Co-Operative Ltd* 2004 (6) SA 66 (SCA) para [23]). To give judges discretionary power beyond this could give rise to considerable legal and commercial uncertainty (*South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) para [27]; *Potgieter v Potgieter NO* 2012 (1) SA 637 (SCA) para [32]).

To decide whether enforcement would cause manifest public harm, the court must consider the interests of the community as a whole, and not merely the interests of the individual parties to the contract or a few members of the community (cf *Standard Bank of SA Ltd v Wilkinson* above 827–32). In addition, not too much weight should be attached to the interests of the party who would be adversely affected by the enforcement. It is clear from *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd (*above) that relevant matters include whether the party in breach knew of the breach or could have prevented it from happening, and the prejudice either party will suffer if enforcement is, or is not, granted.

Enforcement of a valid contractual term will not be offensive to public policy if it can be justified in the broad commercial context in which it is sought. This generally boils down to determining whether the creditor has a sound commercial reason for wanting

to enforce the provision in question (*Standard Bank of SA Ltd v Wilkinson* above 832–7).

Formalities

In *Mokone v Tassos Properties CC & another* 2017 (5) SA 456 (CC), the court confirmed that a contract of pre-emption in respect of land need not comply with the formalities laid down by section 2(1) of the Alienation of Land Act 68 of 1981 (the Act).

Mokone and Tassos concluded a written lease which contained a right of pre-emption. The parties agreed to extend the written lease and Tassos's representative wrote on the cover of the lease: 'Extend till 31/5/2014 monthly rental R5 500'. The representative signed the note, but Mokone did not. Tassos subsequently sold and transferred the property to Blue Canyon. Blue Canyon argued that because only the representative of Tassos had signed the manuscript endorsement extending the lease, the right of pre-emption was invalid.

Madlanga J rejected the argument. He reasoned that in terms of section 2(1) of the Act, the formality on signature relates to 'alienation of land'. The Act provides that 'alienate' in relation to land means to sell, exchange, or donate, irrespective of whether such sale, exchange, or donation is subject to a suspensive or resolutive condition (para [46]). In the case of a right of pre-emption, an 'alienation' takes place only when that right is exercised and a sale comes into being. Merely affording someone that right is not an alienation because that is simply not a sale, exchange, or donation (para [47]).

Madlanga J held that when the Formalities in Respect of Contracts of Sale of Land Act 71 of 1969 (the Formalities Act) was still in operation, it did not apply to a right of pre-emption. In *Rogers v Phillips* 1985 (3) SA 183 (E), Kannemeyer J adopted this view. The parties asked the judge to deal with the preliminary issue of whether writing was a prerequisite for the validity of a right of pre-emption. Kannemeyer held that 'neither in terms of s 1(1) of [the Formalities Act] nor in terms of s 2(1) of [the Act] does a right of pre-emption in respect of land have to be in writing in order to be valid' (188D–E). He explained:

> [A] right of pre-emption gives the pre-emptor no right to claim transfer of land; it merely gives him a right to enter into an agreement of sale with the grantor should the latter wish to sell. When such an agreement is completed then, and not before, will he have a right to claim transfer of land, so that it is the agreement which must be in writing (188C–D).

Corbett JA expressed a contrary view in *Hirschowitz v Moolman & others* 1985 (3) SA 739 (A). He held that section 1(1) of the Formalities Act requires the signatures of all parties to a right of pre-emption (paras [51] [52]). The reason is that a *pactum de contrahendo* is required to comply with the requisites for validity, including requirements as to form, applicable to the second or main contract to which the parties have bound themselves. Crucially, that view is held despite the fact that a right of pre-emption itself is neither a sale nor an alienation. Corbett JA explained:

> [I]n order that the holder of a right of pre-emption over land should be entitled, on his right maturing and on the grantor failing to recognise or honour his right, to claim specific performance against the grantor (assuming that he has such right), the right of pre-emption itself should comply with the Formalities Act. Were this not so, the anomalous situation would arise that on the strength of a verbal contract the grantee of the right of pre-emption could, on the happening of the relevant contingencies, become the purchaser of the land. This would be contrary to the intention and objects of the Formalities Act (767F–H).

Madlanga J held that there is no reason why, upon the occurrence of the contingencies that trigger an entitlement to exercise the right of pre-emption, the holder cannot exercise it in a manner that complies with the requisite formalities. The judge explained:

> The holder may simply make a signed written offer to purchase. If the grantor accepts the offer in writing under signature, a sale that meets the formalities will come into being. If she or he does not, the holder of the right may seek a declarator by a court that she or he is entitled to the exercise of the right and a mandamus requiring the grantor to accept the offer in writing. If the relief is warranted, it must be granted. That is nothing more than holding the grantor to the parties' agreement (para [54]).

Madlanga J concluded that we must not on formalistic or technical grounds give an easy way out to a grantor of a right of pre-emption. Our interpretation must be restrictive on the reach of the formalities required by the Act (para [61]):

> Contrary to what [*Hirschowitz v Moolman & others* 1985 (3) SA 739 (A)] suggests, I reach two related conclusions. First, regardless of the stage to which a sale to a third party by the grantor of a right of pre-emption may have progressed, generally the right is capable of enforcement in a manner that complies with the formalities. (I say 'generally' because issues that may come into the equation are, for example, whether transfer that has already taken place should be undone or whether the right-holder is entitled to specific performance

at all.) Second, the exercise of the right does not ineluctably lead to the anomaly referred to in [*Hirschowitz v Moolman & others*]. In sum, I disagree with the conclusion in that case (para [63]).

Misrepresentation

One of the issues in *De Freitas v Jonopro (Pty) Ltd & others* 2017 (2) SA 450 (GJ) was whether the applicant was entitled to rescind an agreement he had made on the ground of non-disclosure.

The applicant and one Bettencourt ran an adult entertainment business called 'Cheeky Tiger' from two premises. The applicant's premises were in Kempton Park and Bettencourt's in Randburg. The parties fell out and agreed to part ways. They agreed orally that the applicant would change the name of his Kempton Park operation from 'Cheeky Tiger' to 'Manhattan Nights'. When entering into this agreement, Bettencourt did not disclose that he intended opening a similar entertainment operation using the Cheeky Tiger get-up (but not the name) near the applicant's Manhattan Nights and this would draw on the applicant's customer base.

Spilg J held that Bettencourt's failure to disclose his plan amounted *prima facie* to actionable non-disclosure. The judge explained that it was reasonable to conclude that Bettencourt intended to capture the customers who frequented the applicant's Cheeky Tiger establishment and take the applicant's goodwill in that business, including its customer base, without compensation. There was a legal duty to disclose because Bettencourt knew that the customers of the applicant would go to what was familiar to them. The applicant would unwittingly destroy the goodwill he had built up under Cheeky Tiger but its familiar logo and ambiance would simply transfer to Bettencourt's bigger operation, and the applicant would then have to compete under a new brand unfamiliar to the customer base in the area (paras [45] [46]).

Spilg J concluded that *prima facie* there was a duty on Bettencourt to make disclosure 'based on the requirements of good faith in the circumstances of the relationship and the consequences of the alleged bargain struck' (para [49]). The applicant, in the simplest terms, would have been duped to give up, at no cost, the goodwill he had built up in the area (para [49]). *Prima facie* the factual and legal requirements of actionable non-disclosure were present and it appeared, therefore, that the

applicant could terminate the agreement to change the name of the applicant's establishment (para [52]). Spilg J, accordingly, issued an interim interdict prohibiting Bettencourt from using a get-up that would lead the applicant's clients to believe that Bettencourt's business was associated with it (para [60]).

Interpretation

In *Thomani & another v Seboka NO & others* 2017 (1) SA 51 (GP), an issue was whether a mortgage bond registered by the applicants to secure repayment of a home loan which they had received from the fourth respondent (the bank) also covered a separate debt owed by the applicants to the bank in terms of a deed of suretyship. The suretyship secured repayment of a loan granted by the bank to a company (Abrina 1591 (Pty) Ltd).

The court concluded that the bond did not cover the suretyship debt. Clause 4 of the mortgage bond stated:

> The bond shall remain in force as continuing covering security for the capital amount, the interest thereon and the additional amount, [and] notwithstanding any intermediate settlement, the bond shall be and remain of full force, virtue and effect as a continuing covering security and covering bond for each and every sum in which the mortgagor may now or hereafter become indebted to the bank from any cause whatsoever to the amount of the capital amount, interest thereon and the additional amount.

Clause 5 of the deed of suretyship stated:

> I/We acknowledge and admit that this suretyship is additional to any security which the Bank currently holds or may hereafter hold in respect of the obligations of the debtor (Abrina 1591 (Pty) Ltd) and that this suretyship shall not detract in any way from other security already furnished by me/us in favour of the Bank, which security shall remain in force until terminated in writing by the Bank.

Jansen J held that the relevant words in clause 4 of the bond, 'for each and every sum in which the mortgager may now or hereafter become indebted to the bank from any cause whatsoever', could not be construed to include the applicants' liability to the bank in terms of the suretyship agreement. The judge explained that the wording of clause 4 made it clear that it related to 'the obligatory part of the bond – namely the capital amount, the interest thereon and the additional amount payable in respect of the home loan'. The phrase 'any cause whatsoever' was limited to the amount of the capital, interest thereon and the additional amount. Clause 5 of the surety agreement referred to the

obligations of the principal debtor. One could hardly believe that the bank would rely on one mortgage bond to secure a home loan in an amount of approximately R500 000 and, in addition thereto, to secure an amount of R921 322 loaned to Abrina 1591 (Pty) Ltd (paras [26] [27]).

In *Roazar CC v The Falls Supermarket CC* (above), one of the issues was whether the lease agreement before the court provided the lessee with a right of renewal. Klaaren AJ confirmed that when interpreting a contract, the court is required to give a commercially sensible meaning to the contract. The court cited the passage by Lewis JA in *Ekurhuleni Metropolitan Municipality v Germiston Municipality Retirement Fund* 2010 (2) SA 498 (SCA) paragraph [39]:

> The principle that a provision in a contract must be interpreted not only in the context of the contract as a whole, but also to give it a commercially sensible meaning, is now clear. It is the principle upon which [*Bekker NO v Total South Africa (Pty) Ltd* 1990 (3) SA 159 (T)] was decided, and, more recently, [*Masstores (Pty) Ltd v Murray & Roberts Construction (Pty) Ltd & another* 2008 (6) SA 654 (SCA)] was based on the same logic. The principle requires a court to construe a contract in context – within the factual matrix in which the parties operated. In this regard see [*KPMG Chartered Accountants (SA) v Securefin Ltd and Another* 2009 (4) SA 399 (SCA) para [39]].

The idea that the contract must be given a 'commercially sensible' meaning needs to be qualified. Where a contract is capable of two meanings, one commercially sensible and the other not, then, obviously, the court should choose the former meaning. This is, no doubt, what Lewis JA had in mind in the *Ekurhuleni Metropolitan Municipality* case. However, if her intention was to say that even where a contract is not capable of a commercially sensible meaning, the court must give it one, this cannot be supported. The court must adhere to the words chosen by the parties. Even if what they said cannot be given a commercially sensible meaning, the court must give effect to the specific meaning that the parties intended.

In *GPC Developments CC & others v Uys & another* [2017] 4 All SA 14 (WCC) paragraph [36], the court confirmed that, in interpreting a contract, the court must consider the language chosen by the parties against the background facts and circumstances known to them and considered at the time of conclusion of the contract, and give the language its ordinary grammatical meaning, The court should also give the language a sensible and

businesslike interpretation provided it does not violate the actual wording of the agreement.

In *Nash & another v Mostert & others* 2017 (4) SA 80 (GP), the court applied the general principles of interpretation to ascertain the meaning of a court order. The court cited a passage from *Electoral Commission v Mhlope & others* 2016 (5) SA 1 (CC) paragraph [23], where it was confirmed that these principles apply to the interpretation of court orders:

> The basic principles applicable to construing documents also apply to the construction of a court's judgment or order: the court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual, well-known rules. . . . (A)s in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. If, on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify or supplement it (para [62]).

Rectification

The facts of *RM v BM* 2017 (2) SA 538 (ECG) are set out above. In response to Mrs M's argument that the antenuptial contract was void, Mr M claimed rectification of the contract.

Plasket J held that the claim for rectification had not been proved. He pointed out that a party seeking rectification of a written contract bears the *onus* of proving that the contract does not reflect the common intention of the parties as a result of an error in its drafting and what that common intention was. While rectification generally presupposes an agreement antecedent to the written contract, this is not essential. It may be the best proof of the common intention of the parties but there is no reason in principle why that common intention should not be proved in some other manner, provided the proof is clear and convincing (para [17]).

Plasket J considered the evidence dealing with rectification (paras [18]-[30]) and concluded that no agreement was reached between the parties at any time prior to the signing of the ANC. At best for Mr M, the common intention of the parties was that they would marry by ANC with the accrual system. That fell well short of the common intention that was pleaded, namely 'that all business interests then owned by the defendant, and to be acquired by the defendant in the future, should be excluded from the defendant's estate, both in respect of the commencement

value and at the dissolution of the marriage'. That being so, Mr M had failed to discharge the onus that rested on him to prove his claim for rectification (paras [31] [32])

In *K2012150042 (South Africa) (Pty) Ltd v Zitonix (Pty) Ltd* [2017] 2 All SA 232 (WCC), a party to a written contract contended that because he was unaware of a clause in the document, the document fell to be rectified by the striking out of the clause. Holderness AJ, not surprisingly, rejected the argument.

She pointed out that where a party attempts to enforce a contract affected by common mistake, the other party may rely on the mistake as a defence without counterclaiming for rectification, if it proves such facts as would entitle it to rectification (para [56]). However, rectification is a remedy which is only available where there has been a common mistake (not a unilateral one) and the court is asked to change the agreement to bring it into line with the parties' true common intention (para [58]). Even if one accepts that the respondent was unaware of the clause in question, there was no suggestion that the applicant was unaware of the clause and the respondent's error in this regard was a unilateral one (para [57]). This meant that a claim for rectification was not available (para [58]).

Performance

In *Absa Bank Ltd v Moore & another* 2017 (1) SA 255 (CC), the court applied the principle that payment of a debt by a third party, acting fraudulently or in furtherance of a fraudulent scheme, is effective to discharge the debt if it is made with the purpose of discharging the debt and is accepted in good faith by the creditor in discharge of the debt.

In *ABSA Bank Limited v Lombard Insurance Co Ltd* 2012 (6) SA 569 (SCA), Malan JA explained the underlying rationale:

> A debt-extinguishing agreement . . . will be invalid where both parties know that the debt will be discharged with stolen money. This conclusion hardly requires authority. But none of the authorities . . . suggest[s] that the same result would follow where the creditor is in good faith and unaware of the fact that the debt is to be discharged with stolen funds. Any suggestion that the validity of the payment may be questioned for this reason would lead to series of payment transactions being declared invalid *ex post facto* after discovery of the theft. Nor is it required that the law be developed further. The common law has already been developed to impose a duty of care on a collecting bank. Extensive legislation aimed at the prevention of

> money laundering applies to banks. Any further development . . . which, to my mind, is neither necessary nor desirable, should be by way of legislation (para [18]).

Brusson, a fraudster, preyed on homeowners in financial distress by offering them a chance (as the Brusson brochure put it) to 'make money without capital outlay or risk'. Lured by Brusson's brochure, the Moores had signed three agreements: an 'offer to purchase'; a 'deed of sale'; and a 'memorandum of agreement'. The effect of these agreements was that the Moores had unwittingly signed away their home to Brusson's accomplice, Kambini. Having discharged the Moores' bond debt, Kambini obtained, then defaulted on, a new home loan from Absa. Absa, which had cancelled the Moores' existing bonds when the underlying debt was discharged, took judgment against Kambini and attached the house in execution.

In an application for leave to appeal to the Constitutional Court, Absa sought only the re-imposition of the original mortgage bonds passed by the Moores. Absa argued that the cancellation of the Moores' bond debt was part of a fraudulent scheme which should be unwound so as to restore Absa to its pre-fraud position. Cameron J rejected the argument. He held that Kambini's payment of the Moore's debt to Absa had been effective in discharging the debt:

> [A] thief who pays her own debts with stolen funds extinguishes those debts, provided the creditor who receives and accepts payment is innocent (*Absa Bank Ltd v Lombard Insurance Co Ltd* 2012 (6) SA 569 (SCA) para [18]). Thus, an employee who steals money and deposits it for her own benefit in various accounts that are in debit, effectually extinguishes those debts, although the amounts that remain in credit can be recovered by the victim (*Absa Bank Ltd v Lombard Insurance Co Ltd* 2012 (6) SA 569 (SCA) para [19]). Our law goes further. Provided the payee/creditor is innocent, payment of another's debt, even by a thief, with stolen funds, operates to extinguish the debt (*Commissioner for Inland Revenue v Visser* 1959 (1) SA 452 (A) 458). . . . In short, payment is a bilateral act requiring the cooperation of the payer and the payee – but not the debtor. The payer is usually the debtor, but doesn't have to be. If A owes money to B, and C decides to pay off the debt, then C . . . must intend to pay, and B . . . must intend to accept the payment. But A . . . does not have to know of or consent to the payment (*Commissioner for Inland Revenue v Visser* 1959 (1) SA 452 (A) 458) (paras [35] [36]).

Absa's argument was that 'fraud unravels all' and that this principle operated in its favour by 'undoing' the debt payment and the bond cancellation. Cameron J rejected the argument. He

held that the payment by Kambini was valid despite the fraud, and effective in discharging the Moores' debt to Absa (para [37]).

Cession

In *Brayton Carlswald (Pty) Ltd & another v Brews* 2017 (5) SA 498 (SCA), the court confirmed that where a party pays a debt, the right arising from that debt is incapable of cession.

Brayton Carlswald (Pty) Ltd (the first defendant) had borrowed amounts from a bank (FirstRand Bank Ltd t/a Origin (the bank)) and then failed to repay them. The bank obtained judgment against the first defendant and Jonathan Paul Brews (the second defendant). In execution of this judgment, the bank caused certain immovable properties owned by the company to be attached. To forestall the bank executing against its property, the company arranged for the respondent, Gordon Donald Brews (Brews), to pay what was owed.

Some time after payment of the judgment debt, the bank ceded its rights arising from the judgment to Brews. Brews applied to be substituted for the bank in the execution process. This relief was denied by the High Court (Kades AJ) but allowed by the full court. This caused the company to appeal to the Supreme Court of Appeal. Theron JA held that the cession was not competent. Brews's payment of the amount owing extinguished the bank's right to payment, rendering it incapable of transfer.

The main points in Theron JA's reasoning were as follows. The court *a quo* failed to distinguish between the agreement to cede (the obligatory agreement whereby an obligation is created), also referred to as the *pactum de cedendo*, and the cession itself (the real agreement whereby rights are bilaterally transferred), also known as the *pactum cessionis*. Justice PM Nienaber explained it well in his contribution to *The Law of South Africa* (*Lawsa* 2 ed para 8), aptly distinguishing between these two types of agreement:

> The undertaking to cede and the actual cession will often coincide and be consolidated in a single document, yet they remain discrete juristic acts. However, because they are frequently merged into one transaction the clear distinction between the obligatory agreement to cede and the actual cession sometimes tend to be smudged. They are nevertheless distinct in function and can be so in time: by the former a duty to cede is created, by the latter it is discharged (para [15]).

The deed of cession was critical in determining the intention of the parties. When interpreting documents, words must be read in their context and in application to the subject matter to which they relate. The ordinary meaning of the words had to be determined in the context of the document, read as a whole (para [17]). The parties intended the written document to embody their contract. The words of clause 2.1: 'The bank hereby cedes, transfers and makes over', made it plain what the bank and Brews intended. In terms of the deed of cession, the respondent accepted the 'cession upon and subject to the terms of this Agreement'. The parties intended that upon signature thereof, transfer of the right would take effect (para [18]).

When the deed of cession had been executed and fulfilled, there was nothing left to cede because the debt had been extinguished by payment. The author JC Sonnekus in *Unjustified Enrichment in South African Law* (2008) 237 states that 'a debt is after all fulfilled and extinguished through payment' (para [19]). Brews had paid the bank all that was due to it. Transfer of a 'right', which has been extinguished, is a nullity as there is nothing which can be transferred. As a matter of logic, transfer of a non-existent right can never in law be the subject matter of a cession (*First National Bank of SA Ltd v Lynn NO & others* 1996 (2) SA 339 (A) 346) (para [20]).

Excuses for Non-Performance

Prescription

In *Monyetla Property Holdings (Pty) Ltd v IMM Graduate School of Marketing (Pty) Ltd & another* 2017 (2) SA 42 (SCA), the court held that a landlord's claim for damages against its tenant had prescribed in terms of section 11 of the Prescription Act 68 of 1969 (the Act).

The lease agreement was between the appellant (M) as landlord, and the first respondent (I) as tenant. The second respondent had bound himself to M as surety and co-principal debtor for the obligations of I. On 6 March 2009, M cancelled the lease alleging that I had breached it. On 16 March 2012, M instituted an action in the High Court in which it claimed damages from the respondents for loss allegedly suffered as a result of I's breach of the lease and the resultant cancellation of the contract. The respondents raised the special plea that the claim had prescribed.

The High Court upheld this plea and dismissed M's claim. In an appeal to the Supreme Court of Appeal, the respondents contended that M's claim had arisen on the date of cancellation of the agreement (6 March 2009) and that the summons in the present action had been served more than three years after this (on 19 March 2012), so any claim for damages flowing from the breach had prescribed under section 11 of the Act. M's contention was that the damages claimed related to the period after I had vacated the premises. At the earliest, those damages only became 'due' for purposes of section 12 of the Act on 30 April 2010 when I vacated the premises.

Leach JA upheld the respondents' argument. He reasoned that M's claim was founded on a breach of contract and the general rule is that where one party breaches a contract, the other may claim damages to place it in the position it would have been in had the contract been properly performed. The *prima facie* measure of damages is the rental that would have been paid for the premises over the remaining period of the lease (*Hazis v Transvaal and Delagoa Bay Investment Co Ltd* 1939 AD 372 387) less any amounts received which would not have accrued had the lease not been cancelled (para [16]). The lessor's loss was suffered whether or not the lessee vacated or remained in occupation, and it constituted a debt 'immediately claimable' (para [17]). It followed that on cancellation of the contract due to I's breach, M became entitled to claim damages for the remaining period of the lease, less whatever amounts it received in mitigation of its loss. These damages were due and payable as at the date of cancellation. On that date everything had happened which would have entitled M to institute action. The debt sued upon was, therefore, due for purposes of prescription on 6 March 2009 (para [19]). Since action was instituted more than three years after the debt sued upon had become due, the special plea of prescription was correctly upheld by the High Court (para [22]).

Section 11 of the Act provides that the period of prescription is 30 years in respect of any debt secured by a mortgage bond, and six years in respect of a debt arising from a notarial contract, unless a longer period applies in respect of the debt in question. In *Factaprops 1052 CC & another v Land and Agricultural Development Bank of South Africa* 2017 (4) SA 495 (SCA), the issue was whether the period of prescription applicable to a special notarial bond, which complies with the Security by Means

of Movable Property Act 57 of 1993, is 30 years or six years. Zondi JA held that the phrase 'mortgage bond' in the Act has a wide meaning and includes a special notarial bond passed in terms of the Security by Means of Movable Property Act. Accordingly, the 30-year prescription period applies to it.

Zondi JA's reasoning may be summarised as follows. The question in issue is whether the term 'mortgage bond' in section 11*(a)*(i) is sufficiently wide to include a special notarial bond (para [1]). The court below (Msimeki J) concluded that, properly interpreted, the phrase 'mortgage bond' includes a special notarial bond. The judge followed the judgment of Rabie J in *Land and Agricultural Development Bank of South Africa v Boeke & another* GP 12506/07 (17 February 2011), in which it was held that where the debt is secured by a special notarial bond, the prescription period is 30 years. A similar conclusion was reached by Molopa-Sethosa J in *Land and Agricultural Development Bank of South Africa v Phato Farms (Pty) Ltd & others* 2015 (3) SA 100 (GP) paragraph [69]. Msimeki J disapproved of the reasoning and conclusion in the judgments of Phatudi AJ in *Land and Agricultural Development Bank of South Africa v Factaprops 1052 CC & another* [2015] 3 All SA 319 (GP) paragraph [74], and Mabuse J in *Absa Bank Ltd v Hammerle Group (Pty) Ltd* [2013] ZAGPPHC 402 paragraph [27], where it was held that a special notarial bond is not a mortgage bond for the purposes of the Prescription Act (para [9]).

Zondi JA pointed out that the Act does not define 'mortgage bond' nor does it make any reference to a 'notarial bond' (para [12]). When interpreting legislation, what must be considered is the language used, the context in which the relevant provision appears, the apparent purpose to which it is directed, and the material known to those responsible for its production (para [13]). A close analysis of the language used in section 11*(a)*(i) of the Prescription Act, and of its history, shows conclusively that the phrase 'mortgage bond' includes a special notarial bond. *The Shorter Oxford English Dictionary on Historical Principles* Vol II 3 ed defines 'mortgage' as

> the conveyance of real or personal property by a debtor (called the *mortgagor*) to a creditor (called the *mortgagee*) as security for a money debt, with the proviso that the property shall be reconveyed upon payment to the mortgagee of the sum secured within a certain period.

It is apparent from this definition that 'mortgage' is used in relation to immovable property or movable property (para [17]). The Afrikaans texts in both the 1943 and 1969 Prescription Acts use the word 'verband' for 'mortgage bond'. The meaning of 'verband' according to *HAT Verklarende Handwoordeboek van die Afrikaanse Taal* 5 ed (2005) is ''n verbintenis volgens wetlike bepaling waardeur eiendom as sekuriteit gegee word vir 'n lening'. Kritzinger & Labuschagne *Verklarende Afrikaanse Woordeboek* (8 ed (1993)) give the meaning of 'verband' as 'verpanding van, beswaring op 'n eiendom'. These definitions make it clear that 'verband' may be used both in respect of a mortgage bond in respect of immovable property, and a notarial bond in respect of movable property (para [18]). Having regard to the history of the Act, it is clear that the term 'mortgage bond' has been consistently used in a wide sense. The Transvaal Prescription Amendment Act 26 of 1908, which predates the Act, did not differentiate between mortgage bonds and notarial bonds for purposes of prescription. It simply referred to a 'mortgage bond, general or special'. There is no indication that the legislature intended to deviate from that meaning when it used 'mortgage bond' in the Act (para [19]).

Zondi JA observed that in the case law, the phrase 'mortgage bond' was also used to describe a notarial bond. For example, in *Oliff v Minnie* 1953 (1) SA 1 (A) 3, the phrase was interpreted to mean an instrument hypothecating immovable property and other goods. Van den Heever JA said that '[a] mortgage bond as we know it is an acknowledgement of debt and at the same time an instrument hypothecating landed property or other goods' (para [20]). The purpose of the Act is to protect a debtor against any claim that he or she may be unable to defend due to lack of evidence attributable to the passage of time. It follows that longer periods of prescription are justified where transactions are matters of public record, as is the case with special notarial bonds (para [21]).

Zondi JA concluded that accepting that the phrase 'mortgage bond' may be given a narrow meaning that excludes a notarial bond, there is no reason to adopt such a meaning in the interpretation of section 11*(a)*(i) of the Act. Van den Heever JA in *Oliff* chose the correct meaning and this meaning is also supported by MM Loubser *Extinctive Prescription* (1996) 37-8. It follows that the conclusions reached by Phatudi AJ in *Land and Agricultural Development Bank of South Africa v Factaprops*

1052 CC and Mabuse J in *Absa Bank Ltd v Hammerle Group (Pty) Ltd* could not be sustained (para [22]).

Section 12(3) of the Act provides that a debt shall not be deemed to be due for purposes of prescription until the creditor has knowledge of the facts from which the debt arises. In *Fluxmans Incorporated v Levenson* [2017] 1 All SA 313 (SCA), the issue was whether knowledge that a contingency fee agreement did not comply with provisions of the Contingency Fees Act 66 of 1997 (the CFA) was a fact needed to complete the creditor's cause of action for repayment of the amount overcharged. The court held that it was not.

In February 2006, the respondent (L) instructed the appellant (Fluxmans) to institute a damages action on his behalf against the Road Accident Fund. The parties agreed that Fluxmans would charge L a contingency fee of 22,5 per cent of the damages that L recovered from the RAF, plus Value Added Tax on that amount. The claim was settled, and the terms of the settlement were made an order of court on 23 May 2008. On 20 August 2008, Fluxmans sent L a statement of account reflecting his award of compensation and the fees charged by Fluxmans. More than six years later, on 9 April 2014, L wrote a letter to Fluxmans in which he alleged that the contingency fees agreement which he and Fluxmans had concluded did not comply with the provisions of the CFA. In July 2014, L instituted proceedings claiming the sum of R844 994,57. Fluxmans did not dispute the allegation that the agreement did not comply with the CFA. It contended that L's claim had been extinguished by prescription.

The High Court held that the respondent's claim had not prescribed. It reasoned that one of the minimum facts necessary for the debt to have become due was L's knowledge that the agreement was unlawful and invalid, which knowledge he had only acquired in 2014. On appeal, both the majority and minority judges accepted that the High Court had erred in its finding that the invalidity of the agreement was a factual and not a legal conclusion (paras [10] [32]).

Zondi JA, delivering the majority judgment, pointed out that a debt is due for purposes of prescription when the creditor acquires a complete cause of action for its recovery (*Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) 838; *Deloitte Haskins & Sells Consultants* (*Pty*) *Ltd v Bowthorpe Hellerman Deutsch (Pty) Ltd* 1991 (1) SA 525 (A) 532; *Truter & another v Deysel* 2006 (4) SA 168 (SCA) para [16]; MM Loubser *Extinctive*

Prescription (1996) 80-1). For prescription to start running, section 12(3) of the Act requires only that the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises (para [35]). Immediately after L had paid fees to Fluxmans in August 2008, he had knowledge of all the facts from which his claim arose, even though he did not know the crucial legal conclusion flowing from those facts, that the agreement did not comply with the CFA (para [41]). Knowledge of this conclusion was not a fact which the respondent needed to acquire to complete a cause of action and was, therefore, not relevant to the running of prescription. Zondi JA observed:

> This Court stated in [*Minister of Finance and others v Gore NO* 2007 (1) SA 111 (SCA) para 17] that the period of prescription begins to run against the creditor when it has minimum facts that are necessary to institute action. The running of prescription is not postponed until it becomes aware of the full extent of its rights nor until it has evidence that would prove a case 'comfortably'. The 'fact' on which the respondent relies for the contention that the period of prescription began to run in February 2014, is knowledge about the legal status of the agreement, which is irrelevant to the commencement of prescription. It may be that before February 2014 the respondent did not appreciate the legal consequences which flowed from the facts, but his failure to do so did not delay the date on which the prescription began to run (para [42]).

Zondi JA concluded that when L instituted proceedings in July 2014, his claim had prescribed (para [44]).

Section 12(3) of Act states that the creditor shall be deemed to have knowledge of the identity of the debtor and the facts from which the debt arises if the creditor could have acquired this knowledge by exercising reasonable care. In *Nuance Investments (Pty) Ltd v Maghilda Investments (Pty) Ltd & others* [2017] 1 All SA 401 (SCA) paragraph [19], Tshiqi JA made the point that reasonable care for the purposes of section 12(3) of the Act is not measured by the objective standard of the hypothetical reasonable or prudent person, but by the more subjective standard of a reasonable person with the creditor's characteristics.

In terms of section 14(1) of the Act, the running of prescription is interrupted by an express or tacit acknowledgment of liability by the debtor. The question in *KLD Residential CC v Empire Earth Investments 17 (Pty) Ltd* 2017 (6) SA 55 (SCA), [2017] 3 All SA 739 was whether this provision is to be applied where the acknowledgment is contained in a letter that makes an offer of compromise.

In the court *a quo* (*KLD Residential CC v Empire Earth Investments 17 (Pty) Ltd* 2016 (5) SA 485 (WCC), [2016] 3 All SA 832) it was held that the without-prejudice rule applicable to settlement negotiations renders evidence of the acknowledgment inadmissible. The appeal court, by a majority, overruled this decision. Lewis JA, delivering judgment for the majority, held that where an acknowledgment of liability is made and this would interrupt the running of prescription, the acknowledgment is admissible for this purpose, even if made without prejudice during settlement negotiations.

Lewis JA reasoned that section 14 of the Act serves the purpose of protecting the creditor. The reason is clear: if the debtor acknowledges liability, there is no uncertainty about the debt (para [16]). Does the protection given by section 14 fall away if the acknowledgment of debt is made without prejudice? The question requires consideration of a competing policy, which is that admissions made in the course of negotiating a settlement should not be admissible in proceedings between the creditor and the debtor (para [18]). The policy is intended to promote the settlement of disputes without resort to litigation (para [20]).

The tension between competing policies was recognised in *Bradford & Bingley plc v Rashid* [2006] 4 All ER 705 (HL). Lord Walker concluded that 'the policy underlying the without prejudice rule seems . . . to outweigh the countervailing policy reason for lengthening the period of limitation through an acknowledgment'. Lord Hoffman said:

> [I]t takes two to negotiate and there is also a public policy in encouraging the creditor not to initiate legal proceedings. The acknowledgment rule plays an important part in furthering this policy because it means that a creditor, negotiating on the basis that his debt has been acknowledged, can proceed with the negotiations and give time to pay without being distracted by the sound of time's winged chariot behind him (para [23]).

In *Ofulue & another v Bossert* [2009] UKHL 16, Lord Neuberger accepted the view of Lord Walker in *Bradford* (para [27]). Zeffertt and Paizes *The South African Law of Evidence* 2 ed (2009) 702 suggest that the solution to the problem is to allow evidence of communications for the purpose of determining whether the debt has prescribed but not for other purposes (para [28]).

KLD's argument was that the judgment in *ABSA Bank Limited v Hammerle Group (Pty) Ltd* 2015 (5) SA 215 (SCA) is authority for the view that our law recognises exceptions to the without

prejudice rule. In that case, the court recognised that an offer made 'without prejudice' is admissible in evidence as an act of insolvency. The question to be decided was whether another exception should be allowed for admissions of liability, made without prejudice, where the debt would otherwise prescribe (paras [30]–[34]). There was no authority that prevented the appeal court from deciding that where an acknowledgment of indebtedness is made in the course of without-prejudice discussions, it should be admissible for the limited purpose of interrupting the running of prescription (para [35]). As Grosskopf AJA said in *Murray & Roberts Construction (Cape) (Pty) Ltd v Upington Municipality* 1984 (1) SA 571 (A) 579, where the debtor removes uncertainty by admitting liability, the running of prescription is 'suitably adapted'.

This accords with the views expressed in *Bradford*: it is in the public interest that a debtor who acknowledges his debt, 'and so induces his creditor not to have immediate resort to litigation', should not be able to claim that the debt has prescribed because 'the creditor held his hand' (para [36]). In *Bradford,* Lord Hope said there is a balance to be struck between the public interest in prolonging the prescription period when there has been an acknowledgment of liability, and the public interest in preventing statements made in the course of negotiations being used at trial as admissions of liability. He stated:

> [I]t would be bizarre if a claimant who had been dissuaded from taking proceedings time and time again both before and after the expiry of the limitation period by prolonged correspondence which contained repeated statements that liability was admitted, and which sought to negotiate only on the matter of *quantum*, was to be deprived of his claim on limitation grounds when negotiations broke down simply because the admissions were made in letters which contained proposals as to the amount that was to be paid in settlement of that liability (para [37]).

Lewis JA held that the exception contended for was 'well-founded'. She concluded that where acknowledgments of liability are made, and by virtue of section 14 of the Act they would interrupt the running of prescription, such acknowledgments should be admissible, even if made without prejudice during settlement negotiations. The admission is protected in so far as proving the existence and the quantum of the debt is concerned and it is not a question of the without-prejudice rule trumping prescription. The law recognises that both section 14 of the Act

and the without-prejudice rule protect policy interests and must ensure that both interests are properly served (para [39]).

Section 15(1) of the Act provides that the running of prescription is interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt. In *Huyser v Quicksure (Pty) Ltd & another* [2017] 2 All SA 209 (GP), the court held that service of a joinder application has the effect of interrupting prescription as provided for in section 15(1). Prinsloo J reasoned that joinder applications avoid multiplication of actions and wasted costs and it is generally accepted that a joinder application is a 'process' in the spirit of section 15(6) of the Act. If a joinder is granted and the trial then takes its course, final judgment can be expected. To reject this approach would be to argue that a fresh summons issued and served at the time when the joinder application was issued and served, would serve to interrupt prescription but the joinder application, which is the preferred procedure, would not. Such a conclusion could not be correct.

Reciprocity

In *Roazar CC v The Falls Supermarket CC* (above under 'Certainty') a lessor of property contended that it was not obliged to negotiate a renewal of the lease with the lessee, as required by a clause in the lease, until the lessee had paid the amounts it had promised the lessor under two additional agreements. The court found that as the two additional agreements were unlawful, non-performance under those agreements posed no bar to the exercise by lessee of its right to negotiate a renewal of the lease agreement (paras [18] [19]).

Breach

Repudiation

One of the issues in *Starways Trading 21 CC v Pearl Island 714 (Pty) Ltd* [2017] 4 All SA 568 (WCC) was whether the applicant (Starways) had repudiated its contract with the first respondent (Pearl). The court pointed out that repudiation is conduct from which a reasonable person in the position of the innocent party would conclude that the repudiator, without having a lawful ground, would not comply with some or all of its contractual obligations. 'The conduct in question should be clear-cut and unequivocal and should engender a reasonable certainty of an

eventual malperformance by the party in question of the obligations under the agreement' (paras [52] [53]).

Pearl had purchased 25 000 metric tons of white refined sugar from Starways. Section 59(2) of the Customs and Excise Act 91 of 1964 imported an implied term into the contract: a duty on Starways to reduce or permit a reduction of the contract price. Starways had unequivocally indicated that it was willing to perform its obligation to deliver, but it would not perform its duty to reduce or permit the reduction of the contract price.

The court found that this was an act of repudiation justifying cancellation of the contract (para [56]). The court pointed out that a repudiation is not avoided when a party refuses to perform one duty, but is prepared to perform the remaining duties in terms of the contract (para [57]). In short, repudiation is conduct from which a reasonable person can conclude that the alleged repudiator, without having a lawful ground, will not comply with all or some of its contractual obligations. As was made clear in *Metamil (Pty) Ltd v AECI Explosives and Chemicals Ltd* 1994 (3) SA 673 (A) 684-5, the fact that the repudiator was *bona fide* in its interpretation of the agreement and subjectively intended to be bound by it does not preclude the conclusion that its conduct constituted repudiation in law. In effect, the repudiator was insisting on a different contract, however *bona fide* it might have been in its belief that it was not (para [58]).

The 'repentance principle' allows a party who has elected to abide by a repudiated contract to change that election and choose to cancel the agreement and claim damages where the defaulting party persists with its refusal or failure to perform. In *Primat Construction CC v Nelson Mandela Bay Metropolitan Municipality* 2017 (5) SA 420 (SCA), it was held that the aggrieved party may change its election if it reasonably perceives that the defaulting party will not remedy its breach despite having been given the opportunity to do so. No further act of repudiation is required.

The appellant (Primat) concluded a contract with the respondent (the Municipality) for the upgrade of roads in Motherwell, Port Elizabeth. Primat sued the Municipality for damages for breach of contract. The Municipality pleaded that it had repudiated the contract and that Primat had elected not to accept the repudiation and to abide by the contract. Primat, it alleged, was bound by its election and could not subsequently cancel the contract and claim damages.

Lewis JA pointed out that Revelas J, in the trial court, held that Primat was entitled to change its election and was not barred from claiming cancellation and damages. Revelas J relied on the decision in *Sandown Travel (Pty) Ltd v Cricket South Africa* 2013 (2) SA 502 (GSJ), where it was held that the innocent party could change his or her election if the guilty party persisted in the repudiation after being given the opportunity to perform (para [12]). The full court, relying on a passage discussing *Sandown Travel* in 2013 *Annual Survey of South African Law* 570-2, held that in order for the aggrieved party to change his or her election, there had to be a further act of repudiation after the election had been made (para [13]). The Municipality had acted consistently since first repudiating the contract. After each repudiation, Primat had elected to keep the contract alive and was bound by its election. It was not entitled to change its stance (para [15]).

In 2013 *Annual Survey* (above), Sharrock pointed out that the 'repentance' principle was well established as far back as *De Wet v Kuhn* 1910 CPD 263-4 and had been approved by this court, albeit in a dissenting judgment, in *Culverwell & another v Brown* 1990 (1) SA 7 (A) 17, where Nicholas AJA said:

> [W]here the injured party refuses to accept the repudiation and thereby allows the defaulting party to repent of his repudiation and gives him an opportunity to carry out his portion of the bargain, and the defaulting party nevertheless persists in his repudiation, the injured party is entitled to change his mind and notify the other party that he would no longer treat the agreement as existing, but that he would now regard it as rescinded and sue for damages (para [16]).

Sharrock put a gloss on this principle. He said:

> The notion of persisting in the repudiation requires clarification. Repudiation consists of words or non-verbal conduct which indicate an intention not to be bound by the contract. Each separate statement or act indicating an intention not to be bound, is a separate instance of repudiation. It makes no difference whether the guilty party has said or done the same thing before. Where a court speaks of persisting in the repudiation, what it is effectively referring to is the commission of a further repudiation which is the same as or similar to, an earlier one, not simply a failure by the guilty party to retract his or her initial repudiation. It follows that where the innocent party, having initially elected not to cancel the contract, elects to do so because the guilty party has persisted in the repudiation, the innocent party is not simply changing his or her election regarding the earlier repudiation, but making a fresh election based on a new repudiation. The innocent party is given the right to do this because of the guilty party's continued display of bad faith (para [17]).

Sharrock opined that in *Sandown Travel*, Cricket SA had 'clearly committed an additional repudiation by treating the contract as cancelled after the expiry date' (para [18]). Lowe J, in the full court, following the approach advocated by Sharrock, concluded that each time the Municipality confirmed its repudiation of the contract, Primat had elected to abide by the contract. There was no new act of repudiation that entitled Primat to make a fresh election (para [19]).

Lewis JA considered that one must have regard to the nature of repudiation, and to the principles applicable to the doctrine of election, in determining whether an aggrieved party to a contract can change his or her election (para [21]). As Nicholas AJA observed in *Culverwell*, even where the aggrieved party has elected to abide by the contract, if the guilty party persists in the breach despite the opportunity to relent, the aggrieved party may elect to cancel. This was the view taken by GB Bradfield in *Christie's Law of Contract in South Africa* 7 ed (2016) 639. The author suggests that 'persistence' should be understood 'as a further indication of intention to repudiate after having been given an opportunity to reconsider', in which case 'what is involved is an election to cancel based on repeated breach rather than a change of mind' (para [25]).

Lewis JA pointed out that the requirement of a new and independent act of repudiation is not one mentioned in any of the earlier authorities (para [26]). The doctrine of election is not inviolable: the double-barrelled procedure, sanctioned in *Ras & others v Simpson* 1904 TS 254, allows the aggrieved party to claim in the same action specific performance, and, in the event of non-compliance, cancellation and damages. The repentance principle does the same. The aggrieved party gives the defaulting party the opportunity to repent of the breach and to perform. If the defaulting party fails to perform, 'the aggrieved party should then be entitled to change its election, and cancel and claim damages' (para [27]).

The Municipality had persisted in its repudiation by refusing Primat access to the site and appointing new contractors. That conduct showed an unequivocal intention on the part of the Municipality no longer to be bound and Primat reasonably perceived it as such (para [28]). No further act of repudiation was necessary: it was sufficient that Primat reasonably perceived that the Municipality would not repent of its breach and then decided to change its election (para [30]).

Remedies for Breach

Cancellation

In *GPC Developments CC & others v Uys & another* [2017] 4 All SA 14 (WCC), the court confirmed that where a contract specifies a procedure for cancellation, that procedure must be followed or the cancellation will be ineffective.

The appellants (the sellers) and the first respondent (Uys) concluded a written deed of sale in terms of which a residential dwelling was effectively sold to Uys through the disposal of the sellers' interest in GPC Developments CC (GPC). The price was R968 000. Uys took occupation of the dwelling but he did not comply with his obligations by the agreed time and so the parties concluded an addendum which required Uys to pay the outstanding amount into the trust account of a firm of attorneys and repay the bond on the property.

Clause 10 of the deed of sale provided:

> If the Purchaser commits a breach of this agreement . . ., then the Sellers shall be entitled to give the Purchaser 10 (ten) working days' notice in writing to remedy such breach . . . and if the Purchaser fails to comply with such notice, then the Sellers shall forthwith be entitled but not obliged without prejudice to any other rights or remedies which the Sellers may have in law . . . to cancel this agreement . . .

Clause 3 of the addendum provided, inter alia, that should the purchaser fail to comply with a notice to settle all outstanding obligations in terms of the mortgage bond,

> the sellers shall be entitled to demand that they . . . be reinstated as members of the close corporation . . . In the latter circumstance the sellers will be obliged to repay to [Uys] the aforesaid amount of R968 000, less all proven damages as suffered by the sellers because of [Uys'] breach of contract.

Uys failed to comply with his bond payment obligations. The sellers cancelled the contract and sought to evict Uys from the property. The dismissal of this application led to an appeal. The only issue on appeal was whether Uys was in unlawful occupation of the property.

The court below (Ntuku J) reasoned that where a contract specifies a procedure for cancellation, that procedure must be followed or the purported cancellation will be ineffective. Ntuku J found that in the absence of a tender to repay the purchase price, less all proven damages, the cancellation was a nullity.

The sellers contended that they were entitled, upon default by

the purchaser, to cancel under clause 10 and, having exercised that election, they were not bound to resort to clause 3 of the addendum. Gamble J rejected the contention. He pointed out that Ntuku J relied on a passage in *Christie*: 'If the contract lays down a procedure for cancellation, that procedure must be followed or a purported cancellation will be ineffective' (para [27]). Clause 10 constituted a classic *lex commissoria*. It afforded the sellers the right to cancel in the event of default on the part of the purchaser after the latter had been given notice to remedy the breach within ten days and had failed to do so (para [37]). However, clause 10 was not the only *lex commissoria* available to the parties as clause 3 fell into the same category. At the time the addendum was concluded, the sellers had a right to rely on clause 10 and resile from the contract. But that did not happen. On the contrary, the parties took positive steps to keep the agreement alive by concluding the addendum (paras [38] [39]). Having opted to invoke the *lex commissoria* incorporated in clause 3, the sellers were bound to observe the cancellation requirements of that clause, which required a tender to repay the purchase price paid, and did not permit a claim for forfeiture (paras [40] [47]).

Damages

In *Basson & others v Hanna* (above), the question was raised whether a claim for the objective value of performance (referred to as 'damages as a surrogate for specific performance') is competent in our law. During 2002, the respondent (Hanna), the first appellant (Basson), and the second appellant (Dreyer) concluded a contract to develop a farm situated on the banks of the Vaal River. The intention was to use the farm as a weekend retreat. The farm was owned by the third appellant, a close corporation (the CC), of which Basson was the sole member. Basson undertook to build three houses on the property and Hanna and Dreyer each agreed to purchase a third of Basson's membership interest in the CC. Basson carried out the required construction work and in December 2002, the parties each took occupation of a house. The purchase price of Hanna's third share in CC was R624 953, payable, with interest, in monthly instalments over twenty years. Basson was obliged to transfer Hanna's third share to him once he had paid the full amount.

During 2007, the friendship between Hanna and Basson ended. In June 2007, Basson, in breach of his contractual

obligations, told Hanna that he was selling Hanna's membership interest in the corporation. He maintained that he was free to do this because the agreement between the parties was invalid. Hanna stopped paying his monthly instalments and applied for an order of specific performance against Basson, as well as an interim interdict restraining Basson from alienating his membership interest in the corporation. Before the interdictory relief was granted, Basson alienated the subject matter of the contract to his brothers. Hanna amended his particulars to claim 'damages as a surrogate of performance' instead of specific performance.

Basson and the CC defended the action. They denied that Hanna was entitled to damages as a surrogate for performance. They contended that by failing to pay all amounts due by him in terms of the agreement, Hanna had repudiated the agreement, and Basson had been justified in cancelling the contract. The court dismissed these arguments and awarded Hanna damages.

On appeal, the parties reached agreement on the quantum of Hanna's claim and the interest rate to be awarded should the appeal fail. Zondi JA accepted the conclusion of the court *a quo* that Basson's actions constituted repudiation of the agreement because the only reasonable inference that could be drawn from them was that he did not regard himself bound by the agreement and was not prepared to perform its terms (para [19]). Hanna was accordingly entitled to claim damages *in lieu* of specific performance (paras [23]–[27]).

The appellants' argument was that Hanna was claiming damages 'as a surrogate for specific performance' and, according to the majority decision in *ISEP Structural Engineering & Plating Ltd v Inland Exploration* 1981 (4) SA 1 (A), such a claim was not competent in law. Hanna contended that the majority decision in *ISEP* should not be followed as its correctness was doubted by Smalberger ADCJ in *Mostert NO v Old Mutual Life Assurance Co (SA) Ltd* 2001 (4) SA 159 (SCA) 186.

Zondi JA declined to consider the correctness of *ISEP* as, in his view, that case was distinguishable (para [37]). The judge pointed out that in the case before him, justice demanded that damages be paid *in lieu* of specific performance because specific performance was no longer possible. Hanna was ready to carry out his side of the agreement and had a right to demand the monetary value of that performance from Basson. The judge added that a creditor's right to demand performance from the debtor cannot be at the debtor's mercy. The exercise of that right

cannot depend on what the debtor chooses to do with the asset to which the creditor's right relates (paras [38]–[41]). Zondi JA concluded that because of Basson's conduct, which rendered specific performance impossible, Hanna had amended his particulars of claim to introduce a claim for damages in lieu of specific performance. The parties had agreed on the quantum and the *mora* interest rate to be awarded should the appeal fail. This meant that the judgment of the court below should be corrected to the extent proposed by the parties (para [42]).

Therefore, because the parties agreed upon the quantum of damages, Zondi JA did not have to decide whether the majority decision in *ISEP* was correct. The *ISEP* case concerned a claim for damages as a surrogate for specific performance in the sense of the reasonable cost of obtaining the performance from a third party. This is different from a claim for damages in lieu of performance which is the amount of loss suffered by the creditor as a direct result of not having received the promised performance (the amount by which the performance would have enhanced the value of the creditor's estate).

CORPORATE LAW

PIET DELPORT*
IRENE-MARIE ESSER**

LEGISLATION

CORPORATE LAW

There was no legislation on corporate law during the period under review.

CASE LAW

COMPANIES ACT 61 OF 1973

OPPRESSIVE CONDUCT

Off-Beat Holiday Club & another v Sanbonani Holiday Spa Shareblock Ltd & others 2017 (5) SA 9 (CC) was an application for leave to appeal against a decision of the Supreme Court of Appeal (see 2016 *Annual Survey* 267 for the SCA case).

The facts were that Mr Harri, who held most of the shares in Sanbonani Holiday Spa Shareblock Limited (Shareblock), amended Shareblock's articles of association. The other members of the company argued that the amendment of the company's articles of association was unfair, prejudicial, unjust and inequitable. They approached the court for relief in terms of section 252 of the Companies Act 61 of 1973 (1973 Companies Act). The High Court held that the claim, as a debt under sections 11 and 12 of the Prescription Act 68 of 1969 (the Prescription Act), had prescribed (para [9]). The Supreme Court of Appeal, attaching a wide meaning to the term 'debt', confirmed this viewpoint regarding the prescription of the section 252 debt.

The applicants sought to challenge the Supreme Court of Appeal's decision that the claim brought by the applicants in

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terms of section 252 of the 1973 Companies Act had prescribed. They argued that the Supreme Court of Appeal's reasoning went against the decision in *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) (para [1]).

To decide this matter, it was necessary to determine whether claims brought under section 252 were 'debt' that could prescribe under the Prescription Act. The applicants argued that 'debt' should be given a narrow meaning in that context (*Makate* above). In *Makate* it was held that a debt can only be a 'claim for the payment of money, or a claim for the delivery of something. . .'. It was argued that as claims under section 252 were neither, the applicants' claim had not prescribed (para [17]). The respondents contended that the applicants' claim was a debt as it sought the performance of an obligation in the form of the alteration of the company's articles (para [19]).

It was held that the court had a broad discretion under section 252 to grant equitable relief (para [28]), and that until a determination had been made under section 252, neither party could discharge its obligations to the other because neither party would be aware of the existence and extent of those obligations (para [30]). The manner in which section 252 was drafted made it clear that a particular claim brought under that section could not be classified as a 'debt' as defined in *Makate* above (paras [31]–[34] [48]). To determine whether a claim would fall within the definition of a 'debt' under the Prescription Act, one had to characterise the claim correctly (para [33]). The court found that the applicants' claim was based on section 252, which deals with an entitlement to an equitable judicial determination. Consequently, the claim was for declaratory relief and not for an alteration of the terms of contract or a money award (para [34]). The court concluded that a claim under section 252(3) fell outside the Prescription Act (para [35]) and upheld the appeal.

In *De Sousa & another v Technology Corporate Management (Pty) Ltd & others* 2017 (5) SA 577 (GJ) the minority shareholders, De Sousa (co-founder and 30% shareholder) and Diez (7,45% shareholder), launched an application in terms of section 252 of the 1973 Companies Act for relief from oppressive conduct in the form of unfair prejudice. This arose from a breakdown in the relationship between the shareholders following the purchase of shares in TCM (an information technology company) by the Hassim Family Trust (the controlling shareholder). The 1973 Companies Act applied to this case as the proceedings com-

menced in 2010, before the Companies Act 71 of 2008 (the 2008 Companies Act) came into operation.

(Notably, this case was preceded by an exception application during 2016. See 2016 *Annual Survey* for *De Sousa & another v Technology Corporate Management (Pty) Ltd & others* 2016 (6) SA 528 (GJ), where the court held that that there was no justification for the proposition that section 252 did not apply where prejudice was suffered by all the members. The court also held that the evidence had to be considered as a whole, to determine whether there was unfair prejudice under section 252 (para [43]). The conduct had to be viewed, objectively, as not only prejudicial, but also 'unfairly prejudicial' (paras [30] [46]). It is, therefore, clear from that case that although all the members/shareholders may have the same rights, a difference in interests can result in an action based on unfair prejudice in that sense. It is argued in Piet Delport et al *Henochsberg on the Companies Act 71 of 2008* (updated June 2018) (*Henochsberg*) 574(10) that it is not clear whether the same principles, if all the members were prejudiced, will apply in respect of section 163 of the 2008 Companies Act.)

TCM was formed in 1987. The first plaintiff, De Sousa, and the second defendant, Cornelli, were its only directors and shareholders. TCM was, consequently, a domestic company owned and managed on an equal basis. The relationship between the first plaintiff and the second defendant was similar to that between partners. Three other shareholders were subsequently added, bringing the number of shareholders to five. The majority shareholders, led by Cornelli, embarked on conduct that was oppressive, unfairly prejudicial and unjust to the minority shareholders. When it became apparent that the Hassim Family Trust could not afford the agreed purchase price for the shares it acquired in TCM, Cornelli (the CEO and one of the founding members) attempted to persuade the shareholders to amend the shareholders' agreement to reflect a lower purchase price. De Sousa and Diez resisted this on the ground that it was against the interests of the company and shareholders. The plaintiffs further claimed that when they attempted to dispose of their shares in TCM, Cornelli had not negotiated with them in good faith to arrive at a fair price for their shares. De Sousa was ultimately dismissed as an employee of TCM, while Diez was transferred to a post in TCM's Namibian office.

The principal question was whether the plaintiffs had satisfied the jurisdictional requirements for relief under section 252(3).

The court dealt with the legal principles relating to section 252 in detail (paras [31]ff). It found that section 252 provided a member, or some of the members of a company, with the means of obtaining relief from unfairly prejudicial, unjust, or inequitable acts or omissions by the company, or the conducting of its affairs in that manner. The emphasis was on the unfairness of the conduct complained of. A member seeking relief had to show that the conduct was 'unfairly prejudicial, unjust, or inequitable' to that member or to some part of the members. This conduct must not only be prejudicial, it must be unfairly so. Fairness was, therefore, the criterion by which a court would decide whether it had jurisdiction to grant relief (para [34]). The court held that the test for unfair prejudice was an objective one and that fairness was an elastic concept. What is fair or unfair will depend upon the context in which it is used (para [35]).

Various instances have been identified in case law that would qualify as 'unfairly prejudicial' conduct. It has been held that a form of unfair prejudice arises where a minority shareholder who has a right or legitimate expectation to participate in the management of the company is excluded from doing so by the majority, without a reasonable offer or arrangement being made to enable the excluded shareholder to dispose of his or her shares. The prejudicial inequity or unfairness lies not in the legally justifiable exclusion of the affected shareholder from the company's management, but in the effect of the exclusion on that shareholder if a reasonable basis has not been offered for the withdrawal of his or her capital (para [44]).

The court further held that although the right of a shareholder to manage the affairs of a company usually derives from the articles of association or agreements between the shareholders, the relationship between a company's shareholders could give rise to a legitimate expectation of participation in the company's management. This, according to the court, usually occurs in the case of a small domestic company or a 'quasi-partnership' (para [47]).

Cornelli and the majority shareholders under his instruction, had conducted the affairs of TCM in a manner that was detrimental to the plaintiffs' financial interests in various ways. For example, the business of TCM's profitable supplies division had been operated as if it were a entity separate from TCM, with all its income and profits being diverted to another company, in which Hassim was a shareholder. This resulted in TCM losing the

business and profit derived by the supplies division and jeopardised shareholder value (paras [204] [335]).

The court granted the order sought by the plaintiffs. It further ordered that a referee be appointed to determine the value of the plaintiffs' shares as at the date of the granting of the order. No allowance was to be made for the fact that plaintiffs were minority shareholders in the valuation of their shares, ie no discount was to be factored in for that reason.

The following can thus be taken from this case, in the context of section 252:

- The test of fairness is objective. One must consider the conduct as a whole and not in isolation;
- The test is not merely a commercial one;
- Various forms of unfairly prejudicial conduct have been identified in case law. This case is an example of an unfair prejudice where a minority shareholder who has a right or legitimate expectation to participate in the management of the company, is excluded from so doing by the majority without a reasonable offer or arrangement being made to enable the excluded shareholder to dispose of his or her shares;
- The right of a shareholder to manage the affairs of a company is usually derived from the articles of association or agreements between the shareholders, but the relationship between a company's members may give rise to a legitimate expectation to participate in the company's management.

Liquidation & Winding-up

Minister of Justice and Constitutional Development & another v South African Restructuring and Insolvency Practitioners Association & others [2017] 1 All SA 331 (SCA), 2017 (3) SA 95 was an appeal from *South African Restructuring and Insolvency Practitioners Association v Minister of Justice and Constitutional Development & others, and another application* 2015 (2) SA 430 (WCC), where the court had found, in terms of section 172(1)*(a)* of the Constitution of the Republic of South Africa, 1996 (the Constitution), that the Policy on the Appointment of Insolvency Practitioners in Government Notice 798 *GG* 38088 of 17 October 2014), read with Government Notice 77 of 7 February 2014 (*GG* 37287] of 7 February 2014) (policy) in terms of section 158 of of the Insolvency Act 24 of 1936 (the Insolvency Act), was inconsistent with the Constitution and invalid (see 2015 *Annual Survey* 235).

The appeal was dismissed on the basis that clause 7.1 of the policy embodied a strict allocation of appointments in accordance with race and gender, and was rigid and inflexible (para [33]) as well as arbitrary and capricious (paras [34] [36] [38]). This conflicts with the requirements set in *Minister of Finance & another v Van Heerden* 2004 (6) SA 121 (CC) (para [41]). The court held that the policy, however, did not improperly fetter the discretion of the Master but merely restricted it (para [45]). As regards irrationality, the court held that the real problem was that in the absence of proper information as to the basis on which the policy was formulated, and without proper information on the current demographics of insolvency practitioners, one could not say that the policy was formulated on a rational basis properly directed at the legitimate goal of removing the effects of past discrimination and furthering the advancement of persons from previously disadvantaged groups (para [47]). The factors which the court identified included that there was no explanation as to what qualifies as a complex estate or an unsuitable practitioner (para [48]). Furthermore, the Master's definition of a senior practitioner as a person who had received at least one appointment per year over the preceding five years was flawed. The definition did not take the size and complexity of the insolvent estate or winding-up into account (para [49]). In addition, the requirement of the policy that the Master has to appoint the next-in-line practitioner in each case was itself irrational as it failed to consider factors such as the nature of the individual estate, or the industry-specific knowledge, expertise or seniority of the practitioner concerned (para [50]).

Wishart NO & others v BHP Billiton Energy Coal South Africa (Pty) Ltd & others 2017 (4) SA 152 (SCA) was an appeal against an exception upheld by the court *a quo*. It considered the application of section 44(1) of the Insolvency Act and section 366(2) of the 1973 Companies Act (applicable by virtue of item 9(1) of Schedule 5 to the 2008 Companies Act), and more specifically, whether the provisions of section 44(1) of the Insolvency Act, by virtue of section 339 of the 1973 Companies Act, allowing the court or the Master to give leave for the late proving of a claim, applied in the winding-up. The appellants sought the High Court's leave under section 44(1) to prove a late claim and the exception was upheld. On appeal, the respondents contended that the judgment in *Mayo NO & others v De Montlehu* 2016 (1) SA 36 (SCA) (see 2015 *Annual Survey* 244) was

confined to the application of only three aspects of section 44(1): the time period; the fixing of costs; and payment of costs by a creditor who submitted a claim after the three-month period had expired. The balance of the proviso, dealing with the proof of a late claim with the leave of the court or the Master, does not apply to claims in the winding-up of a company. The reason for this, it was argued, was that section 366(2) of the 1973 Companies Act itself provides for a time limit in that the Master could fix a time within which creditors could prove their claims or otherwise be excluded from the benefit of the distribution under any account lodged with the Master (para [13]).

In *De Montlehu v Mayo NO & others* 2015 (3) SA 253 (GJ) the court (para [20]) stated:

> [T]he two sections are functionally different, and have different objectives. Section 366(2) of the Companies Act is a special provision intended to enable participation in a distribution under a particular account. It has no application to the late proof of claims in general, which is governed by the proviso to section 44(1) of the Insolvency Act . . . . Simply put, its objective is to nullify an attempt by a creditor to delay proving his or her claim until a lodged account shows that a distribution is to occur. The proviso to section 44(1) of the Insolvency Act, on the other hand, is to prevent proof of a claim after the expiration of a period of three months as from the conclusion of the second meeting of creditors, except with leave of the court or the master. The overall purpose of the proviso to section 44(1) of the Insolvency Act is to ensure that the administration of the estate is concluded expeditiously.

This was confirmed on appeal in *Mayo NO & others v De Montlehu* (above) where the court said (para [18]) that

> . . . neither in logic nor in the grammar of the respective provisions is there a reason why the three-month time period, together with the fixing of costs and the payment thereof by a later creditor [as provided for in section 44(1) of the Insolvency Act], should not apply alongside the discretionary power granted in terms of s 366(2).

It was further stated:

> [19] Were the three-month period not to apply [in liquidations], then in the absence of a time period being fixed by the master in terms of section 366(2), there would be no formal time period within which creditors would be required to lodge and prove their claims. The risk of tardiness, if not inertia, would be ever present. Clearly, this would not be in the interest of either the creditors or the general public. The three-month period stipulated in section 44(1) of the Insolvency Act relating to the proof of claims thus remains the bench mark in both sequestrations and liquidations. Section 366(2) does not, therefore,

> affect the applicability of section 44(1) of the Insolvency Act to companies in liquidation.

Consequently, the appeal against the order upholding the first exception was successful (para [16]).

The appellants' second claim was for the expungement of the respondents' claim in the winding-up of Euro Coal from the liquidation and distribution account (L&D account). The exception taken by the respondents was that an objection to an L&D account is governed by section 407 of the 1973 Companies Act. The court found that section 403 required the account to be lodged with the Master, and to lie for inspection as provided in section 406. Section 407 specifies the persons who may object to the account and the procedure for doing so. Section 407(4)*(a)* provides:

> The liquidator or any person aggrieved by any direction of the Master under this section, or by the refusal of the Master to sustain an objection lodged thereunder, may within fourteen days after the date of the Master's direction and after notice to the liquidator apply to the Court for an order setting aside the Master's decision, and the Court may on any such application confirm the account in question or make such order as it thinks fit (para [17]).

The respondents' second exception was that objections to an L&D account had to be first made to the Master, and that only once the Master had made a decision as provided for in section 407(4)*(a)*, could the decision be reviewed by a court. In the absence of an allegation that the Master had made a decision, the particulars disclosed no cause of action. The court *a quo* upheld the exception on the basis that the remedy was statutory as a review in terms of section 407, and that a court had no jurisdiction to expunge a claim. The appellants (paras [1] [20]) referred to *Millman & another NNO v Pieterse & others* 1997 (1) SA 784 (C), where the liquidators had instituted action to claim expungement of the claims of certain creditors that had been admitted to proof at the first meeting of creditors. The defendants in that case had excepted to the claims on the basis that a court had no jurisdiction to expunge claims, but was confined to reviewing a decision of the Master under section 151 of the Insolvency Act. The court had, however, dismissed the exception, holding that it had the jurisdiction to review a decision at common law, and that section 151 of the Insolvency Act did not oust that jurisdiction. However, contrary to the decision in *Millman* (above), in *Standard Bank of South Africa v The Master of the High Court &*

others 2010 (4) SA 405 (SCA) (para [93]), it was held that before resorting to review proceedings under section 151 of the Insolvency Act, a liquidator is obliged to follow the procedures set out in section 45 of the Insolvency Act. If a trustee disputes a claim after proof at a meeting, he or she must report on this to the Master and explain why the claim was disputed. The Master may confirm the claim, or, after affording the claimant an opportunity to substantiate the claim, reduce or disallow it. The court pointed out that it is this decision which triggers the review procedure under section 151 of the Insolvency Act (para [25]). In *Wishart NO & others* (above) the court held that the decision in *Millman* (above), insofar as it is not consonant with the principle enunciated in *Standard Bank of South Africa*, was incorrect (para [26]). The court concluded that

> . . . the appellants should have invoked the procedures set out in s 407 of the 1973 Companies Act. The power to expunge a claim or to reduce it is conferred on the master alone. (See B Galgut et al (eds) *Henochsberg on the Companies Act 61 of 1973* vol 1 at 861–2 (service issue 20) and the authorities cited there.) Only when the master has made a decision in this regard may an interested person approach a court to review it. The second exception was thus correctly upheld by the court *a quo*.

Companies Act 71 of 2008

Shares and Shareholders

In *Barry v Clearwater Estates NPC & others* 2017 (3) SA 364 (SCA) the first respondent's Memorandum of Incorporation (MOI) provided that a proxy must be delivered to the company at least 48 hours before the shareholders' meeting at which the proxy was to be exercised. The applicant disputed the validity of resolutions passed at a meeting of the shareholders of the first respondent, on the ground that the proxies submitted and accepted on the day of the meeting were in contravention of the first respondent's MOI. Had the proxies in dispute not been accepted, the attendance at the meeting would not have met the quorum requirements for the purpose of passing the resolutions. Therefore, the issue was whether the provisions of the first respondent's MOI, which stipulated a time limit for the appointment of a proxy, were valid in light of section 58(1)*(a)* of the 2008 Companies Act, which gives shareholders the right to appoint proxies at 'any time'.

The court *a quo* held that the relevant provisions of the first

respondent's MOI were inconsistent with section 58(1)*(a)* of the 2008 Companies Act and were, consequently, void in terms of section 15(1) of the 2008 Companies Act (s 15(1) provides that a provision of the MOI shall be void to the extent that it is inconsistent with the 2008 Companies Act). The result was that the proxies in dispute had been properly considered and the resolutions had been validly passed at the meeting. (See Helena Stoop 'Alterable and unalterable provisions of the Companies Act 71 of 2008: Recent cases expose inherent uncertainties' (2016) 1 *The Journal of Corporate and Commercial Law & Practice* 40–51 for a discussion on this case.) On appeal, the Supreme Court of Appeal confirmed the decision of the court *a quo* (para [16]). A provision in a company's MOI that prescribes a minimum time period within which a proxy must be lodged before the meeting will thus be invalid. This case confirmed the position under section 58(1) of the 2008 Companies Act, which provides that a shareholder may appoint a proxy at 'any time'. It should be noted that a provision in an MOI requiring the proxy to be submitted before a certain time should not invalidate the proxy itself. The words 'any time' in 58(1) further imply that a proxy can be submitted during the meeting.

The case of *Du Plooy NO & others v De Hollandsche Molen Share Block Ltd & another* 2017 (3) SA 274 (WCC) dealt with three important issues: the status of the original subscribers of shares; the transfer of the shares; and the application of sections 161 and 163 of the 2008 Companies Act.

In regard to the status of the subscribers of shares, the court found that an analysis of section 103 of the 1973 Companies Act was relevant. It made reference to Blackman's *Commentary on the Companies Act* (para [20]) in this regard. It also referred to *Henochsberg* (para [26]), where it is pointed out that the 1973 Companies Act used to provide that subscribers to a company's memorandum were deemed to have agreed to become members of the company upon incorporation, and that as soon as the company was incorporated the subscribers were supposed to be entered as members on the company's register of members. However, neither entry into the register of members nor allocation of shares was a condition precedent to becoming a member of the company. The court further referred to *Palmer's Company Law Vol* 27.005, where the author, relying on *Alexander v Automatic Telephone Company* [1900] 2 Ch 52, asserted that subscribers to the memorandum of association became members upon incorporation of the company (para [27]).

Concerning the issue of whether ownership of shares depends on registration thereof in a company's share register, the court held that (as explained by Blackman), in the case of certificated shares, the complex incorporeal rights which constitute a share are transferable by way of cession. The owner (who may also be the registered member) can thus sell such shares and cede the rights attached to them independently of, and prior to, the registration of the purchaser. Ownership of shares is, therefore, not dependent on registration (para [33]).

In regard to the application of sections 161 and 163 of the 2008 Companies Act, it was held that in a situation where share certificates are issued but the holders of the shares are not entered in the securities register, the court could exercise a discretion in terms of section 161 to ensure that the securities register reflects the true owner of securities (para [59]). (See JS Oosthuizen & PA Delport 'Rectification of the securities register of a company and the oppression remedy' (2017) 80 *THRHR* 228.)

Directors and Shareholders

The key question addressed in *Kaimowitz v DeLahunt & others* 2017 (3) SA 201 (WCC) related to the duties of a company director, particularly the extent to which these include involvement in the day-to-day management of the company. The applicant was one of five directors of the fifth respondent (the company) and had previously been employed by the company. The first to fourth respondents were the other four directors of the company. The applicant's employment was terminated and he was informed that he would remain as a non-executive director of the company. As a non-executive director, he would not be involved in the day-to-day management of the business of the company. The applicant brought an application in terms of section 163 of the 2008 Companies Act, arguing that such conduct was unlawful, prejudicial, and oppressive to him in that a post of non-executive director had been created which excluded him from the management of the company's business. This was, so he averred, in conflict with section 66(1) of the 2008 Companies Act which provides that the business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, save to the extent that the 2008 Companies Act or the company's MOI provides otherwise. It was submitted on behalf of the applicant that

section 66(1) conferred on the board of directors the right and obligation to 'manage' the business of the company (para [13]). Although in the court's view the exact nature of the relief sought by the applicant was not spelt out clearly, the court found that the applicant sought to play a greater role in the affairs of the company than merely attending board meetings. Consequently, the court had to consider two separate questions. The first question was whether the applicant, as a director, was as of right entitled to be involved in the day-to-day running of the business of the company. If not, the second question was whether the applicant had been prevented from being involved in the company's business in a manner that impeded his role as a director in terms of the applicable law. The court quoted *R v Mall & others* 1959 (4) SA 607 (N) 623, where a clear distinction was made between a director and a manager and it was pointed out that directors appointed by the shareholders are vested with the management and control of the company, and act as a body unless their powers have been lawfully delegated. A manager, on the other hand, is an employee of the company and his services are engaged by the directors. The court held that it was clear that the office of a director did not intrinsically involve the day-to-day running of the company, unless such powers were conferred, such as in the case of a managing director (para [19]). The court further referred to *Daniels v Anderson* (1995) 37 NSWLR 438 505 as authority for a summary of the general position that the board fulfills a monitoring role over the business of the company as opposed to dealing with its day-to-day affairs. However, the question remained as to whether a director on a board (save where it was provided for in the MOI and where such director, pursuant thereto, could be given the task, by way of membership of a subcommittee created by the board, of being responsible for the management, or an aspect thereof, of the company) was entitled to be involved in the overall day-to-day running of the affairs of the company (para [24]). With reference to the the *dictum* in *Howard v Herrigel & another NNO* 1991 (2) SA 660 (A) 678 that not every director has to be involved in the day-to-day running of a company, the court concluded that it was clear from section 66(1) of the 2008 Companies Act that the management of the company in terms of the overall supervision thereof vested in the board of directors as opposed to individual directors.

In *Moraitis Investments (Pty) Ltd & others v Montic Dairy (Pty) Ltd* 2017 (5) SA 508 (SCA), M and K conducted a dairy business

together. They held their respective interests indirectly. In respect of M, that vehicle was the Moraitis Trust (the Trust) of which he and his brothers were trustees. The Trust was the sole shareholder in Moraitis Investments, which in turn held stakes in the various companies through which the business was conducted. There was a dispute between M and K and they entered into a settlement agreement. M signed the agreement on behalf of both the Trust and Moraitis Investments. The settlement agreement was then made an order of court by consent. In the court *a quo* the trustees sought to set aside both the settlement agreement and the order making that agreement an order of court. They argued that the agreement was invalid because M had not been authorised by either the Trust or Moraitis Investments to conclude it. They further argued that a special resolution in terms of section 115(2)*(a)* was required as the settlement agreement involved a disposal of the whole of Moraitis Investments as contemplated in section 112 of the 2008 Companies Act. It was contended that the agreement was void as no special resolution had been passed.

The court found that Moraitis Investments had one shareholder, the Trust, and two directors, M and K. The authority of Moraitis Investments could, therefore, emanate from two sources, ie, a decision by its sole shareholder to conclude an agreement, or a decision by its two directors (para [35]). It held that the purpose of the requirements of sections 112 and 115 was to ensure that the views of all the shareholders were taken into account, and section 65(9) and (10) provided for the majority of the votes required to pass the special resolution (para [37]). Where a company had only one shareholder, these requirements would become a mere formality and, in the court's view, the principle of unanimous consent could be invoked in answer to the appellants' contention. This English company law principle was accepted as part of our law under both the 1926 and the 1973 Companies Acts (*Sugden & others v Beaconhurst Dairies (Pty) Ltd & others* 1963 (2) SA 174 (E) 179H–181A; *Gohlke & Schneider & another v Westies Minerale (Edms) Bpk & another* 1970 (2) SA 685 (A) 693E–694E). The court concluded that it could see nothing in the 2008 Companies Act to suggest that the principle was no longer applicable. The statement by the court that a shareholder can by resolution authorise conclusion of a contract for the company is not correct. This is so because the sole authority, unless the MOI provides otherwise, lies with the directors in terms of section 66(1) of the 2008 Companies Act. Even though the principle of

unanimous consent is still part of our law, it was not applicable to the facts of this case as the directors still managed the business and affairs of the company in terms of section 66(1) and a resolution, even of a single shareholder, cannot amend section 66(1). The court also accepted the principle of unanimous consent between the directors as a basis for excluding the duty to disclose an interest in a contract in terms of section 75(6) (para [39]).

Oppressive Conduct

Harilal v Rajman & others [2017] 2 All SA 188 (KZD) dealt with an application in terms of section 163 of the 2008 Companies Act. The applicant sought an order directing the first to the fourth respondents to purchase her shareholding and loan account in the fifth respondent. The applicant had obtained her shareholding from her husband, who had transferred it to her. The applicant also replaced her husband as a director, although she never took up any duties in that capacity (para [6]). Her husband also attended the shareholder meetings as her proxy. The respondents claimed that the husband had transferred his shareholding to them, meaning that the applicant did not have the necessary *locus standi* to bring the application as she was not a shareholder at that stage. The applicant did not comply with the elaborate procedure in the shareholders' agreement for the disposition of the respective shareholding (para [8]).

On the first issue of *locus standi*, the court assumed that the applicant had the necessary *locus standi* without deciding this issue. It held that the applicant had not succeeded in discharging the onus of proving her allegation that the respondents had repudiated the shareholders' agreement (para [67]). She attempted to brush the shareholders' agreement aside with vague and general statements that it had been repudiated and that its auditor was biased, without providing any evidence (para [75]). It was also held that the applicant was not entitled to the alternative relief of a winding-up order based on the just and equitable principle (para [76]).

On section 163, the court held that, in order to succeed, an applicant must allege and prove that an act or omission by the company or a shareholder had resulted in oppressive or unfair prejudice and that it had unfairly disregarded the interests of the applicant (para [78]). The applicant had not shown this.

The application was dismissed with costs. This case confirmed

the principles in respect of section 163 and we agree with this decision.

In *De Klerk v Ferreira & others* 2017 (3) SA 502 (GP) the court confirmed the wide discretion to compel a transfer of shares or interests in order to deal with prejudicial, unjust, and inequitable conduct by a company director or shareholder against each other. This case is specifically relevant to the definition of a 'related person' in this context.

De Klerk and Ferreira were equal members in a close corporation and shareholders of a company. When their relationship broke down, De Klerk sought orders in terms of section 163(1) of the 2008 Companies Act to compel Ferreira to transfer his interest in the close corporation and shares in the company to him at fair compensation. The court held that the intertwined nature of the relationship between the close corporation and the company was not sufficient for the application of section 163 of the 2008 Companies Act. The real issue was whether the close corporation was a 'related person' with respect to the company (paras [10] [76]). Section 163 provides relief to shareholders or directors who are subject to oppressive conduct by a company or a 'related person'. The court considered, in this regard, whether Ferreira had the ability materially to influence the policy of both the close corporation and the company in the same way as a person who exercises control through a majority vote at a board or general meeting. It found that the business of the close corporation was conducted on the company's land and the former could not have functioned without the latter. The close corporation was, therefore, a 'related person' (para [83]).

It was held that Ferreira had conducted the affairs of the close corporation in a way that was unfairly prejudicial to De Klerk, and that it was appropriate to make orders ending his membership and for De Klerk to acquire his interest (ss 49 and 36 of the Close Corporations Act 69 of 1984) (para [72]). As the relationship between the company and the close corporation was not sufficiently interlinked, it was necessary to show that the close corporation was a 'related party' in order for it to be entitled to relief in terms of section 163. De Klerk was entitled to relief under section 163(2) in respect of the company as the close corporation was a 'related person' in terms of section 163(1) (paras [83]–[86]).

In *Henochsberg* 32(6) it is argued that if the MOI or a valid shareholders' agreement or the 2008 Companies Act (section 66) provides for co-management in a company by the shareholders

and/or directors, the usurping of these powers by a shareholder or director cannot be seen as being able to exercise the element of control in the 'majoritarian' situations as envisaged in subsection (2)*(a)–(c)*. This 'power' must be in terms of an agreement, express or otherwise, between the shareholder(s) or even between the shareholders, on the one hand, and a third party on the other. Such powers, if given by the board, must comply with section 66. However, such an agreement must comply with the MOI and the 2008 Companies Act. The agreement will be void if it is in conflict with the MOI and/or the 2008 Companies Act. Such an agreement can regulate how the shareholder will exercise his or her rights in terms of the MOI or the 2008 Companies Act, without affecting those rights per se and without conflicting with the MOI or the 2008 Companies Act. A shareholder can, in this manner, validly agree to exercise his or her votes in favour of certain resolutions to be presented, thereby conferring the 'majoritarian' power upon a person or persons, as envisaged in subsection (2)*(a)–(c)*, who does or do not have that power *de jure* in terms of the MOI or the 2008 Companies Act. These resolutions may include, for example, a sale of the company's assets in terms of section 112 or obtaining a loan for the company where the MOI requires certain loans to be approved by a stipulated majority. A person who is a shareholder and/or director of a company, and also a full-time employee, cannot, in the capacity of employee, without an agreement as discussed above, evolve into a person who controls the company as envisaged in subsection (2)*(d)*. But compare *De Klerk v Ferreira & others* (above).

Appraisal Remedy and the PAIA

Loest v Gendac & another 2017 (4) SA 187 (GP) dealt with section 164 of the 2008 Companies Act, which allows shareholders who are dissatisfied with proposed company resolutions to exit the company in return for the fair value of their shares. The issue in this case was whether an aggrieved shareholder could rely on the provisions of the Promotion of Access to Information Act 2 of 2000 (the PAIA) to exercise or protect his or her rights under section 164.

The applicant made a request under section 50 of the PAIA to be given access to company records in order to determine the fair value of his shares. The respondent companies argued that the applicant did not have the necessary *locus standi* as he had been stripped of his status as a shareholder by the exercise of his

rights in terms of section 164 of the 2008 Companies Act. They also argued that the applicant was barred from relying on section 50 of the PAIA because section 164 provided for the valuation of shares by the court.

The court held that section 164 did not deprive the applicant of his status as shareholder, but merely removed other privileges associated with this status while he pursued the appraisal remedy (para [13]). He remained a shareholder for purposes of receiving fair value for his shares. In regard to whether the applicant was entitled to request access to information in terms of the provisions of the PAIA, the court highlighted that even though section 164 of the 2008 Companies Act had built-in mechanisms for dissenting shareholders to protect their right to receive fair value for their shares, there was no impediment in the section to exercising the rights of access to information in terms of the PAIA (para [40]). However, the court found that the applicant had not established why access to information was *required* for the exercise of his appraisal rights in terms of section 164. It held that a parallel process under the PAIA would also result in unnecessary costs and burdens for the company (para [45]).

Derivative Action

Section 165 of the 2008 Companies Act has abolished the common-law derivative action and replaced it with the statutory derivative action. A wide range of persons, including company directors, can now institute derivative proceedings by serving a demand on the company to commence or continue legal proceedings or to take related steps to protect the legal interests of the company. If the company does not accede to a demand, the person who has made the demand may apply to court for leave to bring or continue proceedings in the name or on behalf of the company. The court may only grant leave if it is satisfied that the applicant is acting in good faith, the proposed proceedings involve a trial of a serious question of material consequence to the company, and it is in the best interest of the company that the applicant be granted leave (s 165(5)*(b)*). In *Mbethe v United Manganese of Kalahari (Pty) Ltd* 2017 (6) SA 409 (SCA) the central issue related to the nature of the onus which the applicants had to discharge in terms of section 165(5)*(b)* of the 2008 Companies Act. The court held that the applicants bore the onus of proving (on a balance of probabilities) the requirements of section 165(5)*(b)*, and that the court still had an overriding

discretion to refuse relief even if these requirements were satisfied (see 2016 *Annual Survey* 265 for the court *a quo*). It was further held that the individual requirements of section165(5)*(b)* should not be viewed in isolation. The court pointed out that, in considering whether the 'proceedings involve the trial of a serious question of material consequence to the company', a finding that the applicant had an ulterior motive would also be relevant when deciding whether the applicant acted in good faith (para [19]). Concerning the requirement that an applicant must be acting 'in good faith', the court held that while the test for good faith is subjective, it is also subject to evidence-based objective control (para [20]). The enquiry was, therefore, whether the evidence revealed reasonable grounds on which to find that the applicant was acting in good faith. The absence of reasonable grounds could establish an absence of good faith. If the evidence proved the presence of some ulterior motive/purpose, the pursuit of which did not involve the trial of a serious question of material consequence to the company, or which was not in the best interest of the company, that would also constitute evidence of an absence of good faith (para [22]). This case clarified the position regarding the nature of the onus to be discharged by an applicant for relief under section 165 in order to satisfy the court that the applicant is acting in good faith.

Lewis Group Ltd v Woollam & others 2017 (2) SA 547 (WCC) concerned an application in terms of section 165(2)*(a)* of the 2008 Companies Act, which entitles any shareholder, or a person entitled to be registered as a shareholder, to institute a derivative action. The first respondent served a demand in terms of section 165(2)*(a)* of the 2008 Companies Act, calling upon the applicant company to protect its legal interests by commencing proceedings to declare four of the company's directors (the second to fifth respondents) delinquent.

Notably, section 162 of the 2008 Companies Act provides for the application to declare a director delinquent or under probation. In terms of section 162(2) a wide category of persons, including a company, a shareholder, director, company secretary, prescribed officer of a company, or a registered trade union, may apply to court for a director or former director to be declared delinquent or placed on probation. Therefore, companies have standing to bring proceedings for the disqualification of their directors or former directors (para [10]).

The court must declare a person delinquent if the person, while a director: (i) grossly abused the position of director; (ii) took

personal advantage of information or an opportunity, contrary to section 76(2)*(a)*; (iii) intentionally, or by gross negligence, inflicted harm upon the company or a subsidiary of the company, contrary to section 76(2)*(a)*; (iv) acted in a manner that amounted to gross negligence, wilful misconduct, or breach of trust in relation to the performance of the director's functions within, and duties to, the company or contemplated in section 77(3)*(a)*, *(b)* or *(c)* (see s 162(5)*(c)* of the 2008 Companies Act). In the context of section 162(5)*(c)*, the court referred to *Gihwala & others v Grancy Property Ltd & others* [2016] 2 All SA 649 (SCA), 2017 (2) SA 337 para [13]. Concerning 'grossly abused the position of director', the court held that the conduct in question must relate to the use of the position as director and not to the performance by the person concerned of his duties and functions as a director (para [143]). In regard to 'intentionally, or by gross negligence, inflicted harm upon the company or a subsidiary of the company', the court held that what would be required is conduct that is intended to harm the company (para [16]). It concluded that for a company, or any of its shareholders, to succeed in obtaining a declaration of delinquency it must demonstrate serious misconduct by the person concerned – for example, dishonesty, wilful misconduct, or gross negligence. Poor business decisions or 'ordinary' negligence will not be sufficient (para [18]).

An important question that the court had to answer, however, was whether the applicant could proceed derivatively for relief when he could proceed for such relief on a personal basis (para [19]). The question was, consequently, whether standing under sections 165 and 162, respectively, was mutually exclusive. The court held that the aim of section 165 is to permit the institution or continuance of proceedings in the company's best interests in circumstances where the company was refraining from acting on its own initiative (para [31]). It pointed out that section 165 is not a vehicle for an applicant to protect its own interests using the company's name and legal personality (para [32]). It was also no longer necessary to show that the wrongdoers were using their control of the company to prevent the company from taking action (para [34]). When considering the relationship between sections 165 and 162, the court held that there was a conscious distinction between the concept of the legal interest of a particular company, to which proceedings in terms of section 165 related, and that of protection of the public interest, to which section 162 related (para [39]). It found that the shareholder's

right protected in terms of section 162 is not a right of the company. Instead, it is a separate and personal right that each and every shareholder enjoys individually (para [43]). The court concluded that there was nothing in the nature of the complaints or the contents of the demands to indicate why the first respondent should be allowed to proceed derivatively for relief that he could claim personally (para [52]). The court also held that the shareholder's right in terms of section 162 did not derive from the company but existed independently of the right of the company (para [27]).

It is interesting to note that the court also held that the first respondent was not a shareholder as defined in section 1 of the 2008 Companies Act (para [20]). A 'shareholder' is defined in section 1 to mean '. . . the holder of a share issued by a company and who is entered as such in the certificated or uncertificated securities register, as the case may be'. The applicant's counsel submitted, however, that the first respondent could easily have qualified himself as a shareholder (as defined) of the applicant company simply by obtaining the registration in his name of one or more of the shares he owned beneficially. It is argued, in *Henochsberg* (32(3)), that the 2008 Companies Act is clear on the requirements to be a shareholder and that the 'contextual import' of section 162, or any other section for that matter, cannot change the express wording of section 1.

The court questioned the principle that a director owed fiduciary duties only to the company (para [49]). It found that, following the decision in *Percival v Wright* [1902] 2 Ch 421, the notion that a director's fiduciary duty was exclusively to the company, and not to its shareholders, appeared still to be entrenched in our law. (See *Henochsberg* 298(17) in this regard.) The court also referred to *Grancy Property Limited & another v Gihwala & others; In Re: Grancy Property Limited & another v Gihwala & others* ([2014] ZAWCHC 97 para [104]), where it was held that 'the duty of company directors to act honestly and in accordance with their fiduciary duties to the company is owed not only to the company, but also to the shareholders personally'. In *Gihwala & others v Grancy Property Ltd & others* (above) paragraph [144], the Supreme Court of Appeal stated that the relationship between shareholders and the directors they have put into office involved a 'bond of trust'.

The case of *Lewis Group Ltd v Woollam & others (1)* [2017] 1 All SA 231 (WCC) concerned two interlocutory applications (to

the main application above) in relation to the rules governing discovery as well as a counter-application for an order to deliver the answering affidavit within ten days. The court made some important comments regarding section 165 of the 2008 Companies Act. It held that the bases upon which a company could challenge a demand made in terms of section 165(2) were strictly limited (para [13]). Furthermore, when considering whether a demand is without merit, the court would not pre-empt the determination of the claim that the demander intended to prosecute derivatively, nor would the court be concerned with the prospects of success of that claim. When the court assesses the demand, it does so merely to determine whether the demand has made out a cognisable basis for the contemplated derivative action (para [14]).

Disqualification

Gihwala & others v Grancy Property Ltd & others [2016] 2 All SA 649 (SCA), 2017 (2) SA 337 was an appeal against an order of the Western Cape Division of the High Court which, among other things, declared the first and second appellants to be delinquent directors in terms of section 162(5)*(c)* of the 2008 Companies Act. (See *Grancy Property Ltd & others, in re Grancy Property Limited & another v Gihwala & others* [2014] ZAWCHC 97.) For our purposes, the court made important remarks regarding the scope, ambit, and constitutionality of section 162. This section, dealing with applications to declare directors delinquent in certain instances, is a unique South African provision. (See Du Plessis and Delport ''Delinquent directors'' and ''directors under probation'': A unique South African approach regarding disqualification of company directors' (2017) 134 *SALJ* 276 for a detailed discussion of s 162 and this judgment.)

Concerning the constitutionality of section 162 of the 2008 Companies Act, the first issue was whether the entire section was unconstitutional as it was allegedly retrospective in its operation. The second issue related to whether the absence of judicial discretion in regard to the delinquency order potentially violated the constitutionally protected rights to dignity, to choose a trade, occupation or profession, and the right of access to courts. It was argued, in regard to the first issue, that all the facts relied on to justify the delinquency order were based on events that occurred before the commencement of the 2008 Companies Act. This argument, however, fell away when the court held that a statute

was not retrospective 'because a part of the requisites for its action is drawn from time antecedent to its passing' (para [141]). The argument was then confined to the second issue.

The court started by considering the purpose of section 162(5). It held that the aim of section 162 is to protect those who invested in companies against directors who engaged in serious misconduct. It further held that the provision protected those who dealt with companies by seeking to ensure that the management of companies is in the hands of capable people. Those who enjoy the benefit of limited liability should not abuse their positions (para [144]).

The argument that the absence of flexibility in regard to the imposition of delinquency has the potential to infringe the right to choose a trade or occupation and the right of access to courts, failed (paras [146] [147]). In regard to the right to access to courts, the court held that the court was involved in every stage of the enquiry under section 162(5). It was the court that made the findings on which a delinquency order would rest. Furthermore, the exclusion was for a period of seven years but the court had a discretion to relax this period after three years by placing the person under probation (para [147]). Concerning the right to choose a trade, occupation or profession, the court held that the first and second appellants had not suggested that section 162(5) was either capricious or arbitrary. On that ground alone, the constitutional challenge had to fail (para [146]).

Regarding the constitutional challenge based on the right to dignity, the appellants argued that the right to dignity is infringed as the terms of the statute do not permit the court to take the individual directors' circumstances and degree of blameworthiness into account (para [150]). The court held that this could only be argued if the rationality of the section was attacked, and this was not the case.

(See also on this case R Cassim 'Delinquent directors under the Companies Act 71 of 2008: *Gihwala v Grancy Property Limited* 2016 ZASCA 35' 2016 *PER* 19.)

It is clear from this case that:

- Conduct that occurred prior to the effective date of the 2008 Companies Act may be considered in an application under section 162. This is indicated in item 7(7) of Schedule 5 to the 2008 Companies Act. It is not clear how far back the conduct can go. However, it appears that there is no time limit, as the 2008 Companies Act provides no guidelines or prescription

period (see Cassim above on this point). The maximum period within which an application under section 162(5) must be instituted after the conduct occurred has not been specified.
- The court dismissed the argument that the absence of judicial discretion regarding to the imposition of a delinquency order renders the provision unconstitutional.
- The court held that section 162 was not a penal provision but was aimed at protecting the public.

Business Rescue

Business rescue plan

In *Booysen v Jonkheer Boerewynmakery (Pty) Ltd* & *another* 2017 (4) SA 51 (WCC) the applicant, an employee of the company under business rescue, instituted action against the company and the business rescue practitioner for payment of outstanding remuneration. The applicant's outstanding remuneration had been admitted as a preferent claim in the business rescue plan. Section 133(1) of the 2008 Companies Act provides that during business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except, as far as it is relevant here, with the written consent of the practitioner or with the leave of the court and in accordance with any terms the court considers suitable. The question was whether the applicant had to obtain such leave from the court in a separate substantive application before instituting the main application, or whether the application for leave could be brought as part of the main application. The court analysed the conflicting judgments on this aspect (paras [30]-[38]). In *Merchant West Working Capital Solutions* (*Pty*) *Ltd v Advanced Technologies and Engineering Company Ltd* 13/12406 10 May 2013 (GSJ) (para [67]); *Redpath Mining South Africa* (*Pty*) *Ltd v Marsden NO & others* 18486/2013 14 June 2013 (GSJ) (para [71]); *Elias Mechanicos Building & Civil Engineering Contractors (Pty) Limited v Stedone Developments (Pty) Limited* 2015 (4) SA 485 (KZD) and *Msunduzi Municipality v Uphill Trading 14 (Pty) Ltd & others* [2015] JOL 33101 (para [8]), it was required that a separate formal application be brought. On the other hand, in *African Banking Corporation of Botswana v Kariba Furniture Manufacturers (Pty) Ltd & others* 2013 (6) SA 471 (GNP), such

application was allowed in the main application for the setting aside of the business rescue plan. The court also pointed out that if an applicant – as in *Safari Thatching Lowveld CC v Misty Mountain Trading 2 (Pty) Ltd* 2016 (3) SA 209 (GP) – commenced with an application to wind up the company, there was no need to bring a substantive and separate application to proceed with the application if the business rescue did not proceed or was ineffective (para [54]). However, an application relating to the business rescue plan itself, its development, adoption, and implementation was not subject to section 133(1) (*Moodley v On Digital Media* (*Pty*) *Ltd & others* 2014 (6) SA 279 (GJ) (para [10])). This was so because such an application had to be instituted against the company *and* the business rescue practitioner. Section 133(1) only applies to legal proceedings against the company. The court rejected the approach followed in *Elias Mechanicos Building & Civil Engineering Contractors (Pty) Limited* and *Moodley* (above). Instead, it held that it would be wrong to require that in every matter leave in terms of section 133(1) be sought and obtained by way of a formal application, or that such leave must always be sought by way of a separate, prior application (para [54]). What would be sufficient would depend on the circumstances of each particular matter and the court would have to exercise its discretion in each case. In *Arendse & others v Van der Merwe & another NNO* 2016 (6) SA 490 (GJ) (para [11]) it was held that the court's discretion, in this regard, had to be exercised judicially, based on considerations of convenience, fairness, and what would be in the interests of justice (see 2016 *Annual Survey* 259 on the *Arendse & others* case).

The court rejected the argument that section 133(1) did not apply in respect of the adoption or implementation of the business rescue plan (para [58]). It held that there was no reason why the leave of the court should not be obtained to sanction any proceedings brought in order to give effect to, or to implement, the business rescue plan. Moreover, the court would have every reason to consider whether to grant leave to proceed with such proceedings in the interests of the company and the business rescue to which it was subject, as the precipitous launch thereof could well endanger the chances of the successful rehabilitation of such a company if the proceedings were to be allowed. The court stated that 'it could never have been intended by the legislature to exclude any and all legal proceedings that deal with

the adoption or implementation of a business plan, from the requirement of the consent of the business rescue practitioner or the leave of the court'. However, a full bench in *LA Sport 4X4 Outdoor CC & another v Broadsword Trading 20 (Pty) Limited & others* [2015] ZAGPPHC 78 paragraphs [35] and [36A] held that the right to approach a court to set aside a voluntary business rescue process initiated in terms of section 129 was not subject to leave by the court (or consent of the practitioner). If this were the case, the application for leave would, as a 'legal proceeding', in itself also be subject to leave by the court *ad infinitum.* In addition, the right to approach the court is an essential counter-weight to the curtailment of the affected persons' rights licensed by the (unilateral) action by the company by way of a board resolution. (See also *Henochsberg* 473.) The purpose of the measures does not require section 130(1) to be subject to section 133(1). The contrary is correct. There is also no textual indication that the right in section 130(1) is subject to section 133(1). The court concluded that the business rescue practitioner could not acquire a right to unilaterally amend the adopted business rescue plan, as it would effectively circumvent the procedure set out in the 2008 Companies Act in terms of which the claims, which are to be discharged as per the rescue plan, derive their binding force (para [67]).

BP Southern Africa (Pty) Ltd v Intertrans Oil SA (Pty) Ltd & others 2017 (4) SA 592 (GJ) also addressed the issue of section 133(1) of the 2008 Companies Act. The case involved an application for the winding-up of the respondent. A resolution to place the respondent under business rescue had been adopted but a business rescue plan had not yet adopted. It was contended that separate *a priori* proceedings were required, by way of a substantive application, to lift the moratorium before the winding-up application could have been launched, and that substance should trump form, particularly as leave to institute proceedings and the merits were so intertwined (para [26]). The court held that where the main relief to be sought related to the very status which invoked the moratorium protection, it seemed overly technical to insist on two distinct applications as opposed to one application with two (sets of) prayers: one for permission, and one for the substantive relief (para [27]). The court, in that case, allowed one application. The court's decision was also based on the decision of the full bench in the *LA Sport 4X4 Outdoor CC & another* case. The business rescue practitioner

had suspended all the obligations of Intertrans in terms of the contract with the applicant (supplier). The applicant disputed the entitlement of the business rescue practitioner to do so while at the same time insisting on performance by the applicant of its reciprocal obligations in terms of that agreement. The key question related to the application of section 136 of the 2008 Companies Act, which was the basis of the business rescue practitioner's actions. The relevant part of section 136 provides:

> (1) Despite any provision of an agreement to the contrary –
> . . .
> (2) Subject to subsection (2A), and despite any provision of an agreement to the contrary, during business rescue proceedings, the practitioner may –
> (a) entirely, partially or conditionally suspend, for the duration of the business rescue proceedings, any obligation of the company that –
> (i) arises under an agreement to which the company was a party at the commencement of the business rescue proceedings; and
> (ii) would otherwise become due during those proceedings; or. . .

The court held that the language conferring the power of suspension was, on the face of it, clear and that 'any' is notoriously a word of wide, if not unlimited, import (para [37]). Therefore, 'any obligation of the company' would, at least *prima facie* and unless any absurdity was thrown up, include obligations that were contractually tied with a reciprocal obligation of the creditor. The court stated:

> Also, since the section is silent about the effect that the suspension has on such an obligation, and since the legislature knew and knows the residual law of contract, it must be accepted that the creditor has available, subject to the normal rules, the *exceptio non adimpleti contractus* and, again, if the normal rules of materiality and contractual notices apply, the creditor also has available the normal rights of cancellation (para [38]).

It was, therefore, held that the suspension of all Intertrans's obligations entitled the applicant to withhold the product, access to the premises, and access to the equipment. The applicant could also cancel the branded distribution agreement, provided the appropriate notices were given. However, the applicant could not simply ignore the suspension and insist on performance contrary to it (para [40]).

Intertrans had also ceded its book debts to the applicant as

security. The question was whether the cession of book debts continued to operate in respect of debts that arose from sales concluded during business rescue. Section 134(3) of the 2008 Companies Act provides:

> If, during a company's business rescue proceedings, the company wishes to dispose of any property over which another person has any security or title interest, the company must –
> *(a)* obtain the prior consent of that other person, unless the proceeds of the disposal would be sufficient to fully discharge the indebtedness protected by that person's security or title interest; and
> *(b)* promptly –
> (i) pay to that other person the sale proceeds attributable to that property up to the amount of the company's indebtedness to that other person; or
> (ii) provide security for the amount of those proceeds, to the reasonable satisfaction of that other person.

The court posed the question as to how the security could be preserved if the debtor's obligations to the creditor were suspended (para [44]). It concluded that section 136(2A)*(c)* expressly created a suspended provision of an agreement relating to security, and provided that it 'continues to apply for the purpose of section 134, with respect to any proposed disposal of property by the company'. However, according to the court, that provision had to be be applied in the context of the applicable law which provided that security cession of future book debts was complete and effective by mere initial agreement. When at the future date the book debts came into existence, then, without more and without any further obligation of the cedent, they became the property of the cessionary (para [45]). No further obligation on the part of the cedent existed or was required to be performed for the debt to become subjected to the rights of the cessionary. There was, therefore, no obligation for Intertrans arising from the cession of book debts that was capable of being suspended, even if the right of the cessionary to enforce the debts arose only in business rescue (para [46]). The court pointed out that in terms of section 130(1)*(a)*(ii), read with section 130(5)*(a)*(i), a business rescue resolution could be set aside if there was no 'reasonable prospect' of rescuing the company (para [71]). With reference to *Oakdene Square Properties (Pty) Ltd & others v Farm Bothasfontein (Kyalami) (Pty) Ltd & others* 2013 (4) SA 539 (SCA) paragraphs [29]ff, the court summarised the test for 'reasonable prospect' to mean 'something less than a reasonable probability; something more than a *prima facie* case; something more than an

arguable possibility; a prospect based on reasonable grounds; and mere speculative suggestion is not enough'. In the circumstances of the case, the court found that there was no such reasonable prospect and it granted the winding-up order. The court added that the court hearing such an application could also, under section 130(5)*(a)*(ii), set aside the resolution if, having regard to all of the evidence, the court considered that it was otherwise 'just and equitable' to do so. However, it should be noted that, in contrast to *Panamo Properties (Pty) Ltd & another v Nel & others NNO* 2015 (5) SA 63 (SCA) (2015 *Annual Survey* 263), the 'just and equitable' ground was apparently still accepted as a separate ground in terms of section 130(5).

Section 134 of the 2008 Companies Act was also discussed in *Energydrive Systems (Pty) Ltd v Tin Can Man (Pty) Ltd & others* 2017 (3) SA 539 (GJ). The applicant had sold movable assets to the company under a 'reservation of ownership' clause. The company subsequently went into business rescue. The business rescue practitioner of the company sold those movable assets to the respondent. The applicant instituted an application in the form of a *rei vindicatio* as the assets had been sold in contravention of section 134(3). The court noted that the term 'title interest' differed from 'security', and was not defined in the 2008 Companies Act. However, the court pointed out that the difficulty in defining 'title interest' did not provide a valid reason to disregard the use of that term by the legislature as an alternative to 'security' (para [13]). It held that, like 'security', 'title interest' was something which safeguarded the payment of the indebtedness due to the creditor of the company under business rescue. The court therefore found (para [16]) that:

> In South Africa it is not unusual for creditors to safeguard their rights by way of reservation of ownership clauses in contracts such as contracts for the sale of goods where the purchase price is paid over time. The use of the word title as a synonym or alternative for ownership is also not unusual; for example, ownership of immovable property is based on a title deed. In my view the term 'title interest' would include a reservation of ownership clause such as the one in the lease between the applicant and the second respondent.

The court did not consider the obligation to pay or secure the debt as a mere personal right against the practitioner. The effect of such an interpretation would be to destroy the agreed security or ownership and replace it with a personal right against the practitioner. Therefore, the court interpreted the obligation to

promptly pay or secure the debt and the consideration as a requirement for the valid transfer of ownership by the practitioner by way of a sale and delivery in terms of section 134 without consent of the creditor. It held that the rights of the creditor would only be terminated on payment or provision of other security (para [20]). If the practitioner did not pay or secure the debt due to the applicant, the applicant would remain the owner of the equipment and would be entitled to institute a *rei vindicatio* (para [21]).

Firstrand Bank Ltd v KJ Foods CC (in business rescue) [2017] 3 All SA 1 (SCA) was an appeal from *KJ Foods CC v First National Bank* [2015] ZAGPPHC 221. The appellant, a creditor holding 29,81 per cent of the voting interest, voted against the adoption of a business rescue. Consequently, the business rescue plan was rejected as the 75 per cent of the creditors voting interests required to approve the business rescue plan had not been obtained. The parties reached an agreement but the appellant did not withdraw as it was agreed that the industry would greatly benefit from the Supreme Court of Appeal's judgment in the matter. Section 153(1)*(a)* of the 2008 Companies Act provides, as far as it is relevant here,

> [i]f a business rescue plan has been rejected . . . the practitioner may –
>
> (i) seek a vote of approval from the holders of voting interests to prepare and publish a revised plan; or
> (ii) advise the meeting that the company will apply to a court to set aside the result of the vote by the holders of voting interests or shareholders, as the case may be, on the ground that it was inappropriate.'

Section 153(7) in turn provides:

> (i) On an application contemplated in subsection (i)*(a)*(ii), . . ., a court may order that the vote on a business rescue plan be set aside if the court is satisfied that it is reasonable and just to do so, having regard to–
>
> *(a)* the interests represented by the person or persons who voted against the proposed business rescue plan;
> *(b)* the provision, if any, made in the proposed business rescue plan with respect to the interests of that person or those persons; and
> *(c)* a fair and reasonable estimate of the return to that person, or those persons, if the company were to be liquidated.

The question was whether the court should first determine whether the vote was inappropriate and, if so, invoke section

153(7) to determine whether the vote should be set aside. Various cases, for example, *Shoprite Checkers (Pty) Ltd v Berryplum Retailers CC* [2015] ZAGPPHC 255 and *Ex parte Target Shelf 284 CC* [2015] ZAGPPHC 740, favoured the two-step approach – an approach which was also followed by the minority judgment of Seriti JA. However, Schoeman AJA, delivering the majority judgment, held:

> It is clear that s 153(1)*(a)*(ii) and s 153(1)*(b)*(i)*(bb)* are inextricably linked to s 153(7). On an application to set aside the result of a vote in terms of any of these subsections, the court is enjoined by s 153(7) to determine only whether it is reasonable and just to set aside the particular vote, taking into account the factors set out in s 153(7)*(a)–(c)* and all circumstances relevant to the case, including the purpose of business rescue in terms of the Act. Put differently, the vote would be set aside on application on the grounds that its result was inappropriate, if it is reasonable and just to do so in terms of s 153(7). To my mind this entails a single enquiry and a value judgment (para [80]).

Although the court accepted the dictionary definition of 'inappropriate' as meaning 'not suitable or proper in the circumstances', it is notable that the court did not determine the meaning of that term, particularly in the context of the purpose of business rescue in terms of section 7*(k)* (para [78]). It merely held that the vote would be 'inappropriate' if it was reasonable and just to set it aside in terms of section 153(7). Considering that the appellant would still be paid in full, albeit not immediately, the court concluded that it was reasonable and just to set aside its vote against the approval of the business plan.

Section 153(1)*(a)*(ii) provides for the setting aside of the 'result of the vote', while section 153(7) refers to an 'order that the vote' (not the result) be set aside. The question arose as to whether the business rescue plan had to be put to the vote again at the resumption of the postponed meeting. That, according to the court, did not result in a businesslike interpretation, for if the creditor who voted against the adoption of the business rescue plan were to vote once more against it, the whole process would start all over again (para [88]). The court held that the 2008 Companies Act clearly did not provide for another round of voting. The businesslike interpretation was, therefore, that the vote rejecting the business rescue plan having been set aside, it followed by operation of law that the business rescue plan would be considered to have been adopted and no further voting was envisaged.

The position of a surety in business rescue was considered in an application for summary judgment in *Nedbank Ltd v Zevoli 208 (Pty) Ltd & others* 2017 (6) SA 318 (KZP). The facts were that the second, third and fourth defendants ('sureties') bound themselves as sureties and co-principal debtors for the debt of the first defendant, Zevoli 208 (Pty) Ltd. The first defendant breached the terms of the loan contract with the consequence that the full outstanding loan and interest became due and payable. The first defendant, however, voluntarily resolved to commence business rescue in terms of section 129 of the 2008 Companies Act. The effect was that the plaintiff was precluded in terms of section 133(1), unless certain conditions were complied with, from proceeding against the first defendant. The sureties claimed that that they were also entitled to the moratorium under section 133(1). Various previous judgments have been given on this matter. The court referred to *Desert Star Trading 145 (Pty) Ltd & another v No 11 Flamboyant Edleen CC & another* 2011 (2) SA 266 (SCA), where it was held that the surety could use the defences which were available to the principal debtor, barring defences of a personal nature. It further referred to *Investec Bank Ltd v Bruyns* 2012 (5) SA 430 (WCC), where it was held that the statutory moratorium in terms of section 133(1) was for the benefit of the company and was, therefore, a defence *in personam* which did not protect the surety. Reference was also made to *New Port Finance Company (Pty) Ltd & another v Nedbank Ltd* 2016 (5) SA 503 (SCA), where it was stated that the creditor could, upon default of the debtor, directly sue the surety who was bound as surety and co-principal debtor and there was no authority for the proposition that a compromise of the principal debtor's liability, whether as a result of business rescue or otherwise, would accrue to the surety after judgment had been taken against him (see 2016 *Annual Survey* 261). The sureties also claimed that the creditor could not pursue its claim against the first defendant in the future, ie, after business rescue proceedings. In this regard, the court referred to *Investec Bank Ltd* (above), where it was stated that if, at a later stage, the creditor recovered from the original debtor and the principal debt had been discharged or reduced before judgment against the surety, then the surety was entitled to claim the benefit of the discharge or reduction. Where the creditor recovers in full from the surety, the surety takes the creditor's place by virtue of the surety's right of recourse against the principal debtor. In such a situation the surety would be

entitled to consider a compromise of the claim against the principal debtor. The court also affirmed, with reference to *Investec Bank Ltd*, that section 133(1) was only for the benefit of the company and that if the legislature had intended to preclude enforcement of claims against sureties of companies in business rescue, it would have done so in the 2008 Companies Act (see also *Henochsberg* 536(8F)).

The case of *Tyre Corporation Cape Town (Pty) Ltd & others v GT Logistics (Pty) Ltd (Esterhuizen & another intervening)* 2017 (3) SA 74 (WCC) dealt with an application for winding-up, with an intervening application for business rescue. The court rejected the statement in *Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies and Engineering Company (Pty) Ltd & another* [2013] ZAGPPHC 109 paragraph [8] that a company could not be placed under business rescue if it was already 'insolvent'. Instead, the court held that the definition of 'financially distressed' in section 128(1) of the 2008 Companies Act merely created a threshold and that current commercial or factual insolvency was not a prerequisite. It did not follow that, because the company was already commercially or factually insolvent and therefore obviously financially distressed, it could no longer be the subject of business rescue. Such an interpretation would, according to the court, be inconsistent with section 5(1) read with section 7 of the 2008 Companies Act, particularly subsections 7*(d)* and *(k)*, as it would oblige the court to liquidate a company even though there might have been a reasonable prospect of rescuing it. The court highlighted that in *Oakdene Square Properties (Pty) Ltd & others v Farm Bothasfontein (Kyalami) (Pty) Ltd & others* 2013 (4) SA 539 (SCA), commercial insolvency was regarded as 'financial distress' and that there was no reason why factual insolvency should be treated differently. However, the court said it did not matter whether factual insolvency fell outside the scope of the definition of 'financial distress' because the two legs of the definition were disjunctive – one or the other sufficed. (See also *Tyre Corporation Cape Town (Pty) Ltd & others* (para [16]).) The insolvency of the company would not be a bar to business rescue as, in terms of section 131(4)*(a)*(iii), the court could grant a business rescue order if it was just and equitable to do so for financial reasons, irrespective of whether the company was 'financially distressed'.

The key issue in *Standard Bank of South Africa Ltd v Gas 2 Liquids (Pty) Ltd* 2017 (2) SA 56 (GJ) related to the meaning and

application of section 131(6) of the 2008 Companies Act. Section 131(6) provides that an application to court for an order placing a company under supervision and commencing business rescue proceedings will suspend liquidation proceedings at the time when the business rescue application is made (para [1]). The respondent was placed under provisional liquidation and on the return day the applicant creditor applied for a final liquidation order. At the close of the argument, the respondent debtor presented an application by a third party for the respondent to be placed under supervision and for business rescue proceedings to commence in terms of the 2008 Companies Act. The question was whether the issue, out of court, of the business rescue application had the effect of suspending the liquidation proceedings. In *Investec Bank Ltd v Bruyns* 2012 (5) SA 430 (WCC) and *Blue Star Holdings (Pty) Ltd v West Coast Oyster Growers CC* 2013 (6) SA 540 (WCC), it was pointed out that there was always the possibility that a business rescue application might be used by an obstructive debtor intent on avoiding the obviously inevitable liquidation (para [5]). The respondent argued that a business rescue application was made by the mere issue out of court of the notice of motion in the business rescue application. On the other hand, the applicant contended that for such application to have been properly 'made', service had to have been effected upon both the company and the Companies and Intellectual Property Commission (the CIPC). In addition, according to the applicant, all reasonable steps need to have been taken to identify affected persons and their addresses, and to deliver the application to them (para [11]). Cases such as the *Blue Star Holdings (Pty) Ltd* (above) indicate that a business rescue application was 'made' with the lodging of the business rescue application with the registrar for the issue thereof. The court distinguished this case as there was no provisional winding-up order or an appointment of a provisional liquidator. In *Taboo Trading 232 (Pty) Ltd v Pro Wreck Scrap Metal CC & others* 2013 (6) SA 141 (KZP), which also concerned a liquidation application, it was held that a business rescue application was only to be regarded as having been made once the application had been lodged with the registrar, had been duly issued, a copy thereof served on the CIPC, and each affected person had been properly notified of the application (see also *Absa Bank Ltd v Summer Lodge (Pty) Ltd* 2013 (5) SA 444 (GNP)). Although neither of these cases dealt with a provisional winding-up where a provisional

liquidator had been appointed, the court chose to follow the *dicta* in these cases (para [26]) for the reason that if there was no service of the application on the provisional liquidator, he or she would not officially know of the suspension of his or her duties and powers, and would carry them out in ignorance (paras [23] [24]). He or she would be acting without authority (and perhaps unlawfully) in a multiplicity of respects, a consequence which the legislature could not have intended (para [25]). The court, therefore, concluded that there had to be service and notification as provided in section 131 before a business rescue application could be said to have been 'made' and before the liquidation proceedings could be said to have been suspended (para [26]).

Just and Equitable Winding-Up

In *Minister of Environmental Affairs v Recycling and Economic Development Initiative of South Africa NPC; Minister of Environmental Affairs v Kusaga Taka Consulting (Pty) Ltd* [2017] 4 All SA 783 (WCC), the Minister of Environment Affairs (the Minister) brought *ex parte* applications for the final liquidation of two entities which were in provisional liquidation. The respondent in the first application, Recycling and Economic Development Initiative of South Africa NPC (Redisa), had been appointed to implement a waste tyre management process in terms of the Waste Tyre Regulations (GN R 149 of 2009). Redisa was registered as a non-profit company and was, according to the Minister, also an organ of state engaged in the administration and implementation of subordinate legislation and with an independent board. Redisa appointed the respondent in the second application, Kusaga Taka Consulting (Pty) Ltd (KT), as its management company. KT had complete executive control. Erdmann, who was the CEO of Redisa, owned 80 per cent of the shares in Nine Years Investments (Pty) Ltd (NYI). NYI, in turn, held 75 per cent of the shares in KT. The other executive directors had shareholding in KT through Avranet (Pty) Ltd (Avranet). The legal nature of the 'Redisa Plan' as an 'integrated industry waste tyre management plan' was described by the Supreme Court of Appeal in *Retail Motor Industry Organisation & another v Minister of Water and Environmental Affairs & another* 2014 (3) SA 251 (SCA) paragraphs [30]–[32] as an instrument of subordinate legislation which came into legal existence or force after Ministerial approval of the Redisa Plan under the Waste Tyre Regulations

(para [18]). There were certain statutory amendments, the effect of which was that a tyre tax or an environmental levy on tyres was introduced for collection by the SARS. As a result, Redisa was no longer charged with the responsibility of collecting its contribution from tyre producers or importers in South Africa in terms of the Redisa Plan (paras [23] [24]). The court had granted the Minister leave, in terms of section 157(1)*(d)* of the 2008 Companies Act, to bring the *ex parte* application for the provisional and final winding-up of the respondents in terms of section 81(1)*(c)*(ii) or 81(1)*(d)*(iii). It had also granted an order for the provisional liquidation of both respondents (para [4]). On the return day the respondents opposed the granting of a final winding-up order on the grounds that the Minister did not have *locus standi* to bring the application, the application should not have been brought on an *ex parte* basis, and it would not be just and equitable to wind up the respondents (paras [8] [9]).

The Minister contended that it was just and equitable to wind up the respondents. In respect of Redisa, the ground for seeking the winding-up was that Redisa had set up a management company, KT, to handle all operational aspects of the plan. Furthermore, instead of implementing the Redisa Plan with an independent board, Redisa had handed the complete executive control of the Redisa Plan over to KT (para [27]). Erdmann directly controlled KT as the majority shareholder in NYI, which owned KT (the other executive directors had shareholdings in KT through Avranet). He was, therefore, directly remunerated through his majority shareholding. This, according to the Minister, was in direct contravention of the 2008 Companies Act and Redisa's MOI. This interest had not been disclosed (para [32]). In respect of KT, the grounds for seeking the liquidation were that KT and Redisa were involved in a scheme to divert public funds earmarked for the advancement of a specific environmental objective. Those funds would be diverted by way of management fees to KT. It was further contended that Redisa's executive directors had abused KT's corporate identity to achieve this goal (para [44]). KT and Redisa were also, for all intents and purposes, a single entity. In addition, the cessation of business by Redisa would mean the substratum of KT would disappear as KT existed to manage the business of Redisa (paras [43] [50]). (See also *Kia Intertrade Johannesburg (Pty) Ltd v Infinite Motors (Pty) Ltd* [1999] 2 All SA 268 (W) and *Henochsberg* 329.) In terms of item 1(3) of Schedule 1 to the 2008 Companies Act a non-profit

company must not, directly or indirectly, pay any portion of its income or transfer any of its assets, regardless of how the income or asset was derived, to any person who is or was an incorporator of the company, or who is a member or director, or person appointing a director, of the company, except as reasonable remuneration for goods delivered or services rendered to, or at the direction of, the company, or as payment of, or reimbursement for, expenses incurred to advance a stated object of the company. In *Hülse-Reutter & others v Gödde* 2001 (4) SA 1336 (SCA) paragraph [20], the test as to whether it would be appropriate to pierce the corporate veil was formulated as follows: '[T]here must at least be some misuse or abuse of the distinction between the corporate entity and those who control it which results in an unfair advantage afforded to the latter' (see also *Henochsberg* 89). The court held that there was clearly a misuse or abuse of the distinction between the corporate identity of KT, NYI, and Avranet and those who controlled it – such as Erdmann and the other executive directors of Redisa – which resulted in their receiving an unfair advantage (para [152]). It was unlawful that, as directors of Redisa, they indirectly received income to which they were not entitled in terms of Redisa's MOI and item 1(3) of Schedule 1 to the 2008 Companies Act. In terms of section 239 of the Constitution, an 'organ of state' is any functionary or institution exercising a public power or performing a public function in terms of any legislation. The court found that Redisa's MOI required it to carry out its functions for the benefit of, or in a way that is widely accessible to, the general public or any section thereof. Redisa was, therefore, an organ of state (para [157]) and the moneys it collected were public funds (para [163]).

Concerning the question whether the Minister had the necessary *locus standi* to bring the application for the winding-up of the respondents in terms of section 81 of the 2008 Companies Act, it was clear that section 81 did not directly grant the Minister the necessary standing to bring an application for the winding-up of solvent companies. The court held that the category or categories of persons or entities that could bring such an application was restricted in terms of section 81. These were: the company itself; its directors and shareholders; a business rescue practitioner; a creditor where the company's business rescue proceedings have ended in the manner contemplated in section 132(2) of the 2008 Companies Act; the CPIC; or the Takeover Panel under

the conditions and circumstances set out in section 81 (paras [165] [166]). With reference to *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) paragraph [20], the court rejected as absurd and nonsensical the respondents' submission that section 157(1)*(d)*, merely because it is listed under Chapter 7 of the 2008 Companies Act dealing with remedies and enforcement, does not extend to other applications that may be brought in terms of the 2008 Companies Act, especially applications under section 81(1) (paras [167] [169]). It held that the title of section 157 also clearly intended to extend *locus standi* to the categories of persons referred to in section 157(1)*(a)* to *(d)* to bring applications or matters before a court in terms of other provisions of the 2008 Companies Act in instances where such a person or persons does or do not otherwise have such standing. The provision gives effect to one of the stated goals of the 2008 Companies Act: to promote compliance with the Bill of Rights in the sphere of company law. This goal, according to the court, accords with section 39(2) of the Constitution, which influenced the formulation of section 157, which in turn resembles section 38 of the Constitution (para [174]). The Redisa Plan, which the Minister adopted, could be regarded as 'a reasonable legislative and other measure[s] to prevent pollution and ecological degradation', which clearly gives effect to the constitutional obligation placed upon the Minister by section 24 of the Constitution. Therefore, the Minister, apart from the public interest, had a direct interest in the litigation. However, given the allegations of impropriety levelled against Redisa as an organ of state, the interests of justice or the public interest compelled the court to scrutinise the action even where the Minister's standing was questionable (para [182]). Neither *Mukaddam v Pioneer Foods (Pty) Ltd & others* 2013 (5) SA 89 (CC) nor *Children's Resource Centre Trust v Pioneer Foods (Pty) Ltd* 2013 (2) SA 213 (SCA) referred to the extended standing on the basis of public interest being sought. Those cases also did not require that prior leave be sought in such instances. In granting the respective provisional applications, the judges had adequate grounds to grant the orders (paras [188] [191]). It would be unduly onerous, in most urgent applications brought on motion, to bring a separate substantive motion for certification. Such an approach would be absurd and not in the interests of justice if, in the determination of the merits of the application, a court had to decide whether extended standing should be granted as a

matter of course (para [189] and see Justice Chris Jafta 'Critical analysis of the extended legal standing provisions under section 157(1) of the Companies Act 71 of 2008 to apply for legal remedies' (2015) 1 (Issue 2) *The Journal of Corporate and Commercial Law & Practice* 35).

In respect of the *ex parte* application, it was held that the courts were loath to grant orders against a party on an *ex parte* basis, and would as a rule discourage litigation by stealth or ambush unless there were compelling reasons to allow it. Matters could be brought *ex parte* in a limited number of situations only. One of these situations would be where immediate relief was sought, even though of temporary nature, because of imminent harm that would ensure should the relief not be granted. In respect of both the application against Redisa and KT, the court was satisfied that the Minister had made out a sufficient case why the applications should be brought *ex parte*. It was clear that urgent and drastic action on the part of the Minister and the Department had to be taken after they had been made aware of the conduct of Erdmann and the other directors of Redisa, as well as how funds had been spirited away to KT.

The court granted the Minister extended standing in terms of section 157(1)*(d)*. Consequently, if an application is brought under section 81(1)*(c)*, the Minister must be substituted as one of the parties who can bring the application. The court determined that the application by the Minister would, in such a case, be regarded as one brought by a creditor (para [202]). If the application was brought under section 81(1)*(d)*, the application by the Minister would then be regarded as one brought by the company, one or more of its directors, or one or more of its shareholders (para [203]).

The categories of the 'just and equitable' ground were stated in *Rand Air (Pty) Ltd v Ray Bester Investments (Pty) Ltd* 1985 (2) SA 345 (W) and were summarised by the court (para [102]) as: (1) the disappearance of the company's substratum; (2) illegality of the objects of the company and fraud in connection therewith; (3) a deadlock in the management of the company's affairs; (4) grounds analogous to those for the dissolution of a partnership; and (5) oppression. The court held that it was trite that these categories do not constitute any kind of *numerus clausus* and it was left open to the courts to devise other categories in future, and the court referred to *Kia Intertrade Johannesburg (Pty) Ltd v Infinite Motors (Pty) Ltd* [1999] 2 All SA 268 (W) (paras [204]

[206]). With reference to *Pienaar v Thusano Foundation* 1992 (2) SA 552 (BGD), the court held that in considering whether to grant a final winding-up order on the ground that it was just and equitable to do so, the court had to be satisfied that the applicant had established this on a balance of probabilities. In addition, the court had to exercise a judicial discretion based on the broad principles of law, justice, and equity (paras [210] [211]). In its final analysis, the court considered, among other factors, the acrimony between the Minister and Redisa, and by extension KT, as to the manner in which Redisa should be funded; a deadlock and breach of trust between the Minister and Redisa about funding; and the unlawful misappropriation of public funds by the directors of Redisa that could continue if further funding were to be provided by National Treasury. The court concluded that it was just and equitable to wind Redisa up under section 81(1)*(c)*(ii) or section 81(1)*(d)*(iii) (paras [215] [216]). The factors that the court considered in relation to whether it was just and equitable to wind KT up were that if Redisa ceased operations, the KT's substratum would disappear, and that KT had been complicit in the misappropriation of funds in direct contravention of item 1(3) of Schedule 1 to the 2008 Companies Act and the MOI of Redisa. It had acted as a vehicle through which the money had been misappropriated. It was, therefore, just and equitable to wind KT up under section 81(1)*(c)*(ii) or section 81(1)*(d)*(iii) (paras [217] [218]).

CRIMINAL LAW

SV Hoctor*

LEGISLATION

Higher Education Amendment Act 9 of 2016

This Act amends the Higher Education Act 101 of 1997 in various respects. Insofar as criminal liability is concerned, in terms of section 39 of this Act, section 66(1A) has been inserted (with effect from 22 September 2017) in the Higher Education Act, which provides for a new offence. This offence, which is punishable by a sentence which may be imposed for fraud, is committed by any person contravening the provisions of section 51 (relating to the unregistered and non-prescribed provision of higher education by a local juristic person or foreign juristic person) or section 65D (relating to the offering, awarding or conferring of an unregistered degree, or an unregistered higher education diploma or an unregistered higher education certificate).

Financial Intelligence Centre Amendment Act 1 of 2017

The Financial Intelligence Centre Act 38 of 2001 has been amended by this Act, which commenced on 13 June 2017. There is a notable trend in this Act to transform criminal penalties into administrative sanctions, and to give legislative effect to United Nations Security Council resolutions. Hence the insertion of a new offence contained in section 49A in the principal Act, which provides that anyone who contravenes a provision of section 26B is guilty of an offence. Section 26B, which has been inserted in the principal Act by this Act, although it has yet to commence, prohibits the use or provision of property, financial or other service, or economic support in contravention of a resolution of the Security Council of the United Nations. The form of *mens rea* required for criminal liability encompasses both intent ('knows') and negligence ('ought reasonably to have known').

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Criminal Procedure Amendment Act 4 of 2017

This Act, which came into force on 29 June 2017, amends certain provisions of the Criminal Procedure Act 51 of 1977 relating to the accused's capacity to understand legal proceedings, mental illness, and criminal responsibility. While the procedural amendments to sections 77 to 79 are more properly discussed in the Criminal Procedure and Sentencing chapters, it may be noted, in the context of the substantive criminal law, that section 78 has been amended by the substitution of the term 'intellectual disability' for the erstwhile term 'mental defect'. Whilst this terminological change does not change the ambit of the provision, it reflects a growing sensitivity to the use of descriptors which can be regarded as pejorative.

Protected Disclosures Amendment Act 5 of 2017

This Act, which commenced on 2 August 2017 makes certain changes to the Protected Disclosures Act 26 of 2000, including the insertion of section 9B (in terms of s 10 of the Amendment Act). Section 9B provides for the creation of a new offence of disclosure of false information, where an employee or worker who, knowing that certain information is false or who ought reasonably to have known that such information is false, intentionally discloses such false information, with the intention to cause harm to the affected party, and where the affected party suffers harm as a result of such disclosure. The formulation of the offence indicates the need for actual harm to occur to the affected party, as a result of a disclosure which intentionally seeks to harm such party. *Dolus eventualis* would suffice in this regard. It is further notable that liability may follow such disclosure where the information is known to be false, which is consistent with the requirement that the harm be intentionally inflicted, but, further, that liability may follow where the accused merely 'ought reasonably to have known' about the falsity of the information. It is hard to reconcile this extension of liability into the realms of negligence with the balance of the provision, which is structured in terms of subjective liability. Surely, once again, liability should be limited to *dolus eventualis*, ie, the accused should at least foresee the possibility of the falsity of the information before proceeding to disclose it?

Institution of a prosecution under this provision is dependent on the written authorisation of the Director of Public Prosecutions, which may be delegated. In terms of section 9A of the Protected

Disclosures Act (also inserted in terms of s 10 of the Amendment Act), criminal liability may be excluded for a protected disclosure, despite that disclosure being prohibited by 'any other law, oath, contract, practice or agreement requiring him or her to maintain confidentiality or otherwise restricting the *disclosure* of the information with respect to a matter'.

Courts of Law Amendment Act 7 of 2017

This Act, inter alia, amends the Magistrates' Courts Act 32 of 1944 by inserting (in terms of s 13) new offences relating to judgments, emoluments attachment orders, and instalment orders, contained in section 106C of the Act. In terms of this provision, the operation of which has yet to commence, it is an offence for any person to require the applicant to consent to a judgment or any instalment order or emoluments attachment order prior to the granting of the loan (s 106C(1)). Moreover, it is an offence for any person fraudulently to obtain or issue a judgment, or any instalment order or emoluments attachment order in terms of this Act (s 106C(2)).

Financial Sector Regulation Act 9 of 2017

This Act (which did not commence in 2017) seeks to provide for a system of financial regulation and enforcement in South Africa. In terms of section 7 of this Act, its objective is to achieve a stable financial system that works in the interests of financial customers, and that supports balanced and sustainable economic growth in the Republic, by establishing, in conjunction with the specific financial sector laws, a regulatory and supervisory framework which promotes (a) financial stability; (b) the safety and soundness of financial institutions; (c) the fair treatment and protection of financial customers; (d) the efficiency and integrity of the financial system; (e) the prevention of financial crime; (f) financial inclusion; (g) transformation of the financial sector; and (h) confidence in the financial system. These goals are to be achieved, in part, by the application of the criminal law. In this regard, the Act creates a number of offences.

First, there are a number of offences which enforce the duties attaching to the members and staff of certain bodies. Hence, a member of the Prudential Committee or of a subcommittee established in terms of section 45(1) of the Act is required to act honestly in all matters relating to the Prudential Authority, to

perform the functions of office as a member in good faith, for a proper purpose, and with the degree of care and diligence that a reasonable person in the member's position would exercise (s 46(1), read with s 265 of the Act). Further, a person who is or has been a member of the Prudential Committee or of a subcommittee established in terms of section 45(1) of the Act may not use that position or any information obtained as such a member to benefit himself or herself or another person improperly; impede the Prudential Authority's ability to perform its functions; or cause improper detriment to another person (s 46(2), read with s 265 of the Act). Similar duties (to those set out in s 46(2)) apply to persons who are or have been staff members of the Prudential Authority (s 52(1), read with s 265 of the Act). The terms 'benefit' and 'detriment' are not limited to financial benefit or detriment in respect of these provisions (s 46(3); s 52(2)). Similarly, the Commissioner, each Deputy Commissioner, and each member of a subcommittee of the Financial Sector Conduct Authority (established as contemplated in s 51(1)*(a)*(ii) of the Public Finance Management Act or of s 68 of this Act) is required to act honestly in all matters relating to the Financial Sector Conduct Authority; and to perform the functions of office as a member in good faith, for a proper purpose, and with the degree of care and diligence that a reasonable person in the member's position would exercise (s 69(1), read with s 265 of the Act). Further, such a person may not use that position or any information obtained as such a member improperly to benefit himself or herself or another person; impede the Financial Sector Conduct Authority's ability to perform its functions; or cause improper detriment to another person (s 69(2), read with s 265 of the Act). Similar duties (to those set out in s 69(2)) apply to persons who are or have been staff members of the Financial Sector Conduct Authority (s 74(1), read with s 265 of the Act). The terms 'benefit' and 'detriment' are not limited to financial benefit or detriment in respect of these provisions (s 69(3); s 74(2)). Similarly, a member of the Board of the Ombud Council is required to act honestly in all matters relating to the Ombud Council; and to perform the functions of office as a member in good faith, for a proper purpose, and with the degree of care and diligence that a reasonable person in the member's position would exercise (s 189(1), read with s 270(1) of the Act). Further, such a person may not use that position or any information obtained as such a member improperly to benefit himself or herself or another person; impede the Ombud Coun-

cil's ability to perform its functions; or cause improper detriment to another person (s 189(2), read with s 270(1) of the Act). Similar duties (to those set out in s 189(2)) apply to persons who are or have been staff members of the Ombud Council (s 192(1), read with s 270(10 of the Act). The terms 'benefit' and 'detriment' are not limited to financial benefit or detriment in respect of these provisions (s 189(3); s 192(2)).

In addition to these offences, the Act provides for further offences which criminalise failure to comply with licensing requirements (s 111 read with s 266); failure by a supervised entity (ie, in terms of s 1, each of: a licensed financial institution, a person with whom a licensed financial institution has entered into an outsourcing arrangement, and a representative of a financial institution) to assist in providing specified information (s 131(1)*(b)* read with s 267(1)), or to provide a specified business document in the context of a supervisory on-site inspection (s 134*(a)*(iii)) read with s 267(2), (3)); interference in a supervisory on-site inspection (s 133 read with s 267(4)); interference with an investigation (s 139 read with s 267(5)); failure to comply with a regulator's directive (s149(1) read with s 268(1)); failure to comply with a debarment order issued by the responsible authority for a financial sector law, or contracting with someone under such an order (a debarment order prohibits a person from being involved in the provision of financial products or services, or performing certain roles in a financial institution – s 153(4) read with s 268(2), (3)), or as an employer of someone subject to such order, failing to give effect to such order (s 153(5) read with s 268(4)), or engaging in conduct which violates a debarment order issued by the Ombud Council, or contracting with someone under such an order (s 205(8) read with s 270(3), (4)); failure to comply with a directive of the Ombud Council (s 202(11) read with s 270(2)); failure to provide the Ombud Council with specified information (s 207(2) read with s 270(5)); restrictions on financial institutions in relation to ombud schemes (s 210 read with s 270(6)); failure by a financial institution to comply with the governing rules of the recognised industry ombud scheme (s 215 read with s 270(7)); failure adequately to report, in the context of an ombud scheme, Ombud Council, or ombud (s 217 read with s 270(8)); and offences related to proceedings in the Financial Services Tribunal (s 232(5) read with s 271).

There are also a number of offences directed at (mis)use of information: a financial sector regulator or the Reserve Bank (or

an official, auditor or employee) commits an offence if information is disclosed improperly or in an unlawful manner (ss 251, 252, 254 read with s 272); the intentional or negligent provision of false or misleading information is an offence (s 273); inaccurate, reckless, or intentionally misleading keeping of accounts or records is an offence (s 274); and the false assertion of connection with the financial sector regulator is an offence (s 275). Section 276 provides for liability in relation to juristic persons.

Refugees Amendment Act 11 of 2017

This Act, which has yet to commence, adds (in terms of s 28) further offences to the current list of offences set out in section 37 of the Refugees Act 130 of 1998. These are (i) in respect of a public servant, the intentional provision of false, inaccurate, or unauthorised documentation or benefit, or the facilitation of disguising identity or status, or the acceptance of undue financial or other consideration to perform any act or exercise his or her discretion in terms of the Act; (ii) the wilful or grossly negligent production of false certification or documentation in terms of this Act or another Act administered by the Department of Home Affairs; and (iii) the manufacture or provision by any person, while not being a duly authorised officer of the Department of Home Affairs, of a document purporting to be a document issued or administered by the Department.

CASE LAW

General Principles

Euthanasia

In *Stransham-Ford v Minister of Justice and Correctional Services* & others 2015 (4) SA 50 (GP), the court granted an order ruling that a medical doctor who complied with the request to assist the terminally ill applicant to end his life by providing and/or administering a lethal agent would not be acting unlawfully. In granting this order, the court held that the current absolute prohibition of assisted suicide in the form of the crimes of murder and culpable homicide, as applied in this context, unjustifiably infringed the applicant's rights to dignity, and to freedom and security of the person. While this decision, which was discussed in 2015 *Annual Survey* 298, was welcomed by some as a

significant development in the decriminalisation of physician-assisted suicide and physician-assisted euthanasia, as was pointed out, the order granted was narrowly construed in that it applied only to the applicant, and its value as a precedent was accordingly limited.

The value of the precedent was, however, entirely negated on appeal in *Minister of Justice & others v Estate Stransham-Ford* 2017 (3) SA 152 (SCA). A full bench of the Supreme Court of Appeal (Wallis JA) granted the appeal on the basis of three inter-related reasons. Firstly, the applicant had predeceased the making of the order, as a result of which his cause of action had ceased to exist. Although Fabricius J was unaware of this fact prior to making the order, as were the applicant's counsel (paras [16] [17]), the request for the order to be recalled prior to reasons being given was imprudently turned down by the judge on the basis that he believed that his judgment had 'broader societal implications' (para [17]). Secondly, the appeal court held that there had been no full and proper examination of 'the present state of our law in this difficult area, in the light of authority, both local and international, and the constitutional injunctions in relation to the Bill of Rights and the development of the common law' (para [5]). In this regard, the appeal court held that given that the cases cited in the High Court judgment could be distinguished from the matter at hand, as not having 'anything to do with either assisted suicide (PAS) or active voluntary euthanasia (PAE)' but rather with 'mercy killing' (para [38]), and given that the High Court 'was not in a position to consider whether and subject to what conditions the law in regard to consent as a defence to murder needed to be altered', the court should have refused to entertain this question (para [41]). Thirdly, the appeal court held that the order was made on an incorrect and restricted factual basis, without complying with the Uniform Rules of Court and without affording all interested parties a proper opportunity to be heard (para [5]). The fundamental deficiencies of the High Court judgment are set out in some detail by the Supreme Court of Appeal, for example (para [70]):

> At the outset the High Court misstated the present situation in South African law. It then failed to consider precisely what development was being sought. It treated PAE and PAS as clear and simple concepts capable of easy application, when they are nothing of the sort. It did not recognise the distinction between the two. It paid little regard to international jurisprudence or to the answers to . . . constitutional

> questions . . . It claimed that the relief it was granting was 'case dependent and certainly not a precedent for a general free for all' without any indication of how its effects could be so limited.

Despite the appeal court dismissing the order, it engaged in a consideration of the merits of the case, specifically in order to deal with the view that the High Court judgment had created binding precedent (para [27]). The court proceeded to examine the state of the South African law, pointing out that the focus of the application was not on whether the applicant could commit suicide – the right to die – but rather on the right to choose a method of doing so which was acceptable to him (para [30]). The right to refuse medical treatment is constitutionally protected, the only qualification being that the patient must have the necessary mental and legal capacity to make such decision (paras [31] [32]). Where the patient is unable to make such decision, the doctor, in consultation with the family, may decide to cease treatment. Where there is a difference of opinion or uncertainty in this regard, a declaratory order may be sought (para [33]). Moreover, a medical practitioner who prescribes medication for palliative purposes, which he knows will have the effect of hastening death, does not commit an offence (para [34]). Hence, the court concluded, there are currently a number of options within the law open to both individuals and medical practitioners responsible for their care, which will not lead to preservation of life simply for its own sake, or for artificial purposes. Furthermore, given the advances in palliative care, 'the spectre commonly conjured up of a helpless patient confined to a hospital bed and attached to an array of machinery is, in the vast majority of end-of-life situations, not what occurs, even with patients suffering from extremely grave diseases' – and was not what occurred with Stransham-Ford.

In contrast, the court stated (paras [36]-[40]) that both mercy killing (as occurred in the cases of *S v Hartmann* 1975 (3) SA 532 (C) and *S v De Bellocq* 1975 (3) SA 538 (T)), where neither suicide nor the consent of the person who died is a relevant consideration, and PAE ('active voluntary euthanasia'), where the consent of the person who died has been given, are both murder. In the latter situation, the consent of the deceased does not justify the actions of the medical practitioner. (The court noted that the question whether PAE could be justified, and whether the law in South Africa should be changed to this end, was entirely hypothetical, and was not given full and proper consideration by the High Court – para [41]).

With regard to PAS ('assisted suicide'), the court once again noted that there was no question of criminal liability attaching to the person committing suicide, but that the question of criminal liability arose in relation to the party (in the context of this case, the medical practitioner) providing assistance to this end. The court then carefully examined the case of *Ex parte Die Minister van Justisie: In re S v Grotjohn* 1970 (2) SA 355 (A), where the court was required to answer the question whether encouraging, providing the means for, or assisting someone to commit suicide was a crime. Wallis JA held that, in the light of the *Grotjohn* case, whether criminal liability would follow in these circumstances was not, as bluntly stated by the High Court, a necessity. Instead, a more nuanced and careful assessment of this question on the facts of the case, incorporating both comparative perspectives and constitutional concerns, was called for (paras [42]–[56]).

The court engaged in a brief synopsis of the law in 'permissive jurisdictions', from which it concluded that neither is a common approach to the treatment of PAE and PAS shared, nor is there unanimity as to the effect of guaranteed human rights on PAE or PAS (paras [58]–[67]). Proceeding to a consideration of the South African position, and more specifically whether the common law could and should be developed, the court noted that not only did the High Court engage in something no court may do – exempting an individual from obligations that apply to the rest of society (para [68]) – but it entirely failed to consider a range of significant questions regarding constitutionality, not least the issue of justification of the infringement of rights (in terms of s 36 of the Constitution of the Republic of South Africa, 1996). This latter question was particularly pertinent given the consensus in all the jurisdictions considered that the state has a 'legitimate interest in imposing constraints on the application of PAE, PAS and other forms of aiding and abetting suicide' (para [71]). Such questions must crucially be placed in the South African context, unlike the approach of the High Court, where the Canadian approach was too readily accepted (para [71]; see further paras [98]–[100]).

Given the serious inadequacy and concerns regarding the factual record (paras [79]–[97]), along with the three stated reasons provided by the court (each of which in its own right was sufficiently determinative in this regard), the appeal succeeded (para [101). The court concluded the judgment by reiterating the error that the High Court fell into in seeking to develop the common law of homicide so as to accommodate PAE and PAS

(para [101]). The court, however, indicated that the common law 'will no doubt' evolve in this area, and stated its preference that this occur through Parliament, in order to give the broadest possible option for democratic participation in this complex and somewhat vexed debate. This is certainly wise advice.

Necessity

In response to the charge of aiding and abetting in the rape of her daughter by her partner (the girl's father), the accused in *S v MD & another* 2017 (1) SACR 268 (ECB) pleaded that she had acted 'under compulsion and out of necessity', as a result of her life or bodily integrity being threatened by the girl's father (para [52]). The court defined the defence of necessity as arising when, 'confronted with the choice between suffering some evil and breaking the letter of the law in order to avoid it, the accused chooses the latter alternative' (para [53]). It is clear that in the present case, the accused's averred choice was not merely whether to break the 'letter of the law' in order to avoid suffering harm at the hands of her partner, but indeed, whether to inflict the most serious form of sexual assault on her daughter in order to avoid harm to her own bodily integrity. Nevertheless, the court noted that this situation, which may be described as 'compulsion', may be incorporated in the general definition of necessity.

The court (Mbenenge J) set out the requirements for the justification ground of necessity (para [55]) as they are rendered by Burchell (for the most recent reference, see *Principles of Criminal Law* 5ed (2016) 166–7):

(a) A legal interest of the accused must have been endangered;
(b) there must be a threat to the interest which had commenced or was imminent;
(c) the threat must not have been caused by the accused's fault;
(d) it must have been necessary for the accused to avert the danger; and
(e) the means used for averting the danger must have been reasonable in the circumstances.

The unreliability of the accused's evidence, and her apparent indifference to the plight of her daughter, sounded the death knell for her defence. Moreover, the court did not accept that a number of the requirements to be applied to establish the justification ground of necessity had been proven: there was no imminent danger to the accused, nor was it necessary for her to avert the

danger, nor was the means used – to assist in the rape of her daughter – reasonable (para [61]). What is notable is that the court did not explicitly consider the possibility of putative necessity as a defence. Despite reaffirming that the test for necessity is objective in nature, the court stated that the accused 'could not have seriously and genuinely believed that her life was in imminent danger' (para [61]). Reference to the accused's subjective state of mind cannot be relevant to the question of whether the justification ground has been established. It would apply to the question of putative necessity, but as mentioned, this defence does not appear to have been considered by the court.

Intoxication

In the case of *S v Ramdass* 2017 (1) SACR 30 (KZD), Ploos van Amstel J held (para [6]) that despite the criticism engendered by the decision in *S v Chre*tien 1981 (1) SA 1097 (A), along with the statement in the notorious case of *S v Eadie* 2002 (1) SACR 663 (SCA) paragraph [27], where Navsa JA suggested that the judgment in *Chretien* may have miscalculated the community's attitude to intoxication (para [27]), the *Chretien* judgment continues to reflect the current state of our law. Any reliance on a defence of non-pathological incapacity requires the laying of an evidential foundation for the defence, which would be carefully scrutinised by the court, before making a decision based on all the evidence before it (para [7]). However, the onus of proof of criminal capacity beyond reasonable doubt remains on the state.

The case for the state was hampered by the lack of forensic psychiatric testimony properly to negate the possibility of incapacity, and notably, the concession by the expert witness for the State that it was reasonably possible, at least in theory, that due to consumption of alcohol and crack cocaine the accused may have lacked capacity (para [13]). Other difficulties with the state case arose from the apparent absence of any motive to kill (para [15]), the fact that the state witnesses bolstered the accused's account that he was intoxicated and disorientated (para [16]), the court's view of the accused as a truthful witness despite gaps in his memory of events (para [17), the lack of any indication that the accused was merely feigning amnesia (para [28]), and the absence of expert evidence that these goal-directed actions were inconsistent with his claim of intoxication (para [28]).

Ploos van Amstel J recognised the need for caution in finding that someone acted involuntarily or without capacity in killing

another. He specifically took into account Rumpff JA's warning not to bring the administration of justice into disrepute by too readily making such a finding (para [29]). In this context, it was held that the accused had established an evidential foundation for his defence of incapacity due to intoxication, and that the state had failed, in the face of this evidence, to prove beyond reasonable doubt that the accused had the requisite criminal capacity when he killed the deceased (para [30]). Therefore, the possibility of criminal liability for the killing (or indeed the crime of robbery with which he was also charged) was altogether excluded (para [35]). In coming to this verdict, Ploos van Amstel J added his voice to those who have bemoaned the problematic nature of the offence introduced as a counter to the *Chretien* verdict, section 1(1) of the Criminal Law Amendment Act 1 of 1988, and in particular the difficulty that

> where the accused is acquitted on a charge of murder on the basis that there is a reasonable possibility that he was so drunk that he lacked the required capacity he cannot be convicted of the statutory offence unless the court can find beyond a reasonable doubt that he did not have such capacity (para [33]).

The complete acquittal of an accused who has carried out a brutal killing, on the basis of his voluntary intoxication, cannot fail to be controversial. However, the case of *Chretien* was never intended to subvert the functioning of the criminal law by readily acquitting intoxicated accused. As indicated in the judgment in the present case, Rumpff JA specifically warned against too readily accepting that intoxication had negated one of the key elements of liability. Moreover, Rumpff JA made it clear that only in highly exceptional cases will it be found that the effect of the intoxication was such as to exclude the accused's capacity to know that what he was doing was unlawful, or such as to result in a fundamental disintegration of the accused's inhibitions, and consequently that the accused lacked capacity (1106C-E). That such a finding of non-pathological incapacity can only be made where the evidence justifies this conclusion, is iterated by the court (1106F–G). In the face of policy concerns, a word in defence of our prevailing system of psychological liability on which our criminal principles are based (and on which basis the *Chretien* judgment was handed down): only persons whose acts are truly responsible and worthy of blame can be made liable to punishment. Any other approach violates the right to dignity underpinning our constitutional values.

Rumpff JA in *Chretien* pointed out that any difficulty in adopting the principled approach lies not so much in the legal principle itself, as in the manner of its application (1105H). In the present case, the court's thorough approach commends itself. It is evident that the state's case was unfortunately hopelessly undermined by the lack of crucial expert evidence on certain aspects, such as amnesia (specifically alcoholic amnesia (para [30])), and the inconsistency of such evidence in respect of other aspects. It is telling that in his closing remarks, Ploos van Amstel J states (para [34]):

> The outcome of this case does not mean that persons charged with violent crimes can escape liability easily by claiming a lack of criminal capacity due to the use of alcohol or drugs. Each case will be decided on its own facts and the evidence scrutinised carefully. The State will be well advised to lead expert evidence to assist the court in deciding the issues relating to criminal capacity. *Such expert evidence should be cogent and thorough, which unfortunately was not the case before me* (emphasis added).

Specific Offences

Crimes against bodily integrity

Intimidation

The offence of intimidation has a long history in South African law, first in the specific context of employment, and the prohibition of violent acts or threats by employees towards employers, and indeed by employers towards employees (for the development of the offence, see SV Hoctor 'Intimidation' in Milton, Cowling and Hoctor *South African Criminal Law and Procedure Vol III: Statutory Offences* 2ed HA1:1ff). In 1961, the ambit of the offence was widened to include threatening conduct outside of the employment relationship, and then a more expansive regulation of intimidating conduct was created in the Intimidation Act 72 of 1982. The offences created by this Act include intimidation by violence or threat of violence (s 1(1)*(a)*), and intimidation by conduct inducing fear of harm (s1(1)*(b)*). The latter offence is set out as follows:

> Any person who–
> *(b)* acts or conducts himself in such a manner or utters or publishes such words that it has or they have the effect, or that it might reasonably be expected that the natural and probable consequences thereof would be, that a person perceiving the act, conduct, utterance or publication–

> (i) fears for his own safety or the safety of his property or the security of his livelihood, or for the safety of any other person or the safety of the property of any other person or the security of the livelihood of any other person. . .

Crucially, proof of the offences contained in section 1 of the Intimidation Act has been facilitated by a reverse onus presumption in section 1(2) of the Act:

> In any prosecution for an offence under subsection (1), the onus of proving the existence of a lawful reason as contemplated in that subsection shall be upon the accused, unless a statement clearly indicating the existence of such a lawful reason has been made by or on behalf of the accused before the close of the case for the prosecution.

The constitutionality of the provisions of section 1(1)*(b)* and section 1(2) were challenged in the case of *Moyo & another v Minister of Justice and Constitutional Development & others* 2017 (1) SACR 659 (GP). The challenge in respect of the section 1(1)*(b)* offence was based on the right to freedom of expression, contained in section 16 of the Constitution, and in particular the alleged over-breadth of this provision. The provision has been subjected to both judicial (*Holbrook v S* [1998] 3 All SA 597 (E) 600i-601c) and academic (CR Snyman *Criminal Law* 6 ed (2014) 456; C Plasket & R Spoor 'The new offence of intimidation' (1991) 12/4 *ILJ* 747 at 750) criticism in respect of its breadth. It is, however, evident that in order for liability to ensue under this section, the accused's acts must at least be negligent ('that it may reasonably be expected that the natural and probable consequences thereof would be'), which would qualify the scope of liability under the section. It was held in the *Moyo* case that there are certain forms of expression which are not protected in terms of section 16 (paras [34] [35]), such as incitement of violence, and that the exercise of this right must further be balanced with, and limited by, the right to freedom and security of the person (paras [38] [45]). Given the protection against violence or threat of violence afforded by this provision (para [42]) and the unavailability of less intrusive options which would provide the same level of protection (paras [56] [57]), the court held that the restriction of the right to freedom of expression entailed by section 1(1)*(b)* is reasonable, necessary and justifiable (para [53]).

In respect of the argument that the reverse onus contained in section 1(2) constituted an unconstitutional limitation on the right

to be presumed innocent, to remain silent, and not to be compelled to give self-incriminating evidence (s 35(3) of the Constitution), the court held that the provision was nevertheless constitutional, as there was no risk of unjust conviction (para [75]). The court reasoned that the onus of proving a lawful reason would only arise at the close of the state's case, once a *prima facie* case had been established against the accused, and that the right to be silent had, therefore, not been infringed (paras [67]–[69]). The court further stated that, given the significant policy factors in favour of the existence of the offence of intimidation and the legitimate purpose served by the offence, the burden imposed by the reverse onus is proportionate and less invasive than other reverse onus provisions, and is thus justifiable (paras [91]–[95]).

Can and should reverse onus provisions be ranked? Is the issue not that an accused person may be convicted while a reasonable doubt exists? It is submitted that the reverse onus provision in section 1(2) cannot be justified on the basis of policy factors where it has created the possibility for the presumption of innocence to be breached. Nevertheless, it is submitted that the court in *Moyo* was correct in defending the need for intimidation offences to exist (para [91]) – even critics of the Act acknowledge this (Snyman 455, Plasket & Spoor 751).

Sexual offences

In *S v MD & another* 2017 (1) SACR 268 (ECB), the two accused, the biological parents of the complainant – their ten-year-old daughter – were charged with rape, aiding and abetting in rape, and causing the complainant to witness or be in their presence while engaging in a sexual act. Upon a careful consideration of the evidence, the court had no difficulty in concluding that the complainant had indeed been raped by her father, and that her mother had assisted on one of the occasions when he had done so. (The accused mother's plea of necessity is discussed above.) In respect of the charges relating to rape, the court held that the complainant's evidence was corroborated by other testimony and evidence.

However, the remaining charge, that of causing the complainant to witness or be present whilst engaging in a sexual act, in contravention of section 21(2)*(a)* of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, was held not to be proven beyond reasonable doubt. In discussing

this charge, the court noted that the background to the charge is that the 2007 Act was introduced to remedy the 'prevalence of the commission of sexual offences in our society. . .a social phenomenon. . .reflective of deep-seated, systemic dysfunctionality in our society' (para [66]). Moreover, in dealing with children, the court pointed out that children 'are great imitators and are quick to learn what they see. . .lived' and need to be protected from scenes that 'their immature minds may not process well' (para [67]).

In the case at hand, it was not in dispute that the accused engaged in sexual acts in the presence of their children. The court was at pains to stress that the 'mere presence of a child' does not offend against the section; if this were so, 'the multitudes of persons who live in abject poverty, occupying single-roomed shacks together with their children' – as did the accused – 'would always run the risk of contravening the section' (para [69]). The court set out its interpretation of the offence in section 21(2)*(a)* in the following terms (para [70]):

> In my view, the offence is committed by the perpetrators intentionally and unlawfully causing a child to witness the sexual activity engaged in. Upon a proper construction of the section, the persons concerned must have consciously and deliberately created circumstances that conduce to a child witnessing the sexual activity being engaged in. Furthermore, in my view, the perpetrators must be conscious of the fact that the child is watching them engage in sex.

It was held that despite the evidence of much drunken carousing on the part of the accused, culminating in sexual activity, since the crux of the offence was *causing* a child to witness sexual intercourse, not the 'mere possibility that the child might be watching or might have been watching' (para [71]), there could be no liability on the basis of *dolus eventualis* for the offence set out in section 21(2) (para [72]).

The reasoning of the court would benefit from a little clarification. The requirement that a person accused of contravening this offence should be 'conscious' of the fact that his or her sexual activity is being witnessed by a child is uncontroversial, so too that this circumstance must be caused 'intentionally and unlawfully'. The explanation that such circumstances must be 'deliberately created' seems, however, to militate against liability being based on *dolus eventualis*. There is no indication that this was the intention of the legislature. The further statement that liability could not be founded on the 'mere possibility' of the child

watching the sexual activity also requires clarification – foresight of such a possibility, along with a reckless continuation in the envisaged sexual conduct, would indeed suffice to found liability on the basis of *dolus eventualis*.

The court also stated that there could not be liability on the basis of the offence set out in section 1 of the Criminal Law Amendment Act 1 of 1988, in terms of which a person who 'voluntarily consumes alcohol to such an extent that it leads to criminal non-responsibility, and who, while in this condition, commits an act punishable by law, of which he would have been convicted but for his self-induced lack of criminal responsibility' is guilty of an offence. The question arises why the accused would not be held liable under this offence. The judgment does not explain the court's conclusion in this regard. It may be that the accused could not, in the view of the court, be convicted of this offence, due to the fact that the intoxication did not exclude the accused's criminal capacity, but only their intention. If so, this would only add to the misgivings about the Act mentioned in the *Ramdass* case (discussed above).

Crimes against dignity

Crimen iniuria

In *S v Van Leperen* 2017 (1) SACR 226 (WCC), the appellant's conviction in the trial court for *crimen injuria*, following the uttering of remarks of a sexual nature, and contact with the complainant's buttocks, was set aside on appeal due to the procedural irregularities inherent in the conviction. Allie J nevertheless considered the law relating to *crimen iniuria*, particularly in the context of the alleged verbal utterances, and held that these were 'humiliating and belittling' (para [34]), and that '[s]exual innuendos and gratuitous sexually offensive misconduct. . .are made with a view to treating a person condescendingly and patronisingly' (para [44]). Despite the acquittal of the appellant, an attorney, the court required that a copy of the record and judgment should be sent to the Law Society of the Cape for consideration of corrective measures.

Viewed as a whole, the appellant's conduct in touching the complainant's buttocks, along with the offending words, would certainly qualify as the requisite *actus reus* for *crimen iniuria*, given the unmistakable 'taint of sexual impropriety' associated with the conduct (JRL Milton *South African Criminal Law and*

Procedure Vol II: Common-law Crimes 3ed (1996) 510). However, as Milton points out, the evaluation of whether there was sexual impropriety is often dependent on the time and place in which it occurs, and the precise language used. In this regard, the court was at pains to emphasise that the offending words and conduct took place in a courtroom where other colleagues and members of the public were present (para [34]). The offending words and conduct can, therefore, be distinguished from words or conduct which are merely forward, impertinent, or annoying, where there will not be liability (Milton 515, and cases listed there).

Crimes against public welfare

Drug offences

In *Prince v Minister of Justice and Constitutional Development & others* 2017 (4) SA 299 (WCC), the court upheld a challenge to the constitutionality of a number of legislative provisions criminalising the use of cannabis by an adult in a private dwelling (ss 4*(b)* and 5*(b)* of the Drugs and Drug Trafficking Act 140 of 1992, read with Part III of Sch 2 to this Act; and ss 22A(9)*(a)*(i) and 22A(10) of the Medicines and Related Substances Control Act 101 of 1965, read with Sch 7 of GN R509 of 2003 published in terms of s 22A(2) of this Act). Having set out the history of the application, which incorporates the earlier Constitutional Court decision in *Prince v President, Cape Law Society, & others* 2002 (1) SACR 431 (CC), the court identified the crucial foundation for the challenge from amongst a 'veritable constitutional laundry list', as the right to privacy (para [11]). Crucially, the court noted that the previous pronouncement by the Constitutional Court involving Prince was solely and narrowly focused on the question of whether the prohibition on possession of cannabis limited the religious rights of Rastafari, and that the current application was therefore not bound by the majority decision which upheld the constitutionality of the prohibition.

Counsel for the respondents did not challenge that the prohibitions on private possession and use of cannabis constituted an infringement of the right to privacy, and offered very limited justification of the prohibition. In comparison, the applicants provided the court with very detailed argument on the international trend towards the decriminalisation of private use – a trend which, it may be noted, has not been evidenced elsewhere in Africa. The court also took note of a similar trend permitting private use in the case law of jurisdictions such as Argentina,

Alaska, and Mexico. Moreover, the court held that the decriminalisation of private use and possession of cannabis was consistent with South Africa's international law obligations, in that the 1961 Single Convention on Narcotic Drugs allows for criminalisation to take place subject to the 'constitutional limitations' of each party, and the 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances provides that in respect of offences which do not relate to trafficking or dealing in drugs, the duty to criminalise is similarly subject to a party's 'constitutional principles and the basic concepts of its legal system'.

The court was at pains to stress that by holding that the right to privacy was unjustifiably infringed by private use and possession of cannabis, it was not seeking to undermine the need to curb drug-trafficking, and moreover, that the use of drugs by children could not be permitted. Nevertheless, in the light of the arguments presented to the court, it was held that the 'blunt instrument of the criminal law as employed in the impugned legislation is disproportionate to the harms that the legislation seeks to curb insofar as the personal use and consumption of cannabis are concerned'. The Constitutional Court's pronouncement on this issue is awaited.

CRIMINAL PROCEDURE

Andra le Roux-Kemp*

LEGISLATION

Judicial Matters Amendment Act 14 of 2014

Sections 2, 3 and 6 of the Judicial Matters Amendment Act 14 of 2014 came into operation on 1 December 2017 (Proc 40 in *GG* 41287 of 1 December 2017). These provisions amend the Child Justice Act 75 of 2008 and relate to the determination of criminal capacity of a child.

Also see *Reg Gaz* 41288 GN 1338 of 1 December 2017.

Criminal Procedure Amendment Act 4 of 2017

The Criminal Procedure Amendment Act 4 of 2017 (GN 119 *GG* 40946 of 29 June 2017) amends section 77 of the Criminal Procedure Act so as to provide courts with a wider range of options in respect of orders to be issued in cases where it is found that the accused persons are unable to participate in or understand their criminal proceedings, or are by reason of mental illness or intellectual disability, or for another reason, not criminally responsible for the offences with which they are charged, and to clarify the composition of the panels provided for in section 79 of the Act to conduct enquiries into the mental condition of accused persons.

CASE LAW

Fair Trial Rights

It is the duty of all judicial officers to ensure that there is no irregularity or illegality in the proceedings over which they preside, and that all formalities, rules, and principles of procedure required in such a trial are adhered to (*Dube v S* (A532/15) [2016] ZAGPPHC 302 (29 April 2016) para [11]).

The right of an accused to a fair appeal

The Constitutional Court in *Phakane v S* (CCT61/16) [2017] ZACC 44 (5 December 2017), 2018 (1) SACR 300 (CC) consid-

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ered whether the failure by the state to furnish a complete trial record on appeal constitutes an infringement of an appellant's right to a fair appeal as entrenched in section 35(3) of the Constitution of the Republic of South Africa, 1996 (the Constitution).

The applicant in this case was convicted of murder and sentenced to twenty years' imprisonment. On appeal to the North Gauteng High Court (*Phakane v S* 9A186/2013) [2014] ZAGPPHC 1073 (3 November 2014)), the state delivered an incomplete record of the trial proceedings which did not include the evidence of the main state witness. Despite the absence of this evidence, the High Court found that it was still able to determine the appeal fairly. With regard to the incomplete record, the High Court said (paras [15] [22] of the Constitutional Court judgment) that

> [a]lthough the evidence and statement of Manamela [are] missing, the court a quo did not rely solely on her evidence in order to convict the appellant. The trial court considered the evidence in totality in order for it to make a finding that the appellant was guilty. The learned Judge also quoted the missing statement in full in his judgment. I am satisfied that the nature of the defects in the record are not so serious that a proper consideration of the appeal is not possible. I am, therefore, of the opinion that the appellant will not be prejudiced by the [ir]regularity occasioned by the failure to reconstruct the record and that the record before us is adequate for a fair and meaningful adjudication of this appeal.

The High Court subsequently dismissed the appeal against conviction, but upheld the appeal against sentence and reduced the term of imprisonment from twenty years' to fifteen years' imprisonment (para [2]).

The Constitutional Court reached a different conclusion. In considering the evidence led at trial, Zondo J, for the Constitutional Court, observed that the evidence of the main state witness, which was absent from the trial record, was indeed crucial to the state's case, and clearly also decisive in the trial court's determination of the applicant's guilt. Particularly significant was that there were two discrepancies in the evidence which this main state witness gave at trial, and which she had earlier made in her statement to the police (paras [10]–[13]). The first discrepancy related to the date on which the applicant had visited the main state witness. Justice Zondo noted that the trial judge preferred the version of the statement that the main state witness had given to the police, and rejected, by implication, the version she had

given in court (para [14]). And with regard to the second discrepancy – which related to the main state witness's testimony in court and which was not included in her police statement – the trial judge accepted the version given in court without noting its absence in the witness's police statement (para [15]). Justice Zondo stated as follows:

> [33] It is remarkable that the trial court said nothing in its judgment about the discrepancy between Ms Manamela's evidence in court and the contents of her statement of 2 September 2006 to the police. In its judgment, the trial court also did not say which parts of Ms Manamela's evidence in court the applicant admitted and which ones he disputed nor did it say which parts of Ms Manamela's statement of 2 September 2006 the applicant admitted and which ones he denied. The judgment of the trial court does not even say whether the defence or the Court itself asked Ms Manamela why this critical part of her evidence was not in her statement and how she explained this conflict if she did provide an explanation. The trial court also did not take into account the fact that, when Ms Manamela made her statement as at 2 September 2006, she was still in a romantic relationship with the applicant but, when she testified in court, the two had broken up.
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> . . .
>
> [35] In the absence of a transcript of the trial proceedings or any reconstruction of the record of the trial proceedings, an appeal court could not know whether Ms Manamela ever explained the conflict and how she explained it. Without knowing whether Ms Manamela ever explained this conflict between her evidence in court and her statement to the police, an appeal court would never be in a position to determine the appeal fairly. . .

Justice Zondo subsequently concluded that it was difficult to understand how the trial court had made its finding without having dealt with the 'obvious and material conflict' between the testimony of the main state witness and her earlier police statement. It was, he found, equally difficult to understand how the High Court could conclude that the applicant's appeal could be determined properly and fairly in the absence of an adequate transcript of the trial proceedings or a reconstructed record of the main state witness's testimony (para [37]). As to the appropriate remedy – where missing evidence cannot be reconstructed for the purpose of an appeal, and where this renders an appellant's right to a fair appeal nugatory or illusory – Zondo J quoted from *S v Joubert* 1991 (1) SA 119 (A), where it was held as follows (126, para [38] of the Constitutional Court judgment):

> If during a trial anything happens which results in prejudice to an accused of such a nature that there has been a failure of justice, the

> conviction cannot stand. It seems to me that if something happens, affecting the appeal, as happened in this case, which makes a just hearing of the appeal impossible, through no fault on the part of the appellant, then likewise the appellant is prejudiced, and there may be a failure of justice. If this failure cannot be rectified, as in this case, it seems to me that the conviction cannot stand, because it cannot be said that there has not been a failure of justice.

He also referred to *S v Chabedi* 2005 (1) SACR 415 (SCA), where the Supreme Court of Appeal held as follows (paras [5] [6] and para [39] of the Constitutional Court judgment):

> [T]he requirement is that the record must be adequate for proper consideration of the appeal; not that it must be a perfect recordal of everything that was said at the trial. The question whether defects in a record are so serious that a proper consideration of the appeal is not possible, cannot be answered in the abstract. It depends, inter alia, on the nature of the defects in the particular record and on the nature of the issues to be decided on appeal.

Consequently, given that the available trial record was not adequate for a proper consideration of the applicant's appeal, the conviction on the murder charge was set aside and replaced with a competent verdict of assault. Based on the time the applicant had already served in prison, his immediate release was ordered (para [46]).

Also see *Mulaudzi v S* (A083.2015) [2017] ZALMPPHC 48 (10 May 2017) and *Sippel v S* (A160/2016) [2017] ZAGPPHC 187 (12 May 2017).

In another case before the Constitutional Court, *Barlow v S* 2017 (2) SACR 535 (CC), it was emphasised that the right to a fair trial includes the right to appeal, and that section 35(3)*(a)* of the Constitution provides that every accused person has the right to a fair trial, which includes the right to be informed of the charge with sufficient detail to answer to it; a right which applies equally where a case is taken on appeal.

The applicant in this case was charged with eight counts: '(1) unlawful pointing of a firearm; (2) murder; (3) robbery with aggravating circumstances; (4) attempted murder; (5) unlawful possession of a firearm; (6) unlawful possession of ammunition; (7) another count of unlawful possession of a firearm; and (8) another count of unlawful possession of ammunition' (para [2]). At the close of the state's case, the applicant's request for discharge in terms of section 174 of the Criminal Procedure Act succeeded in respect of count one (unlawful pointing of a firearm), and counts five and six (the first counts of unlawful

possession of a firearm and ammunition) (para [3]). The applicant was found guilty of the remaining counts and was sentenced to ten years' imprisonment on count two (murder), three years on count three (theft), five years on count four (attempted murder), and three years on counts seven and eight (unlawful possession of a firearm and ammunition). All the sentences were ordered to run concurrently, which made for an effective term of fifteen years' imprisonment (para [6]). However, when delivering judgment, Mabesele J started by stating that (*Barlow v S* [2015] ZAGPJHC 318 (30 January 2015 paras [1]–[2] para [4] of the Constitutional Court judgment)

> [t]he accused stands trial on counts of pointing a firearm, murder (read with the provisions of section 51 of Act 105 of 1997), robbery with aggravating circumstances (read with the provisions of [s]ection 51(2) of the Act 105 of 1977), unlawful possession of firearms and unlawful possession of ammunition.

This was clearly an 'inadvertent mistake' as the applicant had already been discharged on the count of pointing a firearm (count one) and it did not refer to the count of attempted murder (count four) (para [5]).

The applicant subsequently appealed against his convictions on the grounds that the state had not proved his guilt beyond a reasonable doubt as regards the convictions for murder and attempted murder, and that the element of intention permanently to deprive the deceased of his firearm had not been established (para [7]). In finding no misdirection in the trial court's evaluation of the evidence, and further that its conclusion that the state had proved its case beyond a reasonable doubt could not be faulted, the High Court dismissed the applicant's appeal. However, in doing so, the High Court failed to mention that the applicant had been found guilty of theft on count three (the robbery charge) (para [9]). The Constitutional Court subsequently had to decide whether the inaccuracies in the introductory paragraph of the trial court's judgment relating to the charges, and the failure of the High Court to mention the theft conviction in the appeal judgment, compounded the infringement of the applicant's right to a fair trial (para [10]).

Justice Froneman, writing for the majority of the Constitutional Court, noted that the trial court's initial incorrect reference to the charge of pointing a firearm (count one) instead of attempted murder (count four) had clearly been inadvertent, as the trial court continued to deal extensively with all the evidence pre-

sented. This included the evidence relating to the attempted murder charge on which the court ultimately concluded that the applicant was guilty (para [12]). On appeal, however, the High Court did not expressly consider the reasons the trial court gave for the theft conviction, nor did it expressly consider the basis upon which the applicant appealed, namely, that his intention permanently to deprive the deceased of his firearm had not been established beyond a reasonable doubt (para [13]). Justice Froneman explained (para [14]) that –

> [b]ecause the Full Court did not expressly consider Mr Barlow's appeal on theft, it may be argued that he has had no appeal on the theft conviction. Consequently it may be argued that the applicant has not had a fair trial regarding his appeal on the theft conviction. The application for leave to appeal against the conviction of theft on the basis of a violation of the applicant's right to a fair trial must therefore be considered with care.

However, although this aspect of the applicant's case raised a constitutional issue, there were no prospects of success as the Constitutional Court also found no reason to interfere with the factual findings made by Mabesele J in the trial court (para [15]).

To this, Judge Zondo added:

> It is important that courts should consider all issues or matters before them and decide them properly and give reasons for their conclusions. When they do not do that, they infringe the fair trial rights of accused persons or appellants (para [45]).

The right to legal representation

The accused in *S v Sokoi* (R75/2017) [2017] ZAFSHC 201 (10 August 2017) appeared, together with co-accused, before the Bloemfontein magistrate's court on a charge of housebreaking with intent to steal and theft and was convicted and sentenced to ten months' imprisonment (para [1]). On review under of section 302 of the Criminal Procedure Act, it was noted from the record that the accused and his co-accused first appeared in court on 1 September 2014, and that the accused then applied for legal assistance from Legal Aid SA (LASA). The matter was subsequently postponed on numerous occasions unrelated to the accused's application for legal assistance to LASA, until 16 April 2015, when the accused terminated the mandate of his legal representative provided by LASA and elected to conduct his own defence (para [5]). On 25 April 2015, the matter could not proceed to trial as one of the other accused had a new private

attorney; and on 23 July 2015, the accused's newly provided legal representative withdrew from the matter on the basis that the accused refused to give her instructions, although she was for her part ready to proceed with the trial. The trial court subsequently directed that the trial proceed without the accused being legally represented, notwithstanding his protestations and explanation of his differences with the legal representative in question (para [6]).

The trial proceeded but the accused refused to participate in the proceedings by declining to cross-examine witnesses; he also informed the court on numerous occasions that he would like to secure another legal representative from LASA (paras [7] [8]). The trial court, however, refused to allow the accused an opportunity to acquire or consult a legal representative, 'pointing out that he would not be allowed to abuse the right to legal representation by changing attorneys provided by Legal Aid SA "left, right and centre"' (para [7]).

Judges Lekale and Mbhele for the High Court, Free State Division, Bloemfontein, emphasised that the right to a fair trial requires 'a substantive, rather than a formal or textual approach' (para [10]; *S v Shaik & others* 2008 (2) SA 208 (CC) para [43]). While the judges acknowledged that fairness is 'not a one-way street conferring an unlimited right on an accused to demand the most favourable possible treatment', it is nonetheless essential if confidence is to be instilled in the South African criminal justice system (para [10]; *S v Shaik & others* 2008 (2) SA 208 para [43]). Thus, while it is not inconceivable that an accused person may abuse the right to legal representation by constantly changing legal representatives, it is equally conceivable that he or she may have sound reasons for moving from one legal representative to another, 'with the view to ensure that his rights are well protected and he, as such, gets a fair trial' (paras [13] [14]). Likewise, an accused who has elected to conduct his or her own defence may also, during the course of the trial, decide rather to enlist the services of a legal practitioner. This may, of course, also be done maliciously to delay the process, or simply because a real need for legal assistance exists (para [15]).

Based on the trial record, Judges Lekale and Mbhele found that the accused in this case had insisted throughout the trial that he needed legal representation, and that the situation between himself and the first legal representative appointed by LASA could have been resolved with the necessary assistance from the presiding officer. The judges explained as follows (para [21]):

> Practical experience and common sense indicate that in most, if not all, cases Legal Aid SA provided legal representatives first have to make deliberate or extra efforts to win the trust and confidence of accused persons before they may hope to get full and proper instructions simply because they are not necessarily the choice of and are often unknown to such accused persons.

Therefore, it was concluded that the accused in this matter had neither abused his constitutional right to legal representation, nor had his exercise of the right been unreasonable. The delay in starting the trial was also not attributable to his exercise of the right to legal representation, as, on numerous occasions, the trial had been postponed for reasons relating to the co-accused joined in the same proceeding (para [24]). In finding that the proceedings had not been in accordance with justice, the court set aside the accused's conviction and sentence and held that it served no purpose 'in law and equity' to remit the matter to the trial court, as the accused had already served the sentence imposed in full (para [25]).

Also see *S v Meyer & others* (204/2012) [2017] ZAGPJHC 286 (4 August 2017).

The right to a speedy trial without unreasonable delay

The applicant in *Mohan v Director of Public Prosecutions KwaZulu-Natal* 2017 (2) SACR 76 (KZD) faced charges in three criminal proceedings, for submitting fraudulent VAT returns to the South African Revenue Service (the SARS), and purchasing property using the proceeds of these fraudulent VAT refunds (paras [1]–[6]). The applicant first appeared in court on these charges in 2014 and the three proceedings were, at the time of the hearing before Chetty J for the High Court, KwaZulu-Natal Local Division, Durban, at different stages of completion. In the first proceeding, the evidence of state witnesses had already been led after which the matter was adjourned. In the second and third proceedings, the state had not yet led evidence and the matters were adjourned pending the outcome of this present application for the confirmation of a temporary stay of proceedings granted to the applicant in June 2016 (paras [1]–[7]). The applicant sought an interdict restraining the respondents from commencing and continuing the three criminal proceedings against him, pending the completion of investigations by the SARS, the South African Police Service (the SAPS), and the Public Protector. These investigations related primarily to the criminal

liability of another individual, as well as a number of SARS employees, who were alleged to have been involved in the alleged illegal transactions, and who had, to date, not been charged with any of the offences (para [12]). The applicant also sought that full information regarding the status of these investigations be made available to him (para [9]).

The basis for this application was, therefore, that the matters pending against the applicant were not ripe for hearing, and should, therefore, not remain on the roll as there was no indication as to when investigations would be completed (para [11]). The applicant also submitted that 'he has a right to a fair hearing, entrenched in the Constitution, and [that] he will be prejudiced if the criminal trials go ahead without the investigations referred to above being finalised. He further contends that he is not being given an opportunity to prove his innocence' (para [14]). Finally, with regard to the nature of the relief sought, the applicant recognised that 'the relief sought is a drastic step but submits that the stay of prosecution being sought is only of a temporary nature, and that if the criminal proceedings against him were to go ahead, he would suffer irreparable trial prejudice' (para [16]).

Chetty J first noted that the applicant had not disclosed, with regard to the original application for a temporary stay which had been granted, that the first (of three) criminal proceedings against him had already commenced, that the state had led its evidence, and that the defence had cross-examined the state witnesses (para [27]). This seemingly willful non-disclosure of material information by the applicant was criticised by the judge, who emphasised that both litigants and their legal representatives at all times owe a duty to place the full facts before a court. This duty was described as 'an essential ingredient in a system designed to achieve a fair and just outcome of a dispute. This duty cannot be switched on and off depending on whether an application is ex parte. It is an abiding duty worn at all times by legal practitioners' (paras [25]–[30]; *National Director of Public Prosecutions v Pilane & others* (692/06) [2006] ZANWHC 68 (16 November 2006); *National Director of Public Prosecutions v Basson & another* 2002 (1) SA 419 (SCA), [2002] 1 SA 419 para [21]).

With regard to the nature of the relief sought, ie, a confirmation of the order for a temporary stay of proceedings against the applicant granted in June 2016, Chetty J noted as follows (para [34], quoting respectively from *Sanderson v Attorney-General, Eastern Cape* 1998 (1) SACR 227 (CC) para [38] and *Attorney-General of Natal v Johnstone & Co Ltd* 1946 AD 256 261):

> The relief the appellant seeks is radical, both philosophically and socio-politically. Barring the prosecution before the trial begins – and consequently without any opportunity to ascertain the real effect of the delay on the outcome of the case – is far-reaching. Indeed it prevents the prosecution from presenting society's complaint against an alleged transgressor of society's rules of conduct. That will seldom be warranted in the absence of significant prejudice to the accused (*Sanderson* para [38]).
>
> Now there is no doubt that, in general where it is alleged by the Crown that a person has committed an offence, the proper way of deciding on his guilt is to initiate criminal proceedings against him; and where such proceedings have already been commenced, even if the stage of indictment only has been reached, it seems to me that a court which is asked to exercise its discretion by entertaining proceedings for an order expressly or in effect declaring that the accused is innocent would do well to exercise great caution before granting such an order. In most types of case such an order would be entirely out of place (*Johnstone* 261).

Therefore, an accused person who seeks a permanent stay of prosecution for reasons associated with an unreasonable delay before the commencement of criminal proceedings must bring that application before the High Court having jurisdiction; and for 'intra-curial' delays occurring after the commencement of criminal proceedings, the matter falls to be dealt with exclusively by the court seized with the criminal proceedings (para [36]; *S v Naidoo* 2012 (2) SACR 126 (WCC)). A High Court will, therefore, interfere in incomplete criminal proceedings in the lower courts in 'rare' cases only, 'where a grave injustice might otherwise result or "where justice might not by other means be attained"' (para [36], quoting from *Wahlhaus & others v Additional Magistrate, Johannesburg & another* 1959 (3) SA 113 (A), [1959] 3 All SA 194). Judge Chetty consequently concluded that given the absence of any evidence pointing to any miscarriage of justice that would befall the applicant in the event of the three criminal trials proceeding at the same time, the temporary interdict granted for a stay of prosecution could not be confirmed (paras [46]-[50]). The judge also found that to grant an order for the temporary stay of proceedings in all three criminal trials pending finalisation of the investigations the applicant believed were outstanding would infringe on the doctrine of separation of powers as the decision to prosecute falls within the exclusive domain of the National Prosecuting Authority (para [51]).

The right to a speedy trial without unreasonable delay: A permanent stay of prosecution

The Supreme Court of Appeal in *Van Heerden & another v National Director of Public Prosecutions & others* 2017 (2) SACR

696 (SCA) emphasised that a permanent stay of prosecution is an extraordinary remedy that is appropriate under exceptional circumstances only.

The appellants in this case were employed by the third respondent, British American Tobacco South Africa (Pty) Ltd (BATSA), and the employment of both was terminated in 2010 after the first appellant was accused by BATA of the theft of cigarettes (paras [5] [6]). In August 2011, in anticipation of criminal charges to be preferred against the appellants, the National Director of Public Prosecutions (the NDPP) applied for and obtained a provisional restraint order under section 25(1)*(b)* of the Prevention of Organised Crime Act 121 of 1998 (the POCA), effectively preventing the appellants from dealing in any manner with virtually all their property (para [7]). The appellants were ultimately charged with the theft of hundreds of boxes of cigarettes with an estimated value of R3,47 million on 29 August 2011 (para [8]). In September 2011, five more accused were charged together with the appellants (para [8]). From this date to the date on which the present matter was decided, there were numerous postponements for a variety of reasons, including: the state awaiting confirmation from the NDPP as to the charges to be instituted under the POCA; a request on the part of the appellants for further particulars; postponements due to changes in legal representatives; a postponement pending the Constitutional Court decision in *Savoi v National Director of Public Prosecutions* 2014 (1) SACR 545 (CC); and the appellants objecting to the charge sheet (paras [9]–[26]).

In December 2015, the appellants launched an application for a permanent stay of criminal prosecution on the ground that the numerous delays and the paucity of information supplied by the state – including a defective charge sheet – had resulted in them being denied a fair trial (para [29]). It was noted, for example, that a period of six years had elapsed since the opening of the police docket, and that the events on which the charges were based covered a period stretching back to January 2009 (paras [38] [44]). The appellants also submitted that, as a result of their loss of employment and the extended duration of the criminal proceedings, which included the restraint order on their property, they had been severely prejudiced, and that their finances were in a perilous state (para [33]). The state, in turn, submitted that the appellants had been 'economical with the truth', had not been truthful about their assets, and had failed to submit monthly financial reports to the curator as required by

the POCA (para [35]). The state also relied on the reasons given for previous applications by the appellants for release of funds, which had been dismissed (paras [35]–[40]).

In considering whether the appellants were entitled to the extraordinary relief of an order permanently staying a criminal prosecution against them, Navsa ADP, writing for the majority of the Supreme Court of Appeal, had regard to the Constitutional Court decision in *Sanderson v Attorney-General Eastern Cape* 1998 (2) SA 38 (CC) (para [47]). The judge described the right to a trial within a reasonable time as an incidence of the right to a fair trial, and pointed out that the prejudice suffered by an accused pending the outcome of a criminal proceeding is not only trial-related, but also of social and personal import and effect (paras [47]–[50]). With regard to the time elapsed, it was noted that 'time has a pervasive significance that bears on all the factors and should not be considered at the threshold or, subsequently, in isolation' (para [49], quoting from *Sanderson v Attorney-General Eastern Cape* above). In addition to considerations that may have resulted in, or otherwise impacted on, the time elapsed, regard must also be had to the nature of the case and to systemic delays which can include resource limitations, court congestion, etcetera (paras [53] [54]). The ultimate question, in considering these factors in the context of an application for a permanent stay of proceedings, is whether an accused, like the two appellants in this case, had suffered unreasonable delay (para [55]).

Applying these considerations to the facts of the present case, Judge Navsa noted that the many delays could

> rightly be termed as systemic delays and that periods of time were lost due to the needs of a number of the appellants' co-accused, the request for further particulars, the State's response thereto as well as the time that passed whilst the parties awaited the decision in *Savoi* (a period of slightly more than two-and-a-half months). A further five months were lost when the matter was postponed to enable the appellants to respond to the further particulars supplied by the State. However, a careful consideration of that history also reveals that the State was irresponsibly lax in investigating the case, finalising the charge sheet and moving forward with the prosecution. It is clear that substantial and material parts of the delays were occasioned by the inertia and vacillation of the prosecutors involved on behalf of the NDPP (para [56]).

Furthermore, considerable emphasis was placed on the fact that initial postponements had been granted to the state to allow it

to consider bringing racketeering and money-laundering charges against the appellants under the POCA, only for the state to indicate that the case would proceed on the theft charges alone, but then later including a racketeering charge on the charge sheet. What were described as 'disingenuous' actions on the part of the state had also contributed to the delays in the case (paras [57] [58]). Finally, it was noted that the state had remained 'inert' by refusing to release the appellants' property under restraint (para [60]). It was, therefore, concluded that 'inadequate consideration, if any, was given by the State to the appellants' rights to a trial within a reasonable time and that a material and substantial part of the delay was due to the State's tardiness and lack of application and concern' (para [61]).

Judge Navsa ultimately concluded that 'the passage of time in this case, relative to its facts, was unreasonable. Importantly, the dishonest and unacceptable conduct of the State *in facie curiae* cannot go unnoticed and must be taken into account in favour of the appellants and against the NDPP' (para [69]). A permanent stay of criminal proceedings in respect of the charges brought against the appellants was ordered (para [71]). The judge further emphasised that

> decisions in matters of this kind are fact-specific. It follows that this judgment should not be resorted to as a ready guide in determining the reasonableness or otherwise of delays in the finalisation of trials. Whether a breach of a right to an expeditious trial has occurred and relief is justified, is to be determined by a court after having been apprised of all of the facts on a case by case basis (para [70]).

Also see *Naidoo v Regional Magistrate, Durban & another* 2017 (2) SACR 244 (KZP).

Addressing an accused person in court

In *S v Chabalala* 2017 (2) SACR 486 (LT), Nair AJ for the High Court Limpopo Local Division, Thohoyandou, reaffirmed that presiding officers should not address those before them in court as 'accused' (para [9]). This, he explained, is 'deprecated and not in keeping with the decorum of the Court' (para [9]). He also held that the way in which judicial officers address litigants, witnesses, and accused persons is a reflection of the temperament of the bench as a whole, and presiding officers should, therefore, take the necessary care (para [13]). In *S v Gwebu* 1988 (4) SA 155 (W), it was stated (158F–H):

> It is perhaps as well also to say something about the habit which a number of magistrates, and some prosecutors in the magistrate's

> courts, have developed in recent years, of addressing accused persons by the appellation 'accused' or 'beskuldigde'. And, one sees, too, in many records that some magistrates (not in this case) refer to witnesses as 'witness' or 'getuie'. This depersonalising of people is disrespectful and degrading. It is no cause for difficulty for people to be called by their proper names. I can find no reason for the appellant, in this case, when addressed directly by the magistrate, not being called 'Mr Gwebu'. Members of the public who appear in our courts, whether as accused or as witnesses, are entitled to be treated courteously and in a manner in keeping with the dignity of the court. It is hoped that judicial officers will always be alive to this and discourage this practice. Nothing further needs be said on this issue.

Prevention of Organised Crime Act 121 of 1998

The primary purpose of the Prevention of Organised Crime Act 121 of 1998 (the POCA) is to provide a civil remedy for the preservation, seizure, and forfeiture of property derived from or concerned with the carrying out of unlawful activities.

Basic principles

In *National Director of Public Prosecutions v Mtwazi & others* (441/2016) [2017] ZAECBHC 4 (5 June 2017), Hartle J for the High Court, Eastern Cape, Bhisho, reaffirmed the basic principles underpinning the legislative scheme of the POCA. With reference to *NDPP v Mohammed NO & others* 2002 (4) SA 843 (CC), he explained that the overall purpose of the Act is to strip criminals of the proceeds of their offences, and thereby to remove the incentive from crime (para [7]). The POCA uses two mechanisms to achieve this: Chapter 5 (ss 12–36) provides for the forfeiture of the benefits derived from crime. Confiscation of such forfeited benefits is ultimately only invoked once the accused has been convicted of an offence. Chapter 6 (ss 37–62), in turn, provides for the preservation and forfeiture of property that was an instrumentality of an offence, or is the proceeds of unlawful activities, or is property associated with terrorist and related activities. Different from Chapter 5 proceedings, the provisions of Chapter 6 are *in rem*, in other words, civil proceedings that are in no way subject to criminal proceedings or to an accused subsequently being convicted of any offence. Judge Hartle explained further that the provisions of the POCA apply to offences committed both before and after its commencement, and that it has a wider ambit than purely the organised crime offences referred to in Chapters 2, 3 and 4 of the Act. For

example, the Act also applies to cases of individual wrongdoing (para [9]; *Mohunram v NDPP* 2007 (4) SA 222 (CC)). The Constitutional Court, in *NDPP v Elran* 2013 (1) SACR 429 (CC), described the seemingly draconian provisions of the POCA as follows (para [70], and para [8] of the judgment under discussion):

> There is no constitutional challenge to these provisions. We therefore have no reason to approach the powers POCA confers on courts with reserve. We should embrace POCA as a friend to democracy, the rule of law and constitutionalism – and as indispensable in a world where the institutions of state are fragile, and the instruments of law sometimes struggle for their survival against criminals who subvert them.

Specifically with regard to Chapter 5 proceedings under the POCA, the following basic principles can be noted: a restraint order can only be made once the prosecution for an offence has been instituted against the defendant concerned, and either a confiscation order has been made against that defendant, or it appears to the court that there are reasonable grounds for believing that a confiscation order may be made against that defendant; and the proceedings against that defendant have been concluded (s 25*(a)*(i)-(iii)). It is further required that, before a restraint order is made, the NDPP first discharge 'the onus of showing a reasonable prospect of obtaining both a conviction in respect of some or all of the charges levied against an accused person and a subsequent confiscation order' (para [18]; *NDPP v Tam & others* 2004 (4) SACR 126 (W) 129). Given that restraint order applications are civil proceedings, the POCA also requires that any question of fact be determined on a balance of probabilities (s 13(1), (2) and (5); para [20]). Judge Hartle explained that '[a] court making a restraint order does not have to decide that the offences were probably committed. It is only called upon to find that there are ''reasonable grounds for believing that a court might find that they were probably committed''' (para [22], quoting from *NDPP v Rautenbach* 2005 (4) SA 603 (SCA) paras [27] [51]).

A confiscation order (also under Chapter 5 of the POCA), in turn, can only follow upon a conviction of the defendants of an offence (s 18(1) of the POCA; *NDPP v Alexander & others* 2001 (2) SACR 1 (T)), and is directed at confiscating the benefits that accrued to the offender, whether or not the offender is still in possession of the particular proceeds (para [16]). And section 12(3) of the POCA states that a person has benefited from

unlawful activities 'if he or she has at any time, whether before or after the commencement of [POCA], received or retained any proceeds of unlawful activities' (para [15]).

The provisions of Chapter 5 of the POCA were considered in *National Director of Public Prosecutions v Ramlutchman* 2017 (1) SACR 343 (SCA). The respondent in this case was convicted on 21 counts of fraud and one count of corruption (para [1]). The NDPP also applied for the amount of R52 million to be confiscated in terms of section 18(1)*(a)* of the POCA (para [3]). This amount reflected the total amount the respondent had been paid under sixteen construction contracts which he had succeeded in securing based on his fraudulent and corrupt activities (para [2]). While it was not in dispute that the respondent had benefited from the offences for which he had been convicted, the amount of the benefit to be confiscated was disputed (para [9]). It was submitted on behalf of the respondent that the value of the proceeds of his unlawful activities did not amount to R52 million, that only the net proceeds constituted a benefit under the POCA, and that the appellant had failed to establish the precise amount of the net proceeds (para [10]). The appellant, in turn, argued that, because the contract value was R52 million, it was this gross value which constituted the benefit which fell to be confiscated in terms of section 18(1), read with section 12(3) of the POCA (para [22]). Both the regional magistrate and the High Court agreed with the respondent and concluded that

> the entire contract amount received by the respondent as proceeds of unlawful activities could not be regarded as a benefit because it was not exclusively a gain or profit. In other words, it held that the costs of the construction component of the proceeds could not rationally be equal to a gain or benefit. . . . to treat the gross proceeds as a benefit, would result in the state being unjustly enriched at the expense of the respondent and this would be disproportionate and result in the respondent paying more than the amount which he benefited from, and which is prohibited under section 18(2) of POCA (para [12]).

Mathopo JA, writing for the majority of the Supreme Court of Appeal, held with regard to section 18 of the POCA as follows:

> In view of the fact that there is a close connection between the criminal conviction and the confiscation order, the discretion conferred upon a court by section 18 is a discretion to determine the amount that it should order a defendant to pay. That determination is made once the court has convicted the defendant of a criminal offence and at the same time imposes a sentence upon such a person. The presiding

> officer upon whom the discretion is conferred by statute is normally the presiding officer who has presided over the criminal trial and had sentenced the accused. Such a judicial officer would have heard all the evidence and the arguments in the criminal trial and would, in the circumstances, have been apprised of all the issues in the case. Consequently the discretion to deal with the confiscation order is analogous to the discretion to determine the proper sentence to be imposed in criminal proceedings. . . With that in mind the legislature sought to ensure that it would be that court which would determine the appropriate amount to be confiscated. It is only in instances where the presiding officer who convicted the defendant is absent or for any reason not available that another judicial officer may be appointed in his stead in terms of section 18(4) of POCA.
>
> [21] In approaching this question a court will bear in mind that the enquiry as to whether the proceeds should be confiscated is not the same enquiry to be undertaken when resolving disputes of fact in motion proceedings. The purpose of confiscating proceeds of crime is to ensure that criminals realise that they cannot benefit from their ill-gotten gains and that crime does not pay. When considering the amount to be confiscated a court must have regard to the extent to which the property to be confiscated derived directly from the criminal activities. In certain instances, as in the present case, where the entire contract amount was not retained by the respondent, a balancing act must be done by a court in the exercise of its discretion to determine the precise amount to be confiscated (paras [20] [21]).

Mathopo JA concluded that it would be unjust in this case to confiscate the full contractual sum of R52 million, as the respondent had used approximately 90 per cent of this sum to construct the buildings which he had completed and handed over to the Department of Public Works (para [23]). To determine the amount to be confiscated under the POCA, section 18(2) requires that the amount confiscated may not exceed the value of the proceeds of the offences or related criminal activities as calculated in accordance with Chapter 5 of the POCA (para [27]). And this must be read together with section 19(1) of the POCA, which provides as follows:

> Subject to the provisions of subsection (2), the value of a defendant's proceeds of unlawful activities shall be the sum of the values of the property, services, advantages, benefits, or rewards received, retained or derived by him or her at any time, whether before or after the commencement of this Act, in connection with the unlawful activity carried on by him or her or any other person.

Unfortunately, the evidence placed before the regional magistrate was not sufficient for a proper determination to be made under the provisions of the POCA, and the matter was conse-

quently remitted back to the regional court to conduct an inquiry in terms of section 18(6) of the POCA, in order to determine the amount to be confiscated under section 18 of the Act (para [32]).

The provisions of Chapter 6 of the POCA were considered in *Stemele & another v National Director of Public Prosecutions* (3428/2015) [2017] ZAECPEHC 44 (14 September 2017). Judge Eksteen for the High Court, Eastern Cape Division, Port Elizabeth, explained that whenever there are reasonable grounds to believe that property is the proceeds of unlawful activity, the NDPP is entitled to bring an application for the preservation of the property. Where the NDPP is aware of persons who have an interest in the property, those persons should be cited and notice of the order should be served on them. For example, and as in this case where the NDPP was aware of a marriage in community of property which might result in a spouse having an interest in certain property or properties, the NDPP is obliged in terms of section 39(1)*(a)* of the POCA to serve notice of the preservation order on such a person/spouse (para [12]). In addition, section 39(1)*(b)* of the POCA also requires that the NDPP give notice of a preservation order granted by a court by publication to this effect in the *Government Gazette* (para [11]). This publication serves as an invitation to any persons having an interest in the property or properties to join in the proceedings (paras [12] [13]). Therefore, the fact that the NDPP is not aware of any or further persons who may have an interest in the property does not preclude the granting of the preservation order. Sufficient safeguards are in place to ensure that any such persons who may have an interest be informed (s 39 of the POCA) and be enabled to join in the proceedings (para [11]).

Also see *National Director of Public Prosecutions v PDP & others* 2017 (2) SACR 57 (NCK) and *National Director of Public Prosecutions v Scholtz & others* 2017 (1) SACR 483 (NCK).

Forfeiture under Chapter 6 of the POCA

The respondent in *Brooks & another v National Director of Public Prosecutions* 2017 (1) SACR 701 (SCA) contended that there were reasonable grounds to believe that the residential property of the two appellants, as well as R6,2 million in cash, were an instrumentality of an offence under the POCA (para [22]). It was submitted that the property was used for illegal diamond dealing, and that both the property and the cash used in the illicit transactions had been deliberately chosen and were integral to

the commission of the offences (para [22]). A forfeiture order under section 50(1) of the POCA was subsequently made, and the appellants appealed against this order.

Schippers AJA and Mocumie JA, for the Supreme Court of Appeal, dismissed the first appellant's denial of involvement in any illicit diamond dealing, that any such transaction had taken place on the property, and that the property was an instrumentality of any offence (para [24]). Therefore, issue was whether the property had been used in a real and substantial way which made the commission of the offences possible or easier (para [27]). With reference to the provisions of the Diamonds Act 56 of 1986, it was held that the property would be an instrumentality of the offences with which the appellants were charged, if it was not registered in terms of the Act as a diamond trading house – ie, premises at which the holder of a diamond trading house licence may facilitate the local purchase and sale of unpolished diamonds (para [27]). Therefore, 'the frequent use of the property as a place to facilitate the buying and selling of unpolished diamonds not only renders the property itself instrumental in the offence of using the property as a diamond trading house, but also points to a direct and immediate connection between the property and the numerous offences of unlawful trading in unpolished diamonds' (para [28]). In considering the facts of the case, Schippers AJA and Mocumie JA subsequently concluded that the property was an instrumentality of the offences with which the appellant was charged, and that there could be 'no question that the property made the commission of the offences possible or easier' (paras [29]–[34]). It was held that '[t]he relationship between the use of the property and the commission of the offences was neither tenuous nor remote. The involvement of the property was not merely incidental to the commission of the offences: it was put to use in a positive sense and was a means through which the crimes were committed. The property was the base for a significant, organised and well-funded illicit diamond-dealing business' (para [36]).

With regard to the proportionality enquiry aimed at balancing the constitutional imperative of law enforcement and combating crime against the right not to be arbitrarily deprived of property, the judges found that in this instance the property was 'the base for an ongoing, organised and well-funded criminal enterprise involving diamond-dealing, huge amounts of cash and inevitably, money laundering. And the uncontroverted evidence is that the

offences were committed in the course of a broader enterprise of criminal activity . . .' (para [41]). The appellant, however, submitted that the residential property was not only his family's home, but that the amount that he had allegedly received from the illegal activities (R58 000) was far less than the market value of the property (R960 000 in 2014) (para [46]). But the Supreme Court of Appeal did not agree, and held that given the 'nature of the offences and the extent to which the property was used as an instrument thereof, forfeiture was not disproportionate' (para [46]; *Prophet v National Director of Public Prosecutions* 2006 (2) SACR 525 (CC)). With regard to the impact that the forfeiture of the property would have on the appellants' children, it was noted that this matter had not been raised by the appellants themselves (paras [51] [52]), and that the court *a quo* was 'alive both to the interests of the children and the fact that the appellants did not allege that they or their children would be rendered homeless if the property were forfeited to the State' (para [53]). It was consequently held that the forfeiture order had been properly made, and the appeal was dismissed (para [54]).

Also see *National Director of Public Prosecutions v Ivanov & another* 2017 (2) SACR 639 (WCC).

Property susceptible to a preservation of property order under section 38 of the POCA

At issue in *National Director of Public Prosecutions v Kalmar Industries SA (Pty) Ltd* 2017 (2) SACR 593 (SCA) was whether certain tools and equipment, as well as a 'Swift 011 purpose built lifting platform', were susceptible to a preservation of property order under section 38 of the POCA and, consequently, to a forfeiture order in terms of the provisions of sections 48 and 50 of the Act (para [1]). The factual background giving rise to this issue was a commercial dispute involving the respondent and a company, Q6, which claimed to be the owner of the platform and to have paid all the costs relating to the research, design, and manufacture of the platform (para [4]).

In considering the evidence before it, the Supreme Court of Appeal (Schippers AJA) held that an allegation of theft with regard to the property had been made, and that this had not been proved in the court *a quo*. Therefore, the matter remained in essence a commercial dispute between the respondent and Q6 (para [17]). He explained that the NDPP should have known that there were numerous, genuine disputes of fact which could not

be resolved on the papers before the court. These disputes related to, among other things, the terms of the agreement between the respondent and Q6; ownership of the platform and the equipment; the circumstances under which Q6 had been ejected from the site belonging to the respondent; where the property was held; and the subsequent use of the property by the respondent (para [18]). But more fundamental than the commercial nature of this dispute, Schippers AJA also noted that the dispute was 'far removed from the objectives of POCA, which, according to its title, was enacted, among other things, to combat organized crime, money laundering and criminal gang activities; and to prohibit certain acts relating to racketeering activities' (para [19]; *National Director of Public Prosecutions v Mohamed NO* 2002 (2) SACR 196 (CC); 2002 (4) SA 843 (CC) para [14]). The dispute in this case was not related to Chapter 6 of the POCA, dealing with the civil forfeiture of property in the context of 'removing incentives for crime; deterring persons from using or allowing their property to be used in crime; eliminating or incapacitating the means by which crime may be committed; and advancing the ends of justice by depriving those involved in crime of the property concerned' (para [19]).

It was consequently concluded that the facts upon which the NDPP relied for the contention that the platform and equipment were instrumentalities of the crime of theft were insufficient for a preservation of property order to be granted under section 38 of the POCA, or for the property to be forfeited in terms of sections 48 and 50 of the Act (paras [25]–[30]):

> What all this shows is that the applications for a preservation-of-property order and a forfeiture order were ill-conceived, and should never have been brought by the NDPP. They were far removed from the main purpose of POCA: to give effect to South Africa's international obligation to ensure that criminals do not benefit from their crimes. In the result, limited public resources have been wasted, and the costs of the abortive POCA applications as well as the costs of this appeal will ultimately be borne by taxpayers. The NDPP's decision to apply in this case for preservation-and-forfeiture orders under POCA, is inexplicable, irrational, and must be severely deprecated (para [33]).

Bail

Bail refers to the release of an accused person from custody, subject to the obligation to appear before the proper authority at a future date and time. The release may also be subject to other specific conditions as the authorised officer – whether a police

officer, a magistrate, or judge – sees fit (*Mfini v S* (CA&R15/2016) [2017] ZAECGHC 6 (2 February 2017)).

A qualified right to be released on bail

The four accused in *S v Hewu & others* 2017 (2) SACR 67 (ECG) were arrested on 11 January 2016 on suspicion of participating in an armed robbery and attempted murder. The accused appeared in the regional court for the first time on 4 May 2016, and the matter was remanded for trial to 19 August 2016. Given that no foreign language interpreter was available to assist the complainant on that day, the matter was further remanded to 5 October 2016 (para [2]). On 5 October 2016, the foreign language interpreter was again not available and the regional magistrate refused to postpone the case further. The matter was consequently struck from the roll. However, the accused were almost immediately re-arrested on the same day during the lunch adjournment, pursuant to a warrant issued by a peace officer in terms of section 43 of the Criminal Procedure Act (para [3]). They were subsequently brought before a different regional magistrate on 6 October 2016. The prosecutor advised that the foreign language interpreter, whose attendance was required to assist the complainant, would indeed be available the following week and insisted on a postponement of the matter, arguing that the accused should remain in custody as they were lawfully before the court in that the state was entitled to re-arrest them (para [7]). The accused, in turn, argued that their re-arrest almost immediately after the matter had been struck from the roll the previous day, was malicious (paras [4]–[6]). The presiding magistrate agreed and stressed the fact that the previous regional court magistrate had struck the matter from the roll just two days earlier, and that the re-arrest of the accused immediately thereafter was 'procedurally unfair' and infringed their fair trial rights as guaranteed under sections 12 and 35 of the Constitution. She subsequently proceeded to strike the matter from the court roll for a second time (para [8]). But on 13 October 2016, the matter again came before the same regional magistrate; it had been set down for trial notwithstanding her dismissal of the application for postponement to that date and the fact that she had struck the matter from the roll. The accused were arrested that very morning on a warrant signed by a different magistrate, taken into custody, and brought to court. The regional magistrate again struck the matter from the roll and told the prosecutor: 'If you intend

bringing, re-arresting the accused what I would advise is that you bring it before the presiding officer because I am not going to entertain this matter any further' (para [9]).

The matter was ultimately referred for special review to Judge Revelas of the High Court, Eastern Cape Division, Grahamstown. The prosecution argued that the provisions of section 60(11) of the Criminal Procedure Act require an accused to be detained in custody until dealt with in accordance with the law, unless that accused is able to show 'exceptional circumstances which in the interest of justice permit his or her release' (para [10]). It was further submitted that no matter how many times an accused is brought before a court on a Schedule 5 or 6 offence, he or she should always be brought while in custody in order to enable the court to comply with section 60(11) (para [11]). The regional magistrate, in turn, reiterated her view that had she not struck the matter from the roll, it would have been a further infringement of the rights of the accused, and she would have simply been a 'tool of the state furthering. . .a gross injustice. . .of an individual who is deemed to be innocent until proven guilty' (para [12]; *Minister of Police & another v Ashwell du Plessis* (666/2012) [2013] ZASCA 119).

Judge Revelas, in determining whether the 13 October 2016 proceedings were in accordance with justice, observed the following: first, he noted that it was 'most undesirable' that the expedition of prosecutions are increasingly hamstrung by the absenteeism of interpreters, social workers, witnesses, and other court personnel (para [17]). He agreed that the re-arrest of the accused by the police immediately after their release 'seemed like conduct aimed at thwarting the effect of the magistrate's order and bore a close resemblance to contempt of court' (para [17]). Such police conduct, he added, might also constitute grounds for or bolster a civil suit for damages against the Minister of Police (para [17]). However, the judge agreed with the prosecution that striking a matter from the roll for a second and third time, as a summary response to the actions of the police, was not appropriate, or legally sound (para [17]).

The presiding magistrate could, for example, have invoked section 342A of the Criminal Procedure Act, which, in peremptory terms, requires a court to investigate any delay in the completion of pending criminal proceedings where the delay appears to be unreasonable, and if the delay may cause substantial prejudice to any of the parties involved (para [18]). It is only once a court

has investigated the delay and taken all the relevant factors into account, that it may issue an appropriate order, which may include refusing further postponement of the proceedings (para [18]; *S v Geritis* 1966 (1) SA 753 (W)).

Judge Revelas concluded that section 60(11) of the Criminal Procedure Act, which is primarily concerned with a court's discretion to grant bail in circumstances where Schedules 5 and 6 apply, does not constitute an absolute bar to a court's refusal of postponement and a decision to strike the case from the roll in terms of section 342A(3)*(a)* of the Act. It will always depend on the unique facts and circumstances of the case (para [23]).

Failure of an accused on bail to appear

The accused in *S v Porritt & another* (SS40/2006) [2017] ZAGPJHC 202 (21 July 2017) failed to appear in court for the continuation of the criminal proceedings against him, although he had been warned by the presiding officer to do so. The accused was subsequently arrested and brought before the court, where he explained that he had been unable to appear on the date and time set down for the continuation of the proceedings due to a medical condition. An enquiry was consequently held under section 67 of the Criminal Procedure Act to determine whether the accused's failure to appear was due to his own fault, and if so, what the consequences of this would be.

Judge Spilg, for the High Court, explained that the substance of the inquiry under section 67 of the Criminal Procedure Act is to determine whether an accused should be held in custody as an awaiting trial prisoner as a consequence of having his or her bail withdrawn (para [22]). This is a particularly significant inquiry given that '[i]ncarceration, whatever its form, amounts to an institutionalised deprivation of liberty' (para [22]). It was consequently held that section 67 of the Act must be read as requiring the accused to satisfy the court that there is no reasonable possibility that any failure on his or her part to appear before the court was due to his or her fault (para [27]). Such a 'reasonable possibility' does not entail a burden of proof (para [47], quoting *Die Afrikaanse Pers Bpk v Neser* 1948 (2) SA 295 (C) 297), where it was held that

> '[s]atisfy' does not mean 'prove'. I take 'satisfy' to mean therefore that the court must feel that there is a fair probability that the defendant's defence is a good one, at any rate that it is bona fide.

Judge Spilg further noted that an accused who has had his bail revoked subsequent to a section 67 inquiry, may nonetheless reapply for bail (para [22]). Moreover, given that section 58 of the Criminal Procedure Act is an overarching provision governing bail under Chapter 9 of the Act, the judge also held that there is 'no requirement that an accused on bail must be warned to appear provided the court has directed the date or dates on which the trial will commence or continue' (paras [37] [39]). In terms of section 67 of the Criminal Procedure Act, therefore, an accused released on bail will have his or her bail cancelled and the bail money forfeited, if he or she fails to appear on the date and time specified, or fails to remain in attendance, as the case may, and furthermore fails to satisfy the court, at his or her subsequent appearance, that there is no reasonable possibility that any failure to appear was due to any fault on his or her (the accused's) part. This provision must be distinguished from the provisions under section 72 of the same Act, which deals with accused persons charged with less serious offences and who have been released on a warning, in contradistinction to a release on bail, and who also fail to appear on the date and time specified. Such accused persons, having been released on a warning pursuant to the provisions of section 72 of the Criminal Procedure Act, and who subsequently fail to appear on the date and time as specified, and are also unable to satisfy the court that this failure was not due to any fault on their part, may be sentenced summarily to a fine not exceeding R300, or to a term of imprisonment not exceeding three months (s 72(4); *S v Singo* 2002 (2) SACR 160 (CC)).

With regard to the determination whether there is indeed a reasonable possibility that the failure of an accused to appear on a date and time as specified was not due to any fault on his or her part, Judge Spilg noted that while such an accused may exercise his or her right to remain silent, the accused must nonetheless 'produce evidence that raises a reasonable doubt' that the failure to appear was not due to any fault on his or her part (para [28]). As to the meaning of 'fault' in this context, it was held that section 67 of the Criminal Procedure Act 'has in mind culpability in the form of intent and not negligence' (paras [29] [30]; *Savoi & others v National Director of Public Prosecutions & another* 2014 (5) SA 317 (CC) paras [86] [87]; *S v Coetzee & others* 1997 (3) SA 527 (CC) para [162]). With regard to the nature of the section 67 inquiry in this case specifically, Judge Spilg explained as follows:

> (In the context of s 67 I believe that the requirement of fault resulting in the cancellation of bail and forfeiture of the bail money will arise in the circumstances of this case if;
> a. Porritt fails to satisfy the court that his non-appearance was not due to circumstances which reasonably prevented him from appearing; and
> b. the court is satisfied that he intended to avoid attending court for the purpose of frustrating the case from either continuing or being postponed to another suitable date.
> While this may overstate the position I would prefer to give Porritt the benefit of such a broad interpretation (para [31]).

In considering the evidence presented by the accused in this case as to why he had failed to appear on the date and time as specified for the continuance of the criminal proceedings against him, Judge Spilg ultimately found that he was satisfied that the accused had not intended to appear in court on any of the dates and times specified, and that he purposefully delayed the proceedings: 'This conclusion arises from Porritt's own evidence regarding what he did and did not do and his failure to satisfy the court that his explanations create a reasonable possibility that his failure to appear was not due to his fault' (para [205]). The accused's bail was consequently provisionally cancelled and the bail money was provisionally declared forfeit (para [208]).

Custody and Punishment for Contempt of Court in Terms of Section 108 of the Magistrates' Courts Act 32 of 1944

The magistrate presiding in *S v Lekalakala* (113/2017) [2017] ZALMPPHC 36 (9 November 2017) observed how the accused, who was seated in the gallery of the magistrate's court, passed something (by throwing it) to a Rulane Baloyi, who was at that stage in the dock appearing before the presiding magistrate on drug-related charges. The presiding magistrate subsequently called the accused to the bar and informed him that what he had done was 'contempt of court *in facie curiae*' (para [1]). The accused had his rights explained to him and the magistrate, upon learning that the accused had passed a packet containing dagga to Baloyi, summarily convicted the accused and sentenced him to three months' imprisonment in terms of section 108(1) of the Magistrates' Courts Act 32 of 1944 (para [2]). In his reasons for this conviction and sentence, the magistrate explained that the '[c]ourt felt very disturbed by the accused's preparedness to go to jail [as he did not respond to any of the questions put by the

magistrate in this regard] and the manner in which he promoted his detention even though the said package could not be found' (para [4]).

On review, Muller J, for the High Court, held that section 108 of the Magistrates' Courts Act 32 of 1944 applies to magistrates only, and contemplates three possible situations of unlawful behaviour: '(a) where a judicial officer is wilfully insulted during a sitting; or (b) where the proceedings of a court is wilfully interrupted; or (c) where a person otherwise misbehaves in the place where the court is held' (para [6]). 'Misbehaviour' in this context includes behaviour which is not 'necessarily directed at the judicial officer to insult him/her, but which is nevertheless serious enough to invoke the provision of section 108(1). . .It has been held that the word ''misbehave'' in section 108(1) connotes impropriety which undermines or interferes with the proceedings to the extent that it undermines the due administration of justice' (paras [7] [8]).

With regard to the conduct of the accused in this case, Muller J observed that the accused's actions had not interrupted the proceedings, nor had they been aimed at insulting the presiding officer (para [9]). As to whether the presiding magistrate was justified in dealing with the case in a summary fashion, Muller J held that the proceedings in terms of section 108(1) are *prima facie* contrary to the provisions of section 35(3) of the Constitution, but that 'the need for swift measures to preserve the integrity of the judicial process by means of a summary enquiry into the conduct of the accused is sometimes called for' (para [12]). However, when invoking the provisions of section 108 of the Magistrates' Courts Act 32 of 1944, the principles laid down in *S v Lavhengwa* 1996 (2) SACR 453 (W) must be followed (para [13], quoting from *S v Lavhengwa* 1996 (2) SACR 453 (W) 495b-j):

> 1. The magistrate should first carefully consider whether or not he/she should resort to the normal procedure of referring the matter to the Attorney-General or the summary procedure. Considerations which would become important at this stage are whether or not he can disregard the accused's conduct as unimportant . . . or merely stupid and not wilfully contumacious. . .or whether the matter can be disposed of by merely removing the accused from the court . . . or whether the conduct is insulting or insolent in its nature towards the magistrate personally. In the instances mentioned above it would be better to take evasive action (such as e.g. the removal of the accused from the court or an adjournment or requesting an apology from the accused or reporting him to his

professional body if the accused is a practitioner) which would obviate the necessity to embark upon a trial under section 108(1) or to take the normal route of referring the matter to the Attorney-General rather than resorting to the summary procedure.

2. If, however, the circumstances are such that the summary procedure is called for (eg in cases of disobedience to rulings, interruption of the proceedings etc) he should warn the accused of his intention to proceed with summary trial under the provisions of section 108(1) of the Magistrates' Courts Act. Depending on the accused's prior knowledge of the contents of section 108(1), it would be advisable for the magistrate to read out the section to the accused so as to inform him of the provisions thereof and thus inform the accused of the nature of the offence with which he is being charged.
3. The magistrate must then proceed to inform the accused of the latter's conduct which in his view contravened section 108(1) and which of the three categories mentioned in section 108(1) his conduct is alleged to have transgressed.
4. The magistrate thereafter should inform the accused of his constitutional rights as set out in section 25(3) of the Constitution and enquire from the accused whether he wishes to remain silent, testify, give an explanation or call witnesses. If the accused is a lay person he should be afforded the right to obtain legal representation should he wish to do so, subject to such time and feasibility constraints as may seem reasonable in the circumstances of the case. Depending on the decision of the accused, the magistrate should then afford the accused full opportunity to exercise his rights in order to ensure that his constitutional rights are not infringed nor that the rules of natural justice are transgressed.
5. After the accused has been given an opportunity to exercise these rights the magistrate should then weigh up all the circumstances, evidence and arguments and convict the accused only if the facts before him prove beyond a reasonable doubt that the accused wilfully contravened any of the offences mentioned in section 108(1).

The presiding magistrate in the case of *Lekalakala* had clearly failed to follow these principles, and the conviction and sentence were set aside (paras [14]–[16]).

Adducing Further Evidence on Appeal in Terms of Section 309B of the Criminal Procedure Act

The appellant in *Munyai v S* 2017 (2) SACR 168 (GJ) was convicted of rape and sentenced to life imprisonment in January 2016. In appealing against both his conviction and sentence, an application was brought on behalf of the appellant in October 2016, in which a request was made for further evidence to be led

under section 309B(5) and (6) of the Criminal Procedure Act (paras [1] [2]). This application was based on a sworn affidavit by the complainant dated April 2016 and in which she recanted her claim of rape (para [4]). Judges Sutherland and Shangisa, for the High Court, described the content of the document as follows:

> [6] The contents are instructive as much for what they do not say, as for what is alleged. Notably what is absent is an account of what happened on the day in question. The document is entirely cast in generalities. The high point of the explanation for initially lying is that the appellant hurt her feelings. She does not advance an alternative version. She does not identify what she initially said was false and what, if anything, was true. For example, was she assaulted, even though not raped? Did her mother and brother arrive to rescue her? Was she crying at the time?
>
> [7] Two additional important points are touched on in the affidavit.
>
> [7.1] First, her poor relationship with her own family and her sense of rejection by her mother. This provokes a thought about whether her motivation to recant is the absence of support for her and her children, a matter that requires investigation.
>
> [7.2] Second, the claim that she was, on 14 April 2016, pregnant with the appellant's third child is significant. A birth certificate of a child born to [the complainant] on 19 April 2016 is among the documents in the record of appeal. She states the child was conceived whilst the appellant was on bail which had been granted on 6 July 2015. By inference, conception must have occurred in July or August 2015. Accordingly, she deposed to this affidavit, five days before that birth, and some three months after the appellant was sentenced. At the time when her evidence was given, on 12 August 2015, she would on the probabilities have not known she was pregnant. Notably, during the trial, she testified to having had sex with the appellant in July 2015, despite his bail conditions stipulating no contact between them.

The only other document submitted in support of the application for further evidence to be led under section 309B(5) and (6) of the Criminal Procedure Act, was an affidavit by the appellant in which he indicated that he had learnt of the recantation affidavit from his Legal Aid Board representative (para [8]). Judges Sutherland and Shangisa noted that this was not sufficient to establish a full and convincing case for further evidence to be led on appeal. They described the two affidavits by the complainant and the appellant as 'woefully inadequate', and the application under section 309B(5) and (6) of the Criminal Procedure Act as 'fundamentally flawed' (para [11]).

The test for acceding to such an application is set out in *S v De Jager* 1965 (2) SA 612 (A) 613A–D:

> This Court can, in a proper case, hear evidence on appeal; see R v Carr 1949 (2) SA 693 (AD); but the usual course, if a sufficient case has been made out, is to set aside the conviction and sentence and send the case back for the hearing of the further evidence, as was done, for example, in *R v Mhlongo and another* 1935 AD 133. However, it is well settled that it is only in an exceptional case that the Court will adopt either of the foregoing courses. It is clearly not in the interests of the administration of justice that issues of fact, once judicially investigated and pronounced upon, should lightly be re-opened and amplified. And there is always the possibility, such is human frailty, that an accused, having seen where the shoe pinches, might tend to shape evidence to meet the difficulty. Accordingly, this Court has, over a series of decisions, worked out certain basic requirements. They have not always been formulated in the same words, but their tenor throughout has been to emphasise the Court's reluctance to re-open a trial. They may be summarised as follows:
> *(a)* There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial.
> *(b)* There should be a *prima facie* likelihood of the truth of the evidence.
> *(c)* The evidence should be materially relevant to the outcome of the trial.

Therefore, while criteria *(a)* and *(b)* had been met in the case under discussion, criterion *(b)* was not properly addressed in the application for further evidence to be led, as it was unclear, for example, how the complainant's affidavit got into the record without an application to admit it, or who had drafted the affidavit, what role the complainant's family had played in the recanting of her complaint, and whether a rational basis existed for accepting that the recanting had been voluntary (paras [9] [13]). However, the judges also emphasised that it is important to take a pragmatic approach and to consider the contents of the affidavits despite the inadequacies of the application (para [14]). In this regard, they found that apart from the deficiencies in the application to lead further evidence, the evidence used to substantiate the claim of rape in the court *a quo* was problematic (para [15]). It was noted that the complainant initially only laid a charge of assault and mentioned rape only at a clinic where she had been taken for a medical examination in regard to the assault charge she had laid (para [16]). In cross-examination this discrepancy had not been adequately resolved, and it was further noted that

the complainant (under cross-examination) conceded to having had sex with the appellant again after the rape and while he was out on bail. This, too, had not been dealt with further under cross-examination at trial (para [17]). Having perused the trial record, judges Sutherland and Shangisa came to the following conclusion (paras [21] [22]):

> [A]lthough there is substantial evidence that points to an abusive relationship between the appellant and [the complainant], and assaults on the night and day in question, there is very little to offer assurances that a rape indeed occurred, other than [the complainant's] belated say-so. The probability that the rape was an exaggeration, aimed at punishing him for yet another assault, cannot be ruled out.
>
> [22] Regrettably, the trial was conducted with such robustness that the many finer details and nuances which are important in this type of case were not addressed. Foremost is the pedestrian attitude of the police and prosecution to proving rape by reference to discernible vaginal injuries, often a fruitless exercise and, indeed, a useless exercise when the key facts about rape are constituted not by raw violence, but by overpowering intimidation inducing submission. There is no shortage of cases on appeal bemoaning these systemic shortcomings in rape cases, but it is apparent that no heed is paid by those who investigate or prosecute.

The judges found the fact that the complainant had continued to have a sexual relationship with the appellant after the arrest and his subsequent release on bail particularly questionable. They held that this was 'a profound consideration in casting doubt on the veracity of the allegation of rape itself, but again, must not be taken out of context and her claims dismissed' (para [23]). Thus, 'some degree of rapprochement' between the complainant and the appellant after the alleged rape had occurred does not necessarily mean that the allegation of rape is untrue, yet, post-arrest sexual encounters cannot be ignored completely and must also be taken into account in considering the veracity of complaints made (para [23]). What this case rather illustrated, according to the judges, is that 'there is no room for superficiality in prosecuting rape cases' (para [23]).

The appellant's conviction and sentence were subsequently set aside, and the matter was remitted to the trial court to be reopened for further evidence to be led (para [24]).

Also see *Moyo: Justice v S* (A204/2017) [2017] ZAGPJHC 356 (30 November 2017), where it was held that lack of jurisdiction is not a new ground of appeal, but rather a ground for review. However, Opperman J for the High Court, Gauteng Local Divi-

sion, Johannesburg, found that appeal and review procedures run parallel, and that a court may interfere where a miscarriage of justice would otherwise result, as 'substantive justice should always prevail over strict adherence to legal principle' (para [11]). Judge Opperman summarised the procedures in respect of conviction and sentence on the one hand (appeal procedures) and irregularities in the procedures arriving at the conviction and sentence (review) as follows:

38.1 The whole of the procedure to access an appeal court (High Court) on the question of conviction and of sentence, is regulated by statute.

38.2 Where a ground on conviction and on sentence was not raised in the application for leave to appeal before the magistrate, or not in the petition to the Judge President where leave was refused, leave to appeal that new ground must be sought. The new ground raises issues that are in fact *res judicata*, despite such new ground of appeal not having been raised previously. Each new ground is not a fresh appeal, see *Molaudzi v S* [2015] ZACC 20, para [44]. The proper approach under such circumstances would be to defer the hearing on the appeal, to afford the appellant an opportunity to obtain leave from the proper court in the hierarchy, see *Pieterse v the State* (A332/2016) 2017 JDR 0748 (GJ) (assuming of course the new ground were meritorious). Whether or not the doctrine of *res judicata* should be relaxed as contemplated in *Molaudzi* (supra), would be for such courts to decide having regard to the particular circumstances of the case.

38.3 Where a point of procedure is raised, the appellant can raise such point in the appeal. Where, however, this did not occur, the review procedure should, as a general rule, be followed, employing rule 53 of the rules of the Superior Court, for this purpose. There is no reason in principle, in my view, why the provisions of section 304(4) of the CPA could not come to the assistance of an appellant in appropriate circumstances.

Broadcasting (via Audio, Audio-Visual and Photographic Means) the Entire Proceedings of a Criminal Trial

The High Court, Western Cape Division, Cape Town, in *Media 24 Limited v National Director of Public Prosecutions, In re: S v Van Breda* (5027/2017) [2017] ZAWCHC 35 (4 April 2017) granted the applicant, a multi-media organisation with interests in digital, print, and other media, permission to, among other things, install two video cameras and record and broadcast the proceedings in *S v Van Breda*. This case involved an accused indicted on several charges of murdering members of his family at their home

on a golf estate near Stellenbosch. His sister survived the attack. Given the shocking nature of the allegations, as well as the *modus operandi* of the crimes, the matter obviously received wide attention in the media. Important limitations were, however, placed on the media in an order granting permission to the applicant to broadcast the entire criminal trial. These limitations included: that no exhibits could be photographed, videotaped or published without the express permission of the court (para [4]); that the video cameras could not be directed at any person, witness or otherwise (para [1.3.2]); and that no photographs, audio recordings or video footage could be taken of the accused's surviving sister who was set to testify testify at trial (para [2]).

Reasons for this order were given by Desai J on 4 April in *Media 24 Limited v National Director of Public Prosecutions, In re: S v Van Breda* (5027/2017) [2017] ZAWCHC 37 (6 April 2017). The judge placed special emphasis on the vulnerable position of accused's surviving sibling because of the injuries she had sustained during the attack (para [8]). And it was for this reason that he placed stricter limitations on the extent to which the media could report on her testimony at trial. Desai J generally agreed with the applicant that the alleged murders were indeed a matter of 'acute public interest' (para [11]).

However, the NDPP objected to the granting of the order to broadcast the entire criminal trial. It was submitted, among other things, that 'witnesses might be intimidated by the presence of recording equipment in the court'; that witnesses might find it inhibiting; and that a witness might even be influenced in deciding not to testify (paras [12] [17]). In this regard, Desai J stated that the original order granted may be varied at any stage during the proceedings, and if any witness, on good cause, asked that his or her evidence not be broadcast, 'the Court will come to his assistance' (para [18]). Another logical difficulty with the broadcasting of witness testimony is that it may prejudice cross-examination, as all persons and witnesses will have access to the proceedings and the value of subsequent testimony may therefore be compromised (para [20]). However, Desai J observed that the media would in any event report extensively on the trial, and further that it would be possible for a witness to access accounts of the proceedings through various media platforms (para [20]).

In balancing the competing interests and rights of the accused in this matter against the interests of witnesses and of the public,

Desai J concluded that the interests of justice do not dictate that greater emphasis be placed upon any of the competing interests; it 'is not whether witnesses and participants in the judicial process will experience a degree of stress if the evidence was to be broadcast. The question is whether any additional burden imposed is so sufficiently serious as to justify a limitation of the fundamental right to freedom of expression' (para [27]; s 16 of the Constitution). This order was again confirmed in *Media 24 Limited v National Director of Public Prosecutions, In re: S v Van Breda* (5027/2017) [2017] ZAWCHC 37 (6 April 2017).

The matter came before the Supreme Court of Appeal in *Van Breda v Media 24 Limited & others; National Director of Public Prosecutions v Media 24 Limited & others* 2017 (2) SACR 491 (SCA), after both the NDPP and the accused continued to resist the video recording and broadcast of the criminal trial. While the position of the NDPP was one of blanket opposition to any part of this criminal proceedings, or any other in future, being broadcast (paras [7] [60]), the appellant's appeal was directed only to that part of Desai J's ruling which allowed Media 24 to place two video cameras in the courtroom to record and broadcast the proceedings. The relevant part of the order made by Desai J reads as follows (paras [5] [7]):

> 1.3 During the sitting of the court, the applicant is permitted to install two video cameras to record and or broadcast the proceedings, with the following guidelines:
>
> 1.3.1 The cameras shall be set up by no later than 15 minutes before the commencement of proceedings every day, and shall be removed by not later than half an hour after the adjournment of proceedings at the end of the day;
>
> 1.3.2 The video cameras shall be stationary, erected on tripods, and shall not be attended by a person;
>
> 1.3.3 The video cameras shall be left to record and broadcast the proceedings, and shall be located in such positions as the court may direct from time to time;
>
> 1.3.4 The cameras shall be located discreetly to cause as little intrusion in the proceedings of the court as possible.

The appellant did not object to the recording and broadcast of counsel's argument and the rulings and judgment of the court (para [7]).

Ponnan JA, writing for the majority of the Supreme Court of Appeal, considered the broadcasting of court proceedings involving the use of the media, like video cameras and sound recordings, and for the purpose of communicating the proceedings to

the public, from historico-legal and comparative perspectives (paras [17]–[30] and [65]–[68]). The first South African court having to engage with the issue was in 2000 in the case of *Doctom Trading 121 (Pty) Ltd t/a Live Africa Network News v King NO* 2000 (4) SA 973 (C) (para [31]). The issue arose again in 2004, in *Midi Television (Pty) Ltd t/a e-tv v Director of Public Prosecutions (Western Cape)* 2007 (5) SA 540 (SCA) (paras [32]–[34]); in *Thatcher v Minister of Justice and Constitutional Development* 2005 (4) SA 543 (C) (paras [35] [36]); in 2006, in *South African Broadcasting Corporation Ltd v Downer NO & Shaik* [2006] ZASCA 90); in 2005, and in 2010, in *AfriForum v Malema* 2011 (6) SA 240 (EqC) (para [38]). The most recent case dealing with the broadcast of a criminal proceeding was the murder trial of Oscar Pistorius in *Multichoice (Proprietary) Limited v National Prosecuting Authority, In Re: Pistorius, In Re; Media 24 Limited v Director of Public Prosecutions North Gauteng* [2014] ZAGPPHC 37, 25 February 2014 (paras [39]–[41]).

In considering these South African cases, and also how the broadcast media have been dealt with in other jurisdictions, Ponnan JA noted that '[t]he question whether, and under what circumstances, cameras should be permitted in South African courtrooms provokes tension between the rights of the press, on the one hand, and the fair trial rights of an accused person, on the other' (para [42]). Concerning these conflicting constitutional rights, Ponnan JA held that it is essential to the proper functioning of any true democracy that these rights – freedom of expression and the fair administration of justice – be harmonised insofar as this is possible (para [42]). On the use of media in the courtroom, he stated that conventional media reporting will inevitably be limited and incomplete, and that despite their importance,

> newspapers (and even television) are yesterday's technology. Pencils and sketchpads are now considered anochronistic: There is no restriction regarding filming outside the court. Nor is there any restriction regarding attending in court and taking notes, drawing pictures or upon accessing exhibits. The [current] restriction relates to the means of gathering the information and the place where it may be gathered. There simply can be no logic in a court permitting journalists to utilise the reporting techniques of the print media but not permitting a television journalist to utilise his or her technology and method of communication, being the broadcasting and recording of proceedings, despite the fact that 'live camera footage will be more accurate than a reporter's after-the-fact summary' (para [44]).

In emphasising the important role of the media in relaying information to the public and in making governmental conduct, in all of its many facets (including courts), more transparent, Ponnan JA held that the media have a discretion to determine what means of communication would be most effective, and that court proceedings must be meaningfully accessible to any member of the public who wishes to be timeously and accurately apprised of such proceedings (paras [45]–[47]). He also listed the following advantages to allowing televised proceedings of criminal trials: it demystifies the judicial process; ensures more informed deliberation and critical assessment of the judiciary based on the public's ability to readily observe judicial proceedings; increases the understanding of and respect for the judiciary based on the public's increased ability to observe the daily working of the courts; improves journalistic standards relative to court reporting, resulting in greater coverage of proceedings and the development of court reports specialising in judicial matters; and heightens the public's awareness of deep seated societal problems (para [58]).

However, he also noted the objections to the use of broadcast media in the courtroom, the most persuasive being the effect that the cameras may have on the testimony of witnesses in criminal trials. In this regard, Ponnan JA held that 'it must be accepted that the courtroom is already a public place with a physical public presence – proceedings are transcribed and members of the press and public are free to be present. Television broadcasts provide members of the public with a virtual presence in the courtroom. If the physical presence of members of the public cannot be said to inhibit or distract counsel, the judges and witnesses, it has to be open to debate that a virtual presence will have that effect' (para [52]). Moreover, with regard to concerns of privacy and security, it must be noted that judicial proceedings are public events and the private interests of individuals appearing in a courtroom may, therefore, have to give way because their disputes are being resolved in a public forum that must be open to public scrutiny (para [57]). Ponnan JA also dismissed concerns about the risk of witness exposure by stating that precise and cautious instructions by the judge to witnesses, that they must testify based solely on their personal knowledge, would ameliorate any possible external influence (para [54]). And, with regard to the argument that commercial imperatives will likely impel the media to focus on high-profile cases or cases that are

particularly unusual or gruesome, he stated that the courts cannot prescribe to the media which trials they should cover, and that it is in any event those high-profile cases on which the public should receive the maximum amount of information relating to the process by which a particular judicial outcome is achieved (para [56]).

The Supreme Court of Appeal concluded that the default position must be that there can be no blanket objection, in principle, to the media recording and broadcasting court proceedings, but that courts have an inherent power, in terms of section 173 of the Constitution, to limit the nature and scope of the broadcast, where necessary, in order to ensure the fairness of the proceedings before it. This power must be exercised in the interests of justice and must be consistent with constitutional imperatives (paras [59] [72]). In permitting the televising of court proceedings, the Supreme Court of Appeal noted that it was doing no more than recognising an appropriate starting point; ultimately, it remains for the trial court to exercise a discretion under section 173 of the Constitution, and on a case-by-case basis (para [70]). The following guidelines were set down in this regard:

(a) A trial court must exercise a discretion by balancing the degree of risk involved in allowing cameras into the courtroom, against the degree of risk that a fair trial may not ensue (para [71]). In exercising this discretion, courts should not restrict the nature and scope of the broadcast unless the prejudice is demonstrable, and there is a real risk that such prejudice will occur (para [75]).

(b) A trial court may issue such directions as may be necessary, including to '*(a)* control the conduct of proceedings before the court; *(b)* ensure the decorum of the court and prevent distractions; and *(c)* ensure the fair administration of justice in the pending case' (para [71]).

(c) In reaching a decision, the trial court may consider whether there is a reasonable likelihood that broadcasting the proceedings would: '(i) interfere with the rights of the parties to a fair trial; or (ii) unduly detract from the solemnity, decorum and dignity of the court' (para [71]).

(d) The following should not be broadcast: '(a) communications between counsel and client or co-counsel; (b) bench discussions; and (c) in camera hearings' (para [71]).

(e) A trial court may terminate the broadcast of proceedings at any stage where the directions given by the judge have been violated, or the substantial rights of individual participants, or the rights to a fair trial will be prejudiced by continuing the broadcast (para [71]).

(f) Counsel's address and all rulings and judgments by the court in respect of both the conviction and sentence are delivered in open court and may therefore, in principle, be recorded and broadcast (para [72]).

(g) A witness may raise an objection with the trial judge as to having his or her testimony broadcast and must specify the grounds upon which the objection is based. The trial judge may then exercise a discretion with regard to each objection raised by each individual witness. Such an individual approach will allow for a distinction to be made between experts, and professional (such as police officers) and lay witnesses. However, in dealing with these objecting participants, the court should not allow the trial to be drawn out unnecessarily (para [72]).

(h) And, where the objection of a witness or other trial participant is found to be valid, it will also be within the discretion of the trial court either to require that cameras be excluded (para [74]), or to provide for alternative means by which such an objecting participant's testimony may be covered, eg by disguising the identity of the person being questioned, altering his or her voice, etcetera (para [73]).

Ponnan JA accordingly set aside paragraph [1.3] of the order made by Desai J (above), and remitted the matter back to that court for the judge to reconsider his decision in accordance with the principles laid down by the Supreme Court of Appeal (para [76]).

Also see *S v Van Breda* (SS17/16) [2017] ZAWCHC 120 (31 October 2017), in which Judge Desai refused an application by the accused for his testimony not to be broadcast.

Arrest

Arrest constitutes one of the most drastic infringements of the rights of an individual, ie the right not to be deprived of your freedom arbitrarily or without just cause, and the right not to be restricted in your freedom of movement. In the year under review, the following two important cases dealt with the power to arrest

and the objects of such an exercise of power, specifically with regard to women.

An arrest under the Domestic Violence Act 116 of 1998

The plaintiff in *Rautenbach v Minister of Safety and Security* 2017 (2) SACR 610 (WCC) was arrested on a warrant issued in terms of section 8 of the Domestic Violence Act 116 of 1998, after a complaint by his former wife (the complainant) that he had breached the protection order granted in her favour. It was argued for the plaintiff that there was no evidence to support the the complainant's statement that he had threatened her, or that she was at risk of imminent danger from the plaintiff, and that his arrest and subsequent detention were, therefore, unlawful (para [17]). In relying on *Seria v Minister of Safety and Security* 2005 (5) SA 130 (C), counsel for the plaintiff further submitted that the arresting officer had failed properly to investigate the matter, and that he had not exercised his discretion to arrest the plaintiff in a reasonable manner (para [18]).

The events giving rise to the complaint, included: an alleged threatening e-mail sent by the plaintiff to his former wife; his visiting her house under false pretenses; and his snooping around the house at night and peeping through the windows (para [10]). This information was included in the police docket relating to the complaint. The arresting officer also contacted the complainant telephonically, and she told him that she feared for her life, and pleaded with him to do something about the matter (para [10]). The arresting officer contacted the plaintiff to inform him of the complaint laid against him, and as the plaintiff was apparently in Worcester and not in the near vicinity of the complainant, the arresting officer decided to inform the plaintiff to attend the local police station in Mossel Bay on the following Monday in order to take down a warning statement from him (para [12]). However, the complainant phoned the arresting officer shortly thereafter, and informed him that the plaintiff had phoned her after learning of the complaint laid against him, that he had lied about his whereabouts, and that he was still in Mossel Bay (para [13]). The arresting officer then went to the plaintiff's house where he was arrested (para [14]).

In considering whether the arresting officer had properly exercised the discretion entrusted to him under sections 8(4) and 8(5) of the Domestic Violence Act 116 of 1998, Le Grange J for the High Court, Western Cape Division, Cape Town, emphasised that

the Act had been promulgated in response to the alarmingly high incidence of domestic violence in South African society, and that its central purpose was to afford victims of domestic violence the maximum protection available under law (paras [20] [24]; *Minister of Safety and Security v Venter* 2011 (2) SACR 67 (SCA) paras [19]–[22])). In the latter case, it was held that

> [t]he extensive protection available under the Act would be meaningless if those responsible for enforcing it, namely SAPS members, fail to render the assistance required of them under the Act and the Instructions. The legislature clearly identified the need for a bold new strategy to meet the rampant threat of ever increasing incidences of domestic violence. Its efforts would come to naught if the police, as first point of contact in giving effect to these rights and remedies, remain distance and aloof to them . . . (para [27]).

With regard to what constitutes 'reasonable grounds to suspect' and 'reasonable suspicion', Le Grange J held that this must be determined objectively, and the grounds must be those which would induce a reasonable man to have the suspicion (paras [28]-[30]; *R v Van Heerden* 1958 (3) SA 150 (T) 152E; *Ralekwa v Minister of Safety and Security* 2004 (2) SA 342 (T) 347D–E; *Minister of Safety and Security v Sekhoto* 2011 (5) SA 367 (SCA)). And the phrase 'imminent danger', in the context of section 8 of the Domestic Violence Act 116 of 1998, refers to 'harm which is about to happen, if not certain to happen' (para [32], quoting from *Seria v Minister of Safety and Security* above 146A–C). Given the factual matrix of this case, judge Le Grange concluded that the plaintiff's arrest had been lawful and in accordance with section 8(4) of the Domestic Violence Act 116 of 1998, and that the arresting officer had applied the standards specified as contemplated in section 8(5) in arriving at his decision to arrest the plaintiff (para [33]). To arrest the plaintiff, it had to appear to the arresting officer that there were reasonable grounds to suspect that the complainant in this case may suffer imminent harm as a result of the alleged breach of the protection order. Judge Le Grange explained that it is not necessary for the arresting officer to be convinced that harm is about to happen or is certain to happen, but merely that there is a possibility that imminent harm may well happen (para [33]). He held that while the arresting officer in this case may not have fully investigated the complaint made, it did not detract from the fact that he acted, 'with the available information to his disposal, rationally' (para [43]). Judge Le Grange held that 'the standard was not breached

because an arrestor exercised the discretion in a manner other than that deemed optimal by the court. The standard is not perfection, or even the optimum, judged from the advantage of hindsight, and, as long as the choice made fell within the range of rationality, the standard was not breached' (para [43]).

Arrest without a warrant and subsequent detention: Prejudices based on gender

The plaintiff in *Mathe v Minister of Police* 2017 (2) SACR 211 (GJ) was arrested, without a warrant, on a suspicion of prostitution, and was then detained for 37 hours before appearing in a magistrate's court. It was clear from the evidence before the High Court, Gauteng Local Division, Johannesburg, that the arrest had been unlawful and that the plaintiff had suffered considerable personal and material loss as a result. The court awarded her damages in the sum of R120 000.

Opperman J's judgment contains a lengthy narrative dealing with the prejudices women face in society generally, in South Africa specifically, and also under the South African criminal justice system. The judge also placed strong emphasis on the fact that section 205 of the Constitution places a duty on the SAPS not only to investigate crime, but also to protect South African society. This narrative on gender-based prejudices in the South African criminal justice system is important, and deserves to be quoted in full:

> [31] In the present case, three women were waiting for transport when an unmarked police vehicle arrived. After a very short exchange, the women were arrested. There is nothing before me to suggest that the police had any lawful reason whatsoever for arresting them. From the facts before me they were arrested because they were out in the early hours of the morning (02h00), they were women and they were seated on chairs at a filling station. These facts appear to have triggered the suspicion (or conclusion), that they were prostitutes. There exists very little doubt in my mind that had three men been seated at the very same location and time, they would not have attracted the police officers' attention let alone have moved them to make an arrest.
>
> [32] The police abused the power entrusted upon them. They did not even take the basic step of identifying themselves to their victims prior to starting their interrogations of these women. . . .
>
> [34] At that time of the morning, the plaintiff and her friends were particularly vulnerable. It is not this court's duty to pronounce upon the wisdom of being out that late without transport. However, women, like all other members of society, should be entitled

to the protection from our police services. When the police turn on those they are supposed to protect the Constitutional order is threatened. It is noteworthy that section 205 of the Constitution goes further than merely obliging the police to investigate crimes. The section imposes a positive duty on the police to prevent and combat crime. To have prevented and combatted crime in this situation may have entailed these policemen advising these women of the fact that the men approaching them were policemen. It would have been beyond reason for the policemen to have prevented and combatted crime by waiting nearby to make sure that the women caught the taxi that they were waiting for. That would have protected them from criminal attention in the vulnerable time that they were not in the vehicle. Instead these policemen put them in their vehicle and took them away to a place of filth and fear for two days without even the benefit of being allowed to advise their loved ones or employer of their fate. In the plaintiff's case this resulted in her losing her job. If one wanted to drive a person to a life of crime, one could hardly think of a more effective way of doing so than causing them to lose their legal employment.

[35] Women are entitled to equal treatment and, as I have already observed, men in the same situation would be unlikely to attract the negative attention that these policemen bestowed on these women. One cannot but deduce that the motives of the police in question were influenced by the fact that the people they arrested were women. Our society does not have a day of protest against violence against men. Our society does not have a public holiday called Men's Day. Women, it is widely recognised, are often undervalued for the role that they play in society as caregivers of children and the elderly. It is equally widely recognised that they are frequently subject to sexual violence. That those who, in general terms, play such a valuable role should be treated so badly is a bitter irony that all South Africans, particularly members of the police service should be working towards eliminating. The members of the police engaged in this arrest and detention did the opposite of what section 205 of the Constitution requires them to do and they added unnecessarily to the infinite quotient of women's humiliation and distress in the history of our society. This cannot be treated lightly by a Court enjoined to apply the Constitution.

[36] The plaintiff was subjected to prejudices which are exclusively based on gender. The grinding down of women's rights, erodes the rights of the community as a whole. One pictures the youths who spoke cruelly to the plaintiff being encouraged by the fact that it was the police who instigated her fall from grace. Role modelling of this kind, our young men can do without. Rather, they should be seeing our police being considerate and respectful of the women in our communities, in the finest traditions of all South

> African cultures. Terms of familial bonds, like 'sister' and 'mother' are commonly used by South Africans of many languages to address women. The women leaders of the struggle towards the liberation of our country, who are celebrated in our Woman's Day public holiday, are not lightly referred to as the mothers of the nation. Our police, though facing many stresses and challenges of their own, should strive to maintain the ethos of kindness and respect that underpin these fine traditions, common courtesies and kindnesses, particularly towards women, as part of their daily interactions.

The Authority of the NSPCA Privately to Prosecute Crimes of Animal Cruelty

In *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development* 2017 (1) SACR 284 (CC), the National Society for the Prevention of Cruelty to Animals (NSPCA), challenged the constitutionality of section 7(1)*(a)* of the Criminal Procedure Act, in that the provision does not allow for the NSPCA, a juristic person, privately to prosecute crimes of animal cruelty. This constitutional challenge by the NSPCA had previously failed in both the High Court (*National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development* [2014] ZAGPPHC 763, 8 October 2014), and the Supreme Court of Appeal (*National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development* 2016 (1) SACR 308 (SCA)) where it was held that only natural persons and public bodies have the power to institute private prosecutions in terms of sections 7 and 8 of the Criminal Procedure Act (paras [13]–[17]). In the matter before the Constitutional Court, the NSPCA also argued, in addition to the constitutional challenge of section 7 of the Act, that it was already empowered to institute private prosecutions in terms of section 8 of the Criminal Procedure Act, read with section 6(2)(e) of the Societies for the Prevention of Cruelty to Animals Act 169 of 1993.

Justice Khampepe, writing for the majority of the Constitutional Court, emphasised that the care and protection of animals fall within the ambit of the Constitution (paras [26] [57] [58]; *S v Lemthongthai* 2015 (1) SACR 353 (SCA) para [20]), and that the NSPCA has a specific statutory mandate to prevent animal cruelty and promote animal welfare (para [2]). The power of prosecution, in turn, is also established through the Constitution and can take one of three forms: state prosecution (by the

National Prosecuting Authority described in s 179 of the Constitution as a 'single national prosecuting authority in the Republic'); statutory prosecution (s 8 of the Criminal Procedure Act) or private prosecution (s 7 of the Criminal Procedure Act) on a certificate *nolle prosequi* (para [31]). In considering section 8 of the Criminal Procedure Act, which makes provision for a private prosecution under a statutory right, it was held that conferral of such a right to institute a private prosecution must be conveyed in the empowering statute in a sufficiently clear manner, but need not be verbally explicit or use specific words – eg, 'private prosecution' (para [33]). Against this background, section 6(2)*(e)* of the Societies for the Prevention of Cruelty to Animals Act must, therefore, be read in a manner that gives expression to the underlying values of the Constitution (para [34]). This provision does not make explicit reference to 'private prosecution', but empowers the NSPCA to 'institute legal proceedings connected with its functions, including such proceedings in an appropriate court of law' (para [35]). However, both the High Court and the Supreme Court of Appeal found that this power to 'institute legal proceedings' does not include the power to institute a private prosecution (para [35]; *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development* [2014] ZAGPPHC 763, 8 October 2014).

The Constitutional Court did not agree. In highlighting that the types of legal proceedings that the NSPCA can institute are intimately connected with its functions, Justice Khampepe noted that the NSPCA is 'uniquely placed to robustly and responsively combat animal cruelty' (para [40]). This was recognised in Parliament with the enactment of the Societies for the Prevention of Cruelty to Animals Act (para [41], quoting from Debates of the National Assembly (*Hansard*) 25 November 1993 14065 (Minister of Agriculture)):

> [T]he responsibilities of animal welfare organisations are becoming greater as urbanisation in South Africa accelerates and animals in many disadvantaged communities are in dire need of basic animal care. The state is and will probably remain unable to provide these services. . .The [Act] gives [the NSPCA] a platform to face this challenge.

In addition to the Societies for the Prevention of Cruelty to Animals Act, the animal protection regime includes five other associated statutes: the Performing Animals Protection Act 24 of 1935; the Medicines and Related Substances Act 101 of 1965;

the Veterinary and Para-Veterinary Professions Act 19 of 1982; the Animal Diseases Act 35 of 1984; and the Abattoir Hygiene Act 121 of 1992. These statutes set the standards for how animals are to be cared for, treated, and used, and the NSPCA is explicitly charged with upholding these statutes (paras [44]–[46]).

Justice Khampepe therefore concluded that the phrase 'institute legal proceedings' connected with its functions in section 6(2)(e) of the Societies for the Prevention of Cruelty to Animals Act, must be interpreted to encompass prosecutions of animal cruelty (para [46]). The NSPCA is best placed to conduct a private prosecution and give effect to preventing and enforcing the offences set out in the animal protection regime, and to read section 6(2)*(e)* as excluding the right of private prosecution would render it futile (paras [47] [48]). This reading of section 6(2)*(e)* is further supported by the historical development of the legislative scheme, and specifically the Prevention of Cruelty to Animals Act 8 of 1914, which expressly confers a right of private prosecution on the NSPCA (para [49]). The declaratory order was subsequently granted to the effect that the NSPCA is already empowered to institute private prosecutions in terms of section 8 of the Criminal Procedure Act read with section 6(2)*(e)* of the Societies for the Prevention of Cruelty to Animals Act 169 of 1993 (para [62]).

With regard to the challenge to the constitutionality of section 7(1)(a) of the Criminal Procedure Act, it was held that this was no longer a live dispute given that the declaratory order had been granted (para [63]).

Automatic Reviews in Terms of Sections 302 and 303 of the Criminal Procedure Act

Seven matters in *S v Jacobs and Six Similar Matters* 2017 (2) SACR 546 (WCC) were remitted to the High Court, Western Cape Division, Cape Town, on automatic review in terms of sections 302 and 303 of the Criminal Procedure Act. Section 302 of the Criminal Procedure Act deals with reviewable sentences imposed by a magistrate's court, while section 303 addresses the transmission of the record by the clerk of the court to the registrar of the provincial or local division having jurisdiction, within one week after the determination of the case, and for the purpose of having the proceedings reviewed by a judge in chambers. A sentence is reviewable if it was imposed by a judicial officer who has not held

the rank of magistrate for a period of more than seven years, and if the sentence exceeds three months' imprisonment or a fine of R6 000 (para [7]; s 302(1)*(a)* of the Criminal Procedure Act). Or, in the case of magistrates who have held the rank for longer, if the sentence imposed exceeds a term of six months' imprisonment or a fine of R12 000 (para [7]; s 302(1)*(a)* of the Criminal Procedure Act). In addition, section 85 of the Child Justice Act 75 of 2008 provides that any matter in which a child has been sentenced to any form of imprisonment, including a sentence of compulsory residence in a child and youth care centre, is also subject to automatic review irrespective of the length of the sentence or the period the judicial officer concerned has held the substantive rank of magistrate or regional magistrate, or whether the child appeared before a district or regional court (para [7]; *S v LM* 2013 (1) SACR 188 (WCC) paras [50] [51]).

The primary purpose of the review powers as set out in these statutory provisions is to consider whether there was any irregularity in the proceedings (para [8]). The reviewing judge must, for this reason (para [8]),

> evaluate whether the entire proceedings, ie those pertaining both to the sentence as well as the merits of the conviction, are not only formally in order and regular, but also whether they are fair, and in doing so it has long been accepted that the reviewing judge exercises a function akin to that ordinarily exercised by an appellate court. As such, the process of automatic review is aimed at ensuring both the validity, as well as the fairness, of the underlying conviction and sentence, and the powers of the reviewing judge are extremely wide and include not only the power to alter or reduce the sentence imposed but also the power to quash the conviction or to set aside or 'correct' the proceedings, or to make any other order which may promote the ends of justice.

Curiously, this statutory framework for automatic review is unique to the South African legal system and is not derived from Roman-Dutch or English law (para [7]). In *S v Letsin* 1963 (1) SA 60 (O), it was described as 'an institution of vital importance to the administration of justice in this country as the great majority of accused who come before the magistrates' courts are legally unrepresented and criminal proceedings in these courts are not considered to be properly concluded until the reviewing judge has certified that they were in accordance with justice' (para [9]; *S v Letsin* 1963 (1) SA 60 (O) 61A-B). And in *S v Joors* 2004 (1) SACR 494 (C), it was described as 'a measure intended to lend substance to the constitutional right which an accused has to

review by a higher court and the constitutional right of every detained person to challenge the lawfulness of their detention' (para [10]; *S v Joors* 2004 (1) SACR 494 (C) 497d). Yet, even before the introduction of the Bill of Rights, it was an accepted principle in South African law that a gross irregularity during the course of a criminal trial could result in a conviction and sentence being set aside (para [11]; *S v Moodie* 1961 (4) SA 752 (A); *S v Mushimba* 1977 (2) SA 829 (A)).

With regard to the 'statutory insistence on the expeditious forwarding of records for review' in terms of section 303 of the Criminal Procedure Act, it was held in *S v Manyonyo* 1997 (1) SACR 298 (E) that this is imperative for the promotion of speedy and efficient administration of justice, which should not be compromised by administrative incompetence (para [10]; *S v Manyonyo* 1997 (1) SACR 298 (E) 300f). Previously, in *S v Letsin* 1963 (1) SA 60 (O), an obligation was placed on presiding magistrates to see to it that criminal trials were properly concluded by ensuring that the record of proceedings was placed before the High Court for review as speedily as possible (para [25]; *S v Letsin* 1963 (1) SA 60 (O) 61G; *S v Lewies* 1998 (1) SACR 101 (C)). And the remedy adopted in *S v Manyonyo* 1997 (1) SACR 298 (E) by the court for a five-month delay in submitting the record, ie to direct that the magistrate provide a full explanation to the court, has since become expected practice in the case of a lengthy delay (para [27]; *S v Mekula* 2012 (2) SACR 521 (ECG) para [13]). Unfortunately, however, it is often not adhered to (para [27]). But while an unreasonable delay post-conviction is certainly lamentable and is often remarked upon with 'the strongest of disapproval' by review courts, it does not per se constitute a failure of justice which would preclude certification that the proceedings were in accordance with justice (paras [27] [28]; *S v Maluleke* 2004 (2) SACR 577 (T)). Possible remedies available to an accused suffering prejudice due to an unreasonable delay are to allow for a claim of damages, or to allow that accused to exercise his or her right to appeal or review, as the case may be (para [29]). And only where the delay is serious and no cogent and convincing reasons have been provided, can the proceedings, in certain instances, be set aside (para [29]; *S v VC* 2013 (2) SACR 146 (KZP)).

Given this uncertain position as to consequences of an unreasonable delay in bringing an automatic review before the appropriate High Court in terms of sections 302 and 303 of the Criminal

Procedure Act, Sher AJ and Henney J for the High Court, Western Cape Division, Cape Town, set down the following guiding principles:

- An accused's rights of review and appeal are a subsidiary part of the overall right to a fair trial (para [32]).
- The jurisprudence on pre-conviction delay of proceedings is distinct from that relating to delays post-conviction, and is, therefore, not always of assistance/relevance (para [33]). For example, the enquiry in respect of a delay in the appeal or review proceedings post-conviction is generally much simpler and the causes are usually much easier to establish than in the case of an enquiry into pre-conviction delay (para [35]). And while the seriousness of an offence may be highly relevant for an enquiry into a pre-conviction delay, the converse may be true of a delay in post-conviction proceedings on a trivial offence. For example, where a person has been sentenced to a term of incarceration or a sizeable fine for a relatively trivial offence, the need to have a speedy review or appeal may be more urgent and compelling (para [36]). Moreover, 'at the post-conviction stage of criminal proceedings which originated from the magistrates' courts, there is much less congestion in the criminal justice system and a lack of resources will not ordinarily constitute a factor of substance. As such, there is much less room for delay to be tolerated post-conviction than pre- and the objective should surely be to process appeals and reviews as expeditiously as possible' (para [34]).
- The aim of the review proceedings post-conviction is to obtain the review court's confirmation of the integrity of the conviction and the fairness of the sentence imposed as soon as possible (para [34]). This is necessary 'at a time when great poverty and rampant crime combined with a lack of legal aid resources often coincide and are common features of our daily experience in the criminal justice system' (para [37]). Closely connected with the aim of review proceedings is the important goal of the review proceedings provided for in terms of sections 302 and 303 of the Criminal Procedure Act, ie to maintain the integrity of the criminal justice system and the public confidence therein by providing a free, far-ranging, and expeditious review by the High Court of proceedings in the lower courts (para [37]). Judges Sher AJ and Henney J

further added that if this review process is not effective, then, 'quite frankly, there is no point to it' (para [37]).

- 'It would be unfair and fallacious to adopt the attitude that if a conviction is sound, any post-conviction delay in the automatic review process is inconsequential and should always be condoned' (para [38]).

The judges concluded that (para [39])

> where an irregularity pertaining to delay in an automatic review matter is egregious and has resulted in prejudice to an accused, and such irregularity has not been brought about through any act or fault of the accused, it should be treated in no lesser fashion that it would ordinarily be treated in the context of the general principles applicable to a criminal trial, ie that if there is a failure of justice, this could, depending on the circumstances, result in a vitiation of the proceedings as a whole.

They explained that '[w]ithout the lower courts being at risk in this regard there will be no incentive for them to ensure that the peremptory requirements of the statutory review provisions are complied with and that there is due and proper adherence to the time periods and the procedures prescribed' (para [39]). Thus, if an accused's constitutional right of review is effectively stymied and rendered nugatory because of egregious delay, 'his constitutional right to a fair trial has been infringed and this may constitute a failure of justice and a ground for the court not only to decline to certify that the proceedings are in accordance with justice, but also to set aside or correct the proceedings, or to make any other order in connection with the proceedings as will, to the court, seem likely to promote the ends of justice' (para [40]).

While it may in certain circumstances be difficult to comply with the strict time limit of seven days laid down in section 303 of the Criminal Procedure Act, the court stated that (para [41]) –

> [t]he reviewing judge must be alive to this inbuilt difficulty which almost in itself sets the system up to fail, and it should not be understood that this judgement in any way seeks to lay down a general principle or rule of law that mere non-compliance with the peremptory period will in itself constitute an irregularity, or that if it constitutes an irregularity it will be of such a nature as to necessarily and inevitably vitiate the entire proceedings. Each matter will have to be decided on its own facts.

DELICT

JOHANN NEETHLING*
JOHAN POTGIETER**

LEGISLATION

There was no new legislation directly affecting this field of the law during the period under review.

CASE LAW

GENERAL PRINCIPLES OF LIABILITY

WRONGFULNESS

Legal duty of obstetrician to prevent cerebral palsy

In *TS & another v Life Healthcare Group (Pty) Ltd & another* 2017 (4) SA 580 (KZD) a child suffered birth asphyxia while his mother was in labour, as a result of which he developed cerebral palsy. His parents claimed damages from the hospital at which the mother gave birth, as well as from the attending obstetrician (the doctor). The parents averred that in attending to the mother's labour, both had acted negligently so causing the harm. The defendants undertook, jointly and severally, to pay to the plaintiffs a sum of R20 million in settlement of liability and *quantum*. The plaintiffs played no part in the current proceedings which concerned the apportionment of liability between the hospital and the doctor as joint wrongdoers, with the former seeking a contribution from the latter in terms of section 2(12) read with section 2(6) of the Apportionment of Damages Act 34 of 1956 (para [7]). While the hospital accepted negligence on the part of its nursing staff in failing to recognise warning signs of the baby's distress during labour, the doctor denied all liability, saying that he had settled the issues relating to liability and the *quantum* of damages without any admission of negligence on his part (paras [1] [2]). The hospital contended, in the delictual context, that the doctor

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owed the patient a legal duty and had been negligent, and, therefore, was liable for a contribution in terms of the Act (para [8]; as to joint wrongdoers, see J Neethling & JM Potgieter *Neethling-Potgieter-Visser Law of Delict* 7 ed (2015) 279-81).

Ploos van Amstel J pointed out that the legal duty of the doctor related to the requirement of wrongfulness (para [10]), and that the test for wrongfulness

> . . . is trite and has been stated in many reported decisions. The general norm to be employed in determining whether a particular infringement of interests is unlawful is the legal convictions of the community: the *boni mores.* It is an objective test based on the criterion of reasonableness. The question is whether the community regards a particular act or form of conduct as delictually wrongful. The legal convictions of the community must be seen as the legal convictions of the legal policy-makers of the community, such as the legislature and judges. In the case of an omission which causes harm to someone the omission will only be wrongful if in the particular circumstances a legal duty rested on the defendant to act positively to prevent harm from occurring and he failed to comply with that duty. The question of whether such a duty existed is answered with reference to the flexible criteria of the legal convictions of the community and legal policy [with reference to Neethling & Potgieter *Delict* (2010) 36-41 42 57] (para [14]).

The judge continued by recounting the new test for wrongfulness as part of the wrongfulness enquiry – that wrongfulness is present if it would be reasonable to impose liability on a defendant – as formulated in *Le Roux & others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae* 2011 (3) SA 274 (CC), 2011 (6) BCLR 577 para [122] and *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* 2006 (1) SA 461 (SCA) para [13]).

With reference to the present case, Ploos van Amstel J stated that the question was whether public policy considerations required that the doctor owed the patient and her unborn baby a legal duty, and whether he should be held liable to compensate them for the damage caused by his negligence (para [16]). After examining the facts (paras [17]-[23]), the judge concluded that in the circumstances, and at the relevant time, considerations of reasonableness and public policy required that the doctor should be held liable for the consequences of any negligent omissions on his part; in other words, that he 'had a legal duty to exercise the required degree of care and skill' (para [23]). Therefore, wrongfulness had been established (para [27]).

With regard to negligence (paras [24]ff), the judge found on the facts that the doctor's failure to examine the patient earlier and to

verify for himself that everything was in order, was a serious lapse which fell short of the degree of care and expertise expected of him as a specialist obstetrician, and that he had accordingly been negligent (paras [27] [28]).

Finally, the court dealt with the question of causation (paras [28]ff). The judge pointed out that the onus of proving a causal link between the doctor's negligence and the cerebral palsy suffered by the baby was on the hospital, and that this had to be established on a balance of probabilities. In this case, it had to be shown that had the doctor gone to the hospital earlier, as the experts said a reasonable obstetrician would have done, the baby would not have suffered cerebral palsy. However, this had not been established on a balance of probabilities (para [34]).

In summary, Ploos van Amstel J found that the doctor had been negligent and in breach of his legal duty to the patient. However, he was unable to find that, had the doctor acted as it is said he should have, the tragic outcome would have been avoided. The hospital's claim against the doctor was, therefore, dismissed (paras [35] [36]).

This judgment provides clear evidence of a reconciliation between the traditional *boni mores* legal duty criterion for wrongfulness and the new formulation of the wrongfulness test as the reasonableness of holding the defendant liable (see J Neethling & JM Potgieter 'Aanspreeklikheid *ex delicto* weens 'n late: Harmonieuse vervlegting van uiteenlopende benaderings' (2017) 5 *TSAR* 98-103; see also the discussions of *MTO Forestry (Pty) Ltd v Swart NO* 2017 (5) SA 76 (SCA), [2017] 3 All SA 502 and *Barley & another v Moore & another* [2017] 3 All SA 799 (WCC) below). Ploos van Amstel J described and applied these two tests as if they did not differ (para [14]). This approach can be supported in principle, provided it is borne in mind that the objections to the new test remain valid. For example, the statement that wrongfulness has nothing to do with the reasonableness of the defendant's conduct, is unacceptable (see Neethling & Potgieter *Delict* (2015) 81-2 84-5).

It is submitted that in establishing wrongfulness in cases of an omission, a court should, in determining the existence of a legal duty, first apply the traditional *boni mores* test which takes account of all relevant policy considerations and factors. If these considerations justify a finding that a legal duty existed, its damaging breach would constitute wrongfulness. Provided that all the other delictual elements are present, it would be reason-

able to hold the defendant liable (see *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* [2014] 1 All SA 267 (SCA), 2014 (2) SA 214, 222; see also *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) 597; *Local Transitional Council of Delmas v Boshoff* 2005 (5) SA 514 (SCA) 522; Neethling & Potgieter *Delict* (2015) 81-2). Therefore, the decision to hold a person liable is the consequence of the fact that a delict has been committed, and not (merely) the result of the application of the test for wrongfulness.

Pure economic loss resulting from a municipality's failure to fulfil its legal duty to issue certificate

In *Home Talk Developments (Pty) Ltd & others v Ekurhuleni Metropolitan Municipality* [2017] 3 All SA 382 (SCA), 2018 (1) SA 391, the basis of the appellants' claims, stated briefly, was that employees of the respondent municipality failed to discharge their duty to issue a certificate in terms of section 82 of the Townships and Town Planning Ordinance 15 of 1986 (the Ordinance) relating to land development (the 'section 82 certificate') to the appellants, causing them to suffer pure economic loss (para [2]).

The municipality's plea was that the claims were *Aquilian* for pure economic loss arising from the alleged delay occasioned by the failure of the defendant to issue the section 82 certificates. This legislation does not anticipate either compensation or damages for any person aggrieved by the failure of, or delay by, the local authority in issuing any such certificate (para [18]). The municipality submitted that any person aggrieved by a decision of the local authority should appeal to a Statutory Services Appeal Board. Alternatively, he or she could apply for a mandatory interdict or judicial review. The municipality pleaded that the statutory duty did not provide a basis for inferring that a duty existed for the first plaintiff at common law, and that neither public policy nor public interest justified holding the defendant's alleged conduct unlawful in the *Aquilian* sense, and so susceptible to a remedy in damages (para [18]).

Ponnan JA stated that although the appellants were entitled to proper administrative legal proceedings, this does not mean that a breach of administrative duties, as set out in the particulars of claim, necessarily translates into a private law duty giving rise to delictual claims. An incorrect administrative decision is not *per se* wrongful. Administrative law has its own remedies and, in

general, delictual liability will not be imposed for a breach of its rules unless convincing policy considerations point in a different direction. If the legal duty invoked is imposed by a statutory provision, the focal question is one of statutory interpretation. Whether the existence of an action for damages can be inferred from the controlling legislation depends on its interpretation, and it is especially necessary to have regard to the object or purpose of the legislation. This involves a consideration of policy factors which, in the ordinary course, will not differ from those that apply when one determines whether or not a common-law duty exists (para [19]).

Ponnan JA then proceeded to set out the requirements for and general principles underlying delictual liability (para [20]ff), stating, as starting point, that conduct 'is wrongful in the delictual sense if public policy considerations demand that in the circumstances the plaintiff has to be compensated for the loss caused by the negligent act or omission of the defendant. It is then that it can be said that the legal convictions of society regard the conduct as wrongful' (para [20]). One of the questions in the present case was whether the legislator intended a claim for damages in respect of loss caused, in addition to the other administrative law remedies available to the appellants (para [22]). The fact that the legislator had made provision for an internal appeal was a sure indicator that the legislator did not consider the refusal of a section 82 certificate, without more, to constitute a wrong entitling an action for damages against the municipality (para [23]). After referring to relevant foreign common-law authorities (para [24]), Ponnan JA cautioned that the English law 'duty of care' straddles both wrongfulness and negligence. Accordingly, in our legal context this phrase is inherently misleading (para [25]).

With reference to *Telematrix* (above) and *Steenkamp NO v Provincial Tender Board*, *Eastern Cape* 2006 (3) SA 151 (SCA), [2006] 1 All SA 478 para [30], the judge pointed out that 'something more' than a mere negligent statutory breach and consequent economic loss was required to hold a functionary delictually liable for the improper performance of an administrative function (para [26]; see also J Neethling 'State (public authority) liability *ex delicto* (3)' (2013) 76 *THRHR* 335). For this, the appellants attempted to rely on the alleged *mala fide* conduct of one of the functionaries of the municipality, but failed to prove it (paras [27]ff [42]). As regards wrongfulness, Ponnan JA concluded that the municipality's actions were not delictually

wrongful, nor had it breached any legal duty owed by it to the appellants. Accordingly, the municipality enjoyed immunity against liability for damages resulting from the conduct complained of (para [44]). Although this could have been the end of the matter, Ponnan JA elected to discuss the element of causation briefly (para [45]ff) and came to the conclusion that both factual and legal causation were absent (paras 52]). The appeal was accordingly dismissed.

Schippers AJA agreed with Ponnan JA's judgment, but added a few observations with regard to causation (paras [54]ff). In a dissenting judgment, Cachalia JA concluded that he would have upheld the appeal (para [223]), mainly because the city manager's dishonesty and *mala fides* in withholding the certificates were an abuse of power, and therefore wrongful (paras [206]-[209]). The non-issuing of the certificates was also the factual and legal cause of the appellants' loss (paras [210]ff).

Failure to halt spread of veld fire

MTO Forestry (Pty) Ltd v Swart NO (above) involved delictual liability for an omission (for a review of this case, see J Neethling & JM Potgieter 'Foreseeability: wrongfulness and negligence of omissions in delict – the debate goes on' (2018) *JJS* 145–161, on which this discussion is based). The appellant company, which ran a forestry business, was the beneficial owner of a plantation called Witelsbos in the district of Humansdorp in that it had the right to harvest the trees and enjoy the income from the forest's production. A fire broke out on the respondent's immediately adjacent farm in an area packed with dense thickets of highly flammable alien plants ('warbos'). A strong wind caused the fire to spread onto Witelsbos, where it burned for several days, destroying some 1 300 hectares of forest. Despite the efforts of teams of firefighters to halt the spread of the fire, the appellant suffered considerable loss. The appellant sued the respondent in the High Court, Cape Town, for damages of more than R23 million, alleging that its negligent omissions had caused or allowed the fire to spread onto Witelsbos. Relief was refused in the High Court and the appellant approached the Supreme Court of Appeal.

Leach JA, in commencing his enquiry into the liability of the respondent, stated the elements of a claim founded in delict – conduct, wrongfulness, fault, harm, and causation (para [12]). He pointed out that the appellant sought to hold the respondent liable, not for starting the fire on the day in question, but for its

alleged negligent omission to take preventative steps, which allowed or caused the fire to spread onto Witelsbos, and that there was no doubt that such a negligent omission, if established, could found liability. It is indeed trite law that a legal duty may rest on the owner, occupier, or controller of property to control a fire on the property (see, eg, *Minister of Forestry v Quathlamba (Pty) Ltd* 1973 (3) SA 69 (A); *Minister of Water Affairs and Forestry & others v Durr & others* 2006 (6) SA 587 (SCA) paras [18] [19]; *Lubbe v Louw* [2006] 4 All SA 341 (SCA) paras [13]-[17]; *Steenberg v De Kaap Timber (Pty) Ltd* 1992 (2) SA 169 (A); *Dews & another v Simon's Town Municipality* 1991 (4) SA 479 (C) 485; and Neethling & Potgieter *Delict* (2015) 64). This view was also confirmed as follows in *HL & H Timber Products (Pty) Ltd v Sappi Manufacturing (Pty) Ltd* [2000] 4 All SA 545 (SCA), 2001 (4) SA 814 para [14], to which Leach JA referred (para [13]):

> Conduct . . . can take the form of a *commissio*, for example where the fire causing the loss was started by the defendant . . . or an *omissio*, for example the failure to exercise proper control over a fire of which he was legally in charge . . . or the failure to contain a fire when, in the absence of countervailing considerations adduced by him, he was under the legal duty, by virtue of his ownership or control of the property, to prevent it from escaping onto a neighbouring property thereby causing loss to others . . .

Leach JA (para [14]) continued by stating that terms such as 'duty' or 'legal duty' have, with justification, been criticised as not really contributing to the determination of whether a defendant's conduct should be regarded as wrongful, and that this may lead to confusion with the concept of duty of care in English law which straddles both wrongfulness and negligence (see *Country Cloud* (SCA) (above) 222). Accordingly, Leach JA supported the comment by FDJ Brand 'Aspects of wrongfulness: A series of lectures' (2014) 25/3 S*tell LR* 451–70 455, that concepts such as 'a legal duty' are 'no more than an attempt at formulating some kind of practical yardstick as to when policy considerations will require the imposition of legal liability'.

These statements are subject to criticism (J Neethling 'Delikseis deur derde party weens kontrakbreuk' (2015) 1 *TSAR* 188ff). First, the concept of a legal duty is central to the inquiry into the wrongfulness of an omission (Neethling & Potgieter *Delict* (2015) 58-9). Secondly, notwithstanding possible confusion, which should be guarded against, the legal duty concept is so ingrained in positive law that the courts and academic writers will not – and

should not – readily renounce it. Even recent decisions by our highest courts continue to use the duty concept to establish the wrongfulness of an omission. For example, in *Minister of Justice and Constitutional Development v X* 2015 (1) SA 25 (SCA), 2015 (1) SACR 187 para [13], Fourie AJA said that a negligent omission will be wrongful only if the appellant is under a legal duty to act positively to prevent the harm suffered by the respondent. The omission will be regarded as wrongful when the legal convictions of the community impose a legal – as opposed to a mere moral – duty to avoid harm to others by positive action. The duty issue was also paramount in the Constitutional Court's decisions in *Mashongwa v Passenger Rail Agency of South Africa* 2016 (3) SA 528 (CC), 2016 (2) BCLR 204 paras [16]-[30] and *Oppelt v Head: Health, Department of Health Provincial Administration: Western Cape* 2016 (1) SA 325 (CC) 2015 (12) BCLR 1471 paras [51]–[54]. This approach is supported by academic writers on the law of delict (JC van der Walt & JR Midgley *Principles of Delict* 4 ed (2016) 115-6; M Loubser & R Midgley (eds) *The Law of Delict in South Africa* 2 ed (2012) 147-8; Neethling & Potgieter *Delict* (2015) 58ff). Van der Walt & Midgley *Delict* 115 state as follows:

> The breach of a legal duty is therefore an independent criterion for determining wrongfulness and plays a vital practical role in founding liability in cases where no infringement of a right is evident [such as in cases of omission].

At this stage in the development of our law it is very unlikely that the legal duty concept with regard to wrongfulness will still be confused with the English law duty-of-care doctrine. Suffice it to say that the Supreme Court of Appeal and academic writers have clarified the distinction between these concepts sufficiently, and have rejected the duty-of-care approach in our law. (See *McIntosh v Premier, KwaZulu-Natal* [2008] 4 All SA 72 (SCA), 2008 (1) SA 1 8–9; *Chartaprops 16 (Pty) Ltd & another v Silberman* [2009] 1 All SA 197 (SCA), (2009) 30 *ILJ* 497, 2009 (1) SA 265, 279; *Knop v Johannesburg City Council* 1995] 1 All SA 673 (A), 1995 (2) SA 1, 27; *Local Transitional Council of Delmas & another v Boshoff* 2005 (5) SA 514 (SCA) 522; *Telematrix* (above) 468; see also Neethling & Potgieter *Delict* (2015) 159 n200, but see also 160 for a number of earlier Supreme Court of Appeal cases that still appear to confuse these concepts.) Furthermore, since the legal duty concept has been firmly embedded in our law to establish wrongfulness, it is not acceptable to shrug it off as, at most, 'an attempt at formulating some kind of practical

yardstick' for the imposition of legal liability (*Country Cloud* (SCA) para [19]).

Leach JA then turned to the distinction between wrongfulness and fault (negligence) (paras [15]ff), beginning with the following quotation from Brand (2014) 25/3 *Stell LR* 451:

> Wrongfulness – sometimes also referred to as unlawfulness – is one of the elements of delictual liability. The other elements are conduct, fault, causation and harm. Without the convergence of all these elements delictual liability will not ensue . . . In modern South African law, wrongfulness has become the most interesting of these elements. Under this rubric the law determines whether the defendant should be held legally liable for the harm suffered by the plaintiff that resulted from the defendant's blameworthy conduct. If the law determines that there will be no liability, the defendant is afforded immunity from the consequences of the wrongful conduct; the defendant is not liable despite the presence of all the other elements of delictual liability.

As has often been stated by Brand JA (*Le Roux v Dey* (above) 315 and in *Country Cloud* (SCA) (above) 222-3; *Roux v Hattingh* 2012 (6) SA 428 (SCA) 439; *Cape Empowerment Trust Limited v Fisher Hoffman Sithole* [2013] 2 All SA 629 (SCA), 2013 (5) SA 183, 193, the criterion for wrongfulness, in his view, is the reasonableness of holding the defendant liable. As this is the case, his statement that, if the law determines that there will be no liability, the defendant is afforded immunity from the consequences of the wrongful conduct, does not make sense, because if, in terms of the new criterion for wrongfulness, the law determines that there will be no liability, wrongfulness should have been absent with the result that there could also be no consequences of 'wrongful conduct'.

As far as wrongfulness is concerned, Leach JA endorsed the development in the Supreme Court of Appeal and the Constitutional Court (*Loureiro & others v Imvula Quality Protection (Pty) Ltd* 2014 (3) SA 394 (CC), 2014 (5) BCLR 511 para [53]; *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2015 (1) SA 1 (CC) paras [20] [21]) over the last decade or so, that wrongfulness is determined in accordance with the criterion that it depends on the reasonableness of imposing liability (para [16]). However, for liability to ensue, wrongfulness needs to be accompanied by fault (para [16]). According to the judge, this was confirmed in *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para [12], where Nugent JA stated:

> A negligent omission is [wrongful] only if it occurs in circumstances that the law regards as sufficient to give rise to a legal duty to avoid negligently causing harm. It is important to keep that concept quite separate from the concept of fault. Where the law recognises the existence of a legal duty it does not follow that an omission will necessarily attract liability – it will attract liability only if the omission was also culpable as determined by the application of the separate test that has consistently been applied by this court in *Kruger v Coetzee* [1966 (2) SA 428 (A) 430], namely whether a reasonable person in the position of the defendant would not only have foreseen the harm but would also have acted to avert it.

Leach JA emphasised that wrongfulness and negligence are indeed separate elements of a delict, but he appears to believe that this view has been questioned in academic circles (para [17]; see also Leach JA's similar remark in *Pauw v Du Preez* (20197/2014) [2015] ZASCA 80 (28 May 2015) para [7]), referring to Neethling's 2006 contribution in the *South African Law Journal* (J Neethling 'The conflation of wrongfulness and negligence: Is it always such a bad thing for the law of delict?' (2006) 123 *SALJ* 204-14; RW Nugent 'Yes, it is always a bad thing for the law: A reply to Professor Neethling' (2006) 123 *SALJ* 557-63 for a response to Neethling's viewpoint; cf Brand (2014) 25/3 *Stell LR* 451ff, where Neethling expresses the view that certain factors, such as foreseeability and preventability of harm, are relevant to the determination of both wrongfulness and negligence. This means that a degree of conflation of these two elements is inevitable, and that, if a degree of overlap can be accepted 'without negating the distinctive functions of wrongfulness and negligence as separate elements of delict', it would 'not be a bad thing'. Neethling based his observation that certain factors are relevant to both wrongfulness and negligence on a number of decisions by the Supreme Court of Appeal. (As regards foreseeability as one such factor, see, eg, *Hirschowitz Flionis v Bartlett & another* 2006 (3) SA 575 (SCA) 589; *Telematrix* (above) 468; *Imvula Quality Protection (Pty) Ltd v Loureiro & others* [2013] 2 All SA 659 (SCA), 2013 (3) SA 407 418; *Steenkamp NO v Provincial Tender Board, Eastern Cape* (above) 159-60; *Minister of Safety and Security & another v Carmichele* 2004 (3) SA 305 (SCA) 324; *Stewart & another v Botha & another* [2009] 4 All SA 487 (SCA), 2008 (6) SA 310 314; and, with regard to preventability of harm, eg, the factors applied in *Cape Metropolitan Council v Graham* 2001 (1) SA 1197 (SCA) 1203; *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck* 2007 (2) SA 118 (SCA) 123; *Adminis-*

trateur, Transvaal v Van der Merwe [1994] 4 All SA 321 (AD), 1994 (4) SA 347 361-2, and *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust as Amicus Curiae)* [2002] 4 All SA 346 (SCA), 2003 (1) SA 389 400.) Nevertheless, Neethling has emphasised throughout that, where it is appropriate (realistic, practical and convenient), a certain extent of overlap should be accepted, provided that this can be done without negating the distinct functions of wrongfulness and negligence as distinct elements of a delict – in the case of wrongfulness, to indicate that a legally protected interest has been infringed in an unreasonable manner; and, in the case of negligence, to indicate the blameworthiness of the alleged wrongdoer for such infringement ((2006) 123 *SALJ* 209-10 214; Neethling & Potgieter *Delict* (2015) 163-4 n222-223). To deny this reality would amount to placing the various factors relevant to the establishment of wrongfulness, on the one hand, and negligence, on the other, into watertight compartments where no particular factor may be applied with regard to more than one of the elements. Ultimately, as far as we know, there is no evidence from academic circles (apart, perhaps, from D Milo 'The cabinet minister, the *Mail & Guardian,* and the report card: The Supreme Court of Appeal's decision in the *Mthembi-Mahanyele* case' (2005) 122 *SALJ* 28 38-9) questioning the separate and discrete existence of wrongfulness and negligence in our law. There is, therefore, no debate in this regard. (Milo (2005) 122 *SALJ* 38-9 argues that courts in South Africa should refrain from distinguishing between wrongfulness and negligence – in the field of media defamation law – and simply apply a test of reasonableness for both elements; but see Neethling (2006) 123 *SALJ* 214 for criticism.) Leach JA's comment that the debate regarding the separate existence of wrongfulness and negligence has become 'sterile' is, therefore, beside the point. Brand JA's ((2014) 25/3 *Stell LR* 451 458) similar remark, on which Leach JA based his comment, clearly relates to a different debate, namely, the acceptability or not of the new test for wrongfulness as formulated by Brand JA in *Le Roux v Dey* (above) 315. In passing, the so-called 'sterility' of this debate can be addressed if our highest courts engage with the criticism levelled against the new test for wrongfulness, instead of simply echoing Brand JA's formulation thereof. (For criticism of this test, see, among others, Neethling & Potgieter *Delict* (2015) 80-85; JC Knobel 'Thoughts on the functions and application of the elements of a delict' (2008) 71 *THRHR* 650-60 652; TJ Scott

'Delictual liability for adultery – A healthy remedy's road to perdition' in J Potgieter, J Knobel & R-M Jansen (eds) *Essays in Honour of / Huldigingsbundel vir Johann Neethling* (2015) 421-38 433; FE Marx 'The naming and shaming of spammers' in Potgieter, Knobel & Jansen (eds) *Essays* 323-32 329-30; M Loubser 'Unlawfulness in the South African law of delict: Focus areas in the debate' in T Boezaart & P de Kock (eds) *Vita Perit, Labor non Moritur – Liber Memorialis PJ Visser* (2008) 117-43 122; JM Potgieter 'Die nuwe onregmatigheidstoets: 'n Trojaanse perd wat delikteregbeginsels bedreig?' (2017) 14/2 *LitNet Akademies* 813-30.) An attempt to engage our criticism of the new test was proffered by FDJ Brand 'The contribution of Louis Harms in the sphere of Aquilian liability for pure economic loss' in *Essays in Honour of Louis Harms* (2013) 76 *THRHR* 57-69, to which we reacted (J Neethling & JM Potgieter 'Wrongfulness in delict: A response to Brand JA' (2014) 77 *THRHR* 116-24), but did not receive a response. (For a recent contribution to the wrongfulness debate, see D Visser 'Taming the chimera: The treatment of ''wrongfulness'' in South African delict scholarship' in *Ars Nocendi et Scribendi – Essays in Honour of Johan Scott* (2018 PULP) 194–209.)

At this stage it is important to emphasise that the new test for wrongfulness is not regarded by all courts as the sole test for the determination of wrongfulness, but, according to Nugent JA in *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck* 2007 (2) SA 118 (SCA) 122, merely as a recent formulation of one variation of the test for wrongfulness in our law. In the result, the traditional test for wrongfulness for an omission may still be applied. As said, this entails whether, according to the *boni mores* or reasonableness criterion (where legal policy considerations, including constitutional norms, play an important part), there was a legal duty on the defendant to act positively to prevent harm to the plaintiff (see *Minister of Justice and Constitutional Development v X* (above) 28; *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust as Amicus Curiae)* (above) 395; *Steenkamp NO v Provincial Tender Board, Eastern Cape* (above) 138; *Harrington NO & another v Transnet Ltd t/a Metrorail & others* [2010] 2 All SA 220 (SCA), 2010 (2) SA 479 485; *RH v DE* 2015 (5) SA 83 (CC) 101; cf Neethling & Potgieter *Delict* (2015) 38-9; Loubser & Midgley (eds) *Delict* 219-20; Van der Walt & Midgley *Delict* 122–3).

Initially, Brand JA was highly critical of the traditional test for wrongfulness (see *Country Cloud* (SCA) (above) para [19]), but,

in *South African Hang and Paragliding Association & another v Bewick* [2015] 2 All SA 581 (SCA), 2015 (3) SA 449 452–3 (see also J Neethling 'Aanspreeklikheid weens 'n late: Versoening tussen die tradisionele en nuwe toets vir deliktuele onregmatigheid, of nie?' (2015) 12/3 *Litnet Akademies* 810ff 813–15), he was willing to reconcile the traditional *boni mores* test with the new test for wrongfulness. He stated:

> As has by now become well established, negligent conduct manifesting itself in the form of a positive act which causes physical injury raises a presumption of wrongfulness. By contrast, in relation to liability for omission and pure economic loss, wrongfulness is not presumed and depends on the existence of a legal duty. The imposition of this legal duty is a matter for judicial determination according to criteria of public and legal policy consistent with constitutional norms . . . On occasion the same principles had been formulated somewhat differently, namely that wrongfulness depends on whether or not it would be reasonable, having regard to considerations of public and legal policy, to impose delictual liability on the defendant for the loss resulting from the specific omission.

This reconciliatory approach is also evident in decisions of the Constitutional Court, for example, the 343-4 (see also *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC) 216; *Loureiro* (CC) (above) 410) where the court proposed the *boni mores*, the legal duty to prevent damage, and the reasonableness of holding the defendant liable, as a potpourri for the determination of wrongfulness:

> The next enquiry is whether the 'negligent omission is unlawful only if it occurs in circumstances that the law regards as sufficient to give rise to a *legal duty to avoid negligently causing harm'*. In *Loureiro* [(CC) (above)], Van der Westhuizen J explained that the wrongfulness enquiry is based on *the duty not to cause harm*, and that in the case of negligent omissions, the focus is on the *reasonableness of imposing liability*. An enquiry into wrongfulness is determined by weighing competing norms and interests. The criterion of wrongfulness ultimately depends on a judicial determination of whether, assuming all the other elements of delictual liability are present, it would be *reasonable to impose liability on a defendant* for the damages flowing from specific conduct. Whether conduct is wrongful is tested against *the legal convictions of the community* which are 'by necessity underpinned and informed by the norms and values of our society, embodied in the Constitution' (italics added).

As both the traditional and the new tests emphasise considerations of policy, they would, closely examined, ultimately produce the same result (see, however, our critical discussion of *TS v Life*

Healthcare Group (Pty) Ltd (above) para [14], where the court said that the test for wrongfulness in our law is trite, and thereafter described the *boni mores* legal-duty test, followed by the new test, as if they do not differ).

Next, Leach JA turned to the question of the applicability of foreseeability as a factor in determining wrongfulness, and came to the conclusion that it should play no role at all in this regard (paras [18]ff). He stated:

> It is potentially confusing to take foreseeability into account as a factor common to the inquiry in regard to the presence of both wrongfulness and negligence. Such confusion will have the effect of the two being conflated and lead to wrongfulness losing its important attribute as a measure of control over liability. Accordingly, I think the time has now come to specifically recognise that foreseeability of harm should not be taken into account in respect of the determination of wrongfulness, and that its role may be safely confined to the rubrics of negligence and causation.

Historically, (reasonable) foreseeability has indeed played a role in determining wrongfulness (see the Supreme Court of Appeal cases cited above). In *Gouda Boerdery BK v Transnet* 2005 (5) SA 490 (SCA) 499, Scott JA explained this as follows:

> The courts have in the past sometimes determined the issue of foreseeability as part of the inquiry into wrongfulness and, after finding that there was a legal duty to act reasonably, proceeded to determine the second leg of the negligence inquiry [preventability], the first (being foreseeability) having already been decided. If this approach is adopted, it is important not to overlook the distinction between negligence and wrongfulness.

For this reason, declared Harms JA in *Steenkamp* (above) 159-60, the role of foreseeability differs depending on whether it is considered in the context of wrongfulness or negligence:

> The role of foreseeability in the context of wrongfulness must be seen in its correct perspective. It might, depending on the circumstances, be a factor that can be taken into account but it is not a requirement of wrongfulness and it can never be decisive of the issue. Otherwise there would not have been any reason to distinguish between wrongfulness and negligence and since foreseeability also plays a role in determining legal causation, it would lead to the temptation to make liability dependent on the foreseeability of harm without anything more, which would be undesirable.

In similar vein, Loubser & Midgley (eds) *Delict* 151 conclude that foreseeability can be part of both wrongfulness and negligence. While foreseeability is a factor that can be considered in

the wrongfulness enquiry, it is one of two core factors to consider in determining negligence (the other being preventability). Foreseeability of harm is, therefore, a requirement for negligence, but although it may add weight to the wrongfulness decision, it may not prove decisive in the latter regard in that other factors could override it. Van der Walt & Midgley *Delict* 107 add that, in line with the objective reasonableness approach to wrongfulness which takes all relevant aspects into account, and, even though it is also a component of negligence and causation assessments, the foreseeability of harm is a factor that may be considered in determining (in the words of the new wrongfulness test) whether liability ought to be imposed in a particular case (cf also Loubser & Midgley (eds) *Delict* 148-51).

In light of the foregoing, it should be emphasised that although foreseeability may be a factor in determining wrongfulness, care should be taken not to elevate it to *the* determining factor for wrongfulness, as this will confuse wrongfulness with negligence and 'lead to the absorption of the English law tort of negligence into our law, thereby distorting it' (see *Telematrix* (above) 468). An example of such an unfortunate application of foreseeability is the judgment by the Appeal Court in *Government of the Republic of South Africa v Basdeo & another* 1996 (1) SA 355 (A) (see J Neethling 'Onregmatigheid, nalatigheid; regsplig, ''duty of care''; en die rol van redelike voorsienbaarheid – Praat die Appèlhof uit twee monde?' (1996) 59 *THRHR* 682ff; cf J Neethling & JM Potgieter 'Wrongfulness and negligence in the law of delict: A Babylonian confusion?' (2007) 70 *THRHR* 120-30 123-4). Contrary to this position where foreseeability was recognised as a factor in determining wrongfulness, the Supreme Court of Appeal has now emphatically stated in the case under discussion (para [18]) that foreseeability of harm should not be taken into account at all in the determination of wrongfulness, and that its role should be confined to negligence and causation. (See also Brand JA's remark in *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* [2009] 1 All SA 525 (SCA), 2009 (2) SA 150 163 that 'the issue of foreseeability should more appropriately be considered under the rubric of legal causation and not as part of determining wrongfulness', and his categorical statement in *Cape Empowerment Trust Limited v Fisher Hoffman Sithole* [2013] 2 All SA 629 (SCA), 2013 (5) SA 183 197-8 that 'foreseeability . . . [does] not play a role in establishing wrongfulness'. Cf his judgment in *Country Cloud* (SCA) (above) 225; cf, however,

Country Cloud Trading CC v MEC, Department of Infrastructure Development (CC) (above) [34].)

Leach JA's decision can be supported as regards the application of *reasonable* foreseeability, not only because of the possible confusion between wrongfulness and negligence that could result from the use of reasonable foreseeability in determining both these elements, but also because – and this is very important – this viewpoint tallies with the traditional test for wrongfulness. In *Waldis & another v Von Ulmenstein* 2017 (4) SA 503 (WCC) para [21], Davis J put it as follows in the context of defamation:

> The general test for wrongfulness is based upon the *boni mores* or the legal convictions of the community. This means that the infringement of the complainant's reputation should not only have taken place but be objectively unreasonable. See Neethling et al *Neethling's Law of Personality* 2 ed (2005) at 135. The application of the *boni mores* test involves an *ex post facto* balancing of the interests of the plaintiff and the defendant in the specific circumstances of this case in order to determine whether the infringement of the former's interests was reasonable.

The defendant's conduct is determined diagnostically (*ex post facto*, by looking back) by taking account of all the relevant facts and circumstances actually present, and all the consequences that actually ensued. Naturally, the prognostic (*ex ante*, by looking forward) reasonable foreseeability of harm plays no part here but is a core requirement of negligence (Neethling & Potgieter *Delict* (2015) 164-5). However, this does not mean that *subjective* foreseeability (the defendant's subjective foresight or knowledge) should not play a role with regard to wrongfulness. Clearly, judged *ex post facto*, the defendant's knowledge is also a relevant fact which is actually present and should be taken into account in determining wrongfulness. This approach is already established practice in case law (Loubser & Midgley (eds) *Delict* 223; Neethling & Potgieter *Delict* (2015) 65-6 309 for further references). Unfortunately, Leach JA opined that the fact that the respondent *in casu* had been aware, or had knowledge of, the fire risk created by the 'warbos', his (subjective) foreseeability of the fire hazard was a factor relevant to the determination of negligence, rather than wrongfulness. (The viewpoint that foreseeability should play no role at all with regard to wrongfulness is strongly supported by Knobel in Potgieter, Knobel & Jansen (eds) *Essays* 229-43 239-242 nn54 74. According to him, any sub-

jective factor, such as foreseeability, knowledge of harm, and motive, should co-determine fault, not wrongfulness.)

Although, according to Leach JA, foreseeability does not play a role in determining wrongfulness, it may still be relevant to the rubrics of negligence and causation. In this regard it should be borne in mind that foreseeability does not play the same role with regard to negligence, on the one hand, and causation, on the other (see, in general, Neethling & Potgieter *Delict* (2015) 211-13 214-16). Whereas, in the case of negligence, harm of a general kind should be foreseeable (see, eg, *Loureiro* (SCA) (above) 416; *Sea Harvest Corporation (Pty) Ltd & another v Duncan Dock Cold Storage (Pty) Ltd & another* 2000 (1) SA 827 (SCA) 839; *Mukheiber v Raath & another* 1999 (3) SA 1065 (SCA) 1077; *Jaftha v Honourable Minister of Correctional Services* [2012] 2 All SA 286 (ECP) paras [22] [23]; cf *Standard Chartered Bank of Canada v Nedperm Bank Ltd* [1994] 2 All SA 524 (A), 1994 (4) SA 747, 768), foreseeability of the actual harm is relevant as regards legal causation (despite the fact that the specific result was not reasonably foreseeable, should considerations of reasonableness, justice and fairness dictate that the defendant should be held liable for the harm suffered by the plaintiff (JM Potgieter 'Deliktuele aanspreeklikheid vir onvoorsienbare gevolge van mediese nalatigheid' (2017) 14/3 *LitNet Akademies* 975–90). In this regard, if the distinctive functions of negligence and causation are borne in mind, there need be no concern that the application of foreseeability in regard to both may lead to confusion between, or even the conflation of, the two elements.

With regard to negligence, the court, after dealing with a dispute between the parties in this regard (paras [20]-[25]), proceeded on the assumption that, in terms of section 34(1) of the National Veld and Forest Fire Act 101 of 1998, there was indeed a presumption that the respondent, being the owner of the land on which the fire started, had been negligent in relation to the fire, and that the section placed an onus on it to show that the fire spread to Witelsbos without negligence on its part (para [25]). In terms of section 34(2) of the National Veld and Forest Fire Act, the presumption of negligence does not exempt the plaintiff from the onus of proving that any act or omission by the respondent was wrongful (para [20]). The court then dealt with the alleged negligent omissions advanced by the appellant (paras [26]ff). Leach JA stated:

> A reasonable landowner in the respondent's position was . . . not obliged to ensure that in all circumstances a fire on its property would

> not spread beyond its boundaries. All the respondent was obliged to do was to take steps that were reasonable in the circumstances to guard against such an event occurring. If it took such steps and a fire spread nevertheless, it cannot be held liable for negligence just because further steps could have been taken (para [47]).

The court found that the respondent had more than fulfilled its obligation to take reasonable steps and that it, therefore, had not been negligent (para [48]).

We return to Leach JA's remarks about the appellant's allegations that the respondent acted wrongfully because it had been aware or had knowledge of the fire risk created by the 'warbos'. In this regard, the judge stated that 'the allegation of wrongfulness was, thus, the foreseeability of the fire hazard caused by the ''warbos'' but, for reasons already mentioned, that is a factor relevant to the determination of negligence rather than wrongfulness'. He therefore concluded that the dispute ultimately turned on whether the respondent had been negligent in failing to remove the 'warbos', rather than on whether its failure was wrongful (para [44]). He continued:

> As was mentioned by this court in [the *Durr* case (above) para [19]], a landowner is under a 'duty' to control or extinguish a fire burning on its land. But, as Nienaber JA stressed in [*H L & H Timber Products* (above) para [21]], whilst landowners may be saddled with the primary responsibility of ensuring that fires on their land do not escape the boundaries, this falls short of being an absolute duty (para [45]).

As indicated, it is trite law that there is a legal duty on a landowner or a person in control of land to prevent fire from spreading from their land to a neighbouring property, and that this duty clearly relates to the wrongfulness issue (Van der Walt & Midgley *Delict* 125; Loubser & Midgley (eds) *Delict* 221; Neethling & Potgieter *Delict* (2015) 64 and the case law cited there). Failure by the owner or person in control to prevent such spread is clearly wrongful. Perhaps Leach JA could have stated more clearly that the 'duty' *in casu* concerned wrongfulness. The judge's failure to do so may perhaps be ascribed to the fact that he, following Brand JA, intimated that the legal-duty approach may readily be replaced by the reasonableness of holding the defendant liable as criterion for wrongfulness (cf para [14]). Nevertheless, in establishing wrongfulness as required by section 34(2) of National Veld and Forest Fire Act, Leach JA did not apply this criterion *in casu*.

It should be emphasised that the fact that a person acted wrongfully does not necessarily mean that he or she will be

delictually liable, as negligence still has to be established (see, eg, the *dictum* in *Van Duivenboden* (above) para [12] quoted by Leach JA para [16]). As has been explained (see, eg, J Neethling 'Delictual liability for an omission: The tragic fishpond incident' 2016 *TSAR* 798-806 805; J Neethling & JM Potgieter 'Aanspreeklikheid *ex delicto* weens 'n late: Harmonieuse vervlegting van uiteenlopende benaderings?' (2017) 5 *TSAR* 97-110 106; Neethling & Potgieter *Delict* (2015) 166-7), an omission is unreasonable, and consequently wrongful, where, on applying the *boni mores* test, it emerges that there was a legal duty on the defendant to act positively in order to prevent harm and he or she failed to comply (fully) with that duty. However, where a defendant did attempt (albeit unsuccessfully) to comply with such a duty and his or her attempt coincided with what the reasonable person would have done, his or her (unreasonable) wrongful act is not accompanied by (unreasonable) negligent conduct (damage could not reasonably have been prevented), and he or she will escape liability. The *Quathlamba* case (above) may be cited as an example. Fire broke out on X's land without any fault on his part. Despite his attempts to extinguish the fire, it spread to Y's land and caused damage. The court held that there is a legal duty on a landowner to control a fire on land under his control. Because the fire caused damage to Y, it may be said that X did not fully comply with his duty and his conduct (omission) was wrongful (unreasonable). The court nevertheless correctly held that, in attempting to extinguish the fire, X acted in accordance with the standard of the reasonable person and that he was thus not liable (88-9). Despite the wrongfulness of his conduct in not complying fully with his legal duty, he escaped liability because of the absence of negligence (see also Neethling & Potgieter *Delict* (2015) 167). It is submitted that this explanation of the relationship between wrongfulness and negligence is preferable to the view expressed by Leach JA that the duty concerned is not absolute and by implication, therefore, is limited by negligence.

In conclusion, Leach JA found that the steps taken by the respondent to avoid a fire on its property spreading to its neighbours were reasonable in the circumstances. Therefore, for lack of negligence, the appellant had failed to prove its case and the claim was dismissed (paras [50] [51]).

The most important aspect of the decision is that Leach JA ruled conclusively on the relevance of foreseeability in the determination of wrongfulness, an area of some controversy in

the law of delict. The court held that it was potentially confusing to take foreseeability into account as a factor common to the inquiry into the presence of both wrongfulness and negligence. Such confusion would have the effect of the two elements being conflated and lead to wrongfulness losing its important role as a measure of control over liability. Accordingly, foreseeability of harm should not be taken into account in the determination of wrongfulness, and its role should be confined to the rubrics of negligence and causation. This aspect of the judgment can be supported because it tallies with the *ex post facto* evaluation of wrongfulness which excludes any use of the *ex ante* reasonable foreseeability of harm; also (subject to the Constitutional Court possibly deciding otherwise) it brings certainty to the role of foreseeability.

This approach seemingly also applies to subjective foreseeability (awareness or knowledge) which, according to the court, should rather be used as a factor in determining negligence. But, as has been pointed out, it is established law that subjective foreseeability may indeed play a role in determining wrongfulness *ex post facto.*

Be that as it may, until the Constitutional Court confirms Leach JA's approach to foreseeability and wrongfulness, the final word in this regard has not been spoken. In the meantime, the question remains whether our law will not be unduly impoverished by restricting foreseeability to the watertight compartments of negligence and legal causation, while disregarding the numerous authoritative earlier judgments on the role of foreseeability with regard to wrongfulness. Moreover, if one bears in mind the distinctly different roles that reasonable foreseeability plays in regard to wrongfulness and negligence, the possibility of confusion between these two elements is in all likelihood slight, and this objection to the use of foreseeability for both wrongfulness and negligence may fall by the wayside. Granted, however, this viewpoint cannot be reconciled with the *ex post facto* determination of wrongfulness.

Other aspects of the court's decision worth mentioning are the following. First of all, notwithstanding Leach JA's rejection of the legal-duty approach to the wrongfulness of an omission, this approach remains of paramount importance in establishing wrongfulness in the present field and, to this end, has become engrained in our law of delict. Interestingly enough, Leach JA himself relied on decisions such as *HL & H Timber Products* (above) and *Van Duivenboden* (above) where the legal-duty

approach was applied, while also recognising the legal duty of a landowner to control or extinguish a fire burning on its land. However, the judge's approach in seemingly using negligence to limit the absolute nature of the legal duty may cause confusion between wrongfulness and negligence.

Secondly, notwithstanding criticism of the new test for wrongfulness as the reasonableness of holding the defendant liable, and the fact that this test is merely a recent formulation of one variation of the test for wrongfulness in our law, Leach JA clearly favours this test as the only test for wrongfulness in the present context. In this way, he attempted to set aside the traditional legal-duty approach to establishing the wrongfulness of an omission, but, as indicated, without success. Be that as it may, there does not appear to be any indication of the judge applying the new test for wrongfulness to establish the wrongfulness of the respondent's conduct.

Thirdly, when dealing with the importance of the distinction between wrongfulness and fault, Leach JA's claim that this distinction is criticised by certain academics does not hold water.

Finally, in regard to Leach JA's view that foreseeability may be relevant to both negligence and causation, it should be borne in mind that foreseeability does not play the same role in negligence, on the one hand, and causation, on the other (see, in general, Neethling & Potgieter *Delict* (2015) 211-13 214-16). Whereas, with reference to negligence, harm of a general kind should be foreseeable (see, eg, *Loureiro* (SCA) (above) 416; *Sea Harvest* (above) 839; *Mukheiber* (above) 1077; *Jaftha* (above) paras [22] [23]; cf *Standard Chartered Bank of Canada* (above) 768), foreseeability of the actual harm that has ensued is relevant as regards legal causation ((2017) 14/2 *LitNet Akademies* 813-30 825-6; Potgieter (2017) 14/3 *LitNet Akademies* 975-90 985-7. In passing, it should be noted that in terms of the flexible approach to legal causation (Neethling & Potgieter *Delict* (2015) 200–203), there may be cases where a result may be imputed to the defendant despite the specific result not being reasonably foreseeable, should considerations of reasonableness, justice, and fairness dictate that the defendant be held liable for the harm suffered by the plaintiff (see Potgieter (2017) 14/3 *LitNet Akademies* 975-90).

Negligence

Attack by person released on parole: Negligence of Minister of Correctional Services

In *Naidu v Minister of Correctional Services* 2017 (2) SACR 14 (WCC), [2017] 2 All SA 651, the plaintiff sued the defendant after

she had been attacked in her home by a person on parole. She claimed that the attack was a direct result of the negligent release of the perpetrator (Michaels) on parole. The judgment dealt only with the merits and called for a determination as to the liability of the defendant on the ground of negligence (paras [1] [2]). According to the plaintiff, the defendant failed to act with reasonable care and diligence when determining whether Michaels should become the subject of community correction; failed adequately to take into account Michael's previous convictions and that he had previously violated his parole conditions; and failed to have proper regard to the reports of the Case Management Committee tasked with assessing Michaels. It was averred that the defendant, as custodian and guardian of all sentenced prisoners, had a legal duty to prevent harm to members of the public by sentenced prisoners within her custody and subject to community corrections (para [3]). The defendant conceded that there existed a legal duty on its part to ensure the safety of members of the public such as the plaintiff, sufficient to found liability, and that if it were to be found that the defendant had been negligent in releasing Michaels on parole, such negligence was causally connected to the harm ultimately suffered by the plaintiff. However, the defendant denied any knowledge of the attack or that it was due to any negligence on its part (para [4]). Therefore, the remaining issue for determination was whether the defendant, acting through the Correctional Supervision and Parole Board (the Board), had been negligent in releasing Michaels on parole (para [5]).

The provisions governing the release of a sentenced prisoner on parole are set out in the Correctional Services Act 111 of 1998. According to Meer J, it was common cause that these provisions had not been complied with in the present case (paras [46]-[48]). Next, the judge dealt with whether the failure to comply with the provisions of the Correctional Services Act constituted negligence (para [49]ff). In this regard, the court applied the classic test for negligence as formulated in *Kruger v Coetzee* 1966 (2) SA 428 (A) 430, namely, reasonable foreseeability and preventability of harm (para [49]). Applying this test to the facts at hand, Meer J concluded that a reasonable person in the position of the Board would have foreseen the reasonable possibility that, if released, Michaels would cause harm of the kind he ultimately inflicted on the plaintiff (para [50]), and would have acted differently to prevent his release. Given the absence of evidence that Michaels

had been rehabilitated, the Board, in the circumstances, ought to have taken reasonable steps to guard against the foreseeable harm resulting from Michaels's release on parole, by refusing his parole application. Failure to do so was an act of negligence. A further act of negligence was the failure to comply with the mandatory statutory requirements of section 42(2) of the Correctional Services Act (para [53]). Accordingly, the plaintiff's claim was upheld on the merits (para [54]).

It is not clear in our law whether conduct contrary to a statutory provision is *per se* negligent, or whether the provision merely affords proof of negligence. It should probably be accepted that in such a situation it is incorrect to speak of statutory negligence, and that the statutory provision at best provides *evidentiary material*; the infringement of the provision in question is consequently not conclusive proof of negligence and the general criterion of the reasonable person still applies (see Neethling & Potgieter *Delict* (2015) 157-8).

Negligent failure to prevent fire in university hostel

The plaintiff in *Potgieter v University of Stellenbosch* [2017] 1 All SA 282 (WCC) sustained serious and permanent injuries when, as a student at a hostel of the defendant, he was compelled to escape a fire through the window of his top-floor room (para [1]). He claimed damages from the defendant, asserting that the defendant was obliged to ensure that proper and reasonable measures and procedures were in place, and implemented, to ensure the safety of students in its hostels, including in the case of fire (para [3]). The plaintiff contended that the defendant was aware of the risk which a fire in non-compartmentalised roof voids posed to the residents in such hostels, and had, after a similar fire at a women's residence, taken steps to mitigate the risk (para [4]). It was contended that the steps taken by the defendant in installing smoke detectors linked to an alarm in the roof void of the plaintiff's hostel were entirely inadequate (para [6]).

Cloete J stated that in order to succeed with his claim, the plaintiff had to show that the defendant was guilty of an omission which was negligent, wrongful, and the cause of the plaintiff's injuries (para [17]). He then outlined the applicable legal principles against which the evidence had to be assessed (paras [18]-[30]). The most important of these principles are, in summary: everyone must bear the loss he or she suffers unless,

among other things, a delict has been committed (para [18]); the test for negligence is the reasonable foreseeability and preventability of harm (para [19]); as to foreseeability, fault would be established if a reasonable person in the defendant's position would have realised that harm to the plaintiff might be caused, even though the exact nature of the ensuing harm fell outside that realisation (para [22]); preventability entails four basic considerations – the degree or extent of the risk created by the actor's conduct, the gravity of the possible consequences if the risk of harm materialises, the usefulness of the actor's conduct, and the burden of eliminating the risk of harm (para [20]). Factual causation is determined by the application of the 'but-for' test where the plaintiff must establish that it is more likely than not that, but for the defendant's wrongful and negligent conduct, his or her harm would not have ensued (para [21]). As regards wrongfulness, the court is obliged to make what is in effect a value judgment based, among other things, on its perceptions of the legal convictions of the community and on considerations of policy on grounds rooted in the Constitution of the Republic of South Africa, 1996 (the Constitution) (paras [23] [25]). These considerations dictate whether it would be reasonable to impose liability on the defendant (paras [24] [25]), and adherence to a statutory rule does not in itself exclude negligence, while the breach of a statutory duty does not necessarily constitute negligence (paras [26]-[28]). Further, accountability is but one of the considerations to be taken into account in determining wrongfulness (para [29]), and in the context of wrongfulness, reasonableness has nothing to do with the reasonableness of the defendant's conduct (para [30]).

After an in-depth analysis of the evidence and the facts, and applying the legal principles set out above, Cloete J found that the defendant had been negligent. A *diligens paterfamilias* in the position of the defendant would have foreseen that its failure to take reasonable steps to guard against a similar occurrence would cause injury to students in its hostels, and would also have taken reasonable steps to guard against such an occurrence. The steps taken by the defendant were not reasonable and fell far short of the reasonableness standard. In this regard, the risk of the fire spreading was severe; the gravity of the possible harm if the risk materialised was serious; the defendant was financially able to take reasonable steps adequately to address that risk; and the burden of adequately addressing the risk was not unduly onerous (paras [146] [147]).

The judge also found that factual causation was present because the defendant's failure to take reasonable steps caused the plaintiff's injuries (para [147]).

Cloete J further found the defendant's conduct wrongful. He explained that compliance with a statutory obligation is not in itself determinative of the issue, and that other considerations of policy are equally important. Stereotypes such as those relating to persons in control of dangerous property are not irrelevant, and will still provide guidance to answering the question of whether or not policy considerations dictate that it would be reasonable to impose delictual liability on a defendant in a particular case. According to the judge, foreseeability may also be a factor (para [148]).

The judge rejected the defendant's 'floodgates' argument – ie, the possibility of indeterminate liability. He stated that all cases such as these are fundamentally fact-bound, and that a finding of wrongfulness will depend on each particular set of proven facts. A finding of wrongfulness in a particular matter will not have the automatic effect of opening the floodgates to potential liability for others (paras [150] [151]). Therefore, wrongfulness was established (para [152]).

The judge concluded that the defendant should be liable to the plaintiff for such damages as might be agreed upon or proven in consequence of the injury (para [157]).

It is clear that Cloete J did not expressly use the traditional *boni mores,* legal-duty approach to wrongfulness which we prefer, but referred to the formulation of the new test for wrongfulness: the reasonableness of holding the defendant liable (eg, para [148]). For criticism of the new test, see Neethling & Potgieter *Delict* (2015) 80-85. In this regard, it should again be emphasised that the reasonableness of a person's conduct indeed plays a prominent role in determining delictual wrongfulness, contrary to Brand J's pronouncement in *Le Roux v Dey* (above para [122]), echoed by Cloete J in paragraphs [30] and [149], that it does not. In addition, as Froneman J also indicated in *Masstores (Pty) Ltd v Pick 'n Pay Retailers (Pty) Ltd* 2017 (2) BCLR 152 (CC), 2017 (1) SA 613 paragraph [48] (discussed below), the new wrongfulness test does not necessarily assist in determining when it is reasonable to hold a person liable. Further, Cloete J's statement that foreseeability is also a factor to be taken into account in determining wrongfulness (para [148]) is no longer valid in light of the

Supreme Court of Appeal's contrary decision in *MTO Forestry (Pty) Ltd v Swart NO* (above) paragraph [18].

Medical negligence

The plaintiff in *Joubert v Meyer* [2017] 3 All SA 878 (GP) sued the defendant, a plastic surgeon, for damage arising from an abdominoplasty – commonly referred to as a 'tummy tuck' – performed on her by the defendant. The plaintiff claimed general damages, past medical expenses, and future medical expenses (para [98]). The merits of the case were settled on the basis that the defendant undertook to pay 90 per cent of the plaintiff's proven or agreed loss arising from the performance of the surgical procedure. The court had to decide which of the *sequelae* complained of arose from the incident and complications arising therefrom, and what damages, if any, were to be awarded. In this regard, Avvakoumides AJ had to determine whether the claim was based on breach of contract ('breach of a legal duty', as the judge would have it) or delict ('breach of a duty of care', in his words) (para [128]). The court confirmed as trite law that the test for negligence in the case of members of the medical profession is 'not whether a medical professional acted as a reasonable ordinary man-on-the-street would, but whether the medical professional acted like a reasonable medical professional, with the same training and knowledge, would have acted' (para [125]; see also Neethling & Potgieter *Delict* (2015) 145-7). It is important to establish the correct basis for the claim because general damages cannot be claimed for breach of contract (para [120]; see *Administrator of Natal v Edouard* 1990 (3) SA 581 (A), [1990] 2 All SA 374; Neethling & Potgieter *Delict* (2015) 272-3), but only if a delict has been committed. In exercising its discretion, the court held that the claim was based in delict and that general damages for pain, suffering, discomfort, and loss of amenities of life could, therefore, be claimed (paras [129]ff [136]), in addition to damages for, among other things, psychotherapy sessions and medical expenses (paras [133]-[135]). The judge discussed the principles to be applied in determining general damages (paras [136] [137]; see, in general, JM Potgieter, L Steynberg & TB Floyd *Visser & Potgieter Law of Damages* 3ed (2012) 108ff) and awarded general damages of R200 000 (para [128]).

Negligence of financial services provider

Oosthuizen v Castro (Centriq Insurance Company Ltd as Third Party) [2017] 4 All SA 876 (FB) was about the loss sustained by

the plaintiff, a widow, who invested R2 million of the proceeds of her husband's life insurance policy in the notorious Sharemax scheme on the advice of the respondent, a financial services provider or broker (FSP), and the obligation of an insurance company (the third party) to indemnify the FSP (para [2]). Apart from an amount of R1 400, she received no further interest and/or dividends and the total amount of the capital was lost. She instituted a claim for damages against the defendant (para [9]), alleging, among other things, that the defendant had failed to act honestly and fairly in the interest of the plaintiff in recommending the investment scheme; to furnish objective financial advice to the plaintiff appropriate to her needs and interests; and to exercise the degree of skill, care and diligence to be expected of an authorised financial services adviser furnishing investment advice (para [10]). The defendant admitted the agreement relied upon by the plaintiff and that he had given financial advice of a general nature, but pleaded that the plaintiff elected to make the investment in Sharemax notwithstanding the fact that he had drawn her attention to a recent negative article about Sharemax in a newspaper. He denied any alleged breach of contract (para [11]). With regard to the damages claim, the duties of a financial advisor such as the defendant had to be considered, as well as the rules of construction of contracts in general and insurance contracts in particular. Daffue J relied heavily on the *locus classicus*, *Durr v Absa Bank Ltd & another* 1997 (3) SA 448 (SCA). In *Durr* (a case dealing with an investment broker; see also *Page v First National Bank Ltd & another* 2009 (4) SA 484 (E) 488-9; H Koziol 'Incorrect advice to investors and the liability of banks' (2011) 74 *THRHR* 1ff) the Supreme Court of Appeal approved the approach in *Van Wyk v Lewis* 1924 AD 438 444 and emphasised that it is for the court to decide what is reasonable under the circumstances. It will pay considerable attention to the views of the profession, but is not bound to adopt them. In respect of the facts before it, the court held that the appropriate standard was not that of the average, typical broker of modest accomplishments, since the acceptance of such a standard would allow a definition chosen by a witness (for the defendant) for his own purposes, to dictate the result, so making the enquiry as to what was required of a particular kind of broker pointless. In *Durr* the appropriate standard was that of the regional manager of the broking division of a financial institution professing investment skills and offering expert investment advice (see Neethling & Potgieter *Delict* (2015) 147).

After also referring extensively to authority such as relevant parts of the Financial Advisory and Intermediary Services Act 37 of 2002 (the FAIS Act), case law, and the opinions of writers (paras [27]-[49]), Daffue J set out the legal principles and authorities relevant to the liability of a financial advisor and their application in the present case (paras [50]-[59]). He found that the defendant was aware that the plaintiff was in a vulnerable position (para [52]) and stressed that she could not afford to lose 'two cents of her investment' (para [53]). There were flashing red lights around the investment scheme that required him to proceed with caution in advising the plaintiff. He should have known that a return on an investment in the scheme was pie in the sky. His inexplicable, but obviously poor, advice was indicative of lack of skill, care, and diligence, and was not commensurate with the commission he had received. The defendant did not say much to the plaintiff, but what he said was false (para [58]). He acted contrary to the provisions of section 16 of the FAIS Act and the Codes of Conduct published since then, and to what the law expects of FSPs, when he provided the financial advice that led to the investment. The judge was satisfied that the defendant did not act as could have been expected of a reasonable FSP (para [59]) and concluded:

> Much more may be said of the defendant's actions and/or inactions, but I conclude by finding that defendant was negligent, and even dishonest, when he advised plaintiff, by placing no credence on the negative articles in the press and failing to objectively investigate the criticism. He failed to exercise the degree of skill, care and diligence which one is entitled to expect from a FSP (para [60]).

The defendant was insured in this matter by the third party (the insurer) cited in the case. The insurer relied on an exclusion of liability clause contained in the insurance contract, claiming that the consequences of the defendant's action and/or advice fell squarely within the parameters of the exclusion clause. Daffue J did not agree and held that the FSP was entitled to indemnification, bearing in mind that the ultimate beneficiary was the client who received wrong advice (paras [61]-[76]; for a full discussion of this aspect of the case, see the Chapter 'Insurance').

The defendant was ordered to pay the plaintiff the capital amount of R2 million and interest as set out in the court order, and

the insurer was ordered to indemnify the defendant against the latter's liability to the plaintiff (para [80]).

Negligence of rail commuter service operator

In *Passenger Rail Agency of South Africa v Moabelo* [2017] 4 All SA 648 (SCA) the respondent claimed damages from the appellant (the PRASA), alleging that he had been injured just outside the railway station after having been pushed from a crowded moving train with open doors (paras [4]-[6]). This version was disputed by the appellant. It claimed that the respondent was a pedestrian who had run or walked in front of an oncoming train outside the confines of the station when it was dangerous or inopportune to do so (paras [7]ff). The trial court found that the appellant's negligence had caused the respondent's injuries and held it liable for damages. On appeal, the full court confirmed the order of the trial court, and dismissed the appeal. The main issue before the Supreme Court of Appeal was whether the appellant's or the respondent's version of the facts should be accepted (para [3]).

Mbatha AJA, delivering the majority judgment, accepted the respondent's version of the facts (paras [27] [41]). The court applied the decision of the Constitutional Court in *Mashongwa v Passenger Rail Agency of South Africa* 2016 (2) BCLR 204 (CC), 2016 (3) SA 528 (for a discussion of this case see 2016 *Annual Survey* 727-31) that the PRASA's failure to ensure that the doors of a train were closed when the train left the station had been negligent. In *Mashongwa* it was also held that the PRASA had a legal duty to protect its passengers from physical harm by, among other things, keeping the doors closed while an overcrowded train was in motion. The Constitutional Court found that this situation posed a real danger to passengers on the train (paras [32]-[35]). Mbatha AJA confirmed that in the present case it was reasonably foreseeable that a train operating at peak hours, in motion with open doors, would result in injury to commuters (para [42]), and that the trial court could not be faulted for finding in favour of the injured repondent. Accordingly, the appeal was dismissed.

In a minority judgment, Ponnan JA found that the respondent had failed to establish factual or legal causation, and therefore that his claim should have been dismissed (paras [46]ff).

See also, as to negligence, the discussion of *TS & another v Life Healthcare Group (Pty) Ltd & another* (above).

Causation

Liability for death of baby at day-care centre

In *Barley & another v Moore & another* [2017] 3 All SA 799 (WCC) the plaintiffs instituted a delictual claim for damages against the defendants based on the death of their five-month-old daughter at the first defendant's day-care centre. It appeared that the child rolled off a bed on which she was sleeping and died. The second defendant, the provincial Department of Social Development, admitted that it had a constitutional and legislative mandate (in terms of the Constitution, the Child Care Act 74 of 1983, the Children's Act 38 of 2005, and relevant regulations and guidelines) to regulate, manage, and control the provision of early childhood development services in the province, as well as to respect, protect, and promote all rights, including the right to life, of all children (including that of the deceased infant) within the province (paras [4]-[6]).

The plaintiffs averred that the first defendant had a legal duty to ensure the safety and security of the child while in her custody and care, and that the death of the child was a direct result of the her wrongful and negligent breach of a legal duty, among other things, in that she had left the child alone and unattended on a bed and failed to place her in a cot or some other safe resting area (para [3]). Dlodlo J confirmed that it was probable that the child had rolled off the first defendant's bed onto the floor and that her positioning on the floor led to a lack of oxygen and death by suffocation. The evidence led to an inescapable conclusion that the first defendant's actions were clearly wrongful and negligent (para [47]).

The plaintiffs alleged that the Department had failed in its duty in a number of ways, including by registering the first defendant's facility without conducting a proper inspection (para [7]). The Department's defence was essentially a bald denial that it had any positive legal duty as alleged by the plaintiffs, and that it had wrongfully and/or negligently breached its legal duty in any respect (para [8]).

The court found that had the Department processed the first defendant's application for registration and visited the premises (which it was required to do as part of the evaluation of the application), it would have realised that the first defendant and her staff were not properly qualified or trained to look after infants, and that they were unfamiliar with and had failed to implement

safe sleep practices (para [64]). The death of the child would probably have been prevented had the second defendant intervened as it could and should have done (para [65]).

Dlodlo J stated that it is trite law that in order to succeed in a delictual claim, a claimant must prove causation, wrongfulness, fault (negligence), and harm (para [65]). Factual causation must be determined through the 'but-for' test where the plaintiff must prove, on a balance of probabilities, that, but for the negligent omissions of the Department, the child would not have died. The judge confirmed the approach to factual causation in recent case law, namely that it is a matter of common sense whether the facts established a sufficiently close link between the omission and the harm (paras [66]-[70]). He found that had the Department complied with its obligations after it received the first defendant's application for registration, the risk of the first defendant leaving the child unattended and alone on the bed would have been eliminated, and her death would have been avoided. Therefore, factual causation had been established (para [70]) (also see, as to factual causation, Neethling & Potgieter *Delict* (2015) 193-4).

As for wrongfulness, Dlodlo J commenced his discussion as follows:

> The Department's omission will only be unlawful if it occurred in circumstances that the law regards as sufficient to give rise to a legal duty to avoid negligently causing harm. The wrongfulness enquiry is based on the duty not to cause harm and that (in the case of negligent omissions), the focus is on the reasonableness of imposing liability. An enquiry into wrongfulness is determined by weighing competing norms and interests. The criterion of wrongfulness ultimately depends on a judicial determination of whether, assuming all other elements of delictual liability are present, it would be reasonable to impose liability on a defendant for the damages flowing from specific conduct. Whether conduct is wrongful is tested against the legal convictions of the community which are 'by necessity underpinned and informed by the norms and values of our society, embodied in the Constitution' (see *Oppelt v Department of Health, Western Cape* [2016 (1) SA 325 (CC) para [51]] (para [71], cf para [73]).

Closely examined, this exposition is a clear example of the conciliatory approach between the traditional *boni mores* legal-duty test for wrongfulness, and the new test of the reasonableness of holding the defendant liable (see the discussions of *TS & another v Life Healthcare Group (Pty) Ltd & another* and *MTO Forestry (Pty) Ltd v Swart NO* (above); Neethling & Potgieter (2017) 5 *TSAR* 98-103).

Dlodlo J continued with an in-depth exposition of all the legal principles with regard to wrongfulness developed in our law, referring to and discussing cases such as: *Mashongwa v Passenger Rail Agency of South Africa* (above); *Van Eeden v Minister of Safety and Security* (*Women's Legal Centre Trust as Amicus Curiae*) (above); *Loureiro & others v Imvula Quality Protection (Pty) Ltd* 2014 (3) SA 394 (CC); *Olitzki Property Holdings v State Tender Board & another* 2001 (3) SA 1247 (SCA); *Minister of Safety and Security v Van Duivenboden* (above) and *Minister of Safety and Security & another v Carmichele* (above) (para [74]ff). The judge concluded that the Department had acted wrongfully:

> An important consideration in favour of recognising delictual liability for damages on the part of the Department in circumstances such as the present is that there is no other practical and effective remedy available to the plaintiffs. Conventional remedies such as review and *mandamus* or interdict do not afford plaintiffs any relief at all. The only effective remedy for plaintiffs is a private law delictual action for damages. . . . [T]here is no reason (no policy considerations) to depart from the general principle that the Department (as an organ of State), will be liable for its failure to comply with its constitutional and legislative duty to protect [the child]. On the contrary, Ava [the deceased baby] was pre-eminently a person who required the State's protection . . . Thus, in my view, it would be eminently reasonable to impose legal liability on the Department in this matter (para [84]).

According to Dlodlo J, legal causation – as the second leg of the causation enquiry apart from factual causation – relates to whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue, or whether the loss is too remote (para [85]). The judge was of the view that

> the question of legal causation is not a logical concept concerned with causation but a moral reaction, involving a value judgment and applying common sense, aimed at assessing whether the result can fairly be said to be imputable to the defendant. If the negligence of the Department caused or contributed to the death of [the child], then it could never be contended by the Department this was too remote a consequence to give rise to legal liability. I hold that policy considerations based on the norms and values of our Constitution and justice point to the reasonableness of imputing liability to the Department. I further hold that failure of the Department to prevent [the child's] death is accordingly the kind of conduct that ought to attract liability (para [87]).

The statement does not accurately reflect the flexible approach to legal causation as set out in, for example, *S v Mokgethi & others* 1990 (1) SA 32 (A) 39ff. Here it was stated that the basic

question is whether there is a sufficiently close relationship between the wrongdoer's conduct and its consequences for the consequences to be imputed to the wrongdoer in view of policy considerations based on reasonableness, fairness, and justice. Moreover, the statement appears to confuse the flexible test for legal causation with the new wrongfulness test. This may eventually have the unfortunate and unacceptable result of legal causation becoming redundant as a separate element of delict (Neethling & Potgieter *Delict* (2015) 82-3 n332). Be that as it may, Dlodlo J concluded that the element of legal causation had been satisfied (para [87]).

Applying the reasonable foreseeability and preventability test for negligence as formulated in *Kruger v Coetzee* 1966 (2) SA 428 (A) 430, Dlodlo J concluded that the Department had acted negligently. As far as the element of foreseeability is concerned, the judge stated that even where the circumstances of a case are deemed somewhat unusual, the element of foreseeability will be met if the general nature of the harm was foreseeable (para [88]).

As for the element of harm, Dlodlo J simply stated that the element was not in dispute (para [91]). Unfortunately, it is not clear from the judgment which of the plaintiffs' rights had been infringed as a result of the child's death or what the nature of the harm was.

The plaintiffs were found to have proved liability on the part of both defendants on a balance of probabilities. The defendants were jointly and severally liable to pay damages to the plaintiffs arising from the wrongful death of their child (paras [92] [93]).

See also, as to causation, the discussion of *TS & another* (above).

Damages

Future medical expenses: Tender of services in lieu of monetary award

In *Premier, Western Cape v Kiewitz* 2017 (4) SA 202 (SCA) the respondent sued the Western Cape provincial government for damages suffered by her son, who became blind when staff at the provincial hospital at which he was born, failed to detect an eye disease at birth. All damages – save for a claim for the son's future medical expenses – had been settled. In its 'plea in mitigation', the province undertook to provide all future medical care required by the son for his sight impairment, arguing that failure to accept the undertaking and thus mitigate the damage

would result in a concomitant reduction in the damages. The High Court dismissed the plea. In an appeal to the Supreme Court of Appeal, Nicholls AJA commenced his analysis by stating that delictual damages have been defined as the 'monetary equivalent of damage awarded to a person with the object of eliminating as fully as possible his or her past as well as future damage' (para [4], with reference to Potgieter, Steynberg & Floyd *Damages* 185). He continued:

> It is trite that the primary purpose of awarding delictual damages is to place the injured party in the same position as they would have been in, absent the wrongful conduct. As a general rule, restitution in kind is prohibited where patrimonial loss, such as past and future medical expenses, past and future loss of income and loss of support, has been suffered as a result of personal injury. Claimants have a duty to mitigate their [damage] but this goes no further than obliging a plaintiff to take reasonable steps to minimise the loss, either by reducing the original loss or by averting further loss (para [4]).

In support of their plea, the Western Cape provincial government argued that the respondent should mitigate the loss by accepting health services based, not on the exorbitant cost of private healthcare, but free of charge in the public health system. As the damages in respect of future medical costs would be reduced to zero, the son and his mother consequently had a duty to accept the tender. In the result, the plea would absolve the province from paying a monetary award (para [5]). Nicholls AJA did not agree. According to him, the province's plea to offer restitution in kind, rather than a monetary award, boiled down to an attempt to abolish the long-established common-law rule that compensation for patrimonial loss should sound in money (para [6]). This would also undermine the application of the once-and-for-all rule (paras [8]-[10]) as it would provide fertile ground for future litigation, a situation that this rule was designed to avoid (para [7]). In the court's opinion, digressing from the once-and-for-all rule in situations such as the present is a policy decision for the legislature and not one for judicial reform (para [12]; see also *MEC for Health and Social Development, Gauteng Provincial Government v Zulu* [2016] ZASCA 185 (30 November 2016) para [12]). Accordingly, the appeal was dismissed.

We agree with the court's conclusion on the facts in this case, that, despite the Western Cape provincial government's disavowal of any reliance on the development of the common law, its plea in mitigation offended against both the once-and-for-all rule and the

rule that compensation in bodily injury matters must comprise a monetary award, and that the plea was thus ill-conceived and unsustainable (para [13]). (See Potgieter, Steynberg & Floyd *Damages* 153-84 185-9 respectively on the once-and-for-all rule, the principle that damages must be expressed in money, the concept of 'restitution in kind' and the approach that, in delictual liability, an order for restitution in kind may generally not be given, as well as that, in the absence of a specific rule, neither the plaintiff nor the defendant may insist on compensation for loss in a form other than an award of damages.)

The matter raised in *Kiewitz* also came before the Constitutional Court in *Member of the Executive Council for Health and Social Development, Gauteng v DZ obo WZ (Member of the Executive Council for Health, Eastern Cape & another as Amici Curiae)* 2017 (12) BCLR 1528 (CC). In the latter case, a child was born with cerebral palsy caused by asphyxia due to the negligence of hospital staff. The applicant, the Member of the Executive Council for Health and Social Development in Gauteng (the MEC), conceded liability for future medical expenses, but pleaded that she did not have to pay these expenses in one lump sum, but could rather give an undertaking to pay service providers directly for future medical expenses as and when they might arise. She contended that this could be done under common law, and that, if it could not, the court should develop the common law accordingly. Both the High Court and the Supreme Court of Appeal, following the same reasoning as in *Kiewitz*, found against the MEC in this regard. The MEC approached the Constitutional Court for leave to appeal the judgment of the Supreme Court of Appeal. The Constitutional Court granted leave to appeal but dismissed the appeal.

In the majority judgment, Froneman J indicated that the MEC and various *amici curiae* contended that delictual compensation need not necessarily sound in money, but could also be paid in kind; that the once-and-for-all rule applied only to the determination of liability on the merits of a delictual claim, and not to the quantification of damages; and that in circumstances such as those in the present case it was open to a defendant to challenge an amount claimed as damages on the basis that the sum was not reasonable because the plaintiff would be likely to use public healthcare rather than private healthcare, the former being as good as, and cheaper than, the latter. Claims for future medical loss, it was argued, may sometimes best be satisfied by the

provision of actual medical services, rather than the payment of money (para [12]).

Froneman J pointed out, with reference to *Standard Chartered Bank of Canada v Nedperm Bank Ltd* (above) 782, that the common-law rule is that when damages are due by law, they are to be awarded in money, and that this rule still stands (para [14]). Likewise, the once-and-for-all rule still forms part of our law (para [15]). This rule is to the effect that a plaintiff must generally claim all past and prospective damages flowing from a single cause of action, in one action (para [16]). Froneman J found that the MEC's first two general propositions: that delictual compensation need not sound in money; and that the once-and-for-all rule does not relate to the quantification of damages, but only to the determination of liability on the merits, do not reflect our current law (para [17]). However, he found the MEC's third proposition – that it is open to counter the method and measure of the claim for damages on the basis that the amount claimed is not reasonable because a plaintiff is more likely to use public healthcare, which is as good as, and cheaper than, private healthcare – feasible (paras [18]ff), relying on *Ngubane v South African Transport Services* 1991 (1) SA 756 (AD); [1991] 4 All SA 22. According to him, this approach is in accordance with general principles in relation to the proof of damages (para [21]) and does not offend the once-and-for-all rule (para [22]). However, if the damages claimed have been proven reasonable, a lump sum assessment must be made of the future loss (para [23]). If not, at least four possibilities exist:

> The first is that no damages for future medical expenses should be awarded if the evidence shows that the claimant is likely not to suffer *any* loss in the future. The second is that, if the evidence establishes only a *lesser* loss, then that sum must be awarded as the monetary damages. The third is that the assessed loss may be ordered to be paid in instalments [as in *Wade v Santam Insurance Company Ltd* 1985 1 PH J3 (C)]. The fourth is that the defendant be ordered to ensure the actual rendering of the medical services that it claims obviates or reduces the claimant's monetary loss. The first two possibilities fall comfortably within the current law of monetary compensation that must be paid 'once and for all'. The latter two may not [para [24]).

Froneman J stated that our law currently requires evidence to substantiate a defence that a claimant has suffered no or less damage than is claimed, for reasonable future medical expenses. As the MEC elected not to present any evidence to show that the

claim for future medical expenses was unreasonable, the pleas had to fail on the state of our existing law. The only question was whether the development of the common law could come to her assistance (para [26]). After a thorough and in-depth investigation (paras [27]ff), Froneman J found that the required factual material upon which the assessment of the development of the common law to be made, was absent. For this reason, the appeal had to fail (para [57]). However, the failure of the appeal did not mean that the door to further development of the common law is shut: 'Factual evidence to substantiate a carefully pleaded argument for the development of the common law must be properly adduced for assessment. If it is sufficiently cogent, it might well carry the day' (para [58]). (See in general Potgieter, Steynberg & Floyd *Damages* 153-94.)

Joint wrongdoers

See the discussion of *TS & another v Life Healthcare Group (Pty) Ltd & another* and *Barley & another v Moore & another* (above).

Loss of support – effect of widow's physical appearance and nature on remarriage contingency

In *Esterhuizen & others v Road Accident Fund* 2017 (4) SA 461 (GP) the plaintiff instituted a claim for loss of support after the death of her husband in a motor vehicle accident. The merits were conceded by the defendant and it was liable for 100 per cent of the proven damages. All the disputes between the parties were settled, but for the contingency to be applied to allow for the possibility of remarriage (para [3]).

Tolmay J pointed out that the possibility of remarriage is usually taken into account when a claim for loss of support is considered. In this regard, factors such as the claimant's number of children and attitude to marriage, as well as her appearance and personality, are considered in determining her chances of remarriage (para [7]). The judge found that cases such as *Legal Insurance Company Ltd v Botes* 1963 (1) SA 608 (A) 616–8 and *Snyders & Another NO v Groenewald* 1966 (1) SA 857 (C) as they relied on a woman's appearance and nature, revealed a rather outdated and offensive approach towards women. To take appearance and nature into consideration is not in accordance with the values of dignity and equality enshrined in our Constitution. In *The Member of the Executive Council Responsible for the Department of Road and*

Public Works, North West Province v Oosthuizen GP 671-2007 (2 April 2009) it was stated that reliance on appearance is offensive and should not be part of our law (paras [10] [11]). Tolmay J agreed with the approach in *Oosthuizen* (above) – an award of damages should be fair and to allow for the possibility of remarriage is appropriate, but no reliance should be placed on factors such as appearance (para [12]). It should also be borne in mind, in considering the remarriage contingency, that a second marriage may not necessarily result in financial support (para [13]). The judge concluded:

> To determine the plaintiff's prospects of remarriage and the possibility of financial support is to gaze into the proverbial crystal ball. I take into consideration all the aspects alluded to in her evidence. I take note of the fact that the care of the children might make it more difficult for her to focus on her own life and will probably impact on her social life. She is relatively young, and I think one can accept that a younger woman might be more inclined to remarry, not based on appearance or desirability but rather based on the fact that one might be more inclined when you are younger to take another chance at marriage.

Tolmay J held that the twenty per cent contingency proposed by the plaintiff was too low, that the 39 per cent proposed by defendant was too high, and that a 27 per cent contingency deduction will be fair under the circumstances.

As to general damages, see also the discussion of *Mathe v Minister of Police* 2017 (2) SACR 211 (GJ), [2017] 4 All SA 130 and *Bridgman NO v Witzenberg Municipality (JL & another intervening)* [2017] 1 All SA 466 (WCC), 2017 (3) SA 435 below.

Aquilian Liability

Interference with contractual relationship

Masstores (Pty) Ltd v Pick 'n Pay Retailers (Pty) Ltd 2017 (1) SA 613 (CC), 2017 (2) BCLR 152 was preceded by three similar cases (*Pick 'n Pay Retailers (Pty) Ltd v Liberty Group Ltd* 2015 (4) SA 241 (GP); *Masstores (Pty) Ltd v Pick 'n Pay Retailers (Pty) Ltd* 2016 (2) SA 586 (SCA); *Shoprite Checkers* (*Pty*) *Ltd v Masstores (Pty) Ltd* [2016] 2 All SA 351 (SCA), [2016] 3 All SA 926 (ECG)). In all four cases, it was alleged that Masstores committed a delict by interfering with the exclusive contractual relationship between a supermarket (Pick 'n Pay or Shoprite Checkers) and the owner or lessor of a shopping centre in terms of which the supermarket had the exclusive right to sell groceries in the shopping centre. In the first three cases an interdict was granted against Masstores

to prohibit it from trading as a general food store in its Game store in the centre (for discussions, see 2015 *Annual Survey* 863-5, 2016 *Annual Survey* 758-62, and, for a review of the Constitutional Court judgment, J Neethling & J Potgieter 'Bemoeiing met 'n uitsluitende kontraktuele verhouding getroef deur vrye mededinging' (2017) 14/1 *LitNet Akademies* 374-88, on which the present discussion is based). In the case under discussion here, the Constitutional Court came to the opposite conclusion.

Froneman J started by emphasising the difficulty of determining the dividing line between lawful and unlawful interference with the trade of another (617). According to him, inducement to breach of contract, which is a recognised form of delict, did not arise in the present case. Rather, the case concerned whether the interference by Masstores in a contract between Hyprop (the owner of the shopping complex and lessor) and Pick 'n Pay (the lessee) was delictually actionable, and therefore allowed for the granting of an interdict against Masstores (para [3]). The requirements for a final interdict are, according to the court: a clear right; an injury actually committed or reasonably apprehended; and the lack of an adequate alternative remedy (para [8]).

Masstores alleged that the Supreme Court of Appeal interpreted the decision in *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2015 (1) SA 1 (CC) incorrectly. Pick 'n Pay argued that its claim fell squarely within the established deprivation category of interference cases recognised in *Country Cloud* (above), and was therefore a case where wrongfulness need not be established positively but could be presumed. Even without that initial presumption, it contended that wrongfulness had nevertheless been established (para [11]). Froneman J stated that the issues arising from this were:

(a) Whether Pick 'n Pay's claim falls within the alleged recognition in *Country Cloud* of a second category of delictual interference with contractual relations (narrow delictual enquiry).
(b) If it does not, a further issue may arise, namely whether Masstores' conduct, while not falling into the established categories of the delict of unlawful interference with contractual relations, nevertheless was actionable on an extended or analogous application of the principles of the delict of unlawful competition (extended unlawful competition enquiry) (para [12]).

With regard to the first requirement, the court was critical of three statements made in *Masstores* (SCA) with regard to the

decision in *Country Cloud* (CC) (above). The first was that the reference in *Country Cloud* (CC) (above) to the 'usurpation of rights' in *Lanco Engineering CC v Aris Box Manufacturers (Pty) Ltd* 1993 (4) SA 378 (D) could be equated with the examples of 'deprivation of interests'. According to Froneman J, this did not happen as *Country Cloud* (CC) (above) did not use the phrase deprivation of interests at all. He continued: 'Whatever the merits of a pure ''deprivation'' case may be, this Court's decision in *Country Cloud* cannot serve as authority that it is a case where wrongfulness does not need to be established positively but can be presumed' (para [18]).

The second proposition (paras [20] [21]) was that *Country Cloud* (CC) (above) held that there are two types of delictual action in interference cases, namely those where inducement is present, and others where there has been a breach of a legal duty or the infringement of a subjective right. According to Froneman J, from this it can be deduced that in instances of inducement, such a breach or violation of a right is not part of the wrongfulness enquiry, and that this would be both unfortunate and wrong. That statement was not made in *Country Cloud* (CC) (above). That court referred to cases of inducement which arguably could be *prima facie* wrongful, but earlier referred to the statement in *Loureiro* (above) that the wrongfulness enquiry is 'based on the duty not to cause harm – indeed to respect rights – and questions the reasonableness of imposing liability'. Froneman J emphasised that our law of delict is based on general principles of liability and not on separate, independent torts. This also applies to the different forms of unlawful competition where the right to goodwill is involved and where inducement cases are no exception. Inducement without harm to, or the infringement of, the right to goodwill, will usually not be wrongful.

The third proposition (paras [22] [23]) was that because *Country Cloud* (CC) (above) recognised *dolus eventualis* as an appropriate form of fault in interference cases, its presence would be sufficient to constitute an actionable delict on the part of Masstores. Nevertheless, according to Froneman J, the court in *Country Cloud* (CC) (above) paragraphs [39] [40] went further and, in the footsteps of *Roux v Hattingh* 2012 (6) SA 428 (SCA), opined that the intensity of fault – for example, where the conduct was intentional, or where there was knowledge that it could entail serious consequences (but not negligence: see also *Cape Empowerment Trust Limited v Fisher Hoffman Sithole* [2013] 2 All

SA 629 (SCA), 2013 (5) SA 183 191-3) – can be relevant to the inquiry of wrongfulness. However, as has been pointed out repeatedly, intent in its legal technical sense, which includes consciousness of wrongfulness, cannot be involved here (see Neethling & Potgieter *Delict* (2015) 46-7). Indeed, the fact that a person directed his or her will to causing a detrimental result (the other leg of intent besides consciousness of wrongfulness) can, just as malicious motive, be relevant in finding that he or she acted wrongfully, but then there is no intent in its technical legal sense (Neethling & Potgieter *Delict* (2015) 252). Therefore, so long as it is clear that intent as determining factor for wrongfulness cannot be used in its technical legal sense, such use is acceptable.

Froneman J summarised the preceding discussion as follows (para [24]):

> So, in summary, this Court's judgment in *Country Cloud* is no authority for the proposition that the deprivation of contractual rights in delictual claims for interference with contractual relations is *prima facie* unlawful. Nor did it lay down that in inducement cases the wrongfulness enquiry need not be concerned with the duty not to cause harm or the infringement of rights. And it confirmed that the degree or intensity of fault may indeed play an important role in the wrongfulness enquiry in these kinds of claims.

In the light of the fact that Froneman J refuted the three propositions that the Supreme Court of Appeal made in *Masstores* (SCA) (above) with regard to the decision in *Country Cloud* (CC) (above), he held that Masstores's trading as a general supermarket did not deprive Pick 'n Pay of its entitlement to continue trading as a supermarket in the shopping centre. There may have been a deprivation of a part of Pick 'n Pay's trading interest, namely its exclusivity, but Masstores had not usurped that exclusivity: 'Masstores did not usurp any exclusive right of Pick 'n Pay and appropriate it as its own. It claims no entitlement to exclusivity' (para [25]). As a result, Pick n Pay had not proved wrongfulness on the ground of interference with a contractual relationship by Masstores.

The question, however, remained whether Pick n Pay was not guilty of the extended form of the delict of unlawful competition (paras [27]-[29]), and here (para [30]) the general principles of Aquilian liability had to be applied, namely whether there was a wrongful, culpable act which caused damage (in this case, pure economic loss) to another. In cases of unlawful competition it is

recognised that the loss can lie in the infringement of the right to goodwill or the legal duty to respect this right (para [30]). Although the general right to goodwill enjoys protection in our law, it is not this right that Pick 'n Pay wished to protect, but its exclusive right to trade in terms of its rental agreement with Hyprop. Froneman J continued (paras [33] [36]):

> Our law does not usually recognise this kind of exclusive right as worthy of general protection. The reason lies in the fact that the underlying purpose of the law of unlawful competition is to protect free competition, not to undermine it by making it less free. Our courts have often acknowledged the need for protection of free competition as an important policy consideration when assessing the unlawfulness of competitive conduct by confirming the need for free and active competition or by taking into account that by prohibiting competition an unlimited monopoly will be bestowed upon the complainant . . . As a general proposition then, there is no legal duty on third parties not to infringe contractually derived exclusive rights to trade. (See especially also *Taylor & Horne (Pty) Ltd v Dentall (Pty) Ltd* 1991 (1) SA 412 (A) 421-2, cited in para [34].)

The question then arose whether the circumstances *in casu* justified a different finding. After a thorough investigation, Froneman J came to the conclusion that an analogous argument on the ground of existing authority did not constitute a convincing case for the extension of the protection of Pick 'n Pay's exclusive right (paras [37]-[46]). This could indicate that the extension should not take place, or perhaps that it should rather be sought in general principles (para [47]). In order to determine wrongfulness in cases not covered by existing precedent, the *boni mores* or reasonableness criterion should be utilised. According to him, this test has recently been refined in decisions of the Constitutional Court and the Supreme Court of Appeal in matters that did not involve the delict of unlawful competition. The refinement probably lies in the recognition that, ultimately, the wrongfulness enquiry questions 'the reasonableness of imposing liability'. Froneman J added, and this is very important: 'Recognising that reality, however, does not necessarily assist in determining when it is reasonable to do so' (para [48]).

Froneman J continued (para [49]) that, because the *boni mores* or reasonableness criterion on its own is often too vague to provide a rational yardstick for the delimitation of the right to goodwill in the wrongfulness enquiry, J Neethling *Van Heerden-Neethling Unlawful Competition* (2ed (2008) 128-33) suggests that the particular concretisation of the *boni mores* test may be found in the so-called competition principle (129 and n83):

> The competition principle is therefore that the competitor who delivers the best or fairest (most reasonable) performance, must achieve victory, while the one rendering the weakest (worst) performance, must suffer defeat . . . Victory over a rival may be obtained in two ways: either by offering the same performance at a lower price, or by offering a better performance at the same price.

Froneman J (para [50]) also pointed out that Neethling *Unlawful Competition* 128–33 recognises that this principle can be properly applied only where the activities of the competitors are comparable, or where the playing fields are even. Where this is the case, or where there is performance (merit) competition, competitive conduct by a rival will in principle be lawful. Applying the competition principle to the facts in this case, the same conclusion is reached according to the judge, namely that as a general proposition there is no legal duty on third parties not to infringe contractually derived exclusive rights to trade. The underlying rationale is the same: exclusive trading rights make the competitive field uneven (para [51]).

According to Froneman J, the question arose whether there is nevertheless room for a delictual claim elsewhere. According to him, this may possibly lie in the unreasonable manner in which Masstores exercised its rights. Liability in these kinds of circumstances has been variously described as grounded in malice, or as an abuse of rights, or where the level of intention or other fault-related elements such as 'motive to cause' are highly relevant in establishing wrongfulness (para [52]).

Accordingly, the appeal succeeded (para [53]). Froneman J made short thrift of the minority judgment of Jafta J who was of the view that Pick 'n Pay's claim for an interdict was based on contract (paras [55]ff).

In summary, the following comments can be made on the salient aspects of the four decisions on the topic of interference with an exclusive contractual relationship. In the courts below, it was held that interference with such a contractual relationship by a third party which results in a contracting party not obtaining the performance to which it is entitled is wrongful. However, the Constitutional Court decided that in our law such exclusive agreements are not protected against third-party interference because to do so would restrict free competition. But this does not mean that in other cases where such exclusive clauses do not exist, the interference by a third party preventing a contracting party from realising its performance may not be regarded as

actionable, especially where the interference takes place in an unreasonable manner, for example where malice or abuse of rights are present.

Secondly, the courts below accepted, mistakenly, that intent is a requirement for an actionable interference with a contractual relationship with regard to both an interdict and the Aquilian action. The Constitutional Court correctly held (by implication) that fault (including intent) is not a requirement for an interdict. As regards intent as a form of fault for the Aquilian action in these cases, there are fortunately already indications that the Supreme Court of Appeal is willing to accept negligence as a sufficient form of fault.

Thirdly, the traditional test for wrongfulness – the *boni mores* or reasonableness criterion – was consistently applied in the cases under discussion. This also applies to the Constitutional Court, where Froneman J was nevertheless prepared to use a special concretisation of the *boni mores* test, namely, the competition principle. This first recognition of the competition principle in our law by our highest court is a milestone in the development of unlawful competition as an independent delictual cause of action.

Both *Shoprite* (ECG) and the Constitutional Court referred to the new test for wrongfulness – the reasonableness of holding the actor liable – alongside the traditional *boni mores* test. Such references may indicate an attempt to reconcile the two tests. However, the Constitutional Court remarked that the fact that the wrongfulness enquiry ultimately involves questions as to the reasonableness of imposing liability does not necessarily assist in determining when it is reasonable to do so. In fact, for Froneman J the reasonableness of holding a person liable is determined with reference to the *boni mores* criterion, as concretised in the competition principle. In light of this, it can be asked whether there is any value in involving the new test at all in the wrongfulness enquiry. It happens all too often that courts simply apply the *boni mores* test while merely paying lip-service to the new test.

Fourthly, the Constitutional Court emphasised that although wrongfulness and fault are two independent delictual requirements, the degree or intensity of fault or fault-related factors such as malice, or the knowledge that damage may be caused, can play a part in the wrongfulness enquiry. Intent in its technical sense can, however, not be involved here.

The outcome of the series of *Masstores* decisions is that the Constitutional Court carefully investigated aspects of interference

with a contractual relationship as delictual cause of action and made it clear that exclusive agreements between a supermarket and the owner or lessor of a shopping centre will not be protected against competitors. These exclusive agreements are therefore trumped by free competition, which is regarded as the 'lifeblood of commerce' (*Taylor & Horne (Pty) Ltd v Dentall (Pty) Ltd* 1991 (1) SA 412 (A) 421-2) and, therefore, is desirable in both a social and an economic sense. Free competition is, therefore, rightly emphasised by the courts as an important public-policy consideration in order to establish the lawfulness or otherwise of competition (Neethling *Unlawful Competition* 1-2).

Pure Economic Loss

See the discussion of *Home Talk Developments (Pty) Ltd* (above).

Unlawful Competition

Passing-off of competing businesses

In *De Freitas v Jonopro (Pty) Ltd & others* 2017 (2) SA 450 (GJ) the applicant (D) and one Betterncourt (B) had a close personal relationship spanning some twenty years. Each ran an adult-entertainment business; the applicant in Kempton Park, and B in Midrand under the name Ipi-Tombi. In 2011, they came up with the name Cheeky Tiger and discussed the broad terms of the concept of adult entertainment targeting a certain income group, but nothing further transpired. In 2013, D single-handedly implemented the concept in a business named Cheeky Tiger and invested money and time to create and build the reputation of Cheeky Tiger in the area. In January 2015, B got D to agree to change the name of his business to Manhattan Nights without disclosing that he (B) intended opening a competing business, using the Cheeky Tiger get-up, near Manhattan Nights. Some time later, B began trading near D's business, replicating the Cheeky Tiger brand in all but name.

In December 2015, D obtained an interim interdict prohibiting B from running the competing business, contending that the only reason B had chosen to open it so close by was to exploit the goodwill he (D) had built up under the Cheeky Tiger brand. The order prohibited B 'from commencing and/or trading business under the name and style of Cheeky Tiger' near D's business.

In March 2016, D approached the present court for (i) an order declaring B to be in contempt of the December 2015 order; and (ii) an interim interdict prohibiting B from conducting a competing business. D argued that he wanted the interdict as an alternative to the contempt proceedings in case the first order did not cover B's passing-off of his get-up. B argued that the decision in the first order had dealt with passing-off and that the matter was *res judicata*.

We do not deal with the aspects of the judgment relating to contempt of court, *res judicata,* and issue estoppel (for a discussion of these, see the Chapter 'Intellectual Property' and the chapter 'Contract: General Principles').

With regard to passing-off, after a thorough investigation of the background and facts, Spilg J held that in order for D to succeed with passing-off, he was required to rely on the common-law principles governing passing-off. The requirements for passing-off are: first, that an applicant must show that the mark-up or get-up is distinctive of his or her services (that is, that they have acquired a reputation in connection with the business); secondly, that the respondents are passing off their services as those of, or as associated with the applicant, in conducting their business (para [29]; see also Neethling *Unlawful Competition* 164ff 171-2 183ff) (para [29]). Spilg J found it necessary to return to basic principles and ask what name, logo, or get-up of the respondent's business is likely to lead the client base from which the applicant's business is drawn to believe that the respondent's business is that of, or is associated with, the applicant's business, and is likely to divert custom from applicant's business to that of the respondents (para [57]). In his view, aside from the name and style of Cheeky Tiger – the subject of the current interim interdict – there were many other features of the get-up that would lead the ordinary clientele to believe that it was part of the branding of the same business or one associated with it (para [58]).

The court granted the interdict and handed down detailed orders restraining the respondents from utilising various logos and get-ups at their business (para [60]).

Passing-off of competing products: defamation

The facts in *Herbal Zone (Pty) Ltd & others v Infitech Technologies (Pty) Ltd & others* [2017] 2 All SA 347 (SCA), as they appear from the judgment of Wallis JA, were briefly the following. The second appellant, sole shareholder of the first appellant (Herbal

Zone), became involved with a Malaysian company (Herbal Zone International) which manufactured capsules containing a root extract believed to have aphrodisiac properties that enhanced male sexual performance. He called the capsules 'Phyto Andro' and, since 2006, it has been marketed in South Africa as 'Phyto Andro for Him' (para [1]). From 2009 to 2014, the first respondent (Infitech), was, in terms of a distribution agreement with Herbal Zone, the sole distributor of Phyto Andro in this country. The present dispute arose from events after the termination of that sole distributorship. Before the termination the third and fourth respondents, shareholders in Infitech, formed the second respondent (Herbs Oils). Herbs Oils has since 2014 distributed a product in South Africa, also under the name 'Phyto Andro for Him', in competition with the product imported by Herbal Zone. This competing product was imported by Infitech, which claimed that it had procured it from an unidentified source in Malaysia. Although neither Herbal Zone nor Herbs Oils had secured registration of 'Phyto Andro' as a trademark, the packaging that each uses for its product includes, after the words 'Phyto Andro', the standard symbol ® used to indicate such registration (para [2]).

In response to Herbs Oils's actions, Herbal Zone published an advertisement in a popular newspaper at the foot of which appeared a statement that products distributed by others under the same name were counterfeit (para [3]). Herbal Zone also distributed a circular to pharmacies and other outlets with a similar message, indicating that the like-named counterfeit products were distributed by Herbs Oils (Infitech) (para [4]). Herbal Zone also employed a private investigator to investigate the source and origin of the competing product, and instigated a search and seizure operation by the police at the premises of Infitech and Herbs Oils (para [6]).

Eventually, Infitech and the other respondents launched proceedings in the High Court seeking a number of interdicts against the appellants. The latter counter-applied for an interdict restraining the respondents from marketing, selling, advertising, promoting, or presenting consumable herbal capsules using trademarks, labels, or names including the words Phyto Andro, or packaging confusingly similar to that being used by Herbal Zone and its distributors. They contended that Infitech and its associates were passing their product off as that of Herbal Zone (para [7]).

The court below granted some of the interdicts sought by Infitech on the basis that the statements made about Infitech and

Herbs Oils in the advertisements and circular were defamatory. The court dismissed the counter-application on the basis that Herbal Zone had failed to discharge the onus of proving that the reputation and goodwill attaching to Phyto Andro, as marketed in South Africa, vested in Herbal Zone, as opposed to Herbal Zone International, which was not party to the application. In the appeal against that decision, Wallis JA treated the passing-off claim as the primary issue, and the defamation claim as the secondary issue (paras [8]ff).

With regard to passing-off, Wallis JA indicated that there was no dispute over the relevant legal principles. He continued, with reference to *Capital Estate and General Agencies (Pty) Ltd & others v Holiday Inns Inc & others* [1977] 3 All SA 306 (A), 1977 (2) SA 916, 929; *Caterham Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd & another* [1998] 3 All SA 175 (SCA), 1998 (3) SA 938 paragraphs [13] [15] [16]; and *Pioneer Foods (Pty) Ltd v Bothaville Milling (Pty) Ltd* [2014] 2 All SA 282 (SCA) paragraph [7]:

> Passing off occurs when A represents, whether or not deliberately or intentionally, that its business, goods or services are those of B, or are associated therewith. It is established when there is a reasonable likelihood that members of the public in the marketplace looking for that type of business, goods or services may be confused into believing that the business, goods or services of A are those of B or are associated with those of B. The misrepresentation on which it depends involves deception of the public in regard to trade source or business connection and enables the offender to trade upon and benefit from the reputation of its competitor. Misrepresentations of this kind can be committed only in relation to a business that has established a reputation for itself or the goods and services it supplies in the market and thereby infringe upon the reputational element of the goodwill of that business. Accordingly proof of passing off requires proof of reputation, misrepresentation and damage. The latter two tend to go hand in hand, in that, if there is a likelihood of confusion or deception, there is usually a likelihood of damage flowing from that (para [9]).

Applying these principles to the present case, Wallis JA pointed out that the packaging of Herbs Oils' product used the same name, Phyto Andro, to describe the product and that the packaging was very similar. The name Phyto Andro was not descriptive of the product, but was an invented mark attached to it in order to distinguish it from other products of a similar type. By calling their product Phyto Andro, there was plainly a representation to the public by the respondents that when they bought

Herbs Oils' product it was the product that enjoyed a reputation in South Africa under that name. The crucial question then was whether Herbal Zone enjoyed the reputation attaching to Phyto Andro in South Africa (para [10]). In passing it should be mentioned that as Phyto Andro was an invented mark or fancy name, it made no sense to require actual proof of reputation, because the connection of such a name or mark to an undertaking or goods can only serve to individualise them. From its very nature it is almost impossible to evade an inference of passing-off where a rival starts using an identical or imitated fancy name (*Truck and Car Co Ltd v Hirschmann* 1954 (2) SA 117 (E) 120-1). This point of view is indeed, by necessary implication, apparent from a decision of the Appellate Division, *Truck and Car Co Ltd v Kar-N-Truk Auctions* 1954 (4) SA 552 (A) 557. Greenberg JA simply accepted that an 'invented or fancy' name is in itself already distinctive. Reputation was, therefore, not set as an additional requirement for individualisation in these cases (see Neethling *Unlawful Competition* 168-9).)

Wallis JA summarily disposed of Herbs Oils' claim that the reputation in the Phyto Andro mark vested in it. He pointed out that Infitech's role concerning the product sold under that mark was that of a distributor. It acquired that role in terms of a distribution agreement that provided that Herbal Zone was the owner of all rights, title, trademarks, and logos in respect of the product (paras [13] [14]).

Turning to Herbal Zone's claim that proprietorship in the mark and the reputation attaching to it vested in it, the difficulty it faced lay in the confusion on the papers between it and Herbal Zone International, and their respective roles in the manufacture of Phyto Andro and its marketing in South Africa. The court agreed with the High Court's finding that Herbal Zone had failed to show that the reputation in the mark vested in it and not in Herbal Zone International (paras [15]-[29]). Accordingly, the appeal against the finding on the issue of passing-off failed (para [30]).

With regard to the defamation claim (paras [31]ff), the respondents argued that in the appellants' advertisements, Infitech and Herbs Oils had been accused of selling counterfeit products, and it was alleged that such conduct on their part was illegal (para [32]). Wallis JA considered the arguments of the parties (paras [33]ff) and set out the proper approach to an application for an interdict to prevent the publication of defamatory matter (para [36]ff):

> Such an interdict is directed at preventing the party interdicted from making statements in the future. If granted, it impinges upon that party's constitutionally protected right to freedom of speech. For that reason such an interdict is only infrequently granted, leaving the party claiming that they will be injured by such speech to their remedy of a claim for damages in due course (para [36]).

Wallis JA stated that a corporate entity such as Herbs Oils was entitled to claim damages based on defamation, but that no attempt had been made to show that Herbs Oils had suffered a loss as a result of the publication of the advertisements and circular, and still less that it would suffer irreparable future harm from the further publication of the material. Nor had it alleged that damages would not be an adequate remedy for any such publication. Indeed, the third respondent's founding affidavit made no mention of these two elements of a claim for an interdict (para [36]).

The judge continued that contentions as to the onus of proof were also contrary to established authority. The proper approach to an application for an interdict to restrain the publication of defamatory matter was dealt with in *Hix Networking Technologies CC v System Publishers (Pty) Ltd & another* 1997 (1) SA 391 (A), [1996] 4 All SA 675 where the court, citing *Heilbron v Blignault* 1931 WLD 167-9, accepted that a person against whom an injury is about to be committed is not compelled to wait for the damage to occur and then sue for damages, but can persuade the court to prevent any damage being done to him or her. However, he or she is not entitled to the intervention of the court by way of interdict, unless it is clear that the defendant has no defence. Therefore, if the defendant in a defamation matter can, for example, prove truth and public benefit, the court is not entitled to disregard this, as the basis of the claim for an interdict is that an actionable wrong – that is, conduct for which there is no defence in law – is about to be committed (para [38]). According to Wallis JA, what is required is that a sustainable foundation be laid by way of evidence that a defence such as truth and public interest or fair comment is available to the respondent. It is not sufficient simply to state that at a trial the respondent will prove that the statements were true and in the public interest without providing a factual basis therefor (para [39]).

On the other hand, Herbal Zone produced evidence that it had, over a lengthy period, first introduced the product 'Phyto Andro for Him', and then caused it to be distributed in South Africa. This

entitled it to describe its own product as the genuine or original product, and to denounce the product of others who were marketing competing products from a different manufacturer and source as 'counterfeit', that is, not the genuine article. Even if the reputation in Phyto Andro did not vest in it, the fact that it was importing it into this country and distributing it here entitled it to level the charge of counterfeit against Herbs Oils products. In those circumstances, and on the authority of *Hix Networking Technologies* (above), the application for an interdict should not have been granted and the appeal against it was upheld.

Finally, Wallis JA also stressed, *obiter,* the importance of freedom of speech as a constitutionally protected fundamental right. This right now carries greater weight than it did in the past. Accordingly, when considering an application for an interdict the proper recognition of the importance of free speech is a factor which must be given full value in all cases (para [40]).

On passing-off, see also the discussion of *Masstores (Pty) Ltd v Pick 'n Pay Retailers (Pty) Ltd* (above).

Defamation

Defamatory remarks in the political sphere

In *Afriforum & another v Pienaar* 2017 (1) SA 388 (WCC), Afriforum (first applicant) and one of its employees, Pawson (second applicant), applied on an urgent basis for a final interdict that the respondent (Pienaar) remove certain allegedly defamatory postings from his Facebook and Twitter accounts, and for a temporary interdict that he be prohibited from posting any such statement on any form of social media pending the finalisation of an action for defamation and possible further interdicts to be instituted by the applicants against him.

Pienaar had posted on social media that he 'had witnessed Afriforum supporters threaten to rape women today', and in three further posts invited readers to watch attached video footage showing that Afriforum supporters 'shouted rape threats' and that 'Marcus Pawson from Afriforum use[d] rape to intimidate a rape survivor'. These posts related to an altercation on the University of Stellenbosch's campus between students from the 'End Rape Culture Campaign' (the ERCC) and Afriforum employees and student supporters.

In order to obtain their temporary interdict, Donen AJ pointed out that the right to be set up by the applicants need not be

shown on a balance of probabilities; it is sufficient if it is *prima facie* established though open to some doubt. The facts as set out by the applicants, together with any facts set out by the respondent which the applicants could not dispute, must be taken and consideration given to the inherent probabilities as to whether the applicants could, on those facts, obtain final relief at trial. The facts set up in contradiction by the respondent should then be considered. Serious doubt was thrown on the applicants' case by the respondents' affidavits and the applicants, therefore, could not succeed in obtaining temporary relief (para [54]).

In dealing with whether a final interdict could be granted, it had to be clear that Pienaar's postings constituted actionable defamation. Donen AJ pointed out, citing from *The Citizen 1978 (Pty) Ltd & others v McBride (Johnstone & others, Amici Curiae)* 2011 (4) SA 191 (CC) paragraphs [99] [100], that public discussion of political issues has, if anything, become more heated and intense since the advent of democracy. However, freedom of expression does not extend to hate speech, and everyone enjoys constitutional protection of their dignity, including their reputation (para [56]). In the political dynamics on the campus of Stellenbosch University it is almost inevitable that any response to Afriforum by, among others, the ERCC would be emotional, bitter, and would involve violent language (para [57]). Accordingly, Pienaar was entitled to a certain amount of latitude in describing the confrontation between Afriforum and students on the campus. It was political, emotional, bitter, and liable to be described in violent language (para [59]). A statement would be defamatory if it would tend to lower the plaintiff in the estimation of right-thinking members of society generally, and it must be accepted that all right-thinking or reasonable members of society subscribe to the norms and values of the Constitution (para [60]). A reasonable reader would interpret Pienaar's statements in the context of the events in relation to which they were made. He or she would accommodate the patois employed in the assertion of the ERCC. The meaning of the words used must be determined, not in isolation, but against the established factual matrix of this particular case (para [62]). Donen AJ continued:

> By thrusting themselves into the public eye, and by entering the premises of Stellenbosch University in order to confront student groups with opposing political views, Afriforum opened themselves to public scrutiny. They must consequently display a greater degree of tolerance to criticism than ordinary individuals . . . Afriforum's promo-

> tion of a political confrontation by pamphlet and by the follow-up action of its members, resulted in violence erupting on the campus which . . . involved Afriforum's supporters committing assault, sexual violence, sexual aggression and intimidation, and expressing of rape culture in an egregious form. The consequence was the employment of the language of the ERCC by its protagonist against apparent perpetrators of rape culture. According to the cases cited above, Mr Pienaar's robust political riposte constitutes an exercise of freedom of expression which, in my view, does not involve defamatory statements concerning the applicants (para [63]).

Furthermore, Donen AJ stated that the protection of the dignity of the women violated by Afriforum supporters is of paramount importance under the Constitution. The comment on these unlawful acts in the present publications cannot give rise to a remedy for the applicants based on a violation of their own dignity (para [64]). The comments made by Pienaar were fair within the context of the acts described by the witnesses who deposed to affidavits in his support (para [65]). The applicants failed to establish that the publications in issue are unlawful in that the respondent had no valid defence in the defamation proceedings; or that the applicants would be irreparably injured if the interdict were not granted. Pienaar's assertions, claims, statements, and comments could be countered most effectively and just as quickly as this urgent application, by refuting them in public meetings, on the internet, on radio and television, and in the newspapers (para [66]), and by countering them in the political arena (para [67]).

Donen AJ held that in all the circumstances

> the applicants have not established a *prima facie* right to have Pienaar's publication taken down from social media; less so have they established a clear right. Nor have they established a well-founded apprehension of irreparable harm. The harm of which they complain has been done. The post has been posted, shared and viewed. The internet world has moved on. They can avail themselves of other remedies such as those referred to above, and claim damages via a defamation action (para [68]).

In the final analysis, Donen AJ held that the application for a temporary interdict in substance, though not in form, amounted to a permanent interdict (para [70]). He dismissed the application for either the mandatory or the interim interdict, stating that the orders sought would have a chilling effect on political free speech and that the limitations sought were oppressive and unjustified (paras [71] [72]).

Donen AJ's judgment resonates with the general approach in our law that politicians, public figures, and public officers are

required to be robust and thick-skinned in relation to negative comments made against them (Neethling & Potgieter *Delict* (2015) 356 and n155).

Defamatory words must have 'illocutionary force'

Waldis & another v Von Ulmenstein (above) concerned an application for an interdict ordering the respondent to remove an allegedly defamatory Internet blog post in which the applicants were accused of fraudulently mislabelling their chocolate products by claiming, among other things, that some of the products were sugar free and thus diabetic-friendly.

Davis J briefly set out the general principles of the law of defamation (para [19]). The law of defamation is defined as the wrongful and intentional publication of defamatory words or conduct that refers to the plaintiff. Once a plaintiff has established that a defendant published a defamatory statement concerning him or her, it is presumed that the publication is both wrongful and intentional. The defendant can then rebut the presumptions by raising a defence that either wrongfulness or intention was absent (para [20]). As to wrongfulness, Davis J stated:

> The general test for wrongfulness is based upon the *boni mores* or the legal convictions of the community. This means that the infringement of the complainant's reputation should not only have taken place but be objectively unreasonable. See Neethling et al *Neethling's Law of Personality* 2 ed (2005) at 135. The application of the *boni mores* test involves an *ex post facto* balancing of the interests of the plaintiff and the defendant in the specific circumstances of this case in order to determine whether the infringement of the former's interests was reasonable (para [21]).

In this balancing process, the conflict between the defendant's freedom of expression and the plaintiff's right to a good name must be resolved. The test to establish whether the alleged words or conduct were defamatory is whether a reasonable person with ordinary intelligence might reasonably understand the words concerned to convey a meaning which is defamatory of the litigant concerned (para [22]). Once it has been shown that the words were defamatory, the defence is not limited to whether the words were true; they must also be in the public interest. In this regard a distinction has been drawn between 'what is interesting to the public' as opposed to 'what is in the public interest' (para [23]). Davis J then referred to Fagan's criticism of the majority judgment *Le Roux v Dey* (above) (see A

Fagan 'The Constitutional Court loses its (and our) sense of humour: *Le Roux v Dey*' (2011) 128 *SALJ* 395). Fagan drew a distinction between utterances with a propositional content but no 'illocutionary force' and utterances with illocutionary force. According to him, the former cannot be defamatory. In other words, Davis J explained,

> the point made is that to defame someone is to make probable one or more of a particular set of consequences by performing conduct of a particular kind or nature (Fagan at 402). Expressed differently, speech must contain a specific form of assertion before it can be regarded for the purposes of the law as being defamatory . . . The concept of illocutionary force must be distinguished from propositional content as, in the former case, the illocutionary force connotes the effect of the words which the speaker intended to convey (paras [25] [26]).

Next, the court dealt with the defences available to the respondent, namely truth and public interest, and fair comment (paras [28]ff). With regard to truth and public interest (see also Neethling & Potgieter *Delict* (2015) 360), Davis J stated that the *prima facie* wrongfulness of a defendant's conduct will be rebutted if he or she proves that the defamatory remarks are substantially true and in the public interest. What is in the public interest, depends on the convictions of the community (the *boni mores*) and in this regard, 'the time, the manner and the occasion of the publication' play an important role (*Independent Newspapers Holdings Ltd & others v Suliman* [2004] 3 All SA 137 (SCA) para [47] (para [41])). Also, past transgressions should not be raked up after a long lapse of time. According to Davis J, it is sufficientto suggest that if something is recently in the public domain, the fact that it is already present does not mean that the defence of truth and public interest cannot be invoked (para [42]).

So far as fair comment is concerned (see also Neethling & Potgieter *Delict* (2015) 362), the *prima facie* wrongfulness of defamatory publication may be rebutted if a defendant proves that the defamation forms part of fair comment on facts that is true and in the public interest. This requires the establishment of four issues: the defamation must amount to comment and not to the assertion of an independent fact; the comment must be fair; the facts on which the comment is based must be true; and the publication of these facts must be in the public interest (para [43]).

With reference to the present case, Davis J held that there can be no doubt that chocolates which claim to be diabetic-friendly

but are in fact not, fall within the scope of the public interest, particularly because, as the respondent submitted, this claim holds major concerns for diabetics who purchase chocolates which do not comport with their diabetic-friendly claim, that is, that they are sugar-free (para [45]). Furthermore, in this case, persistent allegations about a product that is not what it purports to be, definitely remain of public interest and importance, notwithstanding the allegations having been made at some point in the past (para [46]). The respondent raised a justifiable defence on either of the two defences, save for the following sentences which appear within the blog: '[The applicant's] claims on the Le Chocolatier chocolate slab range have been misleading and even life-threatening to diabetics' and 'It is clear that [the applicant] is a fraud continuously looking for business opportunities to make money at the expense and even the health of consumers'. Only these sentences, because they have illocutionary force and are assertions of a kind which have the defamatory meaning as averred by the applicants, should fall within the scope of the law of defamation (para [47]).

From this, it is clear that a distinction can be made between traditional disputes arising from the publication of a newspaper report or similar written publications, and a blog on the internet where the offending passages can be deleted, leaving the balance of the report in the public domain because it does not breach the law of defamation and can be preserved, thus giving effect to freedom of speech (para [48]). The court, therefore, ordered the respondent to remove the offending sentences cited above from the blog concerned (para [54]).

It is interesting that Davis J, despite referring to *Le Roux v Dey* (above), in which the new test for wrongfulness was formulated, did not take note of this new formulation but only referred to and applied the traditional *boni mores* or legal convictions of the community criterion for wrongfulness.

On defamation, also see the discussion of *Herbal Zone (Pty) Ltd & others v Infitech Technologies (Pty) Ltd & others* (above).

Unlawful Arrest and Detention

Due date of debt in claims for unlawful arrest and detention

In *Makhwelo v Minister of Safety and Security* 2017 (1) SA 274 (GJ) the applicant had been arrested and detained by members of the South African Police Service, servants of the Minister of

Safety and Security, for over a year when the charges were withdrawn and he was released (para [3]). The applicant then served summons against the Minister in terms of section 3(2)*(a)* of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 (para [5]), claiming damages for unlawful arrest and detention and for the loss of income sustained while in detention (para [6]). At a pre-trial conference the plaintiff indicated that he would amend his particulars of claim to increase the damages sought, and he delivered the amended particulars some seven weeks before the start date of the trial (paras [10] [11]). Two court days before the trial, the Minister delivered an amended plea, as well as a special plea that plaintiff's notice was defective because it had been served out of time and so barred him from proceeding with the matter (paras [11]-[13] [17]). The plaintiff then applied for an urgent order that the notice was competent because it was timeous; or failing that, for condonation.

For our purposes, the most relevant issue to be decided was whether the plaintiff's notice was defective in terms of the Institution of Legal Proceedings against Certain Organs of State Act (see para [16] for an exposition of the other issues involved). In this regard, the respondent contended that the applicant was obliged to give the statutory notice within six months, reckoned from the date when he was arrested, and not from the date of his release more than a year later, as the plaintiff contended (para [16]).

According to Spilg J, the present cause of action arises from a delict under the *actio iniuriarum*. A delictual debt becomes due in terms of section 3(3)*(a)* of Institution of Legal Proceedings against Certain Organs of State Act when the creditor has knowledge of the identity of the organ of state and of the facts giving rise to the debt, or when, with the exercise of reasonable care, he or she could have acquired such knowledge, unless the organ of state willfully prevents the creditor from acquiring such knowledge (para [43]). In summary, according to Spilg J, a debt is due only when *(a)* the material facts from which the debt arises are known, or ought reasonably to have been known (see *Truter & another v Deysel* 2006 (4) SA 168 (SCA) paras [22] [23]); and provided *(b)* it is immediately claimable and the debtor is obliged to perform immediately. The material facts do not include knowing that the actions were culpable, as culpability, whether in the form of negligence or otherwise, is a conclusion of law drawn from the

evidence. The presence or absence of negligence is therefore not a factor for these purposes (para [53]). (The latter requirement is not applicable in the present case as fault is not a requirement in cases of wrongful arrest or detention, where liability is strict: Neethling, Potgieter & Visser *Personality* 119-20; Neethling & Potgieter *Delict* (2015) 388-9.)

As to the requirement of knowledge of the material facts, Spilg J stated that it is difficult to appreciate that at the time of the arrest, or even during detention, the suspect would have had sight of the docket in order to form a view that the arresting officer did not have a reasonable suspicion that an offence had been committed. As the docket is not available to an accused until the investigation has been completed and he is presented with the indictment, it is most unlikely that the identity of the complainant or the evidence available when the arrest was made would be known to a would-be plaintiff. Without that knowledge a plaintiff cannot assume that the arresting officer was acting unlawfully when effecting the arrest, rather than that the complainant had falsified a charge against him (para [55]). It is therefore clear that as the docket was not available to the plaintiff in the present case, he did not have knowledge of the material facts.

So far as the second requirement for a debt being due is concerned, the court held that it is difficult to appreciate how a debt can be immediately claimable and, therefore, justifiable before the outcome of a criminal trial, or prior to charges being dropped or otherwise withdrawn (para [58]). (For a full discussion of the reasons why a person cannot institute a civil action before the prosecution process has concluded and the plaintiff been discharged, see paras [59]ff; see also *Unilever Bestfoods Robertsons (Pty) Ltd & others v Soomar & another* 2007 (2) SA 347 (SCA) and the other cases discussed by Spilg J.)

In the result, it was held that in cases of unlawful arrest and detention the debt becomes due on release and not on arrest. Spilg J, therefore, declared that the notice of intention to institute legal proceedings against the respondent in terms of the Act had been timeously given, and, if he was wrong, that the late delivery of such notice in terms of the Act could be condoned (para [64]).

In *Mathe v Minister of Police* 2017 (2) SACR 211 (GJ), [2017] 4 All SA 130 the plaintiff was arrested by members of the South African Police Service on a charge of prostitution and detained overnight in a police cell. Flowing from the arrest and detention, the plaintiff sued the defendant for damages. The defendant

conceded that the arrest and detention had been unlawful and the court was called upon to determine the *quantum* of general damages and the scale of costs to be awarded to the plaintiff (para [1]).

The plaintiff's claim for damages was based on an infringement of her constitutional rights to equal protection and benefit of the law, human dignity, freedom and security of the person, freedom of movement, and conditions of detention that are not consistent with human dignity. The damages were also based on an infringement of her personal rights to physical integrity, dignity, privacy, reputation, and sense of self-worth. The particulars of claim alleged that as a result of her arrest and detention, she suffered shock, psychological trauma, emotional shock, and *contumelia* (para [17]).

In assessing general damages, Opperman J discussed the general approach to the assessment of damages for unlawful arrest and detention (para [18]), and, citing Potgieter, Steynberg & Floyd *Damages* 545-8, the factors that can play a role in the assessment (paras [18]ff):

> In deprivation of liberty the amount of satisfaction is in the discretion of the court and calculated *ex aequo et bono*. Factors which can play a role are the circumstances under which the deprivation of liberty took place; the presence or absence of improper motive or 'malice' on the part of the defendant; the harsh conduct of the defendants; the duration and nature (e g solitary confinement or humiliating nature) of the deprivation of liberty; the status, standing, age, health and disability of the plaintiff; the extent of the publicity given to the deprivation of liberty; the presence or absence of an apology or satisfactory explanation of the events by the defendant; awards in previous comparable cases; the fact that in addition to physical freedom, other personality interests such as honour and good name as well as constitutionally protected fundamental rights have been infringed; the high value of the right to physical liberty; the effects of inflation; the fact that the plaintiff contributed to his or her misfortune; the effect an award may have on the public purse; and, according to some, the view that the *actio iniuriarum* also has a punitive function.

Although Opperman J was conscious of the limited value that previous cases provide in assessing damages, he discussed some of them in the process of calculating damages in the present case (paras [23]-[30]). In considering the facts of the present case, the judge related how the plaintiff and two other women had been arrested in the early hours of the morning without any lawful reason whatsoever, apparently on suspicion that they were prostitutes (para [31]). The police had abused the

power entrusted to them, had not identified themselves, had failed to inform the women why they were being arrested, and conducted themselves in a high-handed manner (para [32]). The plaintiff was locked up with other inmates in an unhygienic, dirty, stinking holding cell with only one open toilet that did not work, but in which inmates relieved themselves in full view of others. Not only was the plaintiff detained under these inhumane conditions, but she also lost her employment, a job she had held since 2009. The plaintiff was stigmatised as a result of the nature of the offence which she was alleged to have committed (paras [34] [38] [39]). After setting out the prejudices and violence to which women are generally subjected (para [35]), Opperman J pointed out that the plaintiff had been prejudiced exclusively on the basis of her gender (para [36]). As to damages, the court concluded:

> The plaintiff has sought R175 000 for the unlawful arrest and subsequent 37 hours of unlawful detention. The defendant has contended that R60 000 would adequately compensate the plaintiff. Having regard to the facts as a whole, the past awards and the relevant case law, in my view a fair and reasonable amount for the damages to be awarded to the plaintiff is the amount of R120 000.

The case is particularly important for the emphasis it places on the vulnerability of women in assessing general damages for personality infringement when their rights have been infringed.

Rape and Assault

Liability of municipality for rape of mentally disabled woman

In *Bridgman NO v Witzenberg Municipality (JL & another intervening)* [2017] 1 All SA 466 (WCC), 2017 (3) SA 435 an eighteen-year-old woman (L) with a mental disability (she functioned cognitively at the level of a six- to eight-year-old child) was abducted and raped by three youths at the Pine Forest Holiday Resort in Ceres, Western Cape, where she was staying with her adoptive parents (for a review of this case, see also J Neethling & JM Potgieter 'Delictual liability of a municipality for the rape of a mentally disabled woman' (2018) 81 *THRHR* 325-33, on which the present discussion is based). The resort was owned, managed, and controlled by the defendant, the Witzenberg Municipality (the municipality). The plaintiff, in his capacity as L's *curator ad litem*, instituted an action against the municipality, claiming damages arising from injuries L had suffered as a consequence of the rape. He submitted that the rape had been caused by the negligent

omissions and conduct of the municipality. The municipality denied that it had been negligent. In the alternative, it argued that if it had indeed been negligent, the rape was caused partly through its own negligence, and partly through the negligence of L's parents.

Donen AJ (para [4]) stated that a municipality is an organ of state within the local sphere of government, and as such is bound to respect, protect, promote, and fulfil the aforementioned rights in the Bill of Rights (s 39(2) of the Constitution). He continued (ibid):

> The Municipality failed to protect [L] from being raped. The wrongfulness of this omission is tested by reference to the legal convictions of the community, which by necessity are underpinned and informed by the norms and values of our society embodied in the Constitution. Because of its constitutional duties, and because it owned, managed and controlled the resort in the circumstances described further below, the failure on the part of the Municipality to prevent the rape was unlawful.

(In this respect, the court referred, among other things, to the *locus classicus* on liability for an omission, *Minister van Polisie v Ewels* (above) 597.)

This approach is in conformity with *Van Eeden v Minister of Safety and Security* (above) 395, where the court stated:

> The appropriate test for determining wrongfulness [of an omission] has been settled in a long line of decisions of this Court. An omission is wrongful if the defendant is under a legal duty to act positively to prevent the harm suffered by the plaintiff. The test is one of reasonableness. A defendant is under a legal duty to act positively to prevent harm to the plaintiff if it is reasonable to expect of the defendant to have taken positive measures to prevent the harm.

(See also *Lee v Minister for Correctional Services* 2013 (2) SA 144 (CC) 167; *Minister of Justice and Constitutional Development v X* above para [13]; Neethling & Potgieter *Delict* (2015) 56.)

Interestingly, Donen AJ made no reference to the new test for delictual wrongfulness with regard to the liability for an omission (see generally Neetling & Potgieter *Delict* (2015) 80-5 for an exposition and criticism of this test). Recently, there has been a tendency in our courts, including the Supreme Court of Appeal and the Constitutional Court, to attempt, albeit by implication, to reconcile the traditional *boni mores* or reasonableness test with the new test (see the discussion of *MTO Forestry (Pty) Ltd v Swart NO* above).

The municipality averred that L's parents committed a delict as against L and should therefore be joined as joint wrongdoers (third parties) in the action. In our law, given the close relationship

between parents and children, children would probably not have an action against their parents. Actions between parents and children should, on ethical grounds, be viewed with circumspection. As far as we could determine, a child has never succeeded in our law in a delictual claim against its parent (*Saitowitz v Provincial Insurance Co Ltd* 1962 (3) SA 443 (W) 445-6; J Neethling & JM Potgieter 'Aquiliese aksie van 'n kind vir mediese koste weens persoonlike beserings' (1992) 55 *THRHR* 480-4; J Neethling 'The Constitutional Court affirms the potential existence of an action for wrongful suffering as a result of disability (wrongful life) in South African law' (2016) 79 *THRHR* 533-50). By extension, it has also never been considered whether the child may institute action against a parent as joint wrongdoer (third party) where the child's damage was caused by the negligent conduct of both a defendant and the parent. Contrary to what has previously been contended (cf J Neethling & JM Potgieter 'Swembaddens, visdamme, ander waterpoele en kinderslagoffers – Deliktuele aanspreeklikheid' (2017) 14/1 *LitNet Akademies* 389-400), section 2(1B) of the Apportionment of Damages Act 34 of 1956 does not apply in a case such as the present as the provision applies to a situation where someone suffers damage as a result of the injury or death of another caused partly by the conduct of the injured person as well as a third party. Be that as it may, it seems that Donen AJ, without further ado, proceeded on the basis that it was indeed possible for a parent to be a joint wrongdoer in a delictual action by its child.

The municipality's alternative plea entailed that L's adoptive parents had a duty of care towards L, and that they had breached this duty by, among other things, failing to supervise her properly when she was abducted while playing alone in the resort. The municipality contended that the parents, while they were acutely aware of L's mental disability and hence vulnerability, had failed to exercise reasonable care or to take adequate steps to prevent harm to her when they could and should have done so; failed adequately to monitor her movements at all relevant times prior to, during, and subsequent to the rape; allowed her to stray from their control and area of supervision while being acutely aware of her mental disability and consequential vulnerability or exploitability; and failed to avoid the rape when, by the exercise of reasonable care and measures, they could and should have done so. In the circumstances the municipality maintained that L's adoptive parents and the municipality were jointly and sever-

ally liable to the plaintiff (paras [6] [7]). (The use of the expression 'duty of care' is a source of confusion. In English law, a 'duty of care' is used to denote what in South African law would entail both the second leg of the enquiry into negligence, and 'legal duty' in the context of wrongfulness. Thus 'duty of care' 'straddles both elements of wrongfulness and negligence' – see *McIntosh v Premier, KwaZulu-Natal* 2008 (6) SA 1 (SCA) 8–9; *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) 144. To avoid confusion, it would be preferable to describe the duty involved in the test for wrongfulness as a 'legal duty'; see Neethling & Potgieter *Delict* (2015) 159.)

The question implicit in this exposition was whether the conduct of the parents was wrongful as against their daughter, L. It is generally accepted in our law that the primary responsibility for the safety of children rests with their parents. Parents have a legal duty to supervise their children and to ensure that harm does not befall them (cf Neethling & Potgieter (2017) 14/1 *LitNet Akademies* 389-400). Although at eighteen L was technically an adult, she lacked the mental capacity to function in accordance with her age. The fact that L may have been vulnerable to exploitation, and lacking in social skills, judgement, and defence mechanisms, as well as being emotionally vulnerable and socially inept (para [8]), are, in our view, clear indications that she required some supervision by her parents. This legal duty on the parents was breached when they allowed L to wander freely and unsupervised on the playground from where she was abducted and subsequently raped. They, therefore, acted wrongfully as against L.

Be that as it may, according Donen AJ, L's disabilities did not allow the court to limit her rights and freedoms as a woman. He continued (para [8]):

> Both as a woman and a disabled person, [L] enjoyed entrenched rights to her dignity and security, control over her body, her freedom of movement, and equality before law. She may not be discriminated against on the basis of her gender, sex and disability. A duty rests upon the court to afford [L], both as a woman and a disabled person, the full and equal enjoyment of all her rights and freedoms under the Constitution. Insofar as the alternative plea seeks to rely on the fact that [L] is a disabled woman, the placing of any limitations on her freedom (which is implicit in the alternative plea) is anathema to the Constitution.

Donen AJ was of the opinion that this view of L's rights is supported by international law and, particularly, the Disability

Convention adopted by the UN General Assembly, which is regarded as law in South Africa (para [10]).

It appears that Donen AJ regarded L's rights as absolute because of his view that to attribute delictual liability to L's adoptive parents ('as wrongdoers') for allowing her to exercise independence, freedom of movement, and control over her body, would conflict with the aforementioned constitutional principles. He stated that L's rights could be limited only in terms of the limitation clause in the section 36 of the Constitution. This clause provides that fundamental rights may be limited by a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom. Owing to L's stage of development, and in order to protect her rights, there would have had to be a legitimate reason for limiting her freedom to exercise her fundamental rights in the particular circumstances of the case (para [12]). According to the judge, the only relevant consideration in this regard was whether L had the capacity to refuse the perpetrators consent to sexual intercourse (para [13]). He found that as she lacked such capacity, any limits on her freedom of movement and control over her own body could not be justified (para [14]). This view is open to criticism. In our view, precisely because L 'may have been vulnerable to exploitation, lacking in social skills, judgement and defence mechanisms, as well as being emotionally vulnerable, and socially inept' (para [8]), and having the cognitive capacity of a six- to eight-year-old child, they are more than sufficient grounds to found a reasonable and justifiable limitation of her rights to freedom of movement, independence, and control over her body. Seen in this light, these limitations placed a legal duty on her parents to take reasonable steps to supervise and protect her, or, in other words, it was reasonable to expect of the parents to have taken positive measures to prevent harm from befalling her (cf citation from *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust as Amicus Curiae)* above 395). Therefore, it cannot be accepted that the recognition of a duty on L's parents to supervise her would amount to an unreasonable interference and limitation of her rights to independence and freedom, as appears to have been suggested by Donen AJ (paras [8]ff). The failure of L's parents to supervise her under the circumstances should, therefore, be branded as a breach of their legal duty in this regard and thus as wrongful.

However, this does not mean that L's parents would necessarily be delictually (jointly) liable for the damage she suffered. Apart from wrongfulness, negligence – in particular – is required for such liability and in this regard it appears that the parents' decision to allow L to play alone in the park was reasonable under the circumstances, and they consequently did not act negligently. According to the judge (para [19]), the evidence of L's mother established that a reasonable person in the position of the parents would not have foreseen that L would be raped in the playpark in which she was allowed to play. Nor would a *bonus paterfamilias* have taken any measures exceeding those taken by the parents to monitor L, given the security measures they had seen to be in place at the resort. The evidence showed that the parents had indeed supervised L appropriately. The decision not to allow the municipality's alternative plea was therefore justified.

In view of the above, it is clear that an omission can, on the one hand, be in breach of a legal duty in terms of the *boni mores* or reasonableness criterion and thus wrongful, but, on the other hand, not negligent in terms of the reasonable foreseeability and preventability test for negligence (see Neethling & Potgieter *Delict* (2015) 166-7; *Minister of Forestry v Quathlamba* 1973 (3) SA 69 (A); cf Neethling 2016 *TSAR* 804-6 with regard to the decision in *BS v MS* 2015 (6) SA 356 (GP)). Unfortunately, Donen AJ did not make this distinction clear in his judgment.

Donen AJ (para [153]) commenced his discussion of the municipality's negligence by setting out the well-known reasonable foreseeability and preventability test for negligence as formulated in *Kruger v Coetzee* 1966 (2) SA 428 (A) 430. The judge (para [154]) held that, in the light of the numerous incidents of crime (tens of break-ins, five serious incidents, and assaults) that had occurred at the resort, the broader problem of rape in the Ceres area before L's rape, and the defective security at the resort, a reasonable executive in the control of the municipality, which had assumed responsibility for security in the resort, would have foreseen the very real risk of a very violent incident taking place there. The rape of a resident at the resort was, therefore, reasonably foreseeable.

With regard to the preventability of the rape, the court (para [155]) referred to the four considerations set out in *Ngubane v South African Transport Services* 1991 (1) SA 756 (A) 776. These are: the degree or extent of the risk posed by the actor's conduct; the gravity of the possible consequences if the risk of harm

materialises; the utility of the actor's conduct; and the burden of eliminating the risk of harm (see also Van der Walt & Midgley *Delict* 253-4; Neethling & Potgieter *Delict* (2015) 151-4). The court (paras [158] [165]) held that the degree or extent of the risk of a serious crime being committed was apparent from the evidence; the gravity of possible consequences, if serious crime materialised, was immense; and the burden of eliminating the risk of the harm was no greater than simply putting into force the municipality's security plans. The municipality had not only failed to take such steps, but it had also abandoned any dominance of the terrain on the afternoon of the rape. No reasonable person concerned about security at the resort would have done so. The municipality had therefore been negligent as regards the consequences suffered by L.

The question then arose (paras [159]ff) as to whether the rape would have occurred had the municipality taken reasonable steps to guard against it by providing proper security measures at the resort. This is the question of factual causation which is established by applying the 'but-for' or *conditio sine qua non* test, and involves an inquiry into whether, but for the omission, the damage would probably not have occurred. (Factual causation can also be determined by enquiring whether one fact arises out of another [*Lee* above 161-2; Neethling & Potgieter *Delict* (2015) 195], in other words, whether the rape of L flowed from the failure by the municipality to provide proper security.) In applying the but-for test, Donen AJ relied on the decisions in *Minister of Finance v Gore NO* 2007 (1) SA 111 (SCA) paragraph [33] and *Minister of Safety and Security v Van Duivenboden* (above) paragraph [25], where the Supreme Court of Appeal stated that establishing factual causation 'is a matter of common sense based on the practical way in which the ordinary person's mind works against the background of everyday life experience' and that

> [a] plaintiff is not required to establish the causal link with certainty, but only to establish that the wrongful conduct was probably a cause of the loss, which calls for the sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be expected to occur in the ordinary course of human affairs rather than an exercise in metaphysics.

Applying the commonsense approach, which was also emphasised by the Constitutional Court in *Lee* (above, paras [46] [47]) to the matter at hand, the court concluded that the municipality's

one (positive) act (the withdrawal of all staff, except one) and various omissions (failure to provide for the security presence required by the tender specifications; failure to ensure that four security guards were on duty for the day shift; and failure to ensure that its own access regulations were enforced) were the probable cause of the rape (para [165]).

The application of the but-for test in the case of an omission requires a mental elimination of the wrongful conduct, the substitution of a hypothetical course of conduct, and posing the question whether upon such an hypothesis, the plaintiff's loss would have occurred or not (see Neethling & Potgieter *Delict* (2015) 191-2). It is clear that, following this approach *in casu*, the substitution, for the failures of the municipality, of the appropriate positive conduct would probably have prevented the rape.

Donen AJ's (para [159]) statement that factual causation involves whether the rape would have occurred had the municipality taken 'reasonable' steps to guard against it, could cause confusion between the elements of factual causation and negligence. First, it must be determined whether the wrongdoer could have done *anything* to prevent the relevant consequence (causation), and only then whether a reasonable person in the position of the wrongdoer would have prevented the consequence (negligence) (see again *Lee* (above) 162; Neethling & Potgieter *Delict* (2015) 192–3).

The court concluded (para [166]) that the plaintiff's claim should be upheld and that the plaintiff was entitled to be awarded damages.

There is authority in our law that damages for rape should be substantial. In *N v T* 1994 (1) SA 862 (C) 864, a case involving the rape of an eight-year-old child, Williamson J stated:

> Rape is a horrifying crime and is a cruel and selfish act in which the aggressor treats with utter contempt the dignity and feelings of his victim. An award of damages in a situation of this kind . . . should be substantial.

Donen AJ's approach to determining damages in *Bridgman* reflects this view, and rightly so. Before considering the damages to be awarded, the judge (paras [167]-[215]) presented a thorough analysis of the evidence relating to the damage suffered by L as a result of the rape. This included *contumelia*, acute shock and distress, pain and suffering, and loss of the amenities of life (see as regards damages for these heads of damage, Potgieter, Steynberg & Floyd *Damages* 506-11). Because all

these heads of damage were a consequence of one and the same omission, Donen AJ (para [218]) attempted an holistic approach and made a single award for damages. This approach was not followed in *F v Minister of Safety and Security* 2014 (6) SA 44 (WCC) paragraph [59], where the plaintiff, a thirteen-year-old child, had been raped by a policeman, and the court made separate awards for *contumelia* (R300 000), on the one hand, and pain and suffering (R200 000), on the other (see for a discussion Neethling & Potgieter 2014 *Annual Survey* 754-5).

In passing, it should be noted that *contumelia* covers not only insult or the infringement of dignity, but may also be considered as the equivalent of the broader concept of *iniuria*, thus including any wrongful and intentional infringement of a personality right (see Neethling, Potgieter & Visser *Neethling's Law of Personality* (2005) 44-5; cf *F* (above) para [54]). In *F*, Meer J used *contumelia* in the wide sense of the infringement of personality rights under the *actio iniuriarum*. She stated with regard to the rape involved in *F:*

> [The plaintiff] was subjected to the most heinous invasion of her chastity and privacy and an aggression on her person and reputation. Her constitutionally protected right to dignity, privacy, freedom and security and her right as a child to be protected from abuse and degradation were trampled upon in an utterly inhumane manner, and the effects thereof will be with her always as aforementioned (para [58]).

To avoid confusion, it is suggested that the term *contumelia* should rather be avoided. *In casu* the court used the term in the narrow sense of insult. Donen AJ (para [221]) stated that a remedy for injury should be given when words or conduct involve degradation or an element of insult. Although the court took into account that the act of rape was not perpetrated by the municipality or its servants, nor was any intention attributable to them, it stated that the approach of the municipality in placing the burden on L to prove that she had been raped, when this was in fact clear, added insult to her injury and further violated her dignity. Such an attitude, according to the court, translated into damages (cf Potgieter, Steynberg & Floyd *Damages* 531-2 on the conduct of the defendant as a factor aggravating the amount of damages).

Although, generally speaking, awards in earlier cases are a relevant factor in assessing damages (see Potgieter, Steynberg & Floyd *Damages* 502-6), Donen AJ (para [218]) pointed out that no precedent had been placed before him regarding the rape of a

mentally disabled person, but that, in any event, he placed little reliance on awards made prior to the introduction of the new constitutional dispensation because the entrenchment of personality rights in the Bill of Rights has given these rights a higher status than previously existed. In addition, he pointed out that in delict the defendant must take its victim as it finds her (para [222]), and that prior cases did not address the delicate situation of *iniuria* by rape of a mentally disabled person and did not deal with the appropriate value to be placed upon the loss of dignity of a victim such as L. To follow these cases would ignore this reality, which the court was not prepared to do (para [223]). In the end, the court awarded R750 000 for *contumelia*, shock, pain, suffering, and loss of amenities of life (para [224]). A further amount of R30 780 was awarded for future medical expenses and therapy sessions for L and her parents.

We agree with the outcome of the case. The municipality should be held delictually liable for the damage caused as a result of the rape of L. The court correctly found that the municipality acted wrongfully because it failed to comply with the legal duty to protect L in the circumstances; its failure caused the rape; and it acted negligently. The substantial award of general damages of R750 000 was completely justified.

Although we also agree with the court's decision that the parents should not be liable as joint wrongdoers with the municipality, we differ from the court's approach in reaching this conclusion. The court first accepted that the parents acted lawfully because it would have been a transgression of L's constitutional rights (to freedom of movement, independence and control over her body) were the parents to be under a legal duty to supervise L in the circumstances. To our mind, among other things, L's vulnerability to exploitation, lack in social skills, judgment, and defence mechanisms, and her limited cognitive development, are clear indications that she did require some supervision by her parents, and that they therefore had a legal duty to protect her. This duty was breached when they allowed her to wander freely and unsupervised on the playground from where she was abducted to be raped. The parents thus acted wrongfully as against L. However, we agree with the court that the parents did not act negligently and that they therefore did not commit a delict against L.

Privacy infringement

Use of cannabis for personal consumption

Prince v Minister of Justice and Constitutional Development & others and related matters [2017] 2 All SA 864 (WCC) involved the constitutional validity of certain statutory provisions which prohibit the use of cannabis (dagga) and the possession, purchase of and cultivation thereof exclusively for personal consumption. The core question was whether this limitation of the 'right to privacy' was justifiable in terms of section 36 of the Constitution. Davis J held that the limitation should be narrowly tailored to achieve its purpose, should be carefully focused, and should not be overbroad (para [104]). As the impugned legislation did not employ the least restrictive means to deal with the problem, it was held to be unconstitutional and ordered to be reviewed by Parliament (paras [106] [132]). (For a full discussion of this case, see the chapters 'Constitutional Law' and 'Criminal Law'.) The decision of Davis J was confirmed by the Constitutional Court in *Minister of Justice and Constitutional Development v Prince* [2018] ZACC 30.

For purposes of the law of delict, it is essential to formulate and apply a clear definition of the concept of privacy as it is 'an amorphous and illusive one which has been the subject of much scholarly debate' (*Bernstein v Bester* 1996 (2) SA 750 (CC) 787-8). It is now accepted – also by the courts – that privacy entails an individual condition of life characterised by seclusion from the public and publicity. This condition embraces all those personal facts which the person concerned has him- or herself determined to be excluded from the knowledge of outsiders and in respect of which he or she has the will that they be kept private (see Neethling, Potgieter & Visser *Personality* 29-33; see also *National Media Ltd & another v Jooste* 1996 (3) SA 262 (A) 271; *Greeff v Protection 4U h/a Protect International* 2012 (6) SA 393 (GNP) 406-7; *Jooste v National Media Ltd* 1994 (2) SA 634 (C) 645; *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 (4) SA 376 (T) 384; *Bernstein* (above) 789; *Swanepoel v Minister van Veiligheid en Sekuriteit* 1999 (4) SA 549 (T) 553; cf *NM & others v Smith & others (Freedom of Expression Institute as Amicus Curiae)* 2007 (7) BCLR 751 (CC), 2007 (5) SA 250, 262-3; *Motor Industry Fund Administrators (Pty) Ltd & another v Janit & another* 1994 (3) SA 56 (W) 60; and *Financial Mail (Pty) Ltd & others v Sage Holdings Ltd & another* 1993 (2) SA 451 (A) 462).

This concept of informational privacy should, for the sake of conceptual clarity and legal certainty, be distinguished from other concepts of privacy in South Africa which, on closer examination, reveal different protected interests (such as a person's good name or reputation, psycho-physical integrity – including sensory feelings – dignity, identity, autonomy, and self-realisation; see Neethling, Potgieter & Visser *Personality* 33-5). For present purposes, only the concept of privacy as autonomy is relevant. Where an outsider dictates to a person how he or she should manage his or her private life (in the religious or political spheres, the education of children, etc), or where the state prohibits individuals from, for example, practising sodomy, possessing and using dependence-producing substances, or possessing and reading pornographic material, such conduct is often viewed as an infringement of privacy (see Neethling, Potgieter & Visser *Personality* 34-5). In American law these instances are also classified under the protection offered by the right to privacy. In fact, in recognition of the right to privacy as a constitutionally protected human right in *Griswold v Connecticut* (1965) 381 US 479, the Supreme Court dealt with such a case and held that a statute prohibiting the use of contraceptives in marriage violates the right to privacy. Our Constitutional Court has also extended the field of application of the constitutional right to privacy beyond the protection of informational privacy to include so-called 'substantive' or 'personal autonomy' privacy rights which enable persons to make free decisions about such matters as their family, home, and sexual life (see, eg, *Case & another v Minister of Safety and Security & others; Curtis v Minister of Safety and Security & others* 1996 (3) SA 617 (CC), 1996 (3) SACR 587 para [91]; *National Coalition for Gay and Lesbian Equality & another v Minister of Justice & others* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517; *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* & others 2003 (12) BCLR 1333 (CC), 2004 (1) SA 406 431 440-1). The constitutional right to privacy is, therefore, more comprehensive that the common-law right in that it includes autonomy. However, these instances do not involve an infringement of informational privacy as there is no acquaintance with private facts contrary to the will and determination of the person in question. In reality, a person's autonomy (decision-making freedom) is related to the freedom of human self-determination in society within the limits imposed by the law. This obviously includes a person's freedom to make decisions

about his or her private affairs. As such, it falls under the concept of legal subjectivity which should be distinguished from the concept of informational privacy.

The concept of privacy as autonomy was also accepted by Davis J in *Prince* (above) (para [23]):

> It follows from the animating idea of privacy that a right to make intimate decisions and to have one's personal autonomy protected is central to individual identity of a person who is entitled to make decisions about these concerns without undue interference from the State. Indeed in *Case* . . . para 91 Didcott J, in a case dealing with the question of the prohibition of the possession of pornography, went so far as to say: 'What erotic material I may choose to keep within the privacy of my home, and only for my personal use there, is nobody's business but mine. It is certainly not the business of society or the State.'

Publication of images of graphic sexual nature by online newspaper

NT v Kunene & others [2017] 4 All SA 865 (GJ) concerned an application for an order to remove graphic sexual videos featuring the applicant from the site of the respondents' online newspaper, and to prohibit the respondents from publishing similar material in the future. The images of the applicant were embedded in an article alleging that the Deputy President of South Africa had engaged in extramarital relationships with a number of women, including the applicant, who was alleged to have sent erotic pictures and intimate videos to the Deputy President. According to the applicant, the posting of her intimate videos without her consent exceeded the legitimate bounds of media freedom, and unjustly infringed her rights to privacy and dignity (para [17]). The respondents averred that the videos were a necessary element of the article because they authenticated its textual content, which gave details of the alleged extra-marital relationship that the Deputy President had with the applicant. They asserted that the publication of the videos without the applicant's consent was in the public interest, and that the manner in which they had dealt with the videos represented an acceptable balance between the applicants' rights and the respondents' right to media freedom (paras [18]-[19]).

Keightley J commenced by deciding that the applicant was recognisable and therefore identifiable on the videos (para [12]). The judge accepted that there is an inherent public interest element in the authentication of media reports, particularly where high-profile public persons are involved, and even more so when

the media reports involve allegations of unlawful, immoral, or otherwise reprehensible conduct on the part of our constitutional leaders (para [25]). But this does not mean that the respondents' conduct in publishing the videos was justifiable (para [27]). As far as authentication for media reports was concerned, the media must be sensitive to, consider very carefully, and respect countervailing rights such as the rights to privacy and dignity (para [28]). Individual sexual choices lie at the heart of the right to privacy (para [30]; see also *National Coalition for Gay and Lesbian Equality v Minister of Justice* (above) para [32]; *Prinsloo v RCP Media Ltd t/a Rapport* 2003 (4) SA 456 (T) 471). However, where a high-profile person is reported to have conducted him- or herself in a reprehensible manner, authentication by way of publishing private information may be justified. Arguably, this might even, in some cases, include the publication of material involving private sexual conduct (para [29]). This was not the case with the videos in question, as they featured only the applicant. Viewed on their own, the videos showed no more than an ordinary person engaging in sexual activities in her private space. The conduct depicted in the videos did not authenticate the alleged relationship with the Deputy President. Very little value could be attached to the videos as a means of authenticating the allegations contained in the article (paras [33]-[36]).

The court concluded that the respondents had not acted responsibly and with due regard to the applicant's rights to privacy and dignity. They had failed to exact the appropriate balance between her rights and the public interest (para [41]). Accordingly, Keightley J was satisfied that the applicant had demonstrated that she was entitled to an order directing the respondents to remove the videos from the website, together with the other relief sought, among other things, that the respondents be interdicted and restrained from further publishing such images in future. It made no difference that the publication had already taken place and that the videos had been in the public domain for over a week. The applicant averred that for so long as the videos remained on the website, she would be subjected to an ongoing violation of her rights. In this regard, the judge accepted the decision in *Prinsloo* (above) 468 (see also Neethling, Potgieter & Visser *Personality* 236-9), where Van der Westhuizen J held:

> [D]espite the fact that a considerable number of people had already viewed the material, possession of the images by someone who was not authorised by the original author or those depicted on them could,

> in principle, amount to an ongoing violation or, at least, a continuing threat of violation of their privacy. Every instance when the images were viewed, even by someone who had already seen them, could constitute a renewed intrusion into their privacy (para [43]).

We agree with Keightley J's judgment, particularly as regards the principle developed and applied with regard to the authentication of published allegations by means of images.

Second medical examination as invasion of privacy, physical integrity and dignity

In C*ape Town City & others v Kotzé* 2017 (1) SA 593 (WCC) the City of Cape Town, the defendant in a damages claim, applied for an order in terms of rule 36 of the Uniform Rules of Court that Mrs Kotzé, the plaintiff, attend a second medical examination before a psychiatrist. The issue was whether the examination was 'necessary or desirable for the purpose of giving full information on matters relevant to the assessment of such damages' (para [44]). (For a full discussion of the case, see the chapter 'Evidence'.)

For purposes of delict, the recognition and protection of privacy, physical or psychological integrity, and dignity, as personality interests, are relevant in the present circumstances. Sher AJ pointed out that these interests are protected by the Constitution and that they must be juxtaposed against section 34 of the Constitution, which provides that everyone has a right to have any dispute that can be resolved by the application of law, decided in a fair hearing before a court (paras [26]-[29]). The limitation of a party's rights to bodily integrity, privacy, and dignity, as occasioned by the application of the relevant evidentiary rules, are clearly reasonable and justifiable limitations in an open and democratic society based on freedom and equality (s 36 of the Constitution). Courts should nevertheless be alive to, and effectively regulate, any abuses of rule 36 of the Uniform Rules (para [34]). Sher AJ continued:

> Where a court is of the view that a medical examination is likely to result in an invasion of a party's personal privacy and bodily integrity in circumstances where this is not necessary and the information can be obtained in another manner, or it will cause the party to suffer undue hardship or inconvenience, or physical, emotional or psychological distress or pain, it should not allow the examination to go ahead, or should put conditions in place to safeguard the examinee's rights (para [38]).

In conclusion, Sher AJ dismissed the application as he was of the view that the applicants had substantially all the necessary

information they required to enable them to prepare for trial and to meet the respondent's case. The judge was not disposed to subject the respondent to yet another psychiatric examination which, in his view, was neither necessary nor desirable, and which could cause her further psychological and emotional distress (paras [53] [54]).

We agree with Sher AJ's careful balancing of the personality rights involved and the evidentiary rules to ensure a fair hearing before a court.

Strict Liability

Injuries caused by electricity: Applicability of section 61 of the Consumer Protection Act 68 of 2008

In *Eskom Holdings Ltd v Halstead-Cleak* 2017 (1) SA 333 (SCA) the plaintiff suffered burns when he cycled into a low-hanging live power line under Eskom's control. He instituted a claim for damages against Eskom, relying on delict and product liability. The central question was whether Eskom could be held strictly liable in terms of section 61 of the Consumer Protection Act 68 of 2008 (the CPA) for harm caused to the plaintiff by the powerline which was not supplying or required to supply electricity to anyone (the parties having agreed that the alternative grounds for liability would stand over for later determination, if necessary). (See, as to the application of s 61 of the Act, M Loubser & E Reid *Product Liability in South Africa* (2012) 56ff; J Neethling 'Product liability South Africa' in P Machnikowski (ed) *European Product Liability* (2016) 549ff; Neethling & Potgieter *Delict* (2015) 399-400.) The High Court found for the plaintiff, holding that the CPA did not require the plaintiff to be a consumer in a contractual sense for the defendant to be strictly liable. However, in the Supreme Court of Appeal, Schoeman AJA held that as the CPA's purpose was to protect consumers, there had to be a supplier/consumer relationship for strict liability to ensue (paras [21] [22]).

Schoeman AJA held that in the present case, the plaintiff was not a consumer vis-à-vis Eskom because *(a)* he had not entered into any transaction with Eskom as a supplier or producer of electricity in the ordinary course of Eskom's business; and *(b)* he was not at the time utilising the electricity, nor was he a recipient or beneficiary thereof (paras [22] [23]). Consequently, because the respondent was not a consumer who was entitled to the

protection of the CPA, and, furthermore, the circumstances of this case clearly fell outside the ambit of a consumer-supplier relationship to which the CPA applies, the appeal had to succeed (para [25]). (See, however, Loubser & Reid *Product Liability* 93-4, who state: 'It should be noted also that there is no requirement for the injured person or to have been involved in any transaction or involving the goods, or to have acquired any specific right relating to the defective goods. Third parties physically injured as a result of a defect of goods purchased, owned or possessed by another person may claim compensation in terms of these provisions in the same way as the purchasers, owners or possessors themselves.')

In the result, the plaintiff would have to base his claim on alternative grounds, namely Eskom's role as the sole supplier or producer of electricity on the national grid, and its control of all power lines not falling under the control of a local authority or municipality, and on delict in that Eskom wrongfully and negligently caused the respondent's loss (as set out in para [3]). In this regard, note that section 25 of the Electricity Regulation Act 4 of 2006 creates a rebuttable presumption of negligence on the part of an electrical undertaking (see, eg, *Eskom Holdings Ltd v Hendricks* 2005 (5) SA 503 (SCA); *Malherbe v Eskom* 2002 (4) SA 497 (O) 504; Neethling & Potgieter *Delict* (2015) 161 n207 and 400 n195).

ENVIRONMENTAL LAW

MICHAEL KIDD*

LEGISLATION

There was no new environmental legislation (Acts of Parliament) during 2017. The currently applicable Environmental Impact Assessment (EIA) Regulations and relevant listing notices (GN R982 (Regulations); GN R983 (Listing Notice 1); GN R984 (Listing Notice 2); GN R985 (Listing Notice 3), all in *GG* 38282 of 4 December 2014) have been amended, respectively, by Government Notices 324, 325, 326 and 327 in *GG* 40772 of 7 April 2017. In broad substantive terms, there are no major changes that require discussion here.

CASE LAW

ENVIRONMENTAL AUTHORISATION AND CONSIDERATION OF CLIMATE IMPACTS

In *Earthlife Africa Johannesburg v Minister of Environmental Affairs & others* [2017] 2 All SA 519 (GP), Murphy J focused on the environmental authorisation of the Thabametsi coal-fired power station near Lephalale in Limpopo. A decision to grant such an authorisation is made in terms of section 24 of the National Environmental Management Act 107 of 1998 (the NEMA). The Minister had dismissed Earthlife's appeal against the environmental authorisation originally granted by the national department. Earthlife's argument was that authorisation of a development of this kind required consideration of the climate-change impacts, which had not been carried out in this case. The court characterised a climate-change impact assessment,

> in relation to the construction of a coal fire power station [as one that] ordinarily would comprise an assessment of (i) the extent to which a proposed coal-fired power station will contribute to climate change over its lifetime, by quantifying its GHG emissions during construction, operation and decommissioning; (ii) the resilience of the coal-fired power station to climate change, taking into account how climate change will impact on its operation, through factors such as rising

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> temperatures, diminishing water supply, and extreme weather patterns; and (iii) how these impacts may be avoided, mitigated, or remedied (para [6]).

In her appeal decision, the Minister recognised that the original decision had not satisfactorily canvassed climate-change considerations. Although she upheld the original decision, she added as a condition of approval, that the proponent was to carry out a climate-change impact assessment before the commencement of the project. As Earthlife pointed out, however, if the assessment were to conclude that the project ought not to proceed, the Minister would have no power to withdraw the authorisation. In this light, Earthlife argued that the Minister's decision was unlawful, irrational, and unreasonable.

The court's conclusion, following a careful consideration of the parties' arguments, and the constitutional, statutory, and international law context, was that

> the legislative and policy scheme and framework overwhelmingly support the conclusion that an assessment of climate change impacts and mitigating measures will be relevant factors in the environmental authorisation process, and that consideration of such will best be accomplished by means of a professionally researched climate change impact report. For all these reasons, I find that the text, purpose, ethos and intra- and extra-statutory context of section 24O(1) of NEMA support the conclusion that climate change impacts of coal-fired power stations are relevant factors that must be considered before granting environmental authorisation (para [91]).

The relevant administrative law ground of review is the requirement to take relevant considerations into account. On a review of the facts, the court held that the Chief Director in his original decision had not adequately taken the climate-change impacts into account.

The department had argued, in relation to the Minister's appeal decision, that the purpose (or one of the purposes) of the condition requiring the climate-change impact assessment was that it would allow the Minister to use her powers to amend the authorisation in such a way as to revoke it entirely (as there are no express powers to revoke an authorisation), if it showed that there were problems in allowing the project to proceed. The court, however, concluded that the Minister had misconstrued her powers in this regard and that this amounted to a material error of law, which is another ground of administrative-law review.

In fashioning a remedy, the court decided that it would be disproportionate to set aside the entire decision and require the

authorisation process to start afresh. Considering that the Minister has the power to decide the appeal *de novo*, the court ordered that the Minister must take the climate-change impact report into account and come to a decision on the basis of how that report would influence the outcome. This would be more abbreviated than setting aside the entire decision and requiring the entire environmental authorisation process to start anew.

From an administrative-law perspective, the decision may not be that remarkable – the court correctly found the existence of the ground of review: ie, that a relevant consideration had not been taken into account. The court was assisted in its conclusion by the fact that in her appeal decision, the Minister had seemingly recognised that this factor had not been considered in the original decision. From an environmental-law perspective, on the other hand, this is a landmark judgment which serves to highlight the problematic nature of coal-based activities in South Africa today. It is to be welcomed because there is no express requirement in the Act and relevant regulations that a climate impact assessment must be carried out; the court came to this conclusion on a contextual and purposive interpretation of what the NEMA requires, in the light of section 24 of the Constitution of the Republic of South Africa, 1996 (the Constitution). It is important to bear in mind, though, that it is not a judgment on the merits of coal-based power stations, but a consideration of such merits (although probably not in the courts) that is not likely to be too far in the future.

Animal Welfare and Conservation

The main legal issue in *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development & another* 2017 (1) SACR 284 (CC), 2017 (4) BCLR 517, is not particularly significant from an environmental-law perspective. It concerned the statutory power of the National Society for the Prevention of Cruelty to Animals (the NSPCA) to institute a private prosecution, conferred upon it by section 6(2)*(e)* of the Societies for the Prevention of Cruelty to Animals Act 169 of 1993 read with section 8 of the Criminal Procedure Act 51 of 1977. The court decided, for reasons that need not be discussed here, that the NSPCA does have this power.

The environmental-law relevance involves comments made by the court in reaching the decision. In highlighting the importance of animal welfare, the court referred to the Supreme Court of

Appeal's decision in *S v Lemthongthai* 2015 (1) SACR 353 (SCA), saying that the latter decision is

> notable because it relates animal welfare to questions of biodiversity. Animal welfare is connected with the constitutional right to have the 'environment protected . . . through legislative and other means'. This integrative approach correctly links the suffering of individual animals to conservation, and illustrates the extent to which showing respect and concern for individual animals reinforces broader environmental protection efforts. *Animal welfare and animal conservation together reflect two intertwined values* (para [58]) (emphasis added).

These statements are significant in relation to the link between animal welfare and biodiversity (animal) conservation. Somewhat ironically (since the court, in *NSPCA,* refers to the decision in *South African Predator Breeders Association & others v Minister of Environmental Affairs and Tourism* [2010] ZASCA 151 as supporting its approach on animal welfare), the decision in *NSPCA*, had it preceded the *Predator Breeders* case, may have supported a different finding in relation to at least one of the issues raised in the earlier case. In *Predator Breeders,* the court held, in essence, that the regulations set aside in that case were aimed at unethical hunting, which is not consistent with the legislative purpose of the relevant empowering provision (s 57(2) of the National Environmental Management: Biodiversity Act 10 of 2004) which provides for the conservation of species under threat. There may be some debate about the conflation of animal welfare and biodiversity conservation objectives, particularly in relation to the governance mandates of conservation agencies and the NSPCA, but delineation of appropriate mandates ought not to be a reason to avoid a sentiment that is a welcome recognition of the importance of individual specimens of species in biodiversity conservation initiatives.

Mining in Protected Areas

In *Barberton Mines (Pty) Ltd v Mpumalanga Parks and Tourism Agency* (43125/2013) [2016] ZAGPPHC 254, the applicant was seeking an order declaring that it was entitled to prospect (pursuant to a prospecting licence) on certain land that the respondent alleged was a protected area (the so-called Barberton Nature Reserve). The relevant environmental-law feature of the judgment is whether the land in question was, legally, a protected area. The respondents relied on three different decisions of both the former Transvaal Provincial Administration and

then the Mpumalanga province. However, the court held that none of these decisions had formally and properly declared the area in question a protected area. Consequently, there was no bar – on this basis – to prospecting in the area. While this judgment emphasised how important it is for a protected area to be correctly declared in terms of the applicable law, in such a way that it is clear whether or not a piece of land is part of a protected area, it did not survive appeal.

The appeal decision is *Mpumalanga Tourism & Parks Agency v Barberton Mines (Pty) Ltd* 2017 (5) SA 62 (SCA). The Supreme Court of Appeal did not agree with the High Court, stating that it had taken 'far too narrow a view of the matter' (para [10]). Proclamation 12 of 1996 of the Mpumalanga Environmental Affairs MEC had listed the Barberton Nature Reserve as a protected area in the province. In dealing with the issue of vagueness, the Supreme Court of Appeal held that

> reference to the 'Barberton Nature Reserve' in the 1996 Proclamation had the meaning given and applied to it by the provincial authorities since at least 1985. When regard is had to the nature of the 1996 Proclamation as a 'designation' and to its context – including its relationship to the 1985 Resolution and the administration of the land as the Barberton Nature Reserve since then, it cannot be said that the persons to whom it is addressed would be left in any uncertainty. Since the 1996 Proclamation was a designation of an area already as a matter of fact reserved, its validity and effectiveness did not require a detailed description of the area concerned, as the High Court found. To achieve its purpose, the 1996 Proclamation could simply indicate the designated area by name, as it did (para [17]).

Section 12 of the Protected Areas Act 57 of 2003 reads:

> A protected area which immediately before this section took effect was reserved or protected in terms of provincial legislation for any purpose for which an area could in terms of this Act be declared as a nature reserve or protected environment, must be regarded to be a nature reserve or protected environment for the purpose of this Act.

Because of this provision, and in view of the court's observation quoted above, the Barberton Nature Reserve was to be deemed a nature reserve under the Protected Areas Act.

It is difficult to assess the correctness or otherwise of the court's decision without more information as to how the area had been identified over the years, and whether there was any uncertainty as to its precise footprint and boundaries. At first glance, one would expect a protected area to be clearly designated, especially given the ramifications of land forming part of a

protected area. Whether the decision is correct or not, it is undoubtedly desirable from the point of view of environmental conservation. The effect of the decision is that mining or prospecting may not take place within the nature reserve in terms of section 48(1) of the Protected Areas Act. This is a significant decision, since the Barberton Nature Reserve is an important conservation area, as described in the opening paragraphs of the appeal judgment.

World Heritage Site

The judgment in *Isimangaliso Wetland Park Authority & another v Feasey Property Group Holdings (Pty) Ltd* (unreported KZP case 17351/2014 19 August 2016) has limited environmental-law significance. The case arose from an interdict that had been granted against various respondents in an earlier judgment, ordering them to stop development, construction, and marketing of sites within the Isimangaliso Wetland Park (the Park), which is a World Heritage Site and under the management authority of the applicant in the case. This particular judgment relates only to the sixth and seventh respondents, natural persons who were developing on sites within the Park. The latter raised technical and procedural arguments that have limited environmental significance and which the court characterised as essentially delaying tactics. Consequently, the court had little hesitation in upholding the application and ordering the respondents to vacate the land they were occupying, to rehabilitate it, 'and restore it to its pristine state'. The environmental-law significance of the case as a whole, rather than of the judgment itself, is that it shows – at least as regards this World Heritage Site – that the relevant authorities (particularly the first applicant) are clearly vigilant in relation to contraventions of the applicable law in their area of jurisdiction.

Enforcement

Mineral Sands Resources (Pty) Ltd v Magistrate for the District of Vredendal, Kroutz NO & others [2017] 2 All SA 599 (WCC) dealt with the validity of a search warrant issued by the first respondent in September 2016. The search warrant authorised a search of the applicant's Tormin sand mine near Lutzville. As the judgment indicated, the case raises,

> among other issues, . . . questions (i) about the interpretation of statutory provisions giving effect to the government's One Environmen-

> tal System agreement, an arrangement intended to establish a single environmental system for assessing the environmental aspects of activities, including mining activities, and (ii) about the powers of the various kinds of inspectors appointed to monitor and enforce compliance with environmental legislation (para [1]).

The case arose out of concerns that the Tormin mine was not in compliance with the conditions of its environmental authorisation to carry out mining operations. Acting on these concerns, officials of the national Department of Environmental Affairs (the DEA) approached the respondent magistrate and requested the search warrant, which was granted. It was this search warrant that was the focus of the case.

The main aspect of the applicant's (the MSR's) case was that the DEA officials lacked a mandate to investigate most of the alleged contraventions of the environmental legislation in question. The NEMA prescribes in section 31D the mandates of the various types of inspector, including environmental management inspectors (the DEA officials), and environmental mineral resource inspectors (s 31D(2A)).

Section 31D(3) provides:

> A person designated as an environmental management inspector or environmental mineral resource inspector may exercise any of the powers given to environmental management inspectors in terms of this Act that are necessary for the inspector's mandate in terms of subsections (1) or (2A) that may be specified by the Minister, the Minister responsible for water affairs, the Minister responsible for mineral resources or MEC by notice in writing to the environmental management inspector or environmental mineral resource inspector.

Subsection 4 provides:

> Despite the provisions in subsections (2A) and (3), the Minister may, with the concurrence of the Minister responsible for mineral resources, if the environmental mineral resource inspectors are unable or not adequately able to fulfil the compliance monitoring and enforcement functions, designate environmental management inspectors to implement these functions in terms of this Act or a specific environmental management Act in respect of which powers have been conferred on the Minister responsible for mineral resources.

Subsections (5) to (9) inclusive provide for a process for a decision in terms of subsection (4).

In this case, there had not been a finding that the mineral resources inspectors were unable to do their job, and there had been no concurrence of the Minerals Minister. On these facts, the court held that the DEA officials did not have a mandate to

investigate the alleged infractions of the environmental legislation. In other words, there is no concurrent mandate for environmental and mineral resources inspectors unless the procedure set out in subsection 31D(4) has been followed.

The judgment also deals with issues relating to disclosure of relevant information to the magistrate, including the relevant legislation and recent changes thereto, as well as the clarity of the evidence provided to the magistrate (which was found to be inadequate and 'too confusing and unclear' – para [213]) in relation to the one charge (relating to dumping of mining waste) that was not within the mandate of the mineral resources inspectors. On the basis of the cumulative findings of the court, the court found, in an exhaustive and thorough judgment, that the search warrant and its execution were unlawful and set the warrant aside.

The interpretation of the law reached by the court in relation to the mandates of the various inspectors provided for by the NEMA is correct and the court's conclusion was the only one that could validly have been reached.

Conservation of Agricultural Resources

Minister of Rural Development and Land Reform v Normandien Farms; Mathimbane v Normandien Farms [2017] ZASCA 163, [2018] 1 All SA 390 (SCA), 2019 (1) SA 154 is a land reform case with some relevance to environmental law and the application of the Conservation of Agricultural Resources Act 43 of 1983. Normandien applied for orders that livestock belonging to labour tenants on the farm be removed from the farm and that the Land and Agriculture Ministers and/or the Regional Commissioner facilitate their removal to alternative land. The relief was claimed on the basis that the farm had been severely overgrazed and that the continued presence of the livestock on the farm contravened the Act (para [5]).

The court did not agree that requiring removal of the livestock from the farm amounted to an eviction in terms of the Land Reform (Labour Tenants) Act 3 of 1996 (the LTA). The court correctly held that the LTA 'does not exempt labour tenants from other laws which limit the way in which land can be used' and that labour tenants, 'like everyone else, are subject to CARA' (para [61]).

Appeal in terms of National Environmental Management Act

MEC for Local Government, Environmental Affairs and Development Planning, Western Cape v Hans Ulrich Plotz NO [2017] ZASCA 175 involves an appeal against an administrative fine levied in terms of section 24G of the NEMA. The respondent (Plotz) was the trustee of a trust found to have carried out a NEMA-identified activity without the requisite authorisation. This is an offence in terms of section 24F of the Act and triggers the operation of a (controversial) procedure in section 24G of the Act which in effect requires an applicant to apply for *ex post facto* authorisation of the activity. The trust was required to pay an administrative fine in terms of section 24G in the amount of R475 000. The trust lodged an appeal against this fine, but significantly after the deadlines set in the relevant regulations (GN R982 *GG* 38282 of 4 December 2014).

The case is a straightforward administrative-law matter involving the necessity of exhausting internal remedies under the Promotion of Administrative Justice Act 3 of 2000 (the PAJA). Section 7(2) of the PAJA provides that an application for judicial review to the courts may only take place after exhaustion of internal remedies (an appeal is an internal remedy), failure to do so being subject only to condonation in exceptional circumstances. Failure to exhaust internal remedies will result in the court refusing to consider the review application. In this case, consideration of the facts led the Supreme Court of Appeal correctly to decide that there were no exceptional circumstances. Consequently, it found that there had been no compliance with section 7(2) of the PAJA. On this basis, the court *a quo*'s decision, condoning the late appeal application, was overturned and the appeal upheld.

In my opinion, this case was correctly decided. It emphasises the importance of observing the requisite time limits for lodging appeals against decisions in terms of the NEMA. Failure to appeal in time means that the opportunity to use an internal remedy is lost, and consequently, in the absence of exceptional circumstances, the aggrieved individual will be unable to bring a review application to the High Court.

EVIDENCE

PAMELA-JANE SCHWIKKARD*

LEGISLATION

No relevant legislation was promulgated in the period under review.

CASE LAW

ADMISSIONS AND CONFESSIONS

At common law an admission by one co-accused cannot be admitted against another co-accused. There was a brief period of confusion when the Supreme Court of Appeal, in *S v Ndhlovu & others* 2002 (2) SACR 325 (SCA), held that an admission could be admitted against a co-accused if it met the requirements of the hearsay rule as set out in section 3 of the Law of Evidence Amendment Act 45 of 1988. However, the Supreme Court of Appeal, recognising that it had erred in *Ndlovu*, restored the common-law position in *S v Litako* 2014 (2) SACR 431 (SCA). This was confirmed by the Constitutional Court in *S v Mhlongo*; *S v Nkosi* 2015 (2) SACR 323 (CC). (See also *Molaudzi v S* 2015 (2) SACR 341 (CC), discussed in 2015 *Annual Survey* 906-8.) In *Khanye & another v S* 2017 (2) SACR 630 (CC), the two appellants, who had been co-accused of the successful appellants in *S v Mhlongo; S v Nkosi* and *S v Molaudzi,* appealed on the basis that the extra-curial statements made by their co-accused had been wrongly admitted against them. The court held that the trial court had erred in admitting the extra-curial statements and that the remaining evidence was insufficient to sustain a conviction. This is clearly in accordance with the common law. It would be interesting to know how many accused were incorrectly convicted between 2002 (*Ndhlovu*) and 2014 (*Litako*).

ALIBI

The court emphasised the importance of investigating an alibi at the earliest possible opportunity in *S v Steward* 2017 (1) SACR

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156 (NCK) and endorsed the approach taken by the Constitutional Court in *S v Thebus* 2003 (2) SACR 319 (CC). The failure of the police to investigate the alibi, to take statements from two alibi witnesses at the outset, together with a litany of other omissions and errors, led to the acquittal of the accused, leaving a lingering suspicion that he was indeed the perpetrator.

Cross- and Re-examination

The defendants in *De Sousa & another v Technology Corporate Management (Pty) Ltd & others* 2017 (5) SA 577 (GJ) engaged in litigation tactics which unnecessarily prolonged proceedings. The clearly frustrated presiding officer sought to get the parties to agree to a timetable; the plaintiffs were agreeable, but the defendants refused. In the face of the defendants' refusal to cooperate, the court accepted the plaintiffs' proposed timetable. The defendants proceeded to cross-examine one of the plaintiffs (De Sousa) for eight days without putting their version to him (despite being requested to do so by the court). The court ruled that the defendants would only be allowed one more day of cross-examination. The defendants then argued for the exclusion of De Sousa's evidence on the basis that cross-examination had been curtailed and this infringed the constitutional right to a fair trial. Boruchowitz J recognised that cross-examination was a crucial component of a fair trial, but noted that it was not an absolute right, and whether curtailing cross-examination constituted an infringement of the right to a fair trial would have to be determined in the context of the circumstances that gave rise to the limitation (para [94]). The primary consideration in determining trial fairness is whether the defendant suffers any prejudice (*Distillers Korporasie (SA) Bpk v Kotze* 1956 (1) SA 357 (A)).The court noted its inherent jurisdiction to regulate its own proceedings in the interests of the administration of justice (para [98]), which includes limiting protracted cross-examination which increases the cost of litigation and wastes public time (para [97]). (See *R v Melozani* 1952 (3) SA 639 (A); *Take and Save Trading CC & others v Standard Bank of SA Ltd* 2004 (4) SA 1 (SCA); *Universal City Studios Inc & another v Network Video (Pty) Ltd* 1986 (2) SA 734 (A).)

In determining whether the defendants had suffered any prejudice, the court noted that although the defendants had been allocated five days for cross-examination, they had in fact been allowed to take up nine days. The court had placed no limitations

on the topics or line of cross-examination, despite the defendants spending a significant amount of time on matters that were 'not dispositive of the case' (para [101]). The defendants had plenty of time to ask the pertinent questions and their failure to do so was a consequence of their own choices. Boruchowitz J concluded that the right to a fair trial could not be equated with the right to a long trial, and held that the defendants had not suffered any prejudice and, accordingly, the right to a fair trial had not been infringed (para [112]). It followed that the evidence of De Sousa was not excluded (para [113]). As the defendants chose to close their case without leading any evidence, De Sousa's evidence was not contradicted.

This case provides a textbook example of how a presiding officer can use his or her authority to regulate court proceedings better to promote the administration of justice. It is also an excellent example of how litigation should not be conducted, and is useful material for those who teach procedural law and ethics.

The Constitutional Court in *Snyders & others v De Jager & others* 2017 (3) SA 545 (CC) noted with disapproval the failure of the presiding officer in the magistrate's court to disallow new evidence led during re-examination (paras [64] [65]). The evidence led in re-examination was not confined to issues arising from cross-examination; it also went outside the scope of the leave granted for evidence to be led in the motion proceedings.

Electronic Evidence

Legal systems that are primarily adversarial (as is the case in South Africa) place significant weight on evidence being presented by means of oral testimony in open court. This allows for public scrutiny and cross-examination. In *Uramin (Incorporated in British Columbia) t/a Areva Resources Southern Africa v Perie* 2017 (1) SA 236 (GJ), Satchwell J held that a court can depart from the *viva voce* requirement and in exercising its discretion, it will ask whether 'it is convenient or necessary for the purposes of justice' to do so (para [25]).

The judge took an extremely pragmatic approach by allowing witnesses who were out of the country and unable to attend court proceedings to testify via video link. In doing so, she emphasised South Africa's place in the global economy and the ability and desirability of the rules of court to adapt to evolving technology. She also held that it should not be considered exceptional to use

video-link technology and that the prohibitive costs of bringing witnesses from afar might alone justify its use (para [28]).

The court found that the evidence of the distant witnesses was necessary for the defendant to have a fair opportunity to conduct its defence (and possibly counterclaim) (paras [13] [15]). The fact that they did not wish to come to South Africa, and that there were no means of compelling them to do so, provided sufficient justification for the use of a video link in the circumstances.

In facilitating access to justice, the court was not deterred by the absence of the requisite facilities in the courtroom (para [35]). The court moved to the offices of the defendant's attorneys, where all parties were able to view the witnesses testifying from offices in their respective countries of residence, each accompanied by an independent legal professional. The witnesses were examined without intermediaries and there was very little to differentiate testifying by video link from oral testimony in court, save for the occasional hiccup in the quality of the video link (para [36]).

This is a very sensible judgment that embraces the use of available technology to ensure access to justice whilst ensuring that the necessary safeguards remain in place.

Evaluation of Evidence

Inference from silence

Boruchowitz J in *De Sousa & another v Technology Corporate Management (Pty) Ltd & others* 2017 (5) SA 577 (GJ) noted that where a defendant, in a civil case, closes its case without calling available witnesses, no inference will be drawn if the plaintiff has failed to establish a *prima facie* case. (See also *Titus v Shield Insurance Co Ltd* 1980 (3) SA 119 (A); *Tshishonga v Minister of Justice and Constitutional Development & another* 2007 (4) SA 135 (LC).) However, where a *prima facie* case has been established, it is possible that a negative inference might be drawn depending on the surrounding circumstances. For example, if a witness is available and would be able to testify to matters relevant to the issue before the court, an inference may be drawn that he or she does not wish to testify, as cross-examination may elicit information that is unfavourable to him or her (*Brand v Minister of Justice* 1959 (4) SA 712 (A)). The court also noted that 'no reliance can be placed on versions put to witnesses in respect of which no evidence is subsequently given' (para [125],

citing *ZT Mtembu v Safety & Security Sectional Bargaining Council & others* LC JR2870/10*)*.

Unlike in criminal proceedings, the drawing of inferences from silence in civil proceedings does not give rise to a constitutional issue. An accused's right to remain silent draws its rationale from the specific context of a criminal trial.

In *DPP, Gauteng Division, Pretoria v Heunis* 2017 (2) SACR 603 (SCA), the accused pleaded in terms of section 115 of the Criminal Procedure Act 51 of 1977 and then declined to testify. On the basis of his section 115 statement, the trial court convicted him of culpable homicide. The prosecution appealed pursuant to the reservation of a question of law in terms of section 319 of the Criminal Procedure Act. In summary, the questions of law were directed at the manner in which the section 115 statement had been evaluated, the weight given to the evidence of a ballistics expert, and the failure of the trial court to draw an inference from the accused's choice not to testify.

The appeal court held that the trial court had not properly evaluated the accused's section 115 statement in that his assertion that he had accidentally shot his wife was contradicted by the uncontroverted testimony of the ballistics expert. This, together with the admissions made by the accused in his section 115 statement, constituted a *prima facie* case of murder which the accused had not challenged when he failed to testify. The court was clear that once the prosecution has established a *prima facie* case, the failure to testify may, in the absence of rebuttal, result in a *prima facie* case becoming conclusive. The failure to testify will not automatically result in the state's *prima facie* case becoming a conclusive one, but the court held that it is more likely to do so when the person who has exclusive knowledge of the true facts elects not to testify. A distinction can be drawn between a *prima facie* case becoming conclusive in the absence of a rebuttal, and the drawing of a negative inference from silence. The latter can be said to infringe the right to silence, whereas the former is simply the consequence of uncontroverted evidence. In *Heunis* the court, citing *S v Boesak* 2000 (1) SACR 633 (SCA), refrained from explicitly drawing an inference – but perhaps that is just semantics.

See also *Hohne v Super Stone Mining (Pty) Ltd* 2017 (3) SA 45 (SCA) under 'Unconstitutionally' and 'Improperly obtained evidence' below.

Contradictory accounts

Kgomo J in *Barends v S* 2017 (1) SACR 193 (NCK) held that a trial-within-a-trial should only be held to determine the admiss-

ibility of a statement made by the accused, and not an ordinary witness's statement which differs from the one recorded by the police (para [35]). The appropriate course of action in these circumstances is to cross-examine the witness on the discrepancies between the two statements. The court found the following headnote from the judgment in *S v Mafaladiso & others* 2003 (1) SACR 583 (SCA) extremely useful:

> The juridical approach to contradictions between two witnesses and contradictions between the versions of the same witness (such as, inter alia, between her or his viva voce evidence and a previous statement) is, in principle (even if not in degree), identical. Indeed, in neither case is the aim to prove which of the versions is correct, but to satisfy oneself that the witness could err, either because of a defective recollection or because of dishonesty. The mere fact that it is evident that there are self-contradictions must be approached with caution by a court. Firstly, it must be carefully determined what the witnesses actually meant to say on each occasion, to determine whether there is an actual contradiction and what is the precise nature thereof. In this regard the adjudicator of fact must keep in mind that a previous statement is not taken down by means of cross-examination, that there may be language and cultural differences between the witness and the person taking down the statement which can stand in the way of what precisely was meant, and that the person giving the statement is seldom, if ever, asked by the police officer to explain their statement in detail. Secondly, it must be kept in mind that not every error by a witness and not every contradiction or deviation affects the credibility of a witness. Non-material deviations are not necessarily relevant. Thirdly, the contradictory versions must be considered and evaluated on a holistic basis. The circumstances under which the versions were made, the proven reasons for the contradictions, the actual effect of the contradictions with regard to the reliability and credibility of the witness, the question whether the witness was given a sufficient opportunity to explain the contradictions – and the quality of the explanations – and the connection between the contradictions and the rest of the witness' evidence, amongst other factors, [are] to be taken into consideration and weighed up. Lastly, there is the final task of the trial Judge, namely to weigh up the previous statement against the viva voce evidence, to consider all the evidence and to decide whether it is reliable or not and to decide whether the truth has been told, despite any shortcomings.

Expert Evidence

Rule 36(5) of the Uniform Rules of Court provides:

> If it appears from any medical examination carried out either by agreement between the parties or pursuant to any notice given in

terms of this rule, or by order of a judge, that any further medical examination by any other person is necessary or desirable for the purpose of giving full information on matters relevant to the assessment of such damages, any party may require a second and final medical examination in accordance with the provisions of this rule.

The provisions of rule 36 were carefully scrutinised by Sher AJ in *Cape Town City & others v Kotzé* 2017 (1) SA 593 (WCC) in ruling on an interlocutory application requiring the respondent to submit herself to yet another psychiatric examination. At the instance of the applicant, she had already been examined by a psychiatrist and a psychologist. Also at the applicant's request, she had been examined by a different psychiatrist, 'C', and this examination resulted in a charge of professional misconduct being laid against 'C'. The respondent was persuaded to see yet another psychiatrist, 'C2', at the applicant's instance. However, 45 minutes into the consultation she 'broke down' and was unable to continue with the examination. Her refusal to attend any follow-up consultations with 'C2' led to the interlocutory application.

The court, recognising that rule 36 infringed parties' rights to dignity and privacy, held that it was a justifiable limitation. However, it needed to be interpreted strictly to minimise any impairment of rights that might arise (paras [25] [34]).

Sher AJ held that in considering an application that required a party to submit him- or herself to further medical examination, the court had to balance the interests of ensuring that a party has sufficient information to prepare for trial with the impact it has on the party to be examined. The court then set out six inquiries that a court could make when undertaking such a balancing exercise (para [37]):

(i) '[t]he importance of, and the need for obtaining, the information sought';
(ii) the purpose of obtaining the medical information, ie whether it is to assist the court in the resolution of a dispute or is to gain a tactical advantage;
(iii) whether 'the examination which is proposed is sought on the basis of a medically justifiable rationale or reason relevant to the issues in dispute';
(iv) what the effect of the proposed examination on the party to be examined will be;
(v) 'at what stage in the litigation the examination is being sought' – whether it is an appropriate follow-up or a new inquiry embarked on shortly before trial; and

(vi) 'how many other examinations the party has been subjected to'.

The court found that in the circumstances the parties had sufficient information and that it was not in the interests of justice to require the respondent to undergo further examination as 'to do so would be unduly oppressive and unfair' (para [52]) and, further, it would cause undue stress. In reaching this conclusion the court held (para [38]):

> Where a court is of the view that a medical examination is likely to result in an invasion of a party's personal privacy and bodily integrity in circumstances where this is not necessary and the information can be obtained in another manner, or it will cause the party to suffer undue hardship or inconvenience, or physical, emotional or psychological distress or pain, it should not allow the examination to go ahead or should put conditions in place to safeguard the examinee's rights.

Despite the absence of a clear two-stage analysis in finding that rule 36 infringed the rights to privacy and dignity, the judgment does a skilful job in interpreting the provision so as to promote its underlying rationale (to ensure that parties have sufficient information to enable the court to make a fair decision) in the context of the normative values to be found in the Constitution of the Republic of South Africa, 1996 ('the Constitution').

Hearsay

Affidavit

The evidence in issue in *FirstRand Bank Ltd v Kruger & others* 2017 (1) SA 533 (GJ) was the admissibility of an affidavit deposed to by a commercial recoveries manager employed by the applicant. The court, drawing on case law developed in summary judgment cases, held that the deponent had insufficient personal knowledge reliably to confirm the facts contained in the affidavit. It consequently ordered that the applicant file a supplementary affidavit by a person having the requisite personal knowledge. The court usefully set out the evidentiary requirements that should be met by a credit grantor seeking judgment against a defaulting credit receiver:

> Under the exceptions to the hearsay rule, the inherent difficulties of producing every individual who dealt with the credit receiver and made each entry reflected in the account in question would, in my

view, together with the other factors already mentioned regarding probity and reliability, entitle an applicant credit grantor seeking judgment in an unopposed matter to rely on:

(a) the evidence of a person who exercises custody and control of the documents in issue to introduce them into evidence through the founding affidavit provided such allegation is made, or appears from the contents of the affidavit as a whole, and provided the agreements are attached and are alleged to be true copies. This would usually be a bank manager or an official holding the position of a recoveries manager;

(b) the evidence of a person who has personal knowledge of the current status of the credit receivers' account by reason of having access to the account and being involved in the present management of the account or collection process, in respect of the allegations contained in the founding affidavit regarding the current outstanding balance. This would be subject to the terms of the agreement which may permit a certificate of indebtedness to constitute *prima facie* proof provided it is signed by a designated official at the financial institution and provided further that the court is otherwise satisfied that such person would, in the ordinary course, have personally accessed the records, accounts and other relevant records of the respondent and provided the certificate is otherwise reliable;

(c) the evidence of a person who positively attests that notice was properly sent to the respondent under either section 129(1) or section 86(10) of the NCA (para [25]).

The court did not refer to section 3(1)*(a)* of the Law of Evidence Amendment Act 45 of 1988, which permits hearsay to be admitted by consent. However, it must be implied from the judgment that consent will not be inferred from the unopposed nature of the proceedings.

Dying declaration

In terms of section 3(1) of the Law of Evidence Amendment Act 45 of 1988, hearsay evidence may be admitted (a) by consent; (b) when the party upon whose credibility the probative value of the evidence depends, testifies; and (c) when it is in the interests of justice to do so. In determining whether it is in the interests of justice to admit hearsay evidence the court is required to take a number of factors into account (s 3(1)*(c)*). The court in *Parkins v S* 2017 (1) SACR 235 (WCC), in a systematic application of section 3(1)*(c)*, considered the admission of a dying declaration made to a policeman, identifying the accused as the deponent's assailant. In admitting the evidence, the court emphasised that the evidence was not the only evidence incriminating the accused, and

found that there were sufficient *indicia* of honesty and reliability to overcome the caution required in respect of identification evidence. It is interesting that the court did not refer to the 'dying declaration' common-law exception to the hearsay rule, which it was entitled to do under 'any other factor' stipulated in section 3(1)*(c)*(vii). Perhaps this may be ascribed to the flimsy grounds of rationality underlying the common-law exception.

Oath

'The child was not properly admonished' or 'the presiding officer did not make a sufficient inquiry into a child's ability to understand what it means to tell the truth' are regular allegations on appeal against convictions arising out of harm committed against children. Sometimes the appeal court takes a holistic approach, but at other times it takes a technocratic approach. Fortunately, in *Mbokazi v S* 2017 (1) SACR 317 (KZP), the court took an holistic approach and found that the child victim had been sufficiently admonished and was able to distinguish between truth and lies. What makes this judgment interesting is the following statement (para [16]):

> The finding by the learned magistrate that she [the child witness] was competent to give evidence is also reinforced by the manner in which she gave evidence. Her evidence is clear and her answers to cross-examination reflect her maturity and competence.

Surely, the record of the child's testimony will always be the best evidence of his or her competency and ability to understand what it means to tell the truth. However, this is seldom reflected in the judgments of appeal courts, which does little to bolster public confidence in the criminal justice system.

S v Baadjies 2017 (2) SACR 366 (WCC) is yet another case where a person convicted of the rape and sexual assault of young child appealed on the basis that the oath had not been properly administered. The court in this instance took a sensible approach and held that a formal inquiry into an understanding of the oath was not required, and that the admonishment to tell the truth in the circumstances of the case before it had been adequate. The court held that the child's evidence was admissible; it noted that it had been corroborated and found that it conclusively proved the appellant's guilt. The difficulty with this case is not in the court's approach – the judges simply applied the law and did so correctly. The problem is the law. It allows for

the possibility that offenders can escape conviction on the basis of technicalities, such as the administration of the oath or admonishment, which have no impact on the reliability of evidence. It also directs that the evidence of the most vulnerable witnesses must be approached with the utmost caution when there is an absence of social science evidence supporting the rationale for this evidentiary requirement. This is unfortunate in a society where children are raped every day.

In *Mali v S* 2017 (2) SACR 378 (ECG), the eleven-year-old complainant who had been raped was asked by the presiding magistrate to confirm that she would tell the truth. The appeal court found that the reminder did not constitute an admonishment for the purposes of section 164 of the Criminal Procedure Act. Malusi J held that the accused had suffered no prejudice as a result of the failure to admonish, and that the irregularity was 'procedural and technical in nature' (para [22]). The court set aside the conviction and sentence and remitted the matter to the regional court where the complainant could be properly admonished and asked to confirm her prior testimony after it had been read to her. It is extremely difficult to imagine how this procedure would place the court in a better position to assess the reliability of the complainant's evidence. However, it is very easy to see how having to relive the horror of her rape once again, could deeply traumatise the child witness. A child in the initial trial had to wait five months between giving her evidence in chief and cross-examination. The legal system will continue to lose legitimacy if it clings to technicalities that do not assist the truth-seeking function of the court.

The High Court in *S v Pilane* 2017 (2) SACR 154 (SCA) was not referred to the full text of section 165 of the Criminal Procedure; instead, it was referred to an incomplete version in a textbook. Consequently, the court upheld the appeal of a convicted rapist on the basis that the interpreter (in the presence of the presiding officer) administered the oath to three witnesses when this should have been done by the presiding officer. The court found the evidence of the three witnesses inadmissible and held that the irregularity vitiated the proceedings.

The Supreme Court of Appeal held that the High Court had erred in that section 165 of the Criminal Procedure Act clearly makes provision for the administration of the oath by an interpreter. The section reads as follows:

> 165 Oath, affirmation or admonition may be administered by or through interpreter or intermediary

> Where the person concerned is to give his evidence through an interpreter or an intermediary appointed under section 170A(1), the oath, affirmation or admonition under section 162, 163 or 164 shall be administered by the presiding judge or judicial officer or the registrar of the court, as the case may be, through the interpreter or intermediary or by the interpreter or intermediary in the presence or under the eyes of the presiding judge or judicial officer, as the case may be.

A novel argument raised by the respondent's counsel was that the judicial officer, in permitting the interpreter to administer the oath, failed to ask the witnesses if they had any objection to taking the oath. The Supreme Court of Appeal rejected this argument as there was nothing in the Criminal Procedure Act that made this line of inquiry mandatory, and the failure to do so would not constitute a defect in the proceedings.

As section 165 of the Criminal Procedure Act clearly makes provision for the administration of the oath by an interpreter, the content of the judgment leaves little to comment on. Nevertheless, it does highlight the importance of lawyers using original sources when they are available. The Criminal Procedure Act should have been readily available to all parties. It also provides an opportunity for considering the purpose of administering an oath or admonition.

The oath made sense when people believed they would be punished by a God if they did not tell the truth, and it is also useful for purposes of prosecuting perjury. However, it is not clear that the oath increases the veracity of witnesses, and if it does, is failure to take the oath sufficient to render the evidence inadmissible? The court, in evaluating the evidence of a witness, places that witness's evidence in the context of all the evidence that is before the court, and all witnesses would have been subject to cross-examination. It is indeed surprising that courts should find the appropriate remedy for a perceived deficiency in the administration of the oath to constitute an acquittal.

Privilege

Private privilege against self-incrimination in bail proceedings

Section 60(11B)*(c)* of the Criminal Procedure Act reads:

> *(c)* The record of the bail proceedings, excluding the information in paragraph *(a)*, shall form part of the record of the trial of the accused following upon such bail proceedings: Provided that if the accused elects to testify during the course of the bail proceedings the court must inform him or her of the fact that

> anything he or she says, may be used against him or her at his or her trial and such evidence becomes admissible in any subsequent proceedings.

An interesting set of facts led to Msimeki J's scrutiny of this provision in *S v Miya & others* 2017 (2) SACR 461 (GJ). One Grigorov, in a case referred to by the court as the '*Sandton* case', had made an affidavit in support of his bail application. The court in the '*Sandton* case' had failed to inform him that the evidence he presented at his bail application could be used at his trial and in subsequent proceedings. The affidavit was, therefore, inadmissible in the '*Sandton* case', which had not been concluded when *S v Miya & others* was heard. Although Grigorov had started off as an accused in the *Miya* case, the state had subsequently withdrawn the charges against him when he became a state witness.

Accused number one wished to use the affidavit made by Grigorov in the '*Sandton* case' for purposes of cross-examining Grigorov in the *Miya* case. After a detailed examination of section 60(11B)*(c)* and the limited authorities available, Msimeki J concluded that *(c)* applied to the trial of the accused and to any subsequent proceedings. Inadmissibility applied to all subsequent proceedings, irrespective of the status of the maker of the 'bail statement'. In other words, the fact that Grigorov was now a witness and not an accused was irrelevant, and the affidavit he had given at the bail proceedings without being appropriately warned, remained inadmissible. The court registered its concerns about Grigorov's fair-trial rights in the '*Sandton* case' should the statement that was inadmissible in that case be used against him in the present case. Although dealt with cursorily in the judgment, this gives rise to several vexing questions.

First, how do we balance the fair-trial rights of the accused in the *Miya* case with those of a witness, albeit it an accused, in another case? Second, does the rationale underlying section 60(11B)*(c)* support an extension of inadmissibility to subsequent proceedings where self-incrimination is not in issue?

It should be noted that the wording of the section addresses itself to the admissibility, not the inadmissibility, of evidence given at bail proceedings at subsequent trials.

There can be little doubt that the requirement that an accused be advised that whatever he or she says at a bail hearing can be used against him or her at trial or in subsequent proceedings, is intended to enable him or her to make an informed choice as to

whether to waive the privilege against self-incrimination and the right to remain silent. It is on this basis that, in the absence of a warning, the evidence becomes inadmissible at trial. These two rights will not always arise in subsequent proceeding and, consequently, there would be little purpose in making evidence at subsequent proceedings inadmissible when these rights are not in issue.

A section 204 witness may not refuse to answer a question on the basis that it incriminates him or her – but only in relation to the offence specified by the prosecutor. In the *Miya* case, Grigorov would only be compelled to answer questions relating to the offences specified by the prosecutor in that case. He could still refuse to answer questions that might incriminate him in the '*Sandton* case' or in any other case. If the complexity of testifying in these conditions caused him inadvertently to implicate himself for the purpose of the '*Sandton* case,' the admissibility of that evidence could always be challenged in the '*Sandton* case'.

Had the court taken a purposive approach to interpretation and focused on the rationale of the rule and the rights it sought to protect, it might have found a way of balancing the competing rights of the accused in both cases. It is trite that the interests of justice require that wherever possible relevant evidence should be put before the court, particularly where it is relevant to the accused's defence.

See also 'Evaluation of evidence – Inference from silence' above.

Statements made without prejudice

A statement made by a party involved in a dispute which is genuinely aimed at achieving a compromise is protected from disclosure. These statements are usually marked 'without prejudice' and can only be accepted into evidence with the consent of both parties. The rationale of the rule is based on public policy, which encourages the private settlement of disputes by the parties themselves. This was articulated by Trollip JA in *Naidoo v Marine & Trade Insurance Co Ltd* 1978 (3) SA 666 (A) 677C–D as follows:

> [P]arties to disputes are to be encouraged to avoid litigation and all the expenses (nowadays, very high), delays, hostility, and inconvenience it usually entails, by resolving their difference amicably in full and frank discussions without the fear that, if the negotiations fail, any admissions made by them during such discussions will be used against them in the ensuing litigation.

The question before the court in *KLD Residential CC v Empire Earth Investments 17 (Pty) Ltd* 2017 (6) SA 55 (SCA) was whether a 'without prejudice' admission of indebtedness could be used for the sole purpose of showing that the running of the period of prescription had been interrupted.

Section 14 of the Prescription Act 68 of 1969 provides:

> (1) The running of prescription shall be interrupted by an express or tacit acknowledgement of liability by the debtor.
>
> (2) If the running of prescription is interrupted as contemplated in subsection (1), prescription shall commence to run afresh from the day on which the interruption takes place or, if at the time of the interruption or at any time thereafter the parties postpone the due date of the debt from the date upon which the debt again becomes due.

Lewis JA, citing a number of authorities (including *Murray & Roberts Construction (Cape) (Pty) Ltd v Upington Municipality* 1984 (1) SA 571 (A); *Road Accident Fund v Mdeyide* 2011 (2) SA 26 (CC); *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Ltd t/a Metrobus* (2017) 38 *ILJ* 527 (CC); GB Bradfield *Christie's Law of Contract in South Africa* 7 ed (2016) 561; MM Loubser *Extinctive Prescription* (1996)), identified the primary rationale of extinctive prescription as certainty in social and legal affairs. The justification for interruption of prescription provided for in section 14(1) of the Prescription Act is that uncertainty is eliminated when a debtor acknowledges liability. The judge then went onto examine the competing interests underlying the 'without prejudice' rule and the section 14 provisions governing the interruption of prescription.

These can be summarised as follows: if an admission made for the purposes of settlement can be used for other purposes, it will discourage parties from being frank in reaching out-of-court settlements. Conversely, if an acknowledgment of debt made in a 'without prejudice' statement does not interrupt prescription, there is no reason for a creditor to give the debtor time to pay off the debt – as in doing so the creditor would run the risk of his claim prescribing. Although not finding any authorities directly in point, Lewis JA pointed to numerous authorities which indicated that the 'without prejudice' rule is not absolute and is subject to exceptions – for example, where a statement amounts to an act of insolvency (see, eg, *Absa Bank Ltd v Hammerle Group* 2015 (5) SA 215 (SCA)), or where there is an admission of liability separate from the settlement sought on *quantum* (see, eg, *Kapeller v Rondalia Versekeringskorporasie van Suid-Afrika Bpk* 1964 (4)

SA 722 (T)).Similarly, statements that are not connected with the settlement negotiations will not be covered by the privilege (*Naidoo* above).

The majority of the court (Lewis JA, with Tshiqi JA, Mbha JA and Fourie AJA concurring) held that an exception to the 'without prejudice' rule was justified in the circumstances and that the admission of liability should be admitted for the sole purpose of interrupting the running of prescription. The court noted that the exception was not absolute and whether an admission of liability served to interrupt prescription would depend on the facts of each case (para [38]). For example, the parties in their settlement negotiations might agree that any admission of liability would not interrupt prescription.

The court concluded that the recognition of the exception should not be viewed as one rule trumping the other, but rather as a means by which the rationale underlying both section 14 and the 'without prejudice' rule could be accommodated. Schipper AJA, in a lone dissenting judgment, expressed the contrary view that to recognise the exception for the purposes of interrupting prescription would fatally undermine the public policy and contractual foundation of the 'without prejudice' rule. This view ignores the possibility that it is open to the parties to exclude the exception, and that not recognising the exception could also discourage creditors from engaging in settlement negotiations.

The issue that arose in *AD & another v MEC for Health and Social Development, Western Cape* 2017 (5) SA 134 (WCC) was whether such an offer could be taken into consideration in determining whether or not punitive costs should be awarded.

Rogers J referred to the 'without prejudice' offer as a 'secret offer of settlement' (para [4]). In this case, the plaintiff's offer was one made 'without prejudice save as to costs'. The addition of the phrase 'save as to costs' called for a different descriptor, and the court adopted the terminology arising from the judgment of the English Court of Appeal in *Calderbank v Calderbank* [1975] 3 All ER 333 (CA), and called it a '*Calderbank* offer'. The court noted that in England and other Commonwealth jurisdictions, *Calderbank* offers may be taken into consideration in determining costs orders. However, in order to be admissible, it must explicitly state that it is subject to costs. *Calderbank* offers are considered to be permitted by public policy because the 'substantive issues between the parties have been determined' (para [43]). Rogers J found that there was no reason to deviate from the English law

approach, and held that the 'public policy of encouraging settlements would be better served if litigants appreciate the risk of adverse costs orders if they disregard reasonable offers of settlement' (para [43]).

However, although a *Calderbank* offer may be admitted for the purposes of determining costs, it will not automatically result in costs being awarded on an attorney/client scale against the party who turned down the offer. The impact of the offer on the costs determination will depend on the court's consideration of the surrounding circumstances (para [61]).

State Privilege

Docket privilege

A police docket is usually divided into three sections: 'A' containing the statements of witnesses, expert reports, and documentary evidence; 'B' containing internal reports and memoranda; and 'C' containing the investigation diary. Following the judgment in *Shabalala & others v Attorney-General of Transvaal & another* 1995 (2) SACR 761 (CC), the prosecution will, in granting access to the police docket, divulge those documents contained in section 'A'. The court in *Panayiotou v S & others* 2017 (1) SACR 354 (ECP) held that the accused's request for pre-trial disclosure was not restricted to section 'A' of the docket. However, the accused had to show why he needed further disclosure to place him in a position effectively to adduce and challenge evidence. In this instance, the accused could show why access to information contained in 'C' was necessary to protect his right to a fair trial, but he was unable to present an adequate argument in relation to section B. This purposive approach to the realisation of rights enables an appropriate balance to be struck between fair-trial rights and the effective administration of justice.

Standard of Proof

Mbenenge J, in considering the matter referred to the High Court in terms of section 116(3)*(a)* of the Criminal Procedure Act in *S v Qhayiso* 2017 (1) SACR 470 (ECB), set aside the accused's conviction and sentence on the ground that the magistrate, whilst finding that the accused's version was reasonably and possible true, nevertheless convicted him. This meant that the accused had been convicted despite the existence of a reasonable doubt (para [19]; see also *S v Sithole & others* 1999 (1) SACR 585 (W)).

Subpoena

The accused is entitled to subpoena witnesses to appear at trial and produce relevant documentation. (See s 179(1) of the Criminal Procedure Act; rules 38 & 54 of the Rules of Court; and s 35 of the Superior Courts Act 10 of 2013.) However, an accused cannot use this process to summon witnesses to appear on a date other than the trial date. In *Panayiotou v S & others* 2017 (1) SACR 354 (ECP), the court held that the accused's attempt to do this contemporaneously with an application for further discovery by the prosecution was irregular.

Unconstitutionally and Improperly Obtained Evidence

Criminal proceedings

The facts in *S v Gumede* 2017 (1) SACR 253 (SCA) can be summarised as follows: the police entered and searched the accused's home, seized a firearm, and arrested the accused, all without a warrant. The Supreme Court of Appeal found that the police had had sufficient time to obtain a warrant and had misled the court by alleging that they did not. Shortly after the accused's arrest, he made a pointing-out (which also constituted a confession). His rights were read to him, but the court found that he had not been advised of the consequences of not remaining silent, and that 'he must have been subjected to a considerable degree of coercion, such that his conduct was neither free nor voluntary' (para [39]).

Applying section 35(5) of the Constitution, Zondi JA held that the search and seizure violated the accused's right to privacy but not the accused's right to a fair trial, as the firearm which constituted real evidence 'would have been revealed independently of the infringement'.

The court then went on to consider whether the admission of the firearm would nevertheless be detrimental to the administration of justice. In doing so the court noted there was 'an inextricable link between the firearm evidence and the pointing-out evidence, which was obtained by some degree of coercion' (para [35]). It is here that the court, having rejected the notion that the accused's right to a fair trial had been infringed, started to conflate the two legs of the section 35(5) inquiry – has the right to a fair trial been infringed, and, if not, will admission of the evidence nevertheless be detrimental to the administration of justice?

In reaching its conclusion that the evidence should be excluded as its admission would be detrimental to the administration of justice, the court took the following factors into account:

- The police deliberately sought to mislead the court.
- The appellant's right to privacy was violated by the police.
- The appellant's right against self-incrimination was violated by the police.
- The accused did not make the pointing-out freely or voluntarily.
- The police failed to advise the accused fully of his rights.

At least three of the above five points relate to aspects of trial fairness and it appears that this arises from the court merging the two pieces of evidence – (i) the firearm; and (ii) the pointing-out – into a single inquiry. If they are indeed inseparable, then they should have been excluded on the basis that they infringe the right to a fair trial. If not, it would be appropriate to exclude the firearm on the basis that it would be detrimental to the administration of justice to admit it, and the pointing-out on the basis that it infringed the right to a fair trial.

The judgment in *S v Bakane & others* 2017 (1) SACR 576 (GP) is somewhat of a Pandora's box. The three presiding officers handed down three separate judgments with Preller and Khumalo JJ concurring and constituting the majority judgment, and Manamela AJ dissenting. Unfortunately, all the judgments (although Manamela AJ was a little more forthcoming) give a very restricted account of the facts, which makes an assessment of the import of the following statement by the trial court (para [51]) very difficult:

> We accept that some slapping and rough handling took place. The slapping could be classified as assault but not torture. I then exercised my discretion to accept the somewhat tainted evidence insofar as the assaults were concerned in the interest of justice and for fear that the administration of justice would otherwise be brought into disrepute.

The majority judgments correctly point out that for evidence to be excluded in terms of section 35(5), there must be a link between the infringement of a right and the obtaining of the evidence. The judge then concluded that as there was no link the slapping and rough handling did not call for exclusion of the evidence. However, it is not possible to establish from the majority judgment why Preller and Khumalo JJ found there was no link, save that none was expressly articulated in the judgment

of the court *a quo*. Manamela J looked more closely at the judgment of the trial court, and drew an inference that there was a link from the following passage:

> In my view another court may well come to a different conclusion as regards the slapping, to what extent it might have affected the voluntariness issue.

This may not be conclusive proof, but it certainly indicates that the trial court did think that there was possibly a link between the mistreatment of the accused by the police, and the voluntariness of their confessions. It is indeed unfortunate that there is no record of the sequence of events and it is surprising that, for the majority of the court, 'slapping and rough handling' were not seen as at least *prima facie* evidence of coercion.

It would also appear that there was some contestation among the judges as to the classification of the accused's statements as an admission or a confession. On the limited information given, it would appear irrelevant, as the court appeared to consider the admissibility on the basis of section 35(5) of the Constitution. But if the admissibility was determined by the trial court in terms of section 217 or section 219A of the Criminal Procedure Act, then it would be expected to reach a conclusion without reference to the repute of the administration of justice.

The majority and minority judgments both stressed the importance of taking an holistic approach to the evaluation of evidence but nevertheless reached different conclusions. Only Manamela J, in his dissenting judgment, found that the inferences to be drawn from evidence did not exclude the possibility of a reasonable doubt.

Civil proceedings

The appellant in *Hohne v Super Stone Mining (Pty) Ltd* 2017 (3) SA 45 (SCA) disputed the admissibility of a videotaped confession to the theft of diamonds from his employer, a confession made to a police officer, and a written acknowledgment of debt. Before making the statement he had been threatened with criminal prosecution and media exposure. The threats were extensive and were referred to in the trial as the 'dirty dozen'. They included a promise to request immunity from prosecution if he told the full truth. At his subsequent criminal trial, the confession and resulting pointing out were deemed inadmissible on the basis that they had not been made freely and voluntarily. Super

Stone Mining (the appellant's employer) then instituted civil proceedings for the recovery of damages (R6,015 million) resulting from the appellant's dishonesty. It succeeded in its claim in the High Court, and Hohne appealed to the Supreme Court of Appeal.

The civil court was presented with a most unusual situation in that it was called upon to consider the admissibility of evidence that had been rejected by a criminal court. The Supreme Court of Appeal did not find its prior decision in *Janit v Motor Industry Fund Administrators (Pty) Ltd* 1995 (4) SA 293 (A) 306H-307C useful, in which it left the question open as to whether it could exclude relevant but unlawfully obtained evidence, as in the *Hohne* case the evidence had not been unlawfully obtained. (There are several High Court decisions which have found that a civil court may exclude improperly obtained evidence. See *Shell SA (Edms) Bpk & andere v Voorsitter, Dorperaad van die Oranje-Vrystaat & andere* 1992 (1) SA 906 (O); *Lenco Holdings Ltd & others v Eckstein & others* 1996 (2) SA 693 (N); *Fedics Group (Pty) Ltd & another v Matus & others; Fedics Group (Pty) Ltd & another v Murphy & others* 1998 (2) SA 617 (C); *Lotter v Arlow & another* 2002 (6) SA 60 (T). See also *Ferreira v Levin NO & others; Vryenhoek & others v Powell NO & others* 1996 (1) SA 984 (CC).)

Willis JA confirmed that in civil matters, a court has a discretion to exclude improperly or unlawfully obtained evidence (para [23]). However, he also noted that this discretion would be exercised very differently in criminal and civil matters, given the different purpose of the two proceedings and the concomitantly different statutory provisions applicable to civil and criminal trials. The provisions set out in sections 219A and 217 of the Criminal Procedure Act regulating the admissibility of admissions and confessions do not apply in civil trials. Section 35(5) of the Constitution, which facilitates the exclusion of unconstitutionally obtained evidence in criminal trials, does not have equivalent provisions set out in section 34 for civil trials. Section 34 merely requires civil litigants to have civil disputes decided 'in a fair public hearing before a court' (para [25]). Willis JA indicated that these discrepancies were a product of the coercive and unequal relationship between the parties in criminal proceedings, and the greater equality between parties in civil proceedings (paras [24] [25]). The court appeared to accept that the primary rationale for the exclusionary rule in criminal proceedings was 'to deter

unlawful police conduct' and that this rationale was not relevant in civil proceedings (para [26], the court quoting *United States v Janis* 428 US 433 (1976)).

The court concluded that the evidence on the *quantum* of the theft had not been obtained by a threat of considerable harm or duress that was unlawful, and that an employer is obliged to confront an employee when wrongdoing comes to light. The court went on to consider prior cases founded in both delict and contract to determine whether a threat of prosecution would render the acknowledgement of debt voidable. (See *Machanick Steel & Fencing (Pty) Ltd v Transvaal Cold Rolling (Pty) Ltd* 1979 (1) SA 265 (W); *Arend & another v Astra Furnishers* (*Pty) Ltd* 1974 (1) SA 298 (C); *Ilanga Wholesalers v Ebrahim & others* 1974 (2) SA 292 (D).) It concluded that where there is no dispute regarding the liability of the debtor, a threat of prosecution would not constitute legally recognised duress. The appellant, having failed to discharge the onus of proving the existence of operative or legally recognised duress which would prevent the acknowledgement of debt being enforced against him, lost his appeal (para [35]).

Leach JA (Petse JA concurring) reached the same conclusion as Willis JA as regards the dismissal of the appeal, but found the discussions of admissibility in terms of the Criminal Procedure Act and section 35(5) of the Constitution unnecessary for the purposes of reaching a conclusion. They found that the appellant's failure to testify was a ground from which a negative inference could be drawn, specifically that his own evidence was likely to damage his case (para [49]). This again highlights the difference between civil and criminal trials, as in the constitutional era it appears that the courts in criminal cases have gone no further than to state that silence at trial can have negative consequences as there is nothing to contradict the state's *prima facie* case.

The judgment indeed highlights the paucity of case law and legal analysis on the appropriate way in which a civil court should develop the common-law discretion to exclude improperly obtained evidence in line with constitutional values. Willis JA's attempt to do so should be applauded, but it leaves a few questions unanswered. These include: is the rationale for exclusion in criminal trials not much wider than that of deterring police from unlawful activities? Is it appropriate not to interrogate the equality of arms justification in civil trials? Would constitutional

values be useful in determining what constitutes an unconscionable threat? Does the bar of voluntariness in criminal trials really set the standard too high for civil trials?

Witnesses

Calling of witnesses by presiding officer

In *S v Qhayiso* 2017 (1) SACR 470 (ECB), Mbenenge J found that the trial in the magistrate's court had been a travesty of justice due to a number of departures from the type of conduct expected of a presiding officer. These included interfering with cross-examination, not giving the prosecutor or defence an opportunity to question witnesses on issues raised during the court's questioning of the witnesses, and failing to allow the accused to present highly relevant evidence.

Irregularities on the part of the conduct of a judicial officer were also in issue in *Longano v S* 2017 (1) SACR 380 (KZP). The unfortunate presiding officer in this case found herself, through no fault of her own, in possession of a report by an expert witness whom the state intended to call but never did. The accused applied for her recusal on the basis that there was a reasonable perception of bias as a consequence of her having knowledge of the contents of the report. The presiding officer dismissed the application for recusal and failed to give reasons therefor in her final judgment. Shortly after dismissing the recusal judgment, she exercised her powers in terms of section 186 of the Criminal Procedure Act and called the author of the report as a witness. The accused was convicted of murder and appealed against his conviction and sentence.

The appeal court set aside the conviction on the basis that it was irregular for 'the presiding judge not to recuse herself, to call a witness not essential for the just determination of the case, and to not give reasons for any of the rulings' (para [30]). The appeal court, in reaching this conclusion, chose a very restrictive interpretation of 'essential to the just decision of the case' – it could be argued that in the circumstances of the case, the state, in handing the report to the judge, made the calling of the witness essential for the just determination of the case. In fact, there was no possibility of a just decision ensuing without the witness being called. The witness's evidence was essential to combat perceptions of bias. However, the approach of the appeal court regarding what is essential for the just determination of a case is

perhaps irrelevant in light of the presiding officer's failure to give reasons and take the parties into her confidence as to why she was calling the witness.

Identification of child witnesses

The case of *Centre for Child Law & others v Media 24 Ltd & others* 2017 (2) SACR 416 (GP) is dealt with briefly, as although described as an evidence case by the law report editors, it is more appropriately dealt with under criminal procedure. The constitutionally appropriate interpretation of section 154(3) of the Criminal Procedure Act was considered by the court. The relevant section reads as follows:

> (3) No person shall publish in any manner whatever any information which reveals or may reveal the identity of an accused under the age of eighteen years or of a witness at criminal proceedings who is under the age of eighteen years: Provided that the presiding judge or judicial officer may authorize the publication of so much of such information as he may deem fit if the publication thereof would in his opinion be just and equitable and in the interest of any particular person.

The basis of one constitutional challenge to the subsection was that it did not cover child victims who were neither complainants nor witnesses. Hughes J, taking into account related provisions – section 153(1) of the Criminal Procedure Act and section 63(5) of the Child Justice Act 75 of 2008 – held that on a purposive interpretation, the provisions of section 154(3) applied to the child participant in a criminal trial, whether it be as an accused, a witness, a complainant, or a victim (para [56]).

The central point of contention between the parties was whether the protection afforded by section 154(3) continued once a child reached the age of eighteen. The court held that the age limit specified by the legislature was eighteen, its purpose was to protect children, and once they ceased to be children there was no justification for the continued infringement of other rights, such as freedom of expression. The court showed an appreciation of the importance of the rights enshrined in section 28 of the Constitution and an appropriate caution to extending the paramountcy of the best interests of the child beyond childhood.

FAMILY LAW

CHRIZELL STOOP*

LEGISLATION

There was no new legislation affecting this area of the law during the period under review.

SUBORDINATE LEGISLATION

The fees payable to accredited child protection organisations or social workers in respect of adoptions were amended on 31 March 2017 (Reg 107 of the General Regulations Regarding Children, 2010, issued under the Children's Act 38 of 2005, as amended by GN 282 *GG* 40733 of 31 March 2017).

The Minister of Home Affairs extended the period for the registration of customary marriages in terms of section 4(3)*(a)* and *(b)* of the Recognition of Customary Marriages Act 120 of 1998 to 30 April 2019 (GNs 483 and 484 *GG* 40883 of 2 June 2017).

Regulation 5 of the Regulations relating to Maintenance published under the Maintenance Act 99 of 1998 (GN R 1361 in *GG* 20627 of 15 November 1999) was amended on 6 September 2017 (GN R966 in *GG* 41096 of 6 September 2017). Regulation 5 regulates subsistence and travel allowances to which any person against whom a maintenance order is made is entitled.

Sections 2, 11 and 13*(b)* of the Maintenance Amendment Act 9 of 2015 came into operation on 5 January 2018 (Proc R 44 *GG* 41352 of 21 December 2017). These regulations deal with electronic communications, service providers and credit rating respectively. The other provisions of the Maintenance Amendment Act came operation on 9 September 2015 (Proc 821 *GG* 39183 of 9 September 2015). See the discussion of the provisions of the Maintenance Amendment Act (the Bill at that time) in Jacqueline Heaton 'Family Law' 2014 *Annual Survey* 394–9.

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Draft legislation

The Draft Choice on Termination of Pregnancy Amendment Bill was published in General Notice 517 in *Government Gazette* 40970 of 10 July 2017. The Choice on Termination of Pregnancy Amendment Bill 34 of 2017 was also tabled for approval during 2017. However, the Bill was rejected by the National Assembly on 4 September 2018.

CASE LAW

Accrual system

Legality of clauses in an antenuptial contract

W v H 2017 (1) SA 196 (WCC), [2016] 4 All SA 260 concerned the legality of a clause in an antenuptial contract. The antenuptial contract incorporated a foreign accrual system to govern the marriage which was entered into between the plaintiff wife (W) and defendant husband (H) in a foreign country. The antenuptial contract provided that in consideration of certain donations, W waived any present or future right to claim maintenance for herself should the marriage be dissolved. H sought to rely on this clause to counter W's claim for personal maintenance in a subsequent divorce action instituted against him. The court held that the enforcement of the waiver of maintenance clause in the antenuptial contract was unreasonable and contrary to public policy. It infringed constitutional values including the right to dignity, equality, the enhancement of human rights and freedoms, and the rule of law. The clause was therefore declared unenforceable and voidable (para [28]). See too the discussion in Jacqueline Heaton 'Family Law' 2016 *Annual Survey* 366–74.

RM v BM 2017 (2) SA 538 (ECG) also centred around the validity of clauses in an antenuptial contract. Clause 4 of the antenuptial contract listed the assets making up the defendant's estate, while clause 5 excluded the same assets from his estate. The plaintiff sought an order declaring the antenuptial contract void for vagueness, or in the alternative, for its rectification. In a counterclaim, the defendant also sought rectification, but in a different way, and in the alternative an order that the antenuptial contract be interpreted in accordance with section 4(1)*(b)*(ii) of the Matrimonial Property Act 88 of 1984. The court held, with reference to *JK v RK* [2014] ZAGPPHC 242 and *Bath v Bath*

unreported case GNP 8681/10 (5 November 2012), which was confirmed on appeal in *Bath v Bath* [2014] ZASCA 14 (24 March 2014), that clauses 4 and 5 contradicted each other materially and irreconcilably. Therefore, the antenuptial contract was void for vagueness. In effect, the parties were married in community of property (paras [9]-[13]). Based on the conflict between the two clauses, the court held further that an alternative interpretation of the conflicting clauses offered no solution to the problem (para [14]). See too the discussion of this case in the chapter 'Law of Contract'.

Children

Care and contact

VN v MD & another 2017 (2) SA 328 (ECG) was an appeal against a ruling of the Children's Court in Grahamstown in which a parenting plan was revised. The respondent was dissatisfied with his rights of access in terms of a parenting plan entered into between the parents. He subsequently approached the Children's Court, which ordered that a revised plan which he had presented be made an order of court. The appellant appealed against the decision, and the appeal was upheld, mainly because of the absence of inputs from a family advocate, social worker, or psychologist in the preparation of the revised parenting plan.

The court noted that section 33(5) of the Children's Act does not specifically stipulate that the variation to the parenting plan must be prepared with the assistance of the family advocate, social worker, or psychologist. Nevertheless, it is clear from Part 3 of Chapter 3 that, in pursuing any agreement with regard to the exercise of parental rights and responsibilities, the parties must, before approaching a court, confer with a family advocate, social worker, or a psychologist who is qualified to provide the necessary guidance to ensure that the best interests of the minor child prevail ([para [19]).

The court proceeded to say that it must be borne in mind that section 33(2) of the Children's Act provides that where parents or other co-holders of parental responsibilities and rights are required to reach consensus, they must be assisted by a family advocate, social worker, or psychologist (see also J Heaton 'Parental responsibilities and rights' in Trynie Boezaart *Child Law in South Africa* 2ed (2017) 97–8; LI Schäfer 'Who has parental responsibilities and rights?' in Schäfer *Child Law in South Africa: Domestic*

and International Perspectives (2011) 255–6; J Heaton and H Kruger *South African Family Law* 4ed (2015) 327–8). Similarly, where the parenting plan is to be varied because the parties experience difficulties in exercising or executing their responsibilities and rights, parties must seek the assistance and services of such a qualified person before seeking the intervention of a court (para [19]). In this case, the assistance and guidance services of the family advocate, social worker, or a psychologist were essential as a significant period had lapsed since the previous parenting plan had been endorsed, and because the parties had failed to reach consensus (para [19]).

The High Court concluded that the magistrate had erred in concluding that the Children's Act did not require further consultation for an amendment to a parenting plan as envisaged in section 34(5) (para [19]). The High Court, correctly, set aside the order of the magistrate and upheld the appeal. The magistrate's court had failed to apply the law correctly: for example, it failed to consider the best interests of the minor child. It is important to bear in mind that the best interests of the child must also prevail when a parenting plan is prepared. That is why the guidance and involvement of the family advocate, social worker, or psychologist are crucial during the preparation of the plan. No child ought to be the victim of quarrels and disagreements between his or her parents (JA Robinson 'Divorcing parents and the best interests of their child' (2018) 81 *THRHR* 299–305; Marici Corneli Samuelson 'Parenting coordinators: What is classified as their decision-making powers?' (2018) September *De Rebus* 37 and 'The parenting plan as legal instrument' (2018) October *De Rebus* 48). For a detailed discussion of the case, see the chapter 'Law of Persons'.

Maintenance

In *AG v DG* 2017 (2) SA 409 (GJ), the applicant brought an urgent application against the respondent, from whom she was divorcing, to compel him to pay to her arrear interim maintenance. The applicant also requested the court to hold the respondent, a multimillionaire, in contempt of court and to have him arrested if he continued to fail to pay maintenance. The reason for taking these drastic steps was that, despite several court orders against him, the respondent had failed serially to meet his maintenance obligations in respect of his two minor children (para [5]). The respondent had also jeopardised the

children's constitutional rights in terms of section 28 of the Constitution of the Republic of South Africa, 1996 (the right to parental or family care, and giving effect to the best interests of the child) (para [8]). Spilg J held that it was clear that this application for arrear maintenance founded on the contempt of a court order was urgent, as the applicant's assets were almost depleted and the respondent was deliberately frustrating the ordinary enforcement of court orders (para [15]). The judge proceeded to find that the respondent was concealing his assets intentionally, and that his conduct was wilful and *mala fide* (paras [28] [29]). The court, therefore, granted the urgent application, holding the respondent in contempt of court for non-payment of arrear maintenance. A warrant was to be issued for the respondent's arrest and imprisonment for a period of five days for contempt of court. However, the implementation of the warrant was postponed to the seventh day after the granting of the order and it was to be executed if, by that time, the respondent had not yet made the necessary payment (paras [40.1]-[40.5]). The court's findings can, therefore, not be faulted in that the respondent deliberately made use of unacceptable tactics in order to evade his maintenance obligations.

Surrogacy

In *Ex Parte HP & others* 2017 (4) SA 528 (GP) (also reported as *Ex Parte HPP & others; Ex Parte DME & others* [2017] JOL 37415 (GP)), the court was confronted with two applications for confirmation of surrogate motherhood agreements. Both applications involved couples who approached a so-called surrogacy co-ordinator who introduced them to potential surrogate mothers and charged them a fee for her services. The court had to decide whether this payment violated section 301 of the Children's Act, and whether the surrogacy facilitation agreements are lawful and enforceable. The court held that no payments may be received by the surrogate mother in terms of the agreement since section 301 of the Children's Act stipules that the commissioning parent(s) are permitted to pay for costs directly related to the artificial insemination, pregnancy, birth, and confirmation of the motherhood agreement, as well as professional medical and legal expenses. In short, the surrogate mother cannot earn any form of income simply by being a surrogate mother (paras [45]-[47]). The court held that the purpose of section 301 was to prevent commercial surrogacy as such prevention is in the public interest and therefore a justifiable and admissible limitation to the co-

ordinator's right to practise her chosen occupation. Allowing commercial surrogacy/surrogacy-facilitation agreements would open floodgates and most probably lead to the abuse of vulnerable people – exactly what section 301 is aimed at preventing (para [52]). The court also had to consider the extent to which the surrogacy mother agreements and the surrogacy facilitation agreements are linked, as well as the vulnerability of the surrogate mothers. The court confirmed the validity of the surrogate motherhood agreements entered into between the parties since the surrogate mothers were not vulnerable women and the applicants had the desire to have children (para [71]). However, the surrogacy facilitation agreements were declared unlawful and unenforceable (para [72.1]). For a detailed discussion of this case, see the chapter 'Law of Persons'.

Divorce

Effect of divorce on a will

In *Louw NO v Kock & another* (14270/2015) [2016] ZAWCHC 165, 2017 (3) SA 62 (WCC), the court was required to decide the impact of the death of a husband on a joint will if the death occurred within three months after divorce. The court confirmed that an ex-spouse no longer has a claim for inheritance from the testator if he or she has divorced the testator less than three months before the testator's death. For a detailed discussion of this matter, see De Waal 'Law of Succession (including Administration of Estates)' 2016 *Annual Survey* 969–71; cf Michael Cameron Wood-Bodley 'Wills, divorce, and the provisions of section 2B of the Wills Act: *Louw NO v Kock*' (2018) 3 *SALJ* 418–32.

Forfeiture of patrimonial benefits

The parties in *KT v MR* 2017 (1) SA 97 (GP) had been married in community of property under customary law. The respondent claimed the forfeiture of the plaintiff's patrimonial benefits in terms of section 9(1) of the Divorce Act 70 of 1979. In deciding whether to make the order, the court, in terms of section 9(1), had to consider 'the duration of the marriage, circumstances which gave rise to the breakdown thereof and any substantial misconduct on the part of either of the parties'. Furthermore, in having regard to these factors, the court had to be satisfied that if the order of forfeiture was not made, the one party would, in relation to

the other, be 'benefited'. It was common cause that the plaintiff would benefit in relation to the respondent in the event of an equal division. The main question, therefore, was whether the benefit the plaintiff would derive was 'undue'.

The court investigated the three factors in section 9(1) of the Divorce Act. As regards the duration of the marriage, it was common cause that the marriage was stormy and lasted approximately twenty months. As a general rule, the longer the marriage subsists, the more likely it is that the benefit derived would be due and proportionate. On the flipside, the shorter the marriage, the more likely it is that the benefit will be undue and disproportionate (paras [20.1] [20.19]). The second factor was the circumstances that gave rise to the breakdown of the marriage. The main reason for the breakdown of the marriage relationship was that both spouses had spent a considerable amount of time outside of the marital home during the marriage. Both parties were at fault and incapable of finding a suitable way to deal with the constant tension and conflict in the marriage (para [20.4]). The third factor was substantial misconduct. Kollapen J stated that the factors relating to substantial misconduct and the circumstances which gave rise to the breakdown of the marriage were not decisive and convincing in determining whether a benefit was undeserved. As a result, it was decided that the only ground on which a forfeiture claim stood to be considered in this case was a fault-neutral factor: the duration of the marriage (paras [20.7] [20.18]). It should be borne in mind that misconduct is not the only consideration in a forfeiture order, and that all three factors need not be present for the forfeiture order to be granted (*Wijker v Wijker* 1993 (4) SA 720 (A); see also Jacqueline Heaton 'Family Law' 2016 *Annual Survey* 361–3; cf J Heaton and H Kruger above 135–7). However, it appears that when there is evidence of substantial misconduct which led to the breakdown of a marriage, courts tend to order forfeiture.

In the case under consideration, in order to determine what is meant by 'undue benefit', the court referred to the *South African Concise Oxford Dictionary* (2005 ed), which defines 'undue' as 'unwarranted or inappropriate because excessive or disproportionate'. The court noted that the marriage had been short-lived, lasting only twenty months, and that the defendant had built up a substantial part of the joint estate before the parties married (para [20.17]).

The court concluded that the plaintiff would benefit unduly if an order for forfeiture was not made. The court, correctly, referred to

Engelbrecht v Engelbrecht 1989 (1) SA 597 (C), in which it was decided that if the parties did not make exactly equal contributions either before or during the marriage, the party who contributed less would, on the dissolution of the marriage, be benefited over the other party if forfeiture is not granted (para [18]).

The court, therefore, ordered, and correctly so, that the plaintiff should forfeit all the patrimonial benefits of the marriage entered into between herself and the defendant on 2 May 2011, save for any benefits that arose from the property known as 'Erf XXX'. The plaintiff was entitled to 50 per cent of the net value of that property.

Interim relief

On the failure to comply with an interim maintenance order, see the discussion of *AG v DG* 2017 (2) SA 409 (GJ) above.

Pension interests on divorce

In *GN v JN* 2017 (1) SA 342 (SCA) (also reported as *Ndaba v Ndaba* [2017] 1 All SA 33 (SCA)), the Supreme Court of Appeal had to decide whether the pension interest of a member spouse formed part of the joint estate of the divorcing parties, and whether the non-member spouse was entitled to the member spouse's pension interest. The appellant obtained a divorce order in the regional court against the respondent to whom she had been married in community of property. The settlement agreement was incorporated in the divorce order, and included a term providing for the equal division of the joint estate. The High Court refused the appellant's application for a declaratory order that she and the respondent were equally entitled to 50 per cent of each other's pension interest. The key aspect considered on appeal was the respondent's argument that, in terms of section 7(7)*(a)* read with section 7(8) of the Divorce Act, a spouse married in community of property is only entitled to the pension interest of the other spouse in circumstances where the court granting the divorce has made an order declaring the pension interest part of the joint estate. In other words, the main issue on appeal was the proper interpretation of section 7(7) and (8) of the Divorce Act (para [1]). Section 7(7)*(a)* reads:

> In the determination of the patrimonial benefits to which the parties to any divorce action may be entitled, the pension interests of a party shall, subject to paragraphs *(b)* and *(c)*, be deemed to be part of his assets.

It is important to refresh one's memory regarding the High Court's ruling: it came to the conclusion that, in the absence of a court order by the divorce court declaring the pension interest of the member spouse to be part of the joint estate, the pension interest did not form part of the joint estate (para [6]; cf Sigwadi 'Pension Funds Law' 2016 *Annual Survey* 1109–13).

Petse JA, writing for the majority, referred to various judgments in which the import of the provisions of section 7(7)*(a)* and (8) of the Divorce Act had been considered (para [14]). He noted that the interpretation of these provisions in those judgments had been conflicting and dissonant (para [14]). Only brief summaries of certain of the cases referred to by Petse JA are given below.

The court referred to *Maharaj v Maharaj* 2002 (2) SA 648 (D&CLD), in which it was concluded that it was proper to take account of the value of a pension interest held by one of the spouses married in community of property at the date of divorce (para [17]; see also Jacqueline Heaton 'Law of Persons and Family Law' 2015 *Annual Survey* 423–4).

Reference was also made to *Fritz v Fundsatwork Umbrella Pension Fund* (2323/2011) [2012] ZAECPEHC 57, 2013 (4) SA 492 (ECP). In *Fritz*, no order under section 7(7) of the Divorce Act had been made when the divorce decree was granted (para [18]). Here the court concluded that as the joint estate had already been divided pursuant to the decree of divorce, 'an order the effect of which is to deem a pension interest to be part of the joint estate' would be inappropriate (para [19]; see also Jacqueline Heaton 'Law of Persons and Family Law' 2015 *Annual Survey* 423–4).

In contrast, in *Kotze v Kotze & another* [2013] JOL 30037 (WCC), the court concluded that despite the fact that the division of the joint estate had already been made, the wife was entitled to a share of the pension benefit which had accrued to her (ex-) husband. The court held that the sharing of the pension benefit fell to be determined as at the date of divorce in terms of section 7(7)*(a)* of the Divorce Act (para [22]).

The view that a non-member spouse becomes entitled to a share of his or her member spouse's pension interest only if the court makes such a declaration in terms of section 7(8)*(a)* of the Divorce Act when granting the decree of divorce, was rejected by the Supreme Court of Appeal in the case under discussion (ie *GN v JN*) (para [25]).

The court held that section 7(7)*(a)* is self-contained and does not depend on a section 7(8) order, which deals with endorse-

ment of pension interest after a decree of divorce has been granted. Section 7(7)*(a)* deems a pension interest to be part of the joint estate for the limited purpose of determining the value of the joint estate at the time of divorce (para [25]). The settlement agreement in this case, therefore, automatically included the value of both parties' pension interests (paras [25] [26]; cf Motseotsile Clement Marumoagae 'The law regarding pension interest in South Africa has been settled! Or has it? With reference to *Ndaba v Ndaba* (600/2015) [2016] ZASCA 162' (2017) 20 *PER/PELJ*). The legislature's intention when including section 7(7)*(a)* was to improve the non-member spouse's patrimonial benefits, because such benefits had been available at common law before its inclusion (para [26]).

Section 7(8) creates a mechanism in terms of which the member spouse's pension fund is statutorily obliged to pay the assigned pension interest (as at the date of divorce) directly to the non-member spouse, consequently relieving the member of the obligation to effect payment (para [27]).

The court held that the 'joint estate in this case must necessarily include the pension interest of either party as contemplated in section 7(7)*(a)* of the Act' (para [34]).

Makgoka AJA, who wrote the minority judgment, stated that pension interest is neither immovable nor movable property. In the context of a divorce action and section 7(7) and (8) of the Divorce Act, any suggestion that 'immovable and movable property includes pension interests is untenable' (para [51]). The core of his reasoning is that, if the settlement agreement made provision for pension interest, that interest would certainly not be included under the immovable or movable property sections of the settlement agreement. Consequently, if the settlement agreement specifically provides for a 'pension interest section', it would form part of the joint estate. However, if no separate provision is included, it amounts to a waiver of a right to claim the pension interest (para [39]; cf Marumoagae above).

The importance of this case is that the Supreme Court of Appeal concluded that when marriages in community of property are dissolved by divorce, each party's pension interest is automatically included in the settlement agreement that is made an order of court. However, the Supreme Court of Appeal pointed out clearly that if spouses wish a retirement fund to make a deduction and payment to the non-member spouse in terms of section 37D(1)*(d)*(i) of the Pension Funds Act, a specific order in terms of section 7(8) of the Divorce Act is still required.

This judgment is welcome as it answers some of the questions with which various divisions of the High Court have previously struggled. This judgment notwithstanding, it is advisable rather to plead specifically for the division of the pension interest in terms of sections 7(7) and 7(8).

Taking trust assets into account on divorce

In *REM v VM* 2017 (3) SA 371 (SCA) (also reported as *Mills v Mills* [2017] 2 All SA 364 (SCA)), the Supreme Court of Appeal considered whether trust assets should be taken into account for purposes of calculating the accrual in a spouse's estate upon divorce. The two main questions in this case were whether, on a proper interpretation of the exclusion clause in the antenuptial contract concluded between the parties, certain assets in which the appellant had an interest fell to be excluded from the accrual system; and, if the assets were not to be excluded, whether the trust veil had to be pierced so that the trust assets would form part of the appellant's estate for purposes of the accrual system.

The relevant clause in the antenuptial contract excluded the appellant's beneficial interest in a trust from any accrual, and also excluded 'any other asset acquired by such party by virtue of the possession or former possession of such asset'.

The case of *Badenhorst v Badenhorst* 2006 (2) SA 255 (SCA) is a good starting point for a discussion of this topic. In *Badenhorst*, the Supreme Court of Appeal shed light on the issue of shielding assets using the separate legal personality of a trust. In *Badenhorst*, it was clearly stipulated that the value of assets in the trust could be taken into account for purposes of a redistribution (of assets) order. This was applicable to all marriages entered into before 1 November 1984 when the Matrimonial Property Act came into force.

For purposes of the discussion of the *REM* case, two important principles in *Badenhorst* deserve mention. First, one of the grounds for taking the value of the assets of the trust into account was that the respondent maintained actual and full control over the trust, and by so doing, disregarded the difference between trust assets and his own assets. Simply put, the trust was abused by using it as his alter ego (*Badenhorst* para [11]). Secondly, the court was 'obliged' to take the value of the assets of the trust into account as the trust property had been 'validly transferred to the trustees of a legally created trust' (*Badenhorst* para [13]). It therefore acquired the characteristics of trust assets (Bradley

Smith 'Trust assets and accrual claims at divorce: The SCA opens the door' (2017) August *De Rebus* 22). Consequently, the value of the trust assets was taken into account in determining the extent of the redistribution order in the *Badenhorst* case. This led to the enforcement of the common-law power of 'piercing' the trust's veil (veil piercing), although the court never referred to this remedy. Several other authors were also of the view that the court applied this common-law power, since the court added 'the value of the trust assets to the value of the respondent's estate for the purposes of the redistribution order' (see M de Jong, J le Roux-Bouwer and TA Manthwa 'Attacking trusts upon divorce and in maintenance matters: Guidelines for the road ahead (1)' (2017) 80 *THRHR* 205–8. See also the discussion of *WT & others v KT* 2015 (3) SA 574 (SCA) in Jacqueline Heaton 'Family Law' 2015 *Annual Survey* 424–8).

In the *REM* case, the court was required to decide whether, for purposes of the accrual system, the assets of certain trusts legitimately formed part of the assets of these trusts and were not part of the appellant's estate (para [10]). This meant that the court had to establish whether these trusts were simply the alter egos of the appellant. The court found that the trusts were not simply alter egos of the appellant. The Supreme Court of Appeal acknowledged

> . . . an equitable remedy in the ordinary, rather than technical, sense of the term; one that lends itself to a flexible approach to fairly and justly address the consequences of an unconscionable abuse of the trust form in given circumstances. It is a remedy that will generally be given when the trust form is used in a dishonest or unconscionable manner to evade a liability, or avoid an obligation (para [17]).

An important issue in this case was whether the trust-creating spouse had attempted to prejudice the other spouse's monetary claim by managing and administering the trust in such a manner that it amounted to an abuse of the trust form. The court, correctly, held that this would occur in marriages involving the accrual system, where the trust-creating spouse had set up the trust, transferred personal assets to the trust, and dealt with these assets as if they were trust assets in a fraudulent or deceptive attempt to secrete them and, therefore, prejudice the aggrieved spouse's accrual claim. In such cases, the court held that trust assets could be used to calculate the accrual of the aggrieved spouse's estate, to satisfy any personal liability of the aggrieved spouse, and to satisfy any payment owed under the accrual

system to the other spouse (paras [19]–[20]; cf Bradley Smith 'Trust assets and accrual claims at divorce: The SCA opens the door' (2017) August *De Rebus* 22).

It is therefore clear from the *REM* judgment that the assets of an alter ego trust can now be taken into account in marriages concluded under the accrual system. By taking the assets of the alter ego trust into account, the prejudiced spouse's accrual claim can be calculated.

To conclude: in the *REM* case, the court held that trust assets can be included in a spouse's estate. This will happen if it is proved that a spouse transferred personal assets to the trust, and dealt with them as if they were trust assets. This must be accompanied by the fraudulent or dishonest purpose of evading the obligation properly to account for the accrual of his or her estate in order to evade paying what was due to the other spouse under the accrual claim (para [20]; see also Jacqueline Heaton 'Family Law' 2016 *Annual Survey* 366).

This judgment is to be welcomed, as it provides certainty regarding trust assets and marriages involving the accrual system. For a detailed analysis of the judgment, see also Bradley Smith 'Perspectives on the juridical basis for taking (the value of) trust assets of alter-ego trusts into account for the purposes of accrual claims at divorce: *REM v VM*' (2017) 4 *SALJ* 715–28. This case is also discussed in the chapter 'Law of Trusts'.

Maintenance

Post-divorce spousal maintenance

On the legality of a clause in an antenuptial contract providing for the waiver of any present or future right to claim maintenance upon divorce, see *W v H* 2017 (1) SA 196 (WCC) above.

FINANCIAL INSTITUTIONS

WG Schulze*

LEGISLATION

Primary Legislation

General

Two pieces of primary legislation that are of considerable importance to financial institutions were promulgated and/or came into operation during 2017. These are the Financial Sector Regulation Act 9 of 2017 (the FSR Act) and the Financial Intelligence Centre Amendment Act 1 of 2017 (the Amendment Act). The first part of the discussion under 'Primary Legislation' will be devoted to selected aspects of the FSR Act; while the Amendment Act will be discussed in the second part.

The South African financial sector has been overhauled extensively. For a more detailed explanation of what exactly this process entailed, see WG Schulze 'Financial Institutions' 2015 *Annual Survey* (Schulze 2015) 435ff.)

In 2011, the Minister of Finance released a discussion document 'A safer financial sector to serve South Africa better' (see *www.treasury.gov.za/twinpeaks/*, accessed on 12 March 2017). This document outlined the government's strategy to reform the South African financial sector.

Most of the initiatives outlined in the 2011 discussion document have since come into force, including the Financial Markets Act 19 of 2012 (in 2012); Basel III (in 2013); the Banks Amendment Act 3 of 2015 (in 2015); and the FSR Act (in 2018). (On the Financial Markets Act in general, see Stephanie Luiz & Kathleen van der Linde 'The Financial Markets Act 19 of 2012' (2013) 25 *SA Merc LJ* 458ff.)

A number of other regulatory reforms have also been implemented. These reforms all form part of the 'twin peaks' model of reform. This model consists of a prudential peak, and a market conduct peak (Schulze 2015 above 436).

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The twin peaks model formally became operational when the main part of the Financial Sector Regulation Act came into force on 1 April 2018.

Under the previous regulatory dispensation, all banks in South Africa were regulated by the Banking Supervision Department of the South African Reserve Bank (SARB). All non-bank financial institutions (financial services providers, long- and short-term insurers, pension funds, collective investment schemes and market infrastructures) were regulated by the Financial Services Board (FSB). (For a broad overview of the role of the SARB in ensuring financial stability in South Africa, see Gerda van Niekerk & Corlia van Heerden 'twin peaks: The role of the South African central bank in promoting and maintaining financial stability' (Van Niekerk & Van Heerden) 2017 (80) *THRHR* 636 644ff.) For a discussion of the role and status of the SARB, see Johann de Jager 'The South African Reserve Bank: An evaluation of the origin, evolution and status of a central bank. Part 1' 2006 (18) *SA Merc LJ* 1 *passim*.

Under the new dispensation, the FSR Act has created two new regulators: the Prudential Authority and the Financial Sector Conduct Authority. These two regulators represent the two regulatory 'peaks' in terms of the 'twin peaks' model. The twin peaks model entails the establishment of two primary financial regulators ('peaks') – a prudential regulator is regarded as a 'peak' and a market conduct regulator as another 'peak'. The rationale behind two distinct regulators is, among other things, based on the inherent conflict between the business interests of financial institutions and the interests of consumers. Through a twin peak model of regulation, the interests of each group are regulated separately. On the one hand, a prudential regulator is designed to maintain and enhance the safety, soundness and solvency of financial institutions, and on the other hand, a market conduct regulator oversees consumer protection by protecting consumers of financial services and by promoting confidence in the financial system. The objectives of the twin peak model are to strengthen consumer protection and market conduct in the financial services sector and to create a more resilient and stable financial system (Van Niekerk & Van Heerden above 639).

The FSR Act is a detailed and wide-ranging statutory instrument. It consists of seven parts, divided into seventeen chapters. These chapters, in turn, contain 305 sections. For a broad overview of the structure of the FSR Act, including the main

provisions contained in each chapter, see WG Schulze 'Financial Institutions' 2016 *Annual Survey* 279 (Schulze 2016) 381-94. (The present discussion of certain key chapters from the FSR Act should be read in conjunction with the discussion in Schulze 2016 above.)

In addition to the FSR Act, the Financial Sector Regulations, 2018 have been published and became effective as from 29 March 2018. The regulations relate to, among other things, management of the transitional process to establish the Financial Sector Conduct Authority and the Financial Services Tribunal (GN 405 *GG* 41550 of 29 March 2018). A discussion of these regulations falls beyond the ambit of the present chapter.

For purposes of the present discussion, only selected aspects of the FSR Act will be discussed. First, a brief background and an explanation of the events leading up to the global financial crisis of 2008 are considered. This is followed by an explanation as to why the 'twin peaks' model of regulation has become the preferred model of regulation of the financial industry. Thirdly, it is explained how the twin peaks model, and in particular, the FSR Act, is structured. Fourthly, particular sections of Chapter 2 of the FSR Act, which deal with 'Financial Stability', are dealt with. Thereafter, the main provisions of Chapter 3 (which deals with the 'Prudential Authority') and Chapter 4 (which deals with the 'Financial Sector Conduct Authority') are discussed. This is followed by a explanation of the co-operation and collaboration between financial sector regulators and the SARB (which are provided for in Chapter 5). Finally, the ombud system in terms of the FSR Act (which is provided for in Chapter 14) and the Financial Services Tribunal (which is regulated in terms of Chapter 15 of the FSR Act) are scrutinised.

Chapters of the FSR Act that are not discussed (chaps 6–13, 16–17) address the following: Administrative actions; Regulatory instruments; Licensing; Information gathering, supervisory onsite inspections and investigations; Enforcement; Significant owners; Financial conglomerates; Administrative penalties; Finances, levies and fees; and Miscellaneous.

The Financial Sector Regulation Act

Introduction

Financial sector regulation covers a broad scope of legal and financial principles applicable to the financial services sector. This includes banks, insurance companies and other financial

institutions that provide financial services. The financial services sector plays an essential role in supporting the economy of a country as it enables economic growth, job creation and building vital infrastructure and sustainable development. It also allows people to conclude daily economic transactions, and to save and insure their wealth in order to meet their future aspirations and retirement needs. Effective regulation of the financial services sector is important to maintain confidence in the sector, to maintain the safety and soundness of financial institutions, to provide for consumer protection and to assist with enforcing applicable laws (see Anon 'Financial Sector Regulation Bill. Impact study of the twin peaks reform' available on *www.treasury.gov.za*, accessed 1 July 2018 (Anon 'Impact study').

The financial crisis of 2008

During 2007 and 2008, a global financial crisis occurred which originated from the major financial sectors of developed countries. The financial crisis had a severe impact on financial sectors globally. The root causes of the financial crisis are: the emergence of macroeconomic imbalances (such as current account imbalances and unsustainable external indebtedness) and the inadequate regulation of the financial services sectors (Anon 'Impact study' above).

In the United States (US) in particular, a lack of proper financial services regulation ('light-touch regulation') caused an excessive increase of lending, which in turn caused household debt to rise to unacceptable levels. The financial crisis peaked in 2008 due to the collapse of the global US financial services firm Lehman Brothers Holdings Inc. The firm collapsed mostly due to its involvement in a mortgage crisis, excessive risk-taking and allegations of negligence. The collapse resulted in extreme financial uncertainty to the extent that financial institutions refrained from lending to each other. A significant disruption was caused in the flow of credit to business and consumers. Worldwide, stock markets collapsed, household wealth was reduced, and lending was brought to a standstill. Governments were forced to bail out distressed businesses and buy billions of dollars' worth of debt to assist financial institutions (see *www.thebalance.com*, accessed 20 August 2018).

The impact of the crisis was not felt equally in all countries and regions as the crisis affected global economies in different ways and over different periods. The general effect of the financial

crisis is regarded as the most severe economic disaster since the Great Depression of 1929. Despite the fact that the financial services sector in South Africa mostly withstood the impact of the financial crisis, it led to approximately one million job losses (Ravinder Rena & Malindi Msomi 'Global financial crises and its (sic) impact on the South African economy: A further update' (2014) 5 *Journal of Economics* 17ff).

To fulfil South Africa's commitment to global financial regulatory reform and to establish a stronger regulatory framework, a National Treasury policy document titled 'A safer financial sector to serve South Africa better', was released by the Minister of Finance on 23 February 2011. This policy document introduced a financial sector reform strategy, particularly the introduction of a 'twin peaks' model of regulation for South Africa.

The twin peaks model is regarded as a more effective model of regulation. One of the reasons for favouring this model is the countries that use it, specifically the Netherlands and Australia. These countries, although not totally immune, during the financial crisis were considered better off. The twin peaks model of regulation has also been proposed for the European Union (Olivia Johanna Edéli *twin peaks for Europe: State-of-the-Art Financial Supervisory Consolidation* (2015) 226ff).

South Africa's structure of the twin peaks model comprises the Prudential Authority, which will operate within the administration of the South African Reserve Bank (the SARB) as the prudential regulator to maintain and enhance the soundness of regulated financial institutions; and the Financial Conduct Authority, which would be the market conduct regulator responsible for the protection of consumers of financial services and for the promotion of confidence in the financial system. The SARB also plays a prominent role in the South African twin peaks model, to the extent that academic commentators refer to the SARB as an 'extra' peak as the primary guardian of financial stability (Van Niekerk & Van Heerden above 640 642. For a detailed discussion of the role of the SARB in ensuring financial stability, see Martha Gertruida van Niekerk *The Role of the Central Bank in Promoting and Maintaining Financial Stability in South Africa–A comparative analysis* (unpublished LLD thesis, University of Pretoria September 2018).

The twin peaks model differs from South Africa's previous model of fragmented regulation. Previously, different sectors of the South African financial markets were regulated by different regulators. In other words, the Republic followed a 'silo-based' approach

to regulation. Banks were regulated by the Banking Supervision Department of the SARB while non-banking institutions were regulated by the Financial Services Board (the FSB). Other regulators were regulated by various sectors of the financial markets. A shift away from the fragmented regulatory model reduces the possibility of regulatory arbitrage, ie the ability of financial institutions to act beyond the reach of regulators by taking advantage of loopholes in the system. Moreover, the new model excludes the possibility of forum shopping where complainants select a forum which they believe would give them the most favourable or lenient consideration for their matter. In addition, gaps in the regulatory system are closed by the twin peaks model (Van Niekerk & Van Heerden above 641).

In contrast to the 'silo approach' or fragmented model, the twin peaks model establishes two regulators to separate prudential and market conduct regulation. The twin peaks model is regarded as more effective in streamlining and simplifying the South African regulatory structure.

The FSR Act generally applies to financial institutions rendering 'financial services' (s 4) and providing 'financial products' (s 2) in the South African 'financial system' (s 2). For purposes of the FSR Act, 'financial institution' means a financial product provider; a financial service provider; a market infrastructure; a holding company of a financial conglomerate; or a person licensed or required to be licensed in terms of a financial sector law (Van Niekerk & Van Heerden above 644).

The overarching aim of the FSR Act and the twin peaks model is to maintain financial stability in the South African financial sector. Next, how the FSR Act aims to maintain financial stability is discussed.

Financial stability

Introduction

Chapter 2 of the FSR Act aims to address and promote financial stability. 'Financial stability' is defined in section 4(1) to mean that

- financial institutions generally provide financial products and financial services, and market infrastructures generally perform their functions and duties in terms of financial sector laws, without interruption;
- financial institutions are capable of continuing to provide

financial products and financial services, and market infrastructures are capable of continuing to perform their functions and duties in terms of financial sector laws, without interruption despite changes in economic circumstances; and

- there is general confidence in the ability of financial institutions to continue to provide financial products and financial services, and the ability of market infrastructures to continue to perform their functions and duties in terms of financial sector laws, without interruption despite changes in economic circumstances.

For the sake of brevity, certain sections dealing with 'financial stability' have not been included in the discussion. These include the establishment of a Financial Stability Oversight Committee in terms of section 20(2) and the regulation thereof; and the Financial Sector Contingency Forum (FSCF) established in terms of section 25 of the FSR Act. As reference is made to the committee, the primary objectives of the Financial Stability Oversight Committee should be mentioned. They are to support the SARB when it performs its functions in relation to financial stability, and to facilitate co-operation and collaboration between, and co-ordination of action among the financial sector regulators and the SARB in respect of matters relating to financial stability (s 20).

The powers and functions of the SARB (ss 11–13) and the roles of financial sector regulators and other organs of state in maintaining financial stability (ss 26–28) are discussed in more detail below.

Powers and functions of the SARB

In terms of section 11 of the FSR Act, the SARB takes responsibility for protecting and enhancing financial stability. In the event that a systemic event occurs or becomes imminent, the SARB must restore or maintain financial stability. A 'systemic event' is defined in section 1(1) as an event or circumstance, including one that occurs or arises outside the Republic, that may reasonably be expected to have a substantial adverse effect on the financial system or on economic activity in the Republic. This includes an event or circumstance that leads to a loss of confidence that operators of, or participants in, payment systems, settlement systems or financial markets, or financial institutions, are able to continue to provide financial products or financial services.

In terms of Schedule 4 to the FSR Act, an amendment has also been effected to section 3 of the South African Reserve Bank Act 90 of 1989, which now reflects an addition to its objective of protecting and maintaining financial stability as envisaged in the Reserve Bank Act.

As a point of departure, the SARB is required in terms of section 12 to monitor and keep under review the strengths and weaknesses of the financial system, and any risks to financial stability and the nature and extent of such risks. Risks of systemic events occurring, and any other risks anticipated in matters raised by members of the Financial Stability Oversight Committee, or risks reported to the SARB by a financial sector regulator, must also be monitored and be kept under review. Further, sections 17 and 18 require the SARB

- to take steps to mitigate risks to financial stability, including advising the financial sector regulators and any other organ of state, of the steps to be taken to mitigate those risks; and
- on a regular basis to assess the observance of principles in the Republic developed by international standard-setting bodies for market infrastructures and report its findings to the financial sector regulators and the Minister of Finance. Regard must be had to the circumstances and the context within the Republic.

Financial stability review

Section 13 of the FSR Act requires that the SARB must, at least every six months, assess the stability of the financial system. This assessment is known as a 'financial stability review'. The financial stability review involves the following:

- the SARB's assessment of financial stability in the period under review;
- its identification and assessment of the risks to financial stability in at least the next twelve months;
- an overview of steps taken by it and by the financial sector regulators to identify and manage risks, weaknesses or disruptions in the financial system during the period under review and that are envisaged to be taken during at least the next twelve months; and
- an overview of recommendations made by it and the Financial Stability Oversight Committee during the period under review and progress made in implementing those recommendations (s 13(2)*(a)–(d)*).

A financial stability review may not include information that may materially increase the possibility of a systemic event occurring if published. A copy of each review must be submitted to the Minister of Finance and the Financial Stability Oversight Committee for information and comment. After taking any comments into account, the SARB must publish the review (s 13(4)). For further information regarding the function of the SARB in relation to systemic events, see Van Niekerk & Van Heerden above 649.

Section 14(1) provides that the Governor of the SARB, after consultation with the Minister, may declare a specified event or circumstance, or a combination of events or circumstances, to be a systemic event.

Section 15 empowers the SARB to prevent, manage or mitigate a systemic event. One of the SARB's functions in case of a systemic event is to keep the Minister informed of the event (s 16).

Roles of financial sector regulators and other organs of state in maintaining financial stability

The financial sector regulators are required to co-operate and collaborate with the SARB and with each other in order to maintain, protect and enhance financial stability. Upon request by the SARB or the Financial Stability Oversight Committee, they may be required to provide assistance and information to the SARB and the Financial Stability Oversight Committee to maintain or restore financial stability. The financial sector regulators must also promptly report to the SARB any matter of which the financial sector regulator becomes aware that poses or may pose a risk to financial stability. Financial regulators must also gather information from, or about, financial institutions concerning financial stability. Co-operation and collaboration between the SARB and the financial sector regulators are provided for in sections 76–86 of the FSR Act, which are discussed below.

The Prudential Authority

Establishment, objectives and functions of the Prudential Authority

The establishment, objectives and functions of the Prudential Authority are addressed in Chapter 3 of the FSR Act (ss 32–34**).** The Prudential Authority is established as a juristic person operating within the administration of the SARB (s 32(2)). The objective of the Prudential Authority is to –

- promote and enhance the safety and soundness of financial institutions that provide financial products and securities services;
- promote and enhance the safety and soundness of market infrastructures;
- protect financial customers against the risk that those financial institutions may fail to meet their obligations; and
- assist in maintaining financial stability (s 33*(a)–(d)*).

In order to achieve its objective, the Prudential Authority must perform the following functions:

- regulate and supervise, in accordance with the financial sector laws, financial institutions that provide financial products or securities services and market infrastructures;
- cooperate with and assist the SARB, the Financial Stability Oversight Committee, the Financial Sector Conduct Authority, the National Credit Regulator and the Financial Intelligence Centre, as required;
- cooperate with the Council for Medical Schemes in the handling of matters of mutual interest;
- support sustainable competition in the provision of financial products and financial services, including through co-operating and collaborating with the Competition Commission;
- support financial inclusion;
- regularly review the perimeter and scope of financial sector regulation;
- take steps to mitigate risks identified to the achievement of its objective or the effective performance of its functions; and
- conduct and publish research relevant to its objective (s 34(1)*(a)–(g)*).

Section 34(2) requires the Prudential Authority to perform any other function conferred on it in terms of any other provision of the FSR Act or other legislation. The Prudential Authority may do anything else reasonably necessary to achieve its objective, which includes co-operating with its counterparts in other jurisdictions and participating in relevant international regulatory, supervisory, financial stability and standard-setting bodies (s 34(3)). Finally, the Prudential Authority must perform its functions without fear, favour or prejudice (s 34(5)). For a discussion of the implications of housing the prudential regulator within the SARB, see Andrew J Godwin & Andrew D Schmulow 'The

financial sector regulation bill in South Africa, second draft: lessons from Australia (2015) 132 *SALJ* 756.

Legal nature of and departments of the Prudential Authority

The Prudential Authority is a juristic person operating within the administration of the SARB. The Prudential Authority consists of the following four departments: the Financial Conglomerate Supervision Department; the Banking, Insurance and Financial Market Infrastructure Supervision Department; the Risk Support Department; and the Policy, Statistics and Industry Support Department. The responsibilities of these four departments are briefly discussed below (for further information also see *www.resbank.co.za*).

(a) Banking, Insurance, Market Infrastructure and Co-operative Financial Institutions Supervision

The Banking, Insurance, Market Infrastructure Supervision and Cooperative Financial Institutions Department is responsible for the prudential supervision of stand-alone banks (including co-operative and mutual banks), insurance companies, financial market infrastructures and co-operative financial institutions.

(b) Financial Conglomerate Supervision

The Financial Conglomerates Supervision Department is concerned with the consolidated prudential supervision of those financial institutions that are designated as financial conglomerates. This department is also responsible for anti-money laundering and combating the financing of terrorism (AML/CFT) regulation and supervision.

(c) Risk Support

The Risk Support Department is responsible for providing regulatory and supervisory support on credit risk, operational risk and market risk. It also provides quantitative analysis, actuarial analysis, and financial institution statistics to be used by the Prudential Authority.

(d) Policy, Statistics and Industry Support

The Policy, Statistics and Industry Support Department is charged with formulating policy, developing supervisory frameworks, providing operational and regulatory support, providing industry analyses, the enforcement and resolution of prudentially

regulated financial institutions, and industry technical support on capital and accounting.

Governance of the Prudential Authority

The governance of the Prudential Authority is addressed in sections 35 to 49 of the FSR Act. The overall governance objective of the Prudential Authority is that it must manage its affairs in an efficient and effective way. It is also, when doing so, required to establish and implement appropriate and effective governance systems and processes and to take into account, among other things, internationally accepted standards and practices (s 35).

Section 36 provides for the appointment of a Chief Executive Officer (CEO) of the Prudential Authority. The CEO is responsible for the day-to-day management and administration of the Prudential Authority. He or she must also perform the functions of the Prudential Authority, which include exercising the powers and carrying out the duties associated with the functions of the Prudential Authority (s 37). The CEO is appointed for a maximum term of five years (s 38). Section 39 provides in detail for the circumstances under which the CEO may be removed from office.

Section 41(1) establishes a Prudential Committee for the Prudential Authority. The committee consists of the Governor of the SARB, the CEO of the Prudential Authority and other Deputy Governors of the SARB (s 41(2)).

The role of the Prudential Committee is generally to oversee the management and administration of the Prudential Authority in order to ensure that it is efficient and effective (s 42*(a)*). The Prudential Committee is also required to act for the Prudential Authority in the following matters:

- authorising the CEO of the Prudential Authority to sign, on behalf of the Prudential Authority, a required memorandum of understanding and any amendment to such a memorandum;
- delegating powers of the Prudential Authority to the Financial Sector Conduct Authority in terms of a memorandum of understanding;
- adopting the regulatory strategy of the Prudential Authority, and any amendment to the strategy;
- making prudential standards or joint standards, and any amendments to those standards;

- adopting the administrative action procedures of the Prudential Authority, and any amendment to those procedures;
- appointing members of subcommittees of the Prudential Authority required or permitted by the Act or a specific financial sector law, and giving directions regarding the conduct of the work of any subcommittee;
- making regulatory instruments under financial sector laws for which it is the responsible authority;
- making determinations of fees in terms of a financial sector law; and
- any other matter assigned in terms of a financial sector law to the Prudential Committee (section 42*(b)*(i)-(viii)).

The Prudential Committee must adopt a regulatory strategy for the Prudential Authority to give general guidance to the Prudential Authority on how to achieve its objective and perform its regulatory and supervisory functions (s 42*(b)*(iii).

Section 47 provides in detail what the aim and guiding principles of the regulatory strategy must entail. In terms of section 47(2), a regulatory strategy must describe the regulatory and supervisory functions for the Prudential Authority for the next three years, and the intended key outcomes of the strategy. Further, a regulatory strategy must set guiding principles for the Prudential Authority on

- the manner in which it should perform its regulatory and supervisory functions;
- the matters to which it should have regard in performing those functions;
- its approach to administrative actions; and
- how it should give effect to the requirements applicable to it with respect to transparency, openness to consultation, and accountability (s 47(2)*(b)*(i)–(iv)).

A regulatory strategy must be consistent with relevant international principles, and reviewed annually by the Prudential Committee (s 47(3)). The Prudential Committee must seek, to the extent that is practicable and appropriate, to minimise inconsistencies between the Prudential Authority's regulatory strategy and the Financial Sector Conduct Authority's regulatory strategy (s 47(6)).

Section 48 allows the Prudential Committee to delegate its powers. Section 49 requires members of the Prudential Committee, at a prescribed forum and in a prescribed manner, to disclose any interest of that member or a relative.

Part 3 of Chapter 3 contains a number of provisions dealing with administrative and logistical matters relevant to the Prudential Authority, including its staffing and resources (s 50); resources which are provided by the SARB (s 51); the duties of staff members (s 52); the financial management duties of the CEO (s 53); the duty on the CEO to provide information to the Prudential Committee (s 54); and annual reports and financial accounts (s 55).

Financial Sector Conduct Authority

Introduction

Countries across the globe, including the United Kingdom, the Netherlands and Australia, have taken different approaches to the twin peaks model, all aimed at strengthening prudential and market conduct oversight and stronger consumer protection (Van Niekerk & Van Heerden above 640). (For a crisp discussion of the twin peaks model in the Netherlands, see Marcel CA van den Nieuwenhuijzen *Financial Law in the Netherlands* (2010) 23–5. For an explanation of the United Kingdom's response to the credit crisis, see Anu Arora *Banking Law* (2014) 123ff. And finally, for an explanation of the financial regulatory model in Poland, see Zdzislaw Brodecki (ed) *Polish Business Law* 2003) 258ff.)

The two-tier approach of separating prudential and market conduct regulation is becoming more prevalent with jurisdictions customising the two-tier approach to cater for their particular economic needs and development goals.

Twin peaks will allow for a more dedicated focus on market conduct issues informed by the Treating Customer Fairly (TCF) framework. Under the previous legislative framework, banks were, in the main, not regulated for market conduct. In the pre-twin peaks era, there was regulatory oversight over intermediary services and advice provided in relation to banking products, but other than in relation to credit provision, none over the product or product provider. Under twin peaks, all aspects of banking products and services will be regulated by the Financial Sector Conduct Authority (Van Niekerk & Van Heerden above 639).

The regulator and supervisor of financial products is the Financial Sector Conduct Authority.

Establishment, objectives and functions of the Financial Sector Conduct Authority

The establishment, objectives and functions of the Financial Sector Conduct Authority are addressed in Chapter 4 (ss 56–58)

of the Act. The Financial Sector Conduct Authority is established in terms of section 56(1) of the FSR Act as a juristic person. It is considered a national public entity for the purposes of the Public Finance Management Act 1 of 1999 (the PFM Act).

The objective of the Financial Sector Conduct Authority is to enhance and support the efficiency and integrity of the financial system, and to protect financial customers. The objective of protecting financial customers is to be achieved, firstly, by promoting fair treatment of financial customers by financial institutions. Secondly, the objective is to be achieved by providing financial education programs for current and prospective financial customers in order to promote financial literacy. Assistance must be provided to support these customers to make sound financial decisions and to maintain financial stability (s 57).

To achieve its objective, the Financial Sector Conduct Authority must perform the following functions:

- regulate and supervise, in accordance with the financial sector laws, the conduct of financial institutions;
- cooperate with, and assist, the SARB, the Financial Stability Oversight Committee, the Prudential Authority, the National Credit Regulator, and the Financial Intelligence Centre, as required in terms of the FSR Act;
- cooperate with the Council for Medical Schemes in the handling of matters of mutual interest;
- promote, to the extent consistent with achieving the objective of the Financial Sector Conduct Authority, sustainable competition in the provision of financial products and financial services, including through co-operating and collaborating with the Competition Commission;
- promote financial inclusion;
- regularly review the perimeter and scope of financial sector regulation, and take steps to mitigate risks identified to the achievement of its objective or the effective performance of its functions;
- administer the collection of levies and the distribution of amounts received in respect of levies;
- conduct and publish research relevant to its objective;
- monitor the extent to which the financial system is delivering fair outcomes for financial customers, with a focus on the fairness and appropriateness of financial products and financial services and the extent to which they meet the needs and reasonable expectations of financial customers; and

- formulate and implement strategies and programs for financial education for the general public (s 58(1)*(a)–(j)*).

Further, the Financial Sector Conduct Authority may not regulate and supervise credit agreements without consent from the National Credit Regulator. However, it may regulate and supervise financial services provided in relation to a credit agreement (s 58(2)). The Financial Sector Conduct Authority must also perform any other function conferred on it in terms of any other provision of the FSR Act or other legislation (s 58(3)). The Financial Sector Conduct Authority may do anything else reasonably necessary to achieve its objective, including

- cooperating with its counterparts in other jurisdictions; and
- participating in relevant international regulatory, supervisory, financial stability and standard-setting bodies (s 58(4)).

When performing its functions, the Financial Sector Conduct Authority must

- take into account the National Credit Act 34 of 2005 (the NCA) and regulatory requirements for financial institutions that are authorised and regulated under the NCA;
- take into account the need for a primarily pre-emptive, outcomes-focused and risk-based approach, and prioritise the use of its resources in accordance with the significance of risks to the achievement of its objective; and
- to the extent that it is practicable, have regard to international regulatory and supervisory standards set by relevant international regulatory, supervisory, financial stability and standard-setting bodies and circumstances prevalent in the Republic (s 58(5)*(a)–(c)*).

Finally, section 58(6) provides that the Financial Sector Conduct Authority must perform its functions without fear, favour or prejudice.

Governance of the Financial Sector Conduct Authority

Chapter 4, Part 2 of the FSR Act addresses the governance of the Prudential Authority from sections 59 to 72 of the Act. The Financial Sector Conduct Authority must manage its affairs in an efficient and effective way. It must also in performing these functions establish and implement appropriate and effective governance systems and processes and take into account, among other things, internationally accepted standards and practices (s 59).

A Commissioner of the Financial Sector Conduct Authority must be appointed together with Deputy Commissioners. The Commissioner is responsible for the day-to-day management and administration of the Financial Sector Conduct Authority (s 62(1)). He or she is to perform the functions of the Financial Sector Conduct Authority, including exercising the powers and carrying out the duties associated with the functions. The Commissioner may assign specific responsibilities to a Deputy Commissioner (s 61).

The FSR Act establishes an Executive Committee for the Financial Sector Conduct Authority. The Executive Committee consists of the Commissioner and the Deputy Commissioners. The Commissioner is the chairperson of the Executive Committee. The Executive Committee is required to generally oversee the management and administration of the Financial Sector Conduct Authority to ensure that it is efficient and effective (s 60(3)*(a)*). Further, the Committee must act for the Financial Sector Conduct Authority in the following matters:

- authorising the Commissioner to sign, on behalf of the Financial Sector Conduct Authority, a required memorandum of understanding and any amendments to such a memorandum;
- delegating powers of the Financial Sector Conduct Authority to the Prudential Authority in terms of a memorandum of understanding;
- making conduct standards or joint standards, and any amendments to those standards;
- adopting the regulatory strategy of the Financial Sector Conduct Authority, and any amendments to the strategy;
- Adopting the administrative action procedures of the Financial Sector Conduct Authority, and any amendments to those procedures;
- appointing members of subcommittees of the Financial Sector Conduct Authority required or permitted by a law, and giving directions regarding the conduct of the work of any subcommittee;
- Making determinations of fees in terms of a financial sector law;
- making regulatory instruments in terms of specific financial sector laws for which it is the responsible authority; and
- any other matter assigned in terms of a financial sector law to the Executive Committee (s 60(3)*(b)*(i)–(ix)).

The Executive Committee must adopt a regulatory strategy for the Financial Sector Conduct Authority. The regulatory strategy

must provide general guidance in the achievement of the Financial Sector Conduct Authority's objective and the performance of its regulatory and supervisory functions (s 60(3)*(b)*(iii)). A regulatory strategy must state the regulatory and supervisory priorities for the Financial Sector Conduct Authority for the next three years and the intended key outcomes of the strategy (s 70). Further, a regulatory strategy must set guiding principles for the Financial Sector Conduct Authority on

- the manner in which it should perform its regulatory and supervisory functions;
- the matters which it should have regard to in performing those functions;
- its approach to administrative actions; and
- the manner in which it should give effect to the requirements applicable to it with respect to transparency, openness to consultation and accountability (s 70(2)*(b)*(i)-(iv)).

The regulatory strategy must also be aimed at consistency with relevant international principles and be reviewed annually by the Executive Committee. The Executive Committee to the extent that it is practicable and appropriate must seek to minimise inconsistencies between the Financial Sector Conduct Authority's regulatory strategy and the Prudential Authority's regulatory strategy (s 70(7)).

Like the Prudential Authority, the Executive Committee of the Financial Sector Conduct Authority is allowed to delegate its powers under certain prescribed circumstances and in accordance with certain procedures (s 71). There also rests a duty of disclosure of interest on the members of the Executive Committee of the Financial Sector Conduct Authority (s 72).

In Part 3 of Chapter 4, the appointment of staff and resources (s 73); the duties of staff members (s 74); and a duty of the Commissioner to provide information (s 75), are explained.

Co-operation and collaboration between financial sector regulators and the SARB

The twin peaks structure of financial sector regulation requires close coordination between the Prudential Authority and the Financial Sector Conduct Authority. This is given effect to through provisions in the FSR Act that introduce various formal coordinating mechanisms, such as a requirement to enter into memoranda of understanding. There is also a general principle of cooperation

and coordination entrenched in the FSR Act, which anticipates a culture of ongoing collaboration (Van Niekerk & Van Heerden above 650–51).

The cooperation and collaboration between the financial sector regulators and the SARB is contained in sections 76 to 86 of the FSR Act. For purposes of these sections, reference to financial sector regulators includes the Prudential Authority, the Financial Sector Conduct Authority, the National Credit Regulator and the Financial Intelligence Centre. (For an overview of the interaction between consumer credit and a 'twin peaks' model of regulation, see Gail Pearson 'Making prudence: Consumer credit and twin peaks, a comparison of Australia and South Africa' (2016) 27 *JBFLP* 223.)

The financial sector regulators and the SARB must cooperate and collaborate when performing their functions in terms of financial sector laws, the NCA and the Financial Intelligence Centre Act 38 of 2001 (the FICA) (s 76(1)). To facilitate cooperation and collaboration, the financial sector regulators and the SARB are required to

- generally assist and support each other in pursuing their objectives in terms of financial sector laws, the NCA and the FICA (s 76(1)*(a)*);
- inform each other about, and share information about, matters of common interest (s 76(1)*(b)*);
- strive to adopt consistent regulatory strategies, including addressing regulatory and supervisory challenges (s 76(1)*(c)*);
- coordinate, to the extent appropriate, actions in terms of financial sector laws, the NCA and the FICA, including in relation to –
  - standards and other regulatory instruments, including similar instruments provided for in terms of the NCA and the FICA;
  - licensing;
  - supervisory on-site inspections and investigations;
  - actions to enforce financial sector laws, the NCA and the FICA;
  - information sharing;
  - recovery and resolution; and
  - reporting by financial institutions, including statutory reporting and data collection measures (s 76(1)*(d)*(i)-(vii));
- minimise the duplication of effort and expense, including by establishing and using, where appropriate, common or shared databases and other facilities (s 76(1)*(e)*);

- agree on attendance at relevant international forums (s 76(1)*(f)*);
- develop, to the extent that is appropriate, consistent policy positions, including for the purpose of presentation and negotiation at relevant South African and international forums (s 76(1)*(g)*).

The financial sector regulators and the SARB, at least annually as part of their annual reports or on request, must report to the Minister of Finance, the Cabinet member responsible for administering the NCA, and the National Assembly, on measures taken to co-operate and collaborate with each other (s 76(2)). They must also enter into one or more memoranda of understanding to give effect to the above obligations (s 77).

Financial Services Tribunal

The implementation of the FSR Act set the ball rolling for the Financial Services Tribunal (the Tribunal), which has been established to reconsider decisions of, or omissions to take such decisions by, a financial sector regulator, authorised financial services provider, statutory ombud, or market infrastructure as outlined in section 218 of the FSR Act.

The Tribunal is an adjudication forum similar to the old FSB Appeal Board, except that it has a wider mandate than that of the old FSB Appeal Board.

The Tribunal is an independent body. Its members are appointed by the Minister of Finance. The Tribunal may consist of as many members as the Minister may determine. However, at least two of the members must be retired judges and two other members must be experienced or knowledgeable in respect of financial products, services and instruments as well as market infrastructures or the financial system.

Retired Justices Yvonne Mokgoro and Louis Harms respectively have been appointed by the Minister as the Chairperson and Deputy Chairperson of the Tribunal together with sixteen additional Tribunal members. On 21 May 2018, the Chairperson of the Tribunal issued rules in accordance with section 227 of the FSR Act, and the Ministerial regulations were published on 29 March 2018. They are published on the FSCA website (*www.fsca.co.za*).

Ombud of the Financial Services

Chapter 14 of the FSR Act has introduced a new ombud structure. An Ombud Council is established as a national public

entity for the purposes of the PFM Act. The Chairperson of the Ombud Council is the accounting authority of the Ombud Council in terms of the PFM Act (s 175 of the FSR Act). The Ombud Council must oversee the recognition, cooperation and promotion of public awareness of ombuds and ombud schemes (s 176 of the FSR Act contains the objectives of the Ombud Council).

The Ombud Council must also protect the independence and impartiality of ombuds and resolve overlaps of jurisdictional coverage of different ombud schemes, while also monitoring their performance and their compliance with the requirements of the FSR Act. This is expected to result into a more harmonised and consistent approach to adjudicating customer complaints by ombuds. A Chief Ombud must be appointed by the Minister to oversee the day-to-day management and administration of the Ombud Council.

The objective of the Ombud Council is to assist in ensuring that financial customers have access to, and are able to use, affordable, effective, independent and fair alternate dispute resolution processes for complaints about financial institutions in relation to financial products and services, and services provided by market infrastructures. The Ombud Council must establish and operate one or more centres, which may incorporate a call centre, to facilitate financial customers' access to appropriate ombuds. The purpose of the centre is to provide a place, staff and facilities to assist financial customers to formulate complaints and to identify for them the appropriate ombud to deal with their complaints.

Absent a recognised industry ombud scheme or statutory ombud scheme that makes provision for the resolution of complaints about financial products and services of a particular kind, the Ombud Council may, after consulting with the relevant Ombud schemes, designate an ombud scheme, or two or more ombud schemes, to deal with and resolve the complaints. The designation of an ombud scheme may be made by the Ombud Council on its own initiative or on application by a scheme or a financial institution that provides or proposes to provide financial products or services of the particular kind. Currently, the banking sector, short-term and long-term insurance, retirement funds and Financial Advisory and Intermediary Services (FAIS) all have their own Ombuds. (For a broad overview of the functions of financial

ombuds, see Daleen Millard 'Bespoke justice? On financial ombudsmen, rules and principles' 2011 *De Jure* 232ff.)

Conclusion

The twin peak model of financial regulation is expected to be a more effective model of financial regulation than South Africa's previous regulation framework. Ultimately, the goal is to achieve a safer financial sector that promotes financial stability and increases the ability to manage and mitigate the effects of a financial crisis. It is anticipated that the Financial Sector Regulation Act will assist in obtaining this goal.

The Financial Intelligence Centre Amendment Act 1 of 2017

The Financial Intelligence Centre Amendment Act 1 of 2017 (the Amendment Act) has been promulgated. The Amendment Act serves to amend the Financial Intelligence Centre Act 38 of 2001 (the FIC Act). (For a detailed discussion of the FIC Act, see Louis de Koker *South African Money Laundering and Terror Financing Law* 2015 ed (2014) 15ff.) The aim of the Amendment Act is to enhance South Africa's ability to combat financial crimes by proposing measures to address threats to the stability of South Africa's financial system posed by money laundering and terrorism financing (GN 396 *GG* 40821 of 2 May 2017. For a discussion of the provisions of the Amendment Act, see Charl Hugo & Wynand Spruyt 'Money laundering, terrorist financing and financial sanctions: South Africa's response by means of the Financial Intelligence Centre Amendment Act 1 of 2017' 2018 (2) *TSAR* 227ff).

The Amendment Act and regulations promulgated in terms of the FIC Act are the most authoritative sources that need to be considered by accountable institutions in implementing their obligations under the Amendment Act (s 77 of the FIC Act as amended by s 56 of the Amendment Act). These are supplemented by authoritative guidance notes which are issued by the Financial Intelligence Centre (FIC). Although the guidance notes do not constitute binding law, non-compliance with them may lead to administrative sanctions (Hugo & Spruyt above 253. See Hugo & Spruyt above *passim* for a discussion of the most important of these guidance notes.)

Any reference below to the 'principal Act' refers to the FIC Act.

Objects of the Amendment Act

The primary objective of the Amendment Act is to establish a stronger anti-money laundering (AML) and combating of terrorist

financing (CTF) regulatory framework. This will be achieved by enhancing the customer due diligence requirements; providing for the adoption of a risk-based approach in the identification and assessment of AML and CTF risks; providing for the implementation of the United Nations Security Council Resolutions relating to the freezing of assets; dissolving the Counter-Money Laundering Advisory Council (the CMLAC); extending the objectives and functions of the Financial Intelligence Centre (the FIC) in relation to the sharing of information as well as the functions of the FIC in respect of suspicious transactions; and, finally, by enhancing certain administrative and enforcement mechanisms.

The Amendment Act is an attempt to align South Africa's anti-money laundering legislation with international standards (Hugo & Spruyt above 227).

Certain of the provisions of the Amendment Act came into operation on 13 June 2017, others on 2 October 2017, while others will come into operation on a date yet to be determined, but before the end of 2018 (see *www.fic.gov.za/Documents/*, accessed on 14 March 2018; and Hugo & Spruyt above 228 n10).

The Amendment Act addresses the following three main matters: first, it enhances the customer due diligence requirements for accountable institutions. Customer due diligence refers to the knowledge that an accountable institution has about its customer and the accountable institution's understanding of the business that the customer is conducting with it. The Amendment Act broadens and enhances the elements of customer due diligence requirements, namely the determination of the customer's identity, the duty to keep records, identifying the beneficial owner, and understanding the purpose and the intended nature of the business relationship. The Amendment Act introduces two new concepts under customer due diligence requirements: the ongoing due diligence of the customer's transaction records and the enhanced measures for persons entrusted with prominent public or private sector functions, whenever accountable institutions establish business relationships with customers (see Hugo & Spruyt above 235–36).

Secondly, it provides for the adoption of a risk-based approach to customer due diligence. The risk-based approach is the antithesis of a rules-based approach (see *Guidance Note 7* on the Implementation of Various Aspects of the Financial Intelligence Centre Act 38 of 2001 available on *https://www.fic.gov.za/Compliance/Pages/Guidance-Notes.aspc*, accessed 3 August

2018. See too Hugo & Spruyt above 229. Provision is made in the Amendment Act for the application of a risk-based approach to customer due diligence, which entails that an accountable institution should identify, assess, and understand its AML and CTF risks. The effective implementation and application of the risk-based approach is largely dependent on an accountable institution's AML and CTF Risk Management and Compliance Programme. The Amendment Act places a responsibility on accountable institutions to develop, document, maintain and implement AML and CTF Risk Management and Compliance Programmes. The responsibility for complying with the FIC Act and the Risk Management and Compliance Programme is placed on the board of directors and the senior management of accountable institutions (Hugo & Spruyt above 235ff).

Thirdly, it provides in sections 26A to 26C of the Amendment Act for the implementation of the United Nations Security Council resolutions relating to the freezing of assets. The Amendment Act empowers the FIC to administer the measures adopted by the United Nations Security Council (UNSC) in its Resolutions, which require accountable institutions to freeze property and transactions pursuant to financial sanctions imposed in the UNSC Resolutions. Mechanisms for the implementation of the UNSC Resolutions include the publication in the *Government Gazette*, by the Minister of Finance, of a notice of the adoption of the UNSC Resolution, and the publication of a notice by the executive head of the FIC of persons who are subject to the sanction measures (the sanctions list). These notices may be revoked if they are no longer considered necessary to give effect to the applicable UNSC Resolutions (Hugo & Spruyt above 235–36 249–51).

The acquisition, collection or use of the property of persons or an entity whose name/s appear in the sanctions list will be prohibited. It is also impermissible to provide financial services and products to those persons or entities. Access to financial services and products by persons identified in the sanctions list will only be for ordinary and necessary expenses, such as food, rent or mortgage and medical treatment. For compliance purposes an obligation is placed on an accountable institution to report to the FIC the property in its possession or under its control, which is owned or controlled by or on behalf of a person or an entity identified in the sanctions list (s 26C).

Fourthly, the Amendment Act dissolves the CMLAC. The Amendment Act repeals Chapter 2 of the FIC Act, which establishes the

CMLAC. It is envisaged that collaboration will be facilitated at the policy level between the public sector participants in the country's AML and CTF framework with the structures that will be implemented to direct the application of risk assessments and the management of identified AML and CTF risks (Hugo & Spruyt above 230–31. For a discussion of the structure and aim of the CMLAC, cf De Koker above 89ff).

The decision to dissolve the CMLAC was informed by the fact that a number of platforms exist within the country to discuss matters of concern and of mutual interest. This obviates the need for consultations by a platform such as the CMLAC. Consequential amendments have also been effected to remove reference to the CMLAC in other provisions of the FIC Act (Hugo & Spruyt above 230–31 n21).

Fifthly, it lists the objectives and functions of the FIC. The Amendment Act extends the ability of the Centre to share information held by it. In addition, the Amendment Act confirms explicitly that the functions of the FIC include the analysis of suspicious transactions based on information in its possession or information received other than by means of reports made to the FIC. The Amendment Act also mandates the FIC to provide information and guidance to accountable institutions, which will assist the FIC to meet the requirements to freeze property and transactions pursuant to the sanctions list. In addition, the Amendment Act extends the ability of the FIC to share information held by it to support other government entities more effectively in carrying out their mandates (see Hugo & Spruyt above 227 230 251–52).

Sixthly, the Amendment Act enhances and strengthens the AML and CTF regulatory framework, by effecting amendments to place an obligation on accountable institutions to ensure that their employees are trained to comply with the FIC Act, as well as their respective Risk Management and Compliance Programmes. The FIC is empowered to issue directives, after consultation with the relevant supervisory body, in instances of general application of the Act, or in specific instances set out in the Amendment Act (see Hugo & Spruyt above 248–49).

The Amendment Act ensures that proper safeguards are put in place in respect of the information in the possession of the FIC, in compliance with the Protection of Personal Information Act 4 of 2013. It is important to note that the Amendment Act also gives effect to the Constitutional Court's decision in the matter of *Estate*

Agency Affairs Board v Auction Alliance (Pty) Ltd & others 2014 (3) SA 106 (CC), 2014 (4) BCLR 373. Section 45B of the FIC Act was declared by the Constitutional Court to be unconstitutional, as it allows for the inspector to conduct inspections, for the purpose of determining compliance with the FIC Act, without a warrant in certain instances. (For a discussion of the *Estate Agency* case, see Jason Brickhill & Michael Bishop 'Constitutional Law' 2014 *Annual Survey* 127 156–8.) The Amendment Act amends section 45B of the FIC Act, to provide for a warrant requirement, and to state in which circumstances a warrant would not be required.

Seventhly, the Amendment Act enhances certain administrative and enforcement mechanisms in the FIC Act. The aim of these enhancements is to encourage compliance with the Act, and to assist in combating money laundering and terrorism financing. The Amendment Act provides for financial penalties paid in respect of financial sanctions to be paid into the National Revenue Fund, instead of into the Criminal Assets Recovery Account as before (ss 35–50 of the Amendment Act).

The quorum of the adjudication panel has been reduced for practical reasons, and the Appeal Board will be empowered to condone delays, on good cause shown, in the lodging of appeals. Certain criminal sanctions in the offence provisions will be replaced, by making non-compliance with certain sections of the Act subject to administrative sanctions. These changes in sanctions are only in respect of an accountable institution's obligations regarding customer due diligence and record-keeping measures. Certain penalty fines have been increased by the Amendment Act (see ss 45D–E of the FIC Act, as amended by ss 33 and 34 of the Amendment Act).

Section 1: Definitions

Section 1 contains a number of definitions. A definition of 'administrative sanction' provided for in section 45C, and referred to in a number of new or amended provisions, has now been inserted in section 1 of the principal Act.

The definition of 'authorised officer' has been amended to expand the scope of the persons who may request information from the FIC.

A definition of 'beneficial owner' was inserted in the FIC Act, to define a beneficial owner, in respect of a legal person, to mean the natural person who, independently or together with another person, owns or controls the legal person directly or indirectly.

New definitions for 'client' and 'prospective client' have also been inserted.

Definitions have been inserted into the Amendment Act to describe 'domestic prominent influential person', 'executive officer' and 'foreign prominent public official'.

A definition of 'legal person' has been inserted. The definition covers any person, other than a natural person, that establishes a business relationship or enters into a single transaction with an accountable institution, and includes a person incorporated as a company, close corporation, foreign company or any other form of corporate arrangement or association, but excludes a trust, partnership or sole proprietor.

The definition of 'non-compliance' has been amended, to make a distinction between what constitutes non-compliance that attracts an administrative sanction and non-compliance that is subject to a criminal sanction.

A definition of 'Risk Management and Compliance Programme' has been inserted in the FIC Act. More details regarding this change are provided in section 25, which amends s 42 of the FIC Act.

A definition of 'trust' has been inserted in the FIC Act. The definition is the same as the definition used in the Trust Property Control Act 57 of 1988, except that trusts established by virtue of a testamentary writing; by virtue of a court order; for persons under curatorship; or by the trustees of a retirement fund in respect of benefits payable to the beneficiaries of that retirement fund, are excluded.

Definitions of 'Independent Police Investigative Directorate', 'Intelligence Division of the National Defence Force', 'investigative division in an organ of state', 'Public Protector' and 'Special Investigating Unit' have been inserted to make it clearer with whom the FIC may share information held by it.

Section 2: Objectives of the Amendment Act

The objectives of the FIC, provided for in section 3 of the principal Act, have been extended to enable the FIC to share information held by it with other authorities in order to help other government entities to carry out their mandates more effectively.

As a member state of the United Nations, South Africa must implement targeted financial sanction measures to comply with the UNSC Resolutions under Chapter VII of the Charter of the

United Nations. These resolutions often, in conjunction with other forms of sanctions, such as arms embargoes and travel bans, require countries, without delay, to freeze the funds or other assets of, and to ensure that no funds or other assets are made available, directly or indirectly, to or for the benefit of, any person or entity designated by the UNSC Resolutions under Chapter VII of the UN Charter.

The FIC Act is best placed to provide the mechanism for the implementation of financial sanctions pursuant to the UNSC Resolutions, taking into account the current obligations placed on accountable institutions under the FIC Act. Section 2 of the Amendment Act extends the objectives of the FIC to include administering measures requiring accountable institutions to freeze property and transactions pursuant to financial sanctions that may arise from UNSC Resolutions.

Section 3: Functions

The functions of the FIC, dealt with by section 4 of the principal Act, are extended to allow explicitly for it to initiate an analysis based on information in its possession or on information it has received. This makes it clear that the FIC can conduct an analysis which is not predicated on the receipt of a suspicious transaction report.

The functions of the FIC have been extended in order to enable the FIC to share information held by it with other authorities to help other government entities to carry out their mandates more effectively.

In addition, section 4 of the principal Act makes provision for the FIC to provide information and guidance to accountable institutions that will assist in meeting requirements to freeze property and transactions pursuant to UNSC Resolutions.

Section 4: Appointment of director

Section 6(3) of the principal Act, which required consultation with the CMLAC, has been deleted. This relates to paragraphs 2.2.4 and 3.5 regarding the abolition of the CMLAC.

Section 5: CMLAC

Chapter 2 of the FIC Act, relating to the CMLAC, has been repealed. Collaboration at a policy formulation level between the public sector participants in the country's framework to combat money laundering and terrorism financing can be better facili-

tated if it is linked with structures that will be implemented to direct the application of risk assessments and the management of identified money laundering and terrorism financing risks.

The implementation of risk-based processes in the AML and CTF framework will greatly reduce the need for policy advice to be provided to the Minister on matters such as the detailed content of regulations and the granting of exemptions from AML and CTF requirements. Instead of relying on rigid requirements in regulations and exemptions granted at the executive level, financial and other institutions will have greater discretion to determine the appropriate compliance steps to be taken in given instances, in accordance with their internal AML and CFT compliance and risk management programmes.

The maturity of the country's framework to combat money laundering and terrorism financing has increased to the point where a number of fora exist for the discussion of matters of mutual interest or concern. This has obviated the need for a rigid platform in the form of a statutory body for purposes of consultations.

Sections 7, 8 and 9: Identifications of clients and other persons

These sections amend Chapter 3, insert section 20A and amend section 21 of the principal Act.

Customer due diligence refers to the knowledge that an accountable institution has about its customer and the accountable institution's understanding of the business that the customer is conducting with it.

A customer due diligence programme, if properly implemented, enables an accountable institution better to manage its relationships with customers, and to identify possible attempts by customers to abuse the accountable institution's products and services for illicit purposes.

Section 8 of the Amendment Act prevents an institution from entering into a business relationship or concluding a single transaction with an anonymous client.

Section 9 of the Amendment Act provides for a risk-based approach to customer due diligence. The application of a risk-based approach entails that an accountable institution should identify, assess, and understand its money laundering and terrorism financing risks. The notion of 'money laundering and terrorism financing risks', in this context, refers to the risk that an accountable institution's products or services may be abused by

its customers in order to carry out money laundering or terrorism financing activities. These risks emanate from a combination of factors, including the customers, countries, products and delivery channels involved in a given scenario. An accountable institution must apply its knowledge and understanding of its money laundering and terrorism financing risks in the development of control measures to prevent or mitigate the risks identified.

By adopting a risk-based approach, both the supervisory body and accountable institutions can ensure that measures to prevent or mitigate money laundering and terrorism financing are commensurate with the risks identified. This will ensure that resources are directed in accordance with priorities, so that the greatest risks receive the highest attention. Where lower risks are identified, the requirements to identify and verify are lowered, creating opportunities for accountable institutions to explore more innovative ways of offering financial services to a broader range of customers, and bring previously excluded sectors of society into the formal economy. This will improve the efficacy of measures to combat terrorism financing and money laundering, while also promoting financial inclusion.

Section 10: Understanding and obtaining information on business relationship

Section 10 has inserted a new section 21A in the principal Act. This section requires accountable institutions to ascertain from a prospective client what the purpose and intended nature of the business relationship will be, and to obtain information regarding the source of the funds that the prospective client anticipates using in the course of the business relationship.

Section 10: Additional due diligence measures relating to legal persons, trusts and partnerships

Section 10 has inserted a new section 21B in the principal Act. A key component of customer due diligence measures is the identification of beneficial owners. In many instances, including in cases of corruption, where criminals wish to obscure the ownership or control of funds in the financial system, they make use of a corporate vehicle to transact with financial and other institutions 'at arm's length'.

Requiring the identification of the beneficial ownership of customers that are not natural persons is a key step to promote

transparency in a financial system. Not only does it enhance the ability of accountable institutions to assess customer-related risks in the course of managing business relationships; the ability of authorities to detect, investigate and prosecute abuses of financial and other institutions for money-laundering and terrorism financing purposes is also greatly improved.

Closely linked to identifying the beneficial owner is the responsibility of a country to ensure that accurate and current information on the beneficial ownership and control of companies and other legal persons is accessible in a timely fashion by the relevant authorities. Consultations with the relevant departments will be necessary to ensure that the mechanisms to achieve this objective are in place.

Section 10: Ongoing due diligence

Section 10 has inserted a new section 21C in the principal Act. This section provides for ongoing due diligence measures. These measures include the scrutiny of transactions undertaken throughout the course of a relationship. The purpose is to ensure that the transactions being conducted are consistent with that accountable institution's knowledge of the customer, and the customer's business and risk profile, including the source of funds. The provision further requires accountable institutions keep updated and accurate information on its clients.

Section 10: Doubts about veracity of previously obtained information

Section 10 has inserted a new section 21D in the principal Act. This section indicates measures that accountable institutions must take if doubts arise regarding the veracity or adequacy of previously obtained customer due diligence information, or where a suspicion of money laundering or terrorism financing is formed at a later stage.

Section 10: Inability to verify identity

Section 10 has inserted a new section 21E in the principal Act. The FIC Act as it was did not expressly prohibit an accountable institution which is unable to comply with the identification and verification requirements from commencing with business or performing transactions. The FIC Act also did not specifically state that a suspicious transaction report ought to be made if the accountable institution is unable to comply with the identification and verification requirements in suspicious circumstances. Sec-

tion 21E, as inserted by section 10 of the Amendment Act, now makes provision for those circumstances.

Section 10: Persons entrusted with prominent public or private sector functions

Section 10 has inserted new sections 21F, 21G and 21H in the principal Act.

The starting point for the effective implementation of measures relating to persons who are entrusted with prominent public or private sector functions is for all financial and other institutions (referred to as 'accountable institutions' in the FIC Act) to have effective measures in place regarding who their customers are, and to understand their customers' business.

Typically, this process happens when an institution takes on a new customer. The institution must establish who the prospective customer is, by using reliable and independent source documents. In instances where the customer is a business, the institution will need to make sure that, among other matters, it knows who the beneficial owner is, what the ownership and control structure of the business is, and the what the nature of the business is. Over the lifetime of the relationship with the customer, the institution must monitor the customer's ongoing transactions to ensure that they fit the profile of the customer.

The current South African legislation lacks some of these elements. For instance, it does not require financial and other institutions to identify their customers' beneficial owners, to apply ongoing due diligence to their relationships with their customers, and to determine if they are dealing with a prominent person in a given instance.

If an institution discovers that it is dealing with a foreign prominent public official, senior management approval, among other requirements, is needed to establish the business relationship. If a customer is viewed as being a domestic prominent influential person, then the accountable institution will have to decide whether higher risk attaches to the customer. If so, the accountable institution will need to determine, among other things, the source of wealth and funds, and thereafter monitor the account to spot transactions that seem anomalous given the recognised customer profile. The amendments also apply to immediate family members of prominent persons, and their known close associates.

Section 11: Obligation to keep customer due diligence records

Section 11 of the Amendment Act amends section 22 of the principal Act to allow accountable institutions more flexibility in

the manner in which records are kept for purposes of identification and verification. This will improve the ease of compliance with the obligations in terms of the FIC Act, and reduce compliance costs for accountable institutions.

Section 12: Obligation to keep transaction records

A new section 22A is inserted in the principal Act by section 12 of the Amendment Act, relating to the accountable institution's obligation to keep records in respect of a customer's transaction activity. This will ensure that adequate information will be captured in an accountable institution's records to be able to reconstruct a trail of transactions to assist investigators in the reconstruction of transaction activities and flows of funds when performing their investigative functions.

Section 13: Period for which records must be kept

Section 13 of the Amendment Act amends section 23 of the principal Act to provide clarity regarding the period for which records must be kept in instances where an accountable institution has made a suspicious transaction report. Suffice it to mention here that the period referred to in sections 22, 22A and 29 of the principal Act is now a standard period of five years.

Section 14: Records may be kept in electronic form and by third parties and must be kept in the Republic

Section 24 of the FIC Act is amended to provide for accountable institutions that have outsourced the keeping of records to third parties, to make the records readily available to the FIC and the relevant supervisory bodies. In addition, records may be kept in electronic form, and in a manner that will enable the accountable institution to reproduce them in a legible format. The Amendment Act also makes provision for the records to be kept in the Republic.

Section 15: Admissibility of records

Suffice it to mention here that section 15 of the Amendment Act provides for a technical amendment insofar as the admissibility of records has now also been extended to records kept under section 22A. Previously this section only referred to records kept under sections 22 and 24.

Section 16: Access of authorised representatives of the Financial Intelligence Centre to records

Section 26 has been repealed from the principal Act, and this issue is subsequent to an insertion regulated under the provisions relating to reporting obligations forthwith.

Section 17: Financial sanctions

Section 17 of the Amendment Act inserts Part 2A (ss 26A to 26C) in the principal Act. It sets out the mechanisms to identify and initiate proposals for designations of persons and entities targeted by UNSC Resolution. When a UNSC Resolution is adopted, the Minister must publish a notice of the adoption of the resolution in the *Government Gazette* and another appropriate publication. This does not apply to resolutions of the UNSC contemplated in section 25 of the Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004 (the POCDATARA).

Following the notice published by the Minister, the Director of the Financial Intelligence Centre, from time to time and by appropriate means of publication, must give notice of persons and entities being identified by UNSC Resolutions; and decisions of the UNSC no longer to apply Resolutions to previously identified persons or entities.

Section 17, in addition, enables the Minister to revoke a notice if the Minister is satisfied that the notice is no longer necessary to give effect to financial sanctions pursuant to a UNSC Resolution.

Section 17 provides that no person may, among other things, acquire, collect, use property or provide or make available, or invite a person to provide or make available, any financial or other service, intending that the property, financial or other service will be used for the benefit of or on behalf of a person or an entity identified pursuant to a UNSC Resolution.

In terms of section 17, the Minister may permit a person to conduct financial services or deal with property if it is necessary to provide for basic expenses, including, among other things, foodstuffs, rent or mortgage and medicines or medical treatment. Provision is made for the Director of the FIC to publish a notice of the Minister's permission for the provision of financial services or dealing with property.

Section 18: Accountable institutions, reporting institutions and persons subject to reporting obligations to advise the FIC of clients

Section 18 of the Amendment Act, which replaces section 27 of the principal Act, makes provision for accountable institutions,

reporting institutions, and any person required to make a report in terms of the FIC Act, to advise the FIC whether a specified account number corresponds with a client, as well as the type and status of the business relationship. The amendments are necessary to enhance the FIC's analysis capability.

Section 19: Authorised representative's access to records in respect of reports required to be submitted to the FIC

Section 26 of the FIC Act has been moved and inserted as section 27A. It is more appropriate to deal with access to information relating to reports submitted to the FIC under Part 3 of Chapter 3 of the FIC Act. The section was also amended to provide for instances where a report ought to have been made, but the accountable institution had failed to make a report as envisaged in the Act.

Sections 20 and 21: Property associated with terrorist and related activities and financial sanctions pursuant to UNSC Resolutions

These sections amend sections 28A and 29 of the principal Act. Provision is made for an accountable institution to report to the FIC property in its possession or under its control that is owned or controlled by or on behalf of a person or an entity identified pursuant to a UNSC Resolution.

An accountable institution, after publication of a notice by the President under section 25 of the POCDATARA, or receiving notice from the Director of the FIC, must scrutinise its information concerning clients with whom it conducts business, in order to determine whether a client qualifies as a person or entity identified in the notice.

Section 21: Reporting of suspicious and unusual transactions

Section 21 contains a technical amendment to section 29(1) of the principal Act. It also includes a new provision requiring, in addition to the requirement to report to the FIC, reporting of suspicious and unusual transactions to the SARB and the Financial Services Board, as the key financial sector regulators. The FIC remains responsible for analysing the reports submitted, and if it is deemed necessary, for the referral of the matter to the applicable enforcement agencies.

Section 22: Reporting procedures and furnishing of additional information

Section 22 contains amendments to section 32 of the principal Act, to enhance the FIC's analysis capability in respect of the

information provided by persons making a report to the FIC. It requires that additional information be provided in the prescribed manner and within the prescribed period.

Section 23: Intervention by FIC

Section 23 amends section 34 of the principal Act by increasing the number of days during which an accountable institution may be prevented from continuing with a transaction based on a report submitted to the FIC from five to ten days. This amendment allows more time for the FIC and investigating authorities to make the necessary inquiries in respect of a transaction.

Provision is also made for the intervention by the FIC to be extended to include property owned or controlled by or on behalf of, or at the direction of a person or entity identified pursuant to a UNSC Resolution contemplated in a Notice.

Section 24: Monitoring orders

Section 24 amends section 35 of the principal Act to allow for the monitoring order issued by a judge to be extended to include property owned or controlled by or on behalf of, or at the direction of a person or entity identified pursuant to a UNSC Resolution contemplated in a Notice.

Section 25: Access to information held by the Centre

Section 25 amends section 40 of the principal Act by extending the ability of the FIC to share information held by it to support other government entities more effectively in carrying out their mandates.

Section 26: Protection of personal information

Section 26 inserts section 41A in the principal Act, to ensure that proper safeguards are in place in respect of the information in the possession of the FIC, and to comply with the Protection of Personal Information Act 4 of 2013 (the PoPI), the FIC Act was amended to make provision for measures to be taken to prevent the loss of, or damage to information. Provision is also made to prevent unlawful access to or processing of information, other than in accordance with the FIC Act or the PoPI.

Section 27: Risk management and compliance programs

The customer due diligence measures mentioned above are linked to an accountable institution's application of a risk-based

approach through the institution's AML and CTF compliance and risk management programme. Section 42 of the principal Act, as substituted by section 27, provides that accountable institutions must develop, document, maintain and implement a Risk Management and Compliance Programme.

Section 28: Governance of AML and CTF compliance

Section 28 of the Amendment Act inserts sections 42A and 42B in the principal Act, setting out the governance obligations for accountable institutions. The board of directors or the senior management of an accountable institution is responsible for ensuring compliance with the FIC Act and its Risk Management and Compliance Programme.

Section 29: Training relating to AML and CTF compliance

Section 29 amends section 43 of the principal Act by placing the obligation on the accountable institution to ensure that its employees are trained to enable them to comply with the FIC Act as well as its Risk Management and Compliance Programme.

Section 30: Directives

Section 30 of the Amendment Act amends section 43A of the principal Act. In terms of the amendment the FIC is allowed, after consultation with the relevant supervisory body, to issue a directive concerning the general application of the Act, or in specific instances as set out in section 43A. In addition, the section expands the Centre's as well as a supervisory body's ability to issue a directive which may reasonably be required to give effect to the Centre's objectives.

Section 32: Inspections

The Constitutional Court, in the matter of *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd & others* (above), made a ruling declaring parts of section 45B of the FIC Act unconstitutional. The fact that the section allowed for inspections without a warrant in certain instances was found to be at odds with the Constitution. The declaration of invalidity was suspended for 24 months, to allow Parliament to amend the section. Section 32 gives effect to the Constitutional Court's judgment, by amending section 45B to provide for a warrant requirement, and to state under which circumstances the requirement would not apply.

Section 33: Administrative sanctions

Section 33 amends section 45C of the principal Act, to provide for the financial penalties paid in respect of a financial sanction to

be paid into the National Revenue Fund instead of into the Criminal Assets Recovery Account as was required previously.

Section 34: Appeals

Section 45D of the FIC Act provides that an appeal must be lodged within 30 days. However, the legislation did not make provision for condonation of the late filing of an appeal. Section 34 of the Amendment Act provides for the appeal board to condone delay in lodging an appeal, on good cause shown.

The FIC Act makes provision for the chairperson of the appeal board to determine any procedural matter relating to the appeal process. Section 45D, as amended by section 34 of the Amendment Act, provides that the chairperson may also make rules in respect of procedures relating to an appeal.

To ensure that the appeal board is not burdened with irrelevant and frivolous information, the FIC Act was amended to provide that an appeal is decided on the written evidence, factual information and documentation which was submitted to the FIC or supervisory body before the decision was taken.

Section 45D, as amended, further, provides that the appellant, the FIC, or the supervisory body may, on application to the appeal board and on good cause shown, introduce evidence which was not given to either party prior to a decision being taken.

The provisions in the FIC Act that provided that the decision of the majority the appeal board would constitute the decision of the appeal board had proven to be impractical. There are currently nine members appointed to the appeal board. Effectively, at every appeal hearing, all nine members would be required to hear the appeal. To address this shortcoming, section 45D, as amended, further provides for the establishment of an adjudication panel consisting of no fewer than three members of the appeal board. The decision of the majority of the panel will prevail. The chairperson is given a deciding vote in the case of an equality of votes.

Sections 35 to 49: Replacement of sanctions

Sections 35 to 49 replace the criminal sanctions in the offence provisions, by making non-compliance with certain sections of the FIC Act subject to administrative sanctions. The sections that provide for purely administrative sanctions relate to the account-

able institution's obligations regarding customer due diligence and record-keeping measures.

Sections 51 to 57: Technical amendments

Section 56 increases the fine for a failure to comply with the regulations from a maximum amount of R100 000 to R1 000 000, or such administrative sanction as may apply.

Section 60: Long title of principal Act

Section 60 amended the long title of the principal Act to align it with the changes to the mandate of the FIC concerning the implementation of financial sanctions imposed by the Security Council of the United Nations and also to provide for the introduction of the new risk management and compliance requirements.

Finally, following the inclusion of the administrative sanctions, provisions in the previous amendments to the FIC Act, it was proposed that certain acts of non-compliance in respect of the obligations in the FIC Act should carry a purely administrative sanction (see Hugo & Spruyt above 253).

SECONDARY LEGISLATION

What follows is a solitary example from the vast body of subordinate legislation, and other 'soft law' principles relevant to financial institutions, which was promulgated or circulated during 2017.

Banking Regulations

General

The Bank Supervision Department of the SARB (the Registrar) continues striving to ensure that the legal framework for the regulation and supervision of banks and banking groups in South Africa remains relevant and current.

As part of the internationally agreed regulatory reforms to promote the safety and soundness of the international financial system, the Basel Committee on Banking Supervision (Basel Committee) has issued various new or revised frameworks or requirements during recent years for implementation by member jurisdictions.

In this regard, the Registrar has drafted amendments to the Regulations relating to Banks (the Regulations) which came into

force on 1 September 2017 (see *www.resbank.co.za*, accessed on 10 January 2018).

Introduction

In response to the global financial crisis that commenced in 2007, the Group of Twenty (G-20) initiated a reform programme in 2009 to strengthen the International Financial Regulatory System.

As part of the internationally agreed regulatory reforms, the Basel Committee has issued for implementation by member jurisdictions:

- a revised framework for margin requirements for non-centrally cleared derivatives;
- a capital standard for bank exposures to central counterparties;
- a standardised approach for measuring counterparty credit risk exposures;
- capital requirements for banks' equity investments in funds.

During the past few years the Registrar held extensive discussions with all relevant key players regarding the implementation in South Africa of the relevant internationally agreed regulatory reforms, including margin requirements for non-centrally cleared derivatives and capital requirements for banks' exposures to central counterparties.

In this regard, on 22 November 2016, the Registrar issued a proposed directive related to the proposed implementation on 1 January 2017 of margin requirements for non-centrally cleared derivatives, inviting comments to be submitted to the Registrar by no later than 2 December 2016.

On 20 December 2016, the Registrar issued Guidance Note 8/2016 informing all banks that, based on the comments received by it from various key players, it had decided to delay the implementation of margin requirements for non-centrally cleared derivatives to a date later than 1 January 2017.

The key matters communicated by the Basel Committee in respect of the aforementioned documents and requirements, other than the margin requirements for non-centrally cleared derivatives, are summarised below.

Ideally, the legal framework pertaining to banking regulation must reflect local and international market developments and comply with the applicable international regulatory and supervisory standards and best practices. This ideal situation is

approached in a manner that duly takes into consideration domestic economic and financial system conditions.

Capital requirements for bank exposures to central counterparties

On 10 April 2014, the Basel Committee published the revised standard for calculating the required regulatory capital for banks' exposures to central counterparties (CCPs).

The revised standard replaces the interim capital requirements that were published in July 2012.

The revised standard was developed to simplify the underlying policy framework and to complement the relevant initiatives undertaken by other supervisory bodies, including the Committee on Payment and Settlement Systems (CPSS) and the International Organisation of Securities Commissions (IOSCO) CPSS-IOSCO Principles for financial market infrastructures. The Basel Committee also aimed to support broader policy efforts advanced by the G-20 leaders and the Financial Stability Board, particularly those relating to central clearing of standardised OTC derivative contracts.

Although many of the interim requirements have been retained, the revised standard differs from the interim requirements as follows:

- The final standard includes a single approach for calculating capital requirements for a bank's exposure that arises from its contributions to the mutualised default fund of a qualifying CCP (QCCP);
- The standard uses the standardised approach for counterparty credit risk, as opposed to the Current Exposure Method, to measure the hypothetical capital requirement of a CCP;
- The standard caps the capital charges applicable to a bank's exposures to a QCCP;
- It specifies the treatment of multi-level client structures whereby an institution clears its trades through intermediaries linked to a CCP; and
- It incorporates responses to frequently asked questions posed to the Basel Committee while finalising the standard.

Standardised approach for measuring counterparty credit risk exposures

On 31 March 2014, the Basel Committee published a revised standard for the measurement of banks' exposures to counterparty credit risk in respect of derivatives-related transactions.

The standardised approach for measuring counterparty credit risk exposures replaces both the Current Exposure Method and the Standardised Method in the Basel II capital framework.

The revised standard includes a risk-sensitive methodology that appropriately differentiates between margined and unmargined trades and provides a more meaningful recognition of netting benefits than either of the existing non-modelled approaches.

The revised standard also reduces the need for discretion by national authorities, limits the use of banks' internal estimates, and avoids undue complexity by drawing upon prudential approaches already available in the capital framework. Furthermore, the revised standard is calibrated to reflect the volatilities observed over the recent stress period, while also taking account of incentives for centralised clearing of derivative transactions.

Capital requirements for banks' equity investments in funds

On 13 December 2013, the Basel Committee published a revised standard in respect of the capital requirements for banks' equity investments in funds.

The revised policy framework applies to banks' equity investments in all funds, that is, hedge funds, managed funds and investment funds not held for trading purposes. Furthermore, the framework applies to all banks, irrespective of whether they apply the Standardised Approach or an Internal Ratings-Based (IRB) approach for credit risk.

The revised framework includes three approaches for setting capital requirements for banks' equity investments in funds:

- the 'look-through approach' (LTA);
- the 'mandate-based approach' (MBA); and
- the 'fall-back approach' (FBA).

The hierarchy of approaches provides varying degrees of risk sensitivity and has been adopted to incentivise due diligence by banks and transparent reporting by the funds in which they invest.

The revised framework will also help address risks associated with banks' interactions with shadow banking entities by ensuring that exposures to funds engaging in shadow banking activity are supported by adequate capital.

Proposed amendments to the Regulations

To ensure that the legal framework for the regulation and supervision of banks and banking groups in South Africa remains

relevant and current, the Registrar has drafted the following seven amendments to the Regulations.

First, to amend the provisions of regulation 23(15), among other things, to amend the enabling provisions related to the substitution of the Current Exposure Method and the Standardised Method in the capital framework with the standardised approach for the measurement of counterparty credit risk exposures; and to make provision for a separate regulation, regulation 23(16), to deal with matters related to banks' exposures to central counterparties arising from any OTC derivative instrument, exchange-traded derivative instrument, securities financing transaction or long settlement transaction, as set out in Annexure A.

Secondly, to amend regulation 23(16), as set out in Annexure B, to incorporate the relevant requirements issued by the Basel Committee in respect of banks' exposures to central counterparties.

Thirdly, to amend regulation 23(18), as set out in Annexure C, to incorporate the relevant requirements issued by the Basel Committee in respect of the standardised approach for the measurement of banks' exposures to counterparty credit risk.

Fourthly, to amend the form BA 200, as set out in Annexure D, to incorporate the relevant reporting requirements related to the standardised approach for banks' exposures to counterparty credit risk appropriately.

Fifthly, to amend the provisions of regulations 31(6) and 31(7), as set out in Annexure E, to incorporate the relevant requirements issued by the Basel Committee in respect of banks' equity investments in funds appropriately.

Sixthly, to amend the forms BA 340 and BA 610, as respectively set out in Annexures F and G, to incorporate the relevant reporting requirements related to banks' equity investments in funds appropriately.

Seventhly, to amend regulation 67, as set out in Annexure H, to incorporate the relevant required new or amended definitions.

Directive

Based on the above, and in accordance with the provisions of section 6(6) of the Banks Act 94 of 1990 (the Banks Act), banks, controlling companies and branches of foreign institutions were directed to commence with the preparation for the implementation of the proposed amendments to the Regulations with effect from 1 September 2017.

CASE LAW

Bank-client relationship

In *Minister of Finance v Oakbay Investments (Pty) Ltd & others; Oakbay Investments (Pty) Ltd & others v Director of the Financial Intelligence Centre* [2017] 4 All SA 150 (GP), 2018 (3) SA 515, the court confirmed the constitutional principle that state organs or officials, in this case the Minister of Finance, are only empowered to act to the extent that their powers are defined and conferred by the Constitution and/or by statute. It further confirmed that there is no statute that empowers the Minister to intervene in a private bank-client dispute. The present discussion of the *Oakbay* case will focus on the latter issue.

The facts were as follows. The first main application, the application for declaratory relief which turned out to be the only relevant application for present purposes, was brought by the previous Minister of Finance (the Minister) in the public interest, against the first respondent (Oakbay) and its associated entities (respondents two to 14) (paras [2]-[4]).

In December 2015, respondents 15 to 18 (the banks) notified Oakbay of their intention to close Oakbay's bank accounts. The Banks alleged that they did so in compliance with their obligations in terms of the Financial Intelligence Centre Act 38 of 2001 (para [12]).

Oakbay approached the Minister to intervene and to assist it in having its banking facilities restored on the basis that it was in the national interest to prevent job losses in Oakbay if it became unbanked (para [13]).

The Minister upon legal advice resisted Oakbay's request (para [14]).

The Minister approached the court seeking a declaratory order to the effect that by law he is not empowered or obliged to intervene in the relationship between Oakbay and the banks regarding the closing of Oakbay's bank accounts (para [2]).

The court confirmed that the basis for the relief that the Minister sought was section 21(1)*(c)* of the Superior Courts Act 10 of 2013. This provision deals with the aspect of persons over whom, and matters in relation to which, the High Court has jurisdiction. It provides that a court has jurisdiction over all persons residing in or being in, and in relation to all causes arising within its area of jurisdiction, as well as all other matters which it has the power in terms of its discretion to have jurisdiction over (para [51]).

The application of section 21(1)*(c)* involves a two-legged enquiry (para [52]). This two-prong approach in the application of section 21(1)*(c)* was first explained in *Durban City Council v Association of Building Societies* 1942 AD 27 32, and subsequently confirmed in *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* [2006] 1 All SA 103 (SCA), 2005 (6) SA 205 paras [15]–[17]).

First, the court must be satisfied that the applicant is a person interested in an existing, future or contingent right or obligation. Secondly, the court must decide whether the case is a proper one for the exercise of its discretion (para [53]).

The first leg of the enquiry involves establishing the existence of the necessary condition precedent for the exercise of the court's discretion. An applicant for the declaratory relief satisfies this requirement if he or she successfully proves that he or she has an interest in an existing, future or contingent right or obligation. Only if the court is satisfied accordingly does it proceed to the second leg of the enquiry (ibid).

In the present case, the first stage of the enquiry relates to whether the Minister is authorised or legally obligated to intervene in the dispute between the Oakbay Group and the banks. This legal question has been determined previously by the courts (see *Fedsure Life Assurance Ltd & others v Greater Johannesburg Transitional Metropolitan Council & others* 1999 (1) SA 374 (CC)). In answering the first stage of the enquiry the court held that state organs or officials, in the case under scrutiny the Minister of Finance, are only empowered to act to the extent that their powers are defined and conferred by the Constitution and/or by statute (para [54]).

Neither the Constitution, nor any other statute empowers the Minister to intervene in a private bank-client dispute (para [55]).

In answering the second leg of the section 21(1)*(c)* enquiry, the court referred with approval to the decision in *Bredenkamp & others v Standard Bank of SA Ltd* 2010 (4) SA 468 (SCA), 2010 (9) BCLR 892, [2010] 4 All SA 113 in which it was held that the bank-client relationship is contractual in nature. The court noted that the bank may terminate the relationship at its discretion, on reasonable notice to the client, provided the reasons for terminating the account do not violate public policy or constitutional values (para [56]).

The court refused to grant the declaratory relief sought by the Minister on the basis that it would serve no purpose. Oakbay

conceded both in its papers and in argument to the legal position which the Minister sought to confirm. The court pointed out that none of the parties had requested the court to determine the propriety or impropriety of the decision by the banks to terminate their bank-client relationship with the entities in the Oakbay Group (para [57]).

The application by the Minister was, therefore, clearly unnecessary in the circumstances of this case. The circumstances mentioned in the second leg of the section 21(1)*(c)* enquiry do not warrant that the court exercises its discretion to grant the declaratory relief by pronouncing itself on an undisputed legal question, which has been confirmed in earlier judgments (paras [59]–[60]).

The application for declaratory relief was dismissed with costs.

The decision by the court in *Oakbay* is correct. The case was indeed not a proper one for the exercise of the court's discretion to grant declaratory relief.

However, notwithstanding the court's refusal to grant the declaratory relief, its confirmation of the correctness of the Minister's determination not to intervene in the bank-client relationship between Oakbay and the banks will be welcomed by commercial banks.

The very reason why the court refused the declaratory relief was based on the fact that the court confirmed that the Minister and/or any other state organ lacks the power to intervene in the bank-client relationship.

The Minister, during an earlier meeting with Oakbay, advised Oakbay to seek a resolution of its dispute with the banks through the courts (paras [15] [65]). However, Oakbay disregarded the advice.

Nevertheless, provided that the banks followed the guidelines laid down in the *Bredenkamp* case (which on the face of it, they did) it is highly unlikely that Oakbay (or for that matter, any other client of a bank) will be successful in a potential future application to compel banks to accept them as clients.

As mentioned, in *Bredenkamp* the Supreme Court of Appeal confirmed the contractual nature of the bank-client relationship. In that case, the court held that a bank has the right unilaterally to cancel the agreement between it and its customer. Before this case reached the Supreme Court of Appeal, two lower courts had been required to pronounce on the same question (see *Breedenkamp & others v Standard Bank of South Africa & another* [2009]

3 All SA 339 (GSJ), 2009 (5) SA 304 ('*Bredenkamp* interim application'); *Breedenkamp & others v Standard Bank of South Africa Ltd & another* 2009 (6) SA 277 (GSJ) ('*Bredenkamp* main application'. Bredenkamp's name was spelt incorrectly in the citation of both the interim and main applications but spelt correctly in the citation of the Supreme Court of Appeal decision. For a discussion of the decisions handed down in both the interim and main applications, see WG Schulze 'Financial Institutions' 2009 *Annual Survey* 487 495; IM Rautenbach 'Cancellation clauses in bank-customer contracts and the Bill of Rights' 2010 *TSAR* 637 638 *et seq*. For a discussion of the decisions in the interim and main applications, as well as the decision by the Supreme Court of Appeal (*Bredenkamp* appeal), see IM Rautenbach 'Constitution and contract: The application of the Bill of Rights to contractual clauses and their enforcement – reasonableness as hard law' *ABLU 2011* ('Rautenbach 2011') (paper delivered at the 2011 Annual Banking Law Update on 4 May 2011) 31; L Hawthorne '*Breedenkamp v Standard Bank of SA Ltd* 2009 (5) SA 304 GSJ; and *Breedenkamp v Standard Bank of SA Ltd* 2009 (6) SA 277 (GSJ); *Bredenkamp v Standard Bank* 2010 (4) SA 468 SCA' (2010) 73 *De Jure* 395; WG Schulze 'The bank's right to cancel the contract between it and its customer unilaterally – *Bredenkamp v Standard Bank of South Africa Ltd* 2010 4 SA 468 (SCA)' ('Schulze 2011') 2011 *Obiter* 211 215ff; and WG Schulze 'Financial Institutions' 2011 *Annual Survey* 497 523ff.)

'Business of a bank'

In *Kruger v Joint Estate Trustees of the Insolvent Estate of Paulos Bhekinkosi Zulu & another* [2017] 1 All SA 1 (SCA) the Supreme Court of Appeal was asked to determine the powers of a repayment administrator who was appointed in terms of section 83 of the Banks Act. Such an appointment is made for the administrator to manage and control the repayment of money taken from the general public by someone who accepted the money, but who was not registered to conduct the 'business of a bank'.

The facts in the *Kruger* case were as follows. Zulu was a 'distributor' for an entity, Travel Venture Institute ('TVI') in Newcastle, KwaZulu-Natal. TVI conducted the business of obtaining money by marketing and selling bogus electronic travel vouchers (para [2]).

The business was a pyramid scheme, and the Registrar found that Zulu had conducted the business of a bank without being

registered or authorised to do so as envisaged in the Banks Act (para [4]).

The appellant (Kruger) was appointed as a repayment administrator. In terms of section 83 of the Banks Act, money which had been paid to Zulu would be repaid to the persons from whom it was obtained (para [7]).

In addition, in terms of section 84(1A)(*b)*(i) of the Banks Act, Kruger was to recover and take possession of all Zulu's assets (para [8]).

Zulu opposed the application to take possession of his possessions, contending that Kruger's powers to take possession of his assets were limited to assets which had been acquired through the conduct of the unlawful banking business. He argued that Kruger had no authority to attach fixed property which he (Zulu) co-owned with his wife and six other people. The contention was that Zulu's wife and her siblings had inherited the immovable properties from their parents, who acquired them before he contravened the Banks Act. Zulu further argued that he had bought the fourth immovable property in 2007, prior to the contravention of the provisions of the Banks Act. Therefore, he contended, these assets were not subject to attachment in terms of section 84. It was not in dispute, however, that Zulu and his wife were married in community of property to each other (para [11]).

Zulu argued further that no reason existed for Kruger to approach the High Court as the matter lacked urgency and Kruger had failed to give him notice of his intention to approach the court (para [9]).

The central issue was the extent of the powers of a repayment administrator under section 84(1A)*(b)*(i) of the Banks Act when recovering and taking possession of assets belonging to the unregistered persons in managing the repayment process. The KwaZulu-Natal Division of the High Court, Pietermaritzburg agreed with Zulu's contention regarding the lack of urgency. The court noted that Kruger and Zulu had had previous interactions and had cooperated with one another, and that Kruger knew that Zulu would not dissipate the assets (para [1]).

In the result, the High Court dismissed Kruger's application. However, it granted leave to appeal to Kruger (para [1]).

On appeal, the Supreme Court of Appeal pointed out that in considering urgency of a matter, a court must be mindful of the nature and purpose of the application. In the present case, Kruger sought an anti-dissipation order, and he had explained

why he anticipated resistance by Zulu. It was submitted, on behalf of Kruger, that the relief that he sought was comparable to preservation orders provided for under section 38 of the Prevention of Organised Crime Act 121 of 1998 (the POCA), rather than the common-law anti-dissipation relief. This comparison was made to illustrate that the law provides for applications for anti-dissipation orders of this nature to be made on an urgent, *ex parte* basis. The court agreed with this analogy insofar as it demonstrated the intrinsic urgency in attachments made in terms of section 84(1A)*(b)*(i). However, so the court reasoned, for a full appreciation of the basic nature of the powers and duties of the repayment administrator under that section, a further analogy had to be made. The powers and duties of a repayment administrator are comparable with those of trustees or liquidators of insolvent estates. These powers and obligations arise by operation of the law (*ex lege*), rather than by means of a court order. Just as the assets in an insolvent estate vest in the Master immediately upon sequestration or liquidation and thereafter in the trustees or liquidators (s 20 of the Insolvency Act 24 of 1936) by operation of law, the assets of a person who is the subject of the registrar's directive vest in the repayment administrator immediately on his or her appointment. In the same manner that a trustee, on appointment, assumes control of an insolvent estate, the repayment administrator, on appointment, forthwith takes control and possession of the assets of a person under a directive (para [31]).

The court concluded that the present application was urgent, and that giving notice would have defeated the purposes of the application (para [28]).

A duly appointed repayment administrator is entitled to attach property of which the transgressor is the co-owner, provided that notice is given to the co-owner(s) of such attachment. Because Zulu and his wife were married in community of property, their joint interest in the fixed assets is indivisible. Therefore, the properties had been properly attached. However, Mrs Zulu should have been joined as a respondent in the application (paras [33]–[34]).

The interests of the six other persons were divisible from those of Zulu and his wife, and were not subject to attachment (para [34]).

The court held that there was no merit in Zulu's argument that Kruger's powers were limited to assets acquired through the

conduct of the unlawful business. The wording of section 84(1A)*(b)*(i) of the Banks Act is clear in this regard (para [36]).

The court *a quo*, therefore, had erred in discharging the rule *nisi*. Kruger had made out a proper case for the relief that he sought. In fact, he had been entitled, even without the court order he sought, to take the steps in respect of which he sought the court's pronouncement. Because Zulu's estate was sequestrated, and the trustees were placed in control of the insolvent estate, the court could not grant an order that Kruger could take possession of all Zulu's assets. The court concluded that the powers of the trustees took precedence over those of the repayment administrator (Kruger). The court held that the role of a repayment administrator is different in essence from that of a trustee. The functions of the former are limited to repayment of money unlawfully obtained in the conduct of an unregistered banking business. The role of a trustee is much wider. It entails the administration of all different facets of an insolvent estate. In this case, therefore, once the order of sequestration or liquidation was granted, the powers of the trustees, upon appointment, took precedence over those of the repayment administrator (para [37]).

The appeal was accordingly upheld and the order of the court *a quo* set aside and replaced with one in terms of which the points *in limine* were dismissed (para [38]).

The decision in *Kruger v Joint Trustees* is correct, but merits comment. First, banks and other creditors will welcome the finding that once an order of sequestration or liquidation is granted, the powers of the trustees, upon appointment, take precedence over those of the repayment administrator.

Secondly, assets under control of the trustee of an insolvent estate will be subject to the *concursus creditorum* and secured creditors' claims will enjoy preference over claims by unsecured creditors, such as those of persons who had participated in a pyramid scheme.

It will be in the interest of creditors to act expeditiously in obtaining a sequestration or liquidation order, especially where there is a looming application in terms of section 84(1A)*(b)*(i) of the Banks Act.

Thirdly, the *Kruger v Joint Trustees* case also laid down other important guidelines regarding the powers of a repayment administrator.

Banks and other creditors will welcome the court's decision that the property of owners with an interest that is divisible from

that of the alleged transgressor of the provisions of the Banks Act cannot be attached in terms of section 84(1A)*(b)*(i).

For the same reason, the property of a spouse of the alleged transgressor of the Banks Act, who is married out of community of property with the latter, will also not be attachable in terms of section 84(1A)*(b)*(i).

Fourthly, the court held that it is not necessary to join creditors of the estate of someone whose assets are attached in terms of section 84(1A)*(b)*(i). They are served with a copy of the court order in the same manner as in insolvency proceedings.

Fifthly, the court pointed out that where parties are married in community of property, like Mr and Mrs Zulu, their shares in the property are combined and indivisible, and may be attached and realised in respect of Mr Zulu's transgressions. Mrs Zulu (assuming that she is an innocent party) will be given her proportionate share of the proceeds if the interest is realised to raise funds for repayment. As to the rest of the co-owners, the relevant principle is that ordinary co-ownership rights are capable of being separated because they are held separately by the owners (para [34]).

Our law in this regard is settled. In *Mazibuko & another v National Director of Public Prosecutions* 2009 (6) SA 479 (SCA), [2009] 3 All SA 548, the court considered the effect of a preservation order made in terms of section 38(2) of the POCA on the estate of the innocent spouse who was married in community of property to the guilty spouse. The court distinguished between divisible and indivisible co-ownership and found that whereas ordinary rights of co-ownership are capable of being separated from one another, because they are held separately by the co-owners, the co-ownership rights of spouses who are married in community of property ('tied co-ownership') are not divisible (*Mazibuko* para [48]).

In summary, the Supreme Court of Appeal confirmed that the administrator is entitled to attach also property which the transgressor is the co-owner of, provided that notice is given to the co-owner of such attachment.

Payment

The decision in *Absa Bank Limited v Moore & another* 2017 (1) SA 255 (CC), 2017 (2) BCLR 131 straddled a number of important legal principles. However, only one of these, the question of what constitutes payment, merits our attention here.

The Moores and Absa were both victims of the now infamous fraudulent Brusson scam. Brusson preyed on over-indebted consumers who owned fixed properties by offering them a way out of their debt. The scheme consisted of Brusson offering to lend the consumers an amount of money against the security of their home. However, the underlying documents signed by the consumers were not for loans, but were sales contracts for the sale of their homes against payment of the money loaned. Brusson and a so-called investor would then obtain a mortgage bond loan from a bank against security of the property so bought. That loan would then be used to pay the consumers' indebtedness to the bank, and the rest of the funds they could use for their own purposes (para [3]).

In the meantime, the property would be transferred to the investor and the consumer's old bond would be cancelled. The first notice of the fraud that the unsuspecting consumer received was when the bank applied for their ejection and the sale of the property at auction as the investor invariably failed to make payments on the new bond (para [4]).

Many homeowners and banks were taken in by it. A number of decisions were handed down dealing with this scam (see, eg, *Moore & another v Sheriff, Vereeniging* [2014 ZAGPJHC 230 (26 Sept 2014); and *Absa Ltd v Moore & another* 2016 (3) SA 97 (SCA)). In most it was held that the scheme was fraudulent, and that the contracts concluded under it were either void or voidable (para [6]). In the present case, the court of first instance held that the agreements were void, and that the transfer of ownership was void because the Moores never had the intention to transfer ownership, as they believed the transaction involved a loan. The trial court ordered that the property be retransferred to the Moores, but against reregistration of the original bonds. On appeal, the Supreme Court of Appeal agreed that the agreements were void, but held that the condition imposed by the High Court to reinstate the bonds was not competent. The Supreme Court of Appeal ordered that the property must be restored to the Moores free of the bonds (para [9]).

In a subsequent appeal to the highest court, Absa argued that because all the agreements were void due to the fraud, the cancellation of its bonds was also void and had to be undone. Alternatively, the bank argued that the Moores were unjustifiably enriched at its expense by having the bonds cancelled without having repaid them (para [16]). Absa further contended that

cancellation of the Moores' existing mortgage bonds was an integral part of the fraud (para [17]). As a result, so Absa argued, the discharge of the Moores' debt to it (Absa) was invalid because it was part of the scheme and was tainted with fraud. As the discharge of the existing bonds was invalid, the Moores' debt remained intact (para [18]). At the time of the fraud, the Moores had owed the bank R145 000, but now they owed the bank nothing (para [20]). Absa concluded that the High Court was right to order that the Moores' bonds must be reinstated (para [18]).

Cameron J held that, in opposing the application by the Moores, Absa provided very little information about all the transactions involved. As a result, it was not clear from the available evidence whether or not the Moores' bond had been discharged (para [25]).

The payment of the Moores' indebtedness and the cancellation of their bonds were not invalid as both the debtor and the creditor agreed to the payment and its effects. There is long-standing authority that a debt can effectively be paid by a third party (para [33]).

Generally, payment is a bilateral act – one that, in the absence of agreement to the contrary, requires the cooperation of payer (usually the debtor) and payee (the creditor) (para [36]). Equally generally, discharge of a debt requires an agreement between the debtor (or party acting in the name of the true debtor) and creditor to that effect. But, even assuming that the debt-discharge agreement was between Absa, as the Moores' creditor, and one Kabini, who, acting on their behalf, paid off their bond debt, it does not follow that the discharge was ineffectual because Kabini was a crook (para [32]). This is because, in contrast to some other systems, our law is extraordinarily generous in how a debt may be paid. It allows payment of a debt without the consent – and even without the knowledge – of the debtor. This contrasts with the position of the creditor, whose knowledge of and assent to payment are required (para [33]).

Even a deposit into an account of a fraudster is effectual to transfer ownership in the money. The victim is left with only a personal claim against the fraudster – and a concurrent claim against the fraudster's curators in the case of a sequestration. In this regard the court referred with approval to the decision in *Trustees, Estate Whitehead v Dumas & another* 2013 (3) SA 331 (SCA) paras [13]–[15] [23][24]; (para [34]).

Consistent with this position is that a debt is paid when the creditor/payee receives the money from the bank, whether pay-

ment was authorised or not (see *B & H Engineering v First National Bank of SA Ltd* 1995 (2) SA 279 (AD), [1995] 1 All SA 545 (para [34]).

By way of an analogy, the court reasoned that a thief who pays his or her own debts with stolen funds extinguishes those debts, provided the creditor who receives and accepts payment is innocent. In this regard the court relied on the reasoning in *Absa Bank Ltd v Lombard Insurance Company Ltd, Firstrand Bank Ltd v Lombard Insurance Company Ltd* 2012 (6) SA 569 (SCA), [2012] 4 All SA 485 (para [35]).

The court further pointed out that, provided the payee/creditor is innocent, payment of another's debt, even by a thief, with stolen funds, operates to extinguish the debt. In this regard the court referred with approval to the decision in *Commissioner for Inland Revenue v Visser* 1959 (1) SA 452 (A) (para [35]). (More about the requirement of 'innocence' on the part of the receiver of the money, below.)

The payment of the Moores' debt by Brusson was effective to discharge their debt, even if the 'investor' did so fraudulently with funds provided by Absa (para [37]).

A person induced to contract by the fraudulent representations of another may either stand by the contract or claim its rescission. The agreement is voidable, not void. Unless the Moores chose to rescind the agreement because of the fraud, Brusson remains bound by it (para [38]).

So did 'fraud unravel' in the present case? Put in the context of the present proceedings: did the Brusson fraud unravel the cancellation of the Moores' bonds? The court answered this question in the negative. It, correctly, held that the Moores' main obligation, the loan, was validly cancelled, and so was the accessory obligation, the mortgage agreement (para [40]).

Absa also pursued an alternative argument. It argued that its security under its agreement with the Moores should be restored to it because it provided the funds from which the Moores are now benefitting. Further, so Absa argued, it never intended to expose itself to debt, whether to the Moores or Kabini, minus the security of the Moores' property (paras [41] [42]). The court rejected this argument for three main reasons. Suffice it to mention here that it held that the SCA was right when it said that the court cannot make a new agreement for the parties. A new agreement would be the only way to reinstate the bank's mortgage bond (para [44]).

Next, the court held that neither the investor nor Brusson would be entitled to claim anything from the Moores as any claim could be met with the *par delictum* defence. Although the trustees or liquidators of those parties should in principle be in the same position as the parties, overriding considerations of public policy may conceivably entitle the trustees or liquidators to claim back from the Moores the benefit they gained in the fraud despite the *par delictum* defence (paras [47] [48]). (See *Afrisure CC v Watson NO* 2009 (2) SA 127 (SCA) para [7], in which the court relaxed the *par delictum* rule and declared the liquidators in that case eligible to recover, in the light of public policy considerations, notwithstanding the turpitude on the part of the claimant company.)

Finally, the court held that Absa's contention that an enrichment claim should be developed to restore it to the security it previously enjoyed over the Moores' property, on the facts of the *Moore* case, could not be sustained. There may be circumstances in which it could. Each case has to be decided on its own facts (paras [55] [56]).

The decision in *Absa v Moore* is correct, but merits comment.

First, the confirmation of the line of cases in the Supreme Court of Appeal dealing with fraud, payment and enrichment by the Constitutional Court is to be welcomed. It affords legal certainty in an uncertain area.

Secondly, it is also encouraging that the court did not fully exclude the possibility that the common law of enrichment may be developed to afford a creditor or bank a remedy in situations like these. It is unfortunate that the enrichment claim by the bank could not properly be assessed due to the lack of evidence before the court. In this regard, it has been submitted that properly pleaded and proven, a creditor (bank) may well have an enrichment claim in cases like this against the consumer in so far as the consumer has been enriched. This would address the difficulty of third-party interpositions that was first raised in *Gouws v Jester Pools (Pty) Ltd* 1968 (3) SA 563 (T) and later left open in *Buzzard Electrical (Pty) Ltd. v 158 Jan Smuts Avenue Investments (Pty) Ltd & another* 1996 (4) SA 19 (SCA), [1996] 3 All SA 1. For a discussion of the application of the principles of enrichment in the recovery of unauthorised electronic funds transfers, see Robert Sharrock (ed) *The Law of Banking and Payment in South Africa* (2016) 317 382–84.

Thirdly, the court's reference to and reliance on the decision in *Absa Bank Ltd v Lombard Insurance Company Ltd* (above)

merits comment. The *Lombard* case constituted an important milestone in the law of payments and the question regarding the ownership of money in a bank account. Although *Lombard* did not deal with the reversal of an electronic transfer, it is still important to the law of money payments and the ownership of stolen money in a bank account. *Lombard* turned on whether the receipt of stolen funds by a bank which is unaware of the tainted nature of the money operates as a discharge of the thief's debts to the bank. (For a general discussion of the recovery of unauthorised electronic funds transfers, see Sharrock above 377–82.).

In this regard it is worth noting that the positive law in regard to the payment of moneys tainted by fraud or theft is not always clear or consistent (Chris Pretorius 'The use of stolen funds to discharge a debt and enrichment: *Absa Bank Ltd v Lombard Insurance Co Ltd*' (Pretorius 'Stolen funds') (2013) 25 *SA Merc LJ* 589 596–97). This uncertainty is caused by two factors. First, payment in the banking context often involves complex issues (see, generally, FR Malan & JT Pretorius 'Credit transfers in South African law (1)' (2006) 69 *THRHR* 1; WG Schulze 'Countermanding an electronic funds transfer: The Supreme Court of Appeal takes a second bite at the cherry' (2004) 16 *SA Merc LJ* 667. The second factor which may cause uncertainty is the fact that one is often dealing with multiple parties. This, in turn, renders it difficult at times to determine inter-related issues of ownership, including the question of who has the right to the funds, the discharging of obligations, the appropriateness of a remedy (including one in enrichment), and whether the requirements for a particular remedy have been met (see Pretorius (2013) 25 *SA Merc LJ* 596 and the authorities referred to there; cf CJ Nagel & JT Pretorius 'Ownership and appropriation of funds deposited in a bank account' (2017) 80 *THRHR* 308 310 for a discussion of the general rule that money which is deposited in a bank account becomes the property of the bank, and the exceptions to the general rule).

The decision in *Lombard* has also attracted criticism. In this regard it has been argued that the decision in *Lombard* rests largely on the promotion of certainty and the protection of the bona fide receiver of money, but potentially does so at the expense of the true owner (see Pretorius 'Stolen funds' 603). As a result, it may so happen that a bank which in good faith receives stolen money may benefit from the proceeds of theft or fraud, especially in circumstances such as those present in *Lombard*. To counter this potential unsatisfactory situation, it has been

suggested that a bank (as creditor) should only be legally permitted to retain stolen money to discharge the debt of its customer (as debtor) where the bank's belief in the legitimacy of – and its consequent entitlement to – the funds is reasonable (Pretorius (2013) 25 *SA Merc LJ* 604). Put differently, the bank's belief must be plausible and justifiable in the light of all the circumstances. The question in each case should be whether a reasonable banker in the position of the bank-creditor in question would have held a bona fide belief as to the untainted origins of the money so deposited into the account.

Finally, and for a case which dealt with a related issue, namely which of the bank or its client bears the risk of theft from a bank account as a result of internet fraud, see the decision in *Roestoff v Cliffe Dekker Hofmeyr Inc* 2013 (1) SA 12 (GNP). And for a decision in which the court was asked to pronounce on the place of payment in the case of an electronic transfer, see *Bush and others v BJ Kruger Inc & another* [2013] 2 All SA 148 (GSJ). One of the issues in the *Bush* case was whether the South Gauteng High Court in Johannesburg (SGJ) had jurisdiction to hear the present matter. The aspect of jurisdiction, in turn, hinges on whether payment by the defendant to the plaintiffs took place in Pretoria or in Johannesburg (paras [2]–[17]). The court held that it is the receipt of money in the bank account of the recipient (here: the plaintiffs) that constitutes payment. Payment by EFT only occurs when the party entitled to receive such payment receives it in his bank account. Payment would, therefore, be made and completed only when the money becomes available in the plaintiffs' Johannesburg bank account (para [67]).

South African Reserve Bank

In *South African Reserve Bank v Public Protector & others* 2017 (6) SA 198 (GP) the Gauteng North High Court confirmed that the primary function of the SARB is to protect the value of South Africa's currency. This function is entrenched in section 224 of the Constitution. The Public Protector does not have the power to instruct Parliament to amend section 224 in order to change the primary function of the SARB. (For a broad overview of the role of the SARB as the systemic regulator of the South African financial system, see Sharrock above 63 65; and Johann de Jager 'The South African Reserve Bank: Blowing winds of change (Part 2)' (De Jager 'Blowing winds: Part 2') (2013) 25 *SA Merc LJ* 492 499ff.)

The facts were as follows. Two issues were raised in a report issued by the Public Protector (Report 8 of 2017/2018). The first

was the finding and remedial action recommended for the government to recover 'misappropriated public funds' after the South African Reserve Bank ('SARB') in 1985 extended a 'lifeboat' involving millions of rands to Bankorp (which has since been absorbed by ABSA) (para [1]).

Secondly, the Public Protector directed the Portfolio Committee on Justice and Correctional Services to initiate a process that would result in the amendment of section 224 of the Constitution. In terms of this directive section 224 had to be amended to change the primary function of the SARB from 'the protection of the value of the currency' to 'the promotion of balanced and sustainable economic growth' in the Republic (para [5]).

The present application by the SARB was concerned solely with the second issue, namely the Public Protector's order to Parliament to amend section 224 of the Constitution. The SARB sought urgent relief to set this order aside (para [7]).

The court held that the Public Protector's direction to amend section 224 of the Constitution was illegal and *ultra vires* for the following reasons.

First, the Public Protector, without any notice to any affected person, illegally broadened the scope of her investigation regarding the alleged 'misappropriation of public funds' to include an investigation into the primary function of the SARB and a directive to Parliament to amend the Constitution. She offered no reasons for expanding the scope of the investigation in this manner (para [31]).

The Public Protector's order that the Constitution be amended to strip the SARB of its primary function of protecting the value of the currency fell outside the powers granted to the Public Protector in terms of section 182(1)*(a)* of the Constitution. The latter provision empowers the Public Protector to investigate improper conduct in state affairs or in the public administration (para [41]).

Because the Office of the Public Protector derives its powers from the Constitution, the Public Protector has no power to recommend that the Constitution be amended (para [42]).

Further, the Public Protector's order regarding the amendment of the Constitution was entirely unrelated to the so-called improper conduct that she had found to be have been committed with regard to the 'lifeboat' to Bankorp (para [40]).

The Public Protector's recommended remedial action was set aside in terms of section 6(2)*(a)*(i) of the Promotion of Administrative Justice Act 3 of 2000 (the PAJA) because she was not authorised by section 182(1) of the Constitution to make such an order (para [42]).

Secondly, the Public Protector's direction to Parliament to amend section 224 of the Constitution was also *irrational and unreasonable*. In this regard, the court reasoned that the Public Protector's order trenched unconstitutionally and irrationally on Parliament's exclusive authority. It is trite that the enactment of national legislation is within the exclusive constitutional domain of Parliament. Sections 43 and 44 of the Constitution vest legislative authority in Parliament, including the power to amend the Constitution; and sections 55(1) and 68 vest the National Assembly and the National Council of Provinces, respectively, with the exclusive responsibility to initiate or prepare legislation and to consider, pass, amend or reject legislation. The Public Protector does not have the power to prescribe to Parliament how to exercise its discretionary legislative powers. The Public Protector is a creature of the Constitution. Her remedial powers are derived from the Constitution, and consequently she operates under the Constitution and not over it. She therefore has no power to order an amendment of the Constitution. Section 74 of the Constitution prescribes the conditions for its own amendment. Section 74(3)*(a)* of the Constitution provides that section 224 can only be amended with a supporting vote of at least two-thirds of the members of the National Assembly (para [43]). The remedial action recommended by the Public Prosecutor therefore violated the doctrine of the separation of powers entrenched in section 1*(c)* of the Constitution (para [44]).

Based on expert evidence adduced by the SARB, it is a generally accepted principle of economics that the primary function of central banks world-wide is to protect the value of the local currency (para [48]). For a broad overview of the important and independent role that central banks should play in ensuring financial stability, see De Jager 'Blowing winds: Part 2' 494ff. For a discussion of another of the functions of the SARB, namely to establish, conduct, monitor, regulate and supervise a payment, clearing or settlement system in South Africa, see FR Malan, CJ Nagel & JT Pretorius 'Operational aspects of the National Payment Systems Act 78 of 1998' 2018 (81) *THRHR* 1 2ff.)

The protection of a country's currency has a close bearing on aspects such as the inflation rate and ensuring the competitiveness of South African goods and services in export markets. These aspects are crucial, also for the marginalised and the poor (para [49]).

The Public Protector's order to amend the Constitution would

change all this. The Public Protector's order is both unscientific and irrational and consequently also, for this reason, invalid (para [50]).

Thirdly, the Public Protector's direction to amend section 224 of the Constitution was procedurally unfair and had to be set aside in terms of section 6(2)*(c)* of PAJA because she failed to honour an agreement with the SARB in terms of which she undertook to make her report available to it before making it public (para [58]).

In the result, the Public Protector's order to Parliament to amend the Constitution was set aside with costs (paras [59] [60]).

Although the court's decision is sound and correct, it merits comment.

It confirms that a creature of statute (here the Office of the Public Protector) derives its powers from the law. It does not enjoy rights or privileges which are not accorded to it by the laws of the state, including the right to change the law in terms of which it has been created and empowered.

The SARB and South African banks alike will welcome the decision because it brings clarity and calm after the turmoil which was caused in financial markets after the Public Protector had released her report on 19 June 2017.

The court's decision reaffirms the recognition of the SARB's independence and of the important function that it plays as the central bank of South Africa, including the function of ensuring economic stability that it exercises in terms of the South African Reserve Bank Act 90 of 1989. The SARB, too, is a creature of statute. When the 1996 Constitution was promulgated on 18 December 1996, section 223 of that Act established the SARB as the central bank of South Africa. (For a general overview of the role of the SARB as central bank, including the continuous evolution and changes faced by the SARB, see Johann de Jager 'The South African Reserve Bank: Blowing winds of change. Part 1' (2013) 25 *SA Merc LJ* 342 343ff.)

Finally, it must be pointed out that on 10 July 2017, after the SARB had lodged the present application, but before the matter was heard, the Public Protector filed an answering affidavit in which she consented to the order sought by the SARB (para [9]).

Although the Public Protector agreed that her powers were subject to the Constitution (and that she, therefore, has no power to order that the Constitution be amended), she did not consent to the allegation made by the SARB in its application that she had acted unreasonably and irrationally (ibid]).

For this reason, and also because of the importance of the issues at stake, the SARB requested the court to give full considerations to the issues, including an explanation of the powers and functions of the Public Protector.

INSOLVENCY LAW

AL STANDER*

LEGISLATION

The Insolvency Act 24 of 1936 was amended by the Financial Sector Regulation Act 9 of 2017 (date of commencement: 1 April 2018) (GN 169 in *GG* 41549 of 29 March 2018).

Item 1 of schedule 4 to Act 9 of 2017 amends the definition of 'market infrastructure' in section 35A(1) by adding paragraphs *(d)* and *(e)* (Date of commencement of item 1: 29 March 2018.) The paragraphs inserted read:

35A Transactions on exchange

(1) In this section '**market infrastructure'** means

. . .

(d) a central counterparty as defined in section 1 of that Act and licensed under section 49 of that Act; or

(e) a licensed external central counterparty as defined in section 1 of that Act;

Item 2 amends section 83, as follows: paragraph (a) substitutes subsection (2); paragraph (b) substitutes subsection (3); and paragraph (c) substitutes subsection (8)*(a)*. (Date of commencement of item 2: 29 March 2018.)

83 Realisation of securities for claims

(2) If such property consists of securities as defined in section 1(1) of the Financial Markets Act, 2012 (Act 19 of 2012), a bill of exchange or a financial instrument or a foreign financial instrument as defined in section 1(1) of the Financial Sector Regulation Act, 2017, the creditor may, after giving the notice mentioned in subsection (1) and before the second meeting of creditors, realise the property in the manner and on the conditions mentioned in subsection (8).

(3) If such property does not consist of securities or a bill of exchange, the trustee may, within seven days as from the receipt of the notice mentioned in subsection (1) or within seven days as from the date which the certificate of appointment issued by the Master in terms of subsection (1) of section eighteen or subsection (2) of section fifty six reached him, whichever be the later, take over the property from the creditor at a value agreed upon

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between the trustee and the creditor or at the full amount of the creditor's claim, and if the trustee does not so take over the property the creditor may, after the expiration of the said period but before the said meeting, realise the property in the manner and on the conditions mentioned in subsection (8).

(8) The creditor may realise such property in the manner and on the conditions following, that is to say –

(a) if it is any property of a class ordinarily sold through an authorised user or an external authorised user, on an exchange or an external exchange, each defined in section 1 (1) of the Financial Markets Act, 2012 (Act 19 of 2012) or, where applicable, a person prescribed by the Minister of Finance as a regulated person in terms of section 5 of that Act, the creditor may, subject to the provisions of that Act and applicable standards and rules in terms of that Act, immediately sell it through an authorised user, external authorised user or such regulated person, or if the creditor is an authorised user, external authorised user or regulated person, also to another authorised user, external authorised user or regulated person;

CASE LAW

Sequestration of Two or More Individuals in Single Application

Strutfast (Pty) Ltd v Uys & another 2017 (6) SA 491 (GJ) was an application for the sequestration of the first and second respondents. The applicant's founding affidavit contained no allegations to show that the sequestration of the estates of the two individuals was sought in a single application based on an identity of interests between the respondents or their estates. It was, however, stated that the respondents were married, but not in community of property (para [1]).

The application, therefore, violated the long-standing practice in the Gauteng courts that one should not seek the sequestration of numerous respondents in a single application, 'save where parties are married in community of property or in the otherwise very unusual circumstance of a complete identity of interests' (para [2]).

Before discussing Gauteng court practice of not including multiple respondents in a joint application, Rome J referred to the following important fundamental principles with regard to sequestrations. This was a vital aspect in guiding the final decision of the court.

The court emphasised that, like an application for the appointment of a *curator bonis* for a patient, an application for sequestration should relate solely and specifically to that debtor's circumstances. The sequestration of an individual's estate is aimed at reducing that debtor's legal status and ability to act based on a specific reason (para [3]).

The court agreed with the view in *Ferela (Pty) Ltd v Craigie & others* 1980 (3) SA 167 (W) that, as regards the specific statutory requirements for proof in a compulsory sequestration, the sequestration of more than one respondent seldom relates to the determination of essentially the same factual questions (para [7]). *Ferela* explained that the purpose of sequestration proceedings is to achieve a *concursus creditorum*. It is, therefore, inadvisable that two separate estates should be dealt with together, as each estate leads to its own and totally separate *concursus creditorum.* As to the likelihood of an advantage to creditors regarding that particular debtor, one deals with two diverse sets of asset, two diverse sets of creditor, and two diverse situations or circumstances, each of which must be examined (para [7]). The court, correctly, supported these remarks (para [10]).

In the *Ferela* case, the court noted the decision by Coetzee J as authority for the practice against joining multiple respondents in a single joint application for their individual sequestration. However, recently, and contrary to this practice, *Ferela* was not followed in *Maree & another v Bobroff & another* [2017] ZAGPJHC 116 on the basis that it had been incorrectly decided (para [4]). Briefly, *Bobroff* allowed a single application for the sequestration of partners in a law firm. The court's view was that in the matter of *Business Partners Ltd v Vecto Trade 87 (Pty) Ltd & others* 2004 (5) SA 296 (SE), it was held that this was the preferable way of dealing with such a situation. In *Business Partners* it was suggested that the qualification for allowing multiple respondents in a single sequestration application should be only a 'substantial coincidence of interests', rather than a 'complete identity of interests' (para [12]).

This situation prompted the court to ask two questions (para [5]): Was the 'established practice' still good insolvency law? In terms of the rules of *stare decisis*, the court in *Bobroff* was entitled to depart from *Ferela* – a decision of a court of the same division – only if the latter was 'clearly, plainly or palpably wrong'. Had this standard then been met?

In *Ferela* the applicant applied for sequestration orders against three respondents. The first two respondents were alleged to be

partners in the third respondent, which was cited as a partnership. However, no case was made as to 'why the partnership fell within the purview of an application for its sequestration' (para [5]). This, in effect, means there was no essential information in the application regarding the cited partnership, and so no case had been made out for its sequestration.

Consequently, the question in *Ferela* was whether the estates of the first and second respondents (the two partners above) could be sequestrated jointly in a single application. The issue of joinder was considered in the context of the requirements for compulsory sequestration set out in sections 9(1) and 10*(c)* of the Insolvency Act (para [6]).

In paragraph [7] it is clear that Rome J's view corresponds to Coetzee J's statement that as far as each of the *facta probanda* is concerned, the court may be faced with two entirely different cases (para [7]). Rome J indicated that support for Coetzee J's viewpoint was to be found in *Breetveldt & others v Van Zyl & others* 1972 (1) SA 304 (T), and some four decades later, in *Brack & another v Front Runner Racks 2000 (Pty) Ltd* [2011] ZAGPJHC 34 (4 May 2011) paragraph [7]. Boruchowitz J remarked that *Breetveldt* has 'stood the test of time' (paras [8] [9]).

Rome J, in the matter under discussion, was convinced that the judgment in *Ferela* had similarly, and for sound reason, withstood the passage of time. He declared that the judgment's 'authoritative force has grown, not diminished, over the years' (para [11]).

The court also stated that *Business Partners* (above) had expressed doubts as to the *Ferela* and *Breetveldt* practice (para [12]). In discussing this situation, Rome J drew attention to the following:

- Firstly, *Business Partners* explicitly validated the approach in *Ferela* and *Breetveldt* (para [13]), but then qualified this.
- This qualification 'was one expressed as to kind, namely that the strictness of the rule be reduced from a complete identity of interest to a somewhat more flexible substantial coincidence of interest' (para [14]).
- This qualification was also somewhat tentative using the word 'perhaps' (para [14]).
- That case in fact concerned an application for liquidation in terms of the Companies Act 61 of 1973 (the 1973 Companies Act). It was not an application for the sequestration of individuals under sections 9 and 10 of the Insolvency Act.

Therefore, the qualification as it relates to the sequestration proceedings was clearly *obiter* (para [15]).

- *Business Partners* did not address a central aspect of *Ferela's* reasoning, namely that the rules of practice play a greater role in sequestration proceedings because of the statutory necessity to prove a probable benefit to the creditors of a particular debtor.

Rome J consequently concluded that the practice established in *Ferela* remains unaffected by the verdict in *Business Partners*.

Then came *Maree & another v Bobroff & another* [2017] ZAGPJHC 116 (7 March 2017), which rendered the continued application of the practice established in *Ferela* uncertain (para [16]). The court explained that in *Bobroff* there was an application for the sequestration of two attorneys, a father and son, who were partners in the same law firm. Again, it did not appear from the judgment that the law firm itself had been sequestrated or liquidated. Therefore, the facts in *Bobroff* fall squarely within the ambit of the *Ferela* precedent. Relying on *Ferela,* the respondents contended that their joinder was improper (para [17]). Theron AJ dismissed the objection on the basis that *Ferela* was 'clearly wrong' (para [17]).

In *Bobroff,* Theron AJ clearly relied on the qualification of the general rule in *Business Partners*. This meant that the court in *Strutfast*, per Rome J, had to decide whether the judgment in *Ferela* constituted a clear judicial error (para [18]).

Relying on the Constitutional Court case of *Gcaba v Minister of Safety & Security* 2010 (1) SA 238 (CC), 2010 (1) BCLR 35, [2009] 12 BLLR 1145, the following principles were identified by the court for purposes of deciding the legal question (para [21]):

- Precedents must be respected in order to ensure legal certainty and equality before the law.
- Law cannot rule unless it is reasonably predictable.
- A highest court of appeal – and this court in particular – must be especially cautious as far as adherence to, or deviation from, its own previous decisions is concerned.
- As a jurisprudence develops, understanding may increase, and interpretations may change.
- At the same time, however, a single source of consistent, authoritative, and binding decisions is essential for the development of a stable constitutional jurisprudence and for the effective protection of fundamental rights.

- This court must not easily and without coherent and compelling reason deviate from its own previous decisions or be seen to have done so.
- One exceptional instance where this principle may be invoked, is when this court's earlier decisions have given rise to controversy or uncertainty, leading to conflicting decisions in the lower courts.

In another Constitutional Court case, *Camps Bay Ratepayers' and Residents' Association & another v Harrison & another* 2011 (4) SA 42 (CC), further constitutional confirmation for the continued principled application of *stare decisis* was given:

- The doctrine of precedent binds not only lower courts.
- It also binds courts of final jurisdiction to their own decisions.
- These courts may depart from a previous decision of their own only when satisfied that that decision is clearly wrong.
- *Stare decisis* is, therefore, not simply a matter of respect for courts of higher authority. It is a manifestation of the rule of law itself, which, in turn, is a founding value of our Constitution (para [22]).

In paragraph [23], the court pointed out that the applicant in *Strutfast*, after joining two respondents in a single application, offered no basis as to why the established practice might be constitutionally suspect.

In paragraph [24] the court took the view that the established rule of practice 'chimes with important constitutional values'. It then gave a very good example of what might happen if applicants were allowed to deviate from the rule in *Ferela*: it would enable large financial institutions, 'for reasons of their own commercial convenience, to join numerous debtors as multiple respondents in an application for their sequestration, with the inevitable blurring between the estates, creditors and the specific circumstances of each debtor that such an application would entail'.

From paragraphs [27]–[31] the court made the following points. The *stare decisis* doctrine is, accordingly, summarised by the notion that a court may ignore its own recognised precedent only in circumstances where the precedent was crystallised in a judgment that is not merely wrong, but 'clearly' wrong. Further, the deviating court must be quite satisfied that it is wrong; and that it is plainly wrong. In this regard, the court referred to *R v Jansen* 1937 CPD 294 297; *Duminij v Prinsloo* 1916 OPD 83 84; *S v Tarajka Estates (Edms) Bpk & andere* 1963 (4) SA 467 (T) 470;

and *National Chemsearch (SA) (Pty) Ltd v Borrowman & another* 1979 (3) SA 1092 (T) 1101B.

Although it concluded that there appears to be no clearly articulated or precise test as to when a decision is not only wrong but clearly wrong, the *stare decisis* doctrine requires more than a mere conclusion that a previous judgment was incorrectly decided. Whatever the precise test, a clearly or patently wrong judgment is a judgment where the error is so profound that it amounts to a 'judicial blunder', or results in a 'manifest and unsustainable absurdity or injustice' (para 30]). The reason offered in *Bobroff* for declining to follow *Ferela* and preferring the qualification as set out in *Business Partners* – that it was almost impossible to conceive of a situation where there would be a complete identity of interests – did not indicate a palpable error in *Ferela* (para [31]). Consequently, *Ferela* was not wrong, and still less, clearly or palpably wrong (para [32]).

The established approach was appropriate, given (1) that an application for sequestration involved a reduction in the status of a particular debtor; and (2) the difficulty of establishing, in a single application for the sequestration of multiple respondents, whether there was a likelihood of advantage to creditors in respect of each debtor (para [32]).

Blurring the distinction between the affairs of the respondents

In *Strutfast* there was a judgment debt obtained against each of the respondents. It was based on a settlement agreement that was made an order of court. However, there was no identity of interests between the respondents, and particularly as regards the requirement of advantage to creditors (para [33]).

The court declared that the failure to differentiate, or even attempt to distinguish, between the creditors and the assets of each of the respondents for the purposes of identifying a potential dividend to the creditors in each separate estate, rendered the application fatally defective (para [34]).

The court expressly held (para [34]) that it is not satisfactory for an applicant merely to comfort himself with a reassuring assertion that he has very little knowledge of the affairs of the respondents. Even if this is true, the applicant should still distinguish between the affairs of each of the respondents. The applicant should not merely merge the creditors of each respondent into one combined body of creditors and cannot merely state that the respondents' sequestration would be to the advantage of the general

body of creditors. His founding affidavit should contain allegations from which it can be established that there is an identical group of joint creditors for each of the respondents.

It was the court's view that even were the test to be the less strict formulation of 'a similarity or coincidence of interests' which would justify joinder, the court would be unable to conclude that the joinder in this matter was justified. The court explained that while the founding affidavit set out that the second respondent was vested with ownership of two bonded immovable properties, there was no allegation as to whether the relevant mortgagees were creditors of the first respondent, the second respondent, or of both (para [34]). Therefore, the court emphasised that where there is such a blurring of the distinction between the affairs of the respondents (as in this case), this shows 'why the joinder of respondents in an application for their sequestrations is an ill-advised practice' (para [35]).

Decision

The decision in *Bobroff* to disregard the earlier judgment in *Ferela* was itself an error of such a nature that it had to be held to be clearly wrong and should be departed from (para [32]). The 'established practice' is still good insolvency law; the required standard of 'clearly, plainly or palpably wrong' had not been sufficiently met in this case to justify deviating from the *Ferela* rule. The application was dismissed with costs as there was no rationale for having launched sequestration proceedings against both respondents in a single application (para [36]).

Advantage to Creditors: Body Corporate must Prove Pecuniary Benefit to General Body of Creditors

Section 10*(c)* of the Insolvency Act provides:

> If the court to which the petition for the sequestration of the estate of a debtor has been presented is of the opinion that *prima facie* –
> *(a)* . . . . .
> *(b)* . . . . .
> *(c)* there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated,
> it may make an order sequestrating the estate of the debtor provisionally.

In *Body Corporate of Empire Gardens v Sithole & another* 2017 (4) SA 161 (SCA), the interpretation of the requirement of 'advantage to creditors' as contemplated in section 10*(c)* of the Insol-

vency Act again took centre stage. The issue in this case was whether, in an application for the provisional sequestration of one its members, the body corporate of a sectional title development is required to prove that there is reason to believe that it will be to the advantage of the *concursus creditorum* if the debtor's estate is sequestrated (para [1]).

The appellant was the body corporate of Empire Gardens (EG Body Corporate). It was established in accordance with section 36 of the Sectional Titles Act 95 of 1986. The first respondent, Sithole, was the joint registered owner of unit twelve of the sectional title scheme. She was, therefore, in terms of section 36(1) of this Act, one of the members of the EG Body Corporate. The other registered owner of the unit was the first respondent's sister. She was not cited as a party in the proceedings (para [2]).

In terms of section 37(1)*(a)* of the Sectional Titles Act, a body corporate is obliged to establish a fund for administrative expenses for the repair, upkeep, control, management, and administration of the common property; for the payment of rates and taxes and other local authority charges for the supply of electric current, gas, water, fuel, and sanitation; for other services to the buildings and land; for insurance premiums; for the discharge of any other obligation of the body corporate; etcetera (para [37]).

In terms of section 37(1)*(b)* the body corporate must require the owners of the units (and thus members of the body corporate) to make contributions, where necessary, to this fund to satisfy any claims against the body corporate. Section 37(1)*(c)* and *(d)* further provide that the body corporate must, from time to time, determine amounts to be raised from each member, and must raise the amounts by levying contributions on the owners in proportion to the quotas of their respective sections (para [3]).

As joint owners of one of the units in the scheme and thus members of the EG Body Corporate, the Sithole sisters had to pay levies, but defaulted. Two default judgments were granted against them, in the amounts of ± R13 385 and ± R99 300 respectively. At the behest of the body corporate, their movable assets were attached and sold at an auction in order to satisfy the judgments. This only realised an amount of ± R3 200. There was not even enough money to settle the sheriff's fees and costs (para [4]).

A further attempt to satisfy the judgments was made by the EG Body Corporate which thereafter obtained a warrant of execution against the sisters' immovable property. Their unit in the sectional

title scheme was attached and sold at auction. Unfortunately, the sale had to be abandoned as Nedbank refused to accept the sale price of R170 000. Nedbank had a mortgage bond registered in its favour over the unit. The EG Body Corporate then launched the application for the sequestration of Sithole's estate. It alleged that Sithole appeared to be factually insolvent as she had not paid her levies. Further, her movable assets had realised a totally inadequate amount. EG Body Corporate also referred to another judgment in favour of Amazing Properties CC in the amount of approximately R31 000. This debt, they contended, had also not yet been paid (para [5]).

The EG Body Corporate stated in its founding affidavit that a body corporate need not show a pecuniary benefit when it applies for the sequestration of its members. Because of the nature of a sectional title development, a body corporate (and, therefore, EG Body Corporate) enjoys a certain preference over other creditors. It relied on section 89 of the Insolvency Act (read with s 15B of the Sectional Titles Act 95 of 1986). This section states that a body corporate is a preferential creditor for any unpaid levies or contributions. Reference was made to *Barnard NO v Regspersoon van Aminie & 'n ander* 2001 (3) SA 973 (SCA). According to EG Body Corporate, the current position is that where a body corporate applies to have the estate of a member sequestrated, 'the guiding principle should be the removal of the defaulting member from the scheme in order to bring the negative effect of her actions to an end' (para [6]).

Intervening creditor

As a secured creditor, Nedbank obtained leave to intervene in the sequestration proceedings. It opposed the application principally on the basis that EG Body Corporate had not proved that the sequestration would be to the advantage of any creditor other than itself. Nedbank revealed that its bond instalments were up to date. It further criticised the fact that the application was against Sithole alone, and not against her sister, the co-owner of the unit. Nedbank claimed that if an order of sequestration were granted in respect of only one co-owner, 'the trustee would face practical difficulties in dealing with half of the value of the unit' (para [8]).

TRIAL COURT

The court *a quo* dismissed the application and held as follows:

- Such an order would only benefit the body corporate and not the general body of creditors (para [8]).

- The purpose and effect of the sequestration process are 'to bring about a convergence of the claims in an insolvent estate to ensure that it is wound up in an orderly fashion and that the creditors are treated equally' (para [9], referring to *Investec Bank Ltd & another v Mutemeri & another* 2010 (1) SA 265 (GSJ)).
- It cannot appropriately be described as an instrument to be used by a creditor to claim a debt due by the debtor to a single creditor (para [9], referring to *Collett v Priest* 1931 AD 290 at 299).
- The moment a sequestration order is made, a *concursus creditorum* comes into being, with the effect that the rights of the creditors as a group are preferred to the rights of an individual creditor (para [9]).
- The phrase 'advantage to creditors' means that 'there should be a reasonable prospect of some pecuniary benefit to the general body of creditors as a whole' (para [10], referring to *Lynn & Main Inc v Naidoo & another* 2006 (1) SA 59 (N) and *Ex Parte Bouwer and Similar Applications* 2009 (6) SA 382 (GNP)).
- This condition is fulfilled where it is determined that there is reason to believe that there will be advantage to a 'substantial proportion' or the majority of the creditors reckoned by value (para [10], referring to *Fesi & another v Absa Bank Ltd* 2000 (1) SA 499 (C) 505–6; *Trust Wholesalers and Woollens (Pty) Ltd v Mackan* 1954 (2) SA 109 (N); S*amsudin v De Villiers Berrange NO* [2006] SCA 79 (RSA)).
- 'Advantage to creditors' is not a rigid concept (para [10], referring to *Stratford & others v Investec Bank Ltd & others* 2015 (3) SA 1 (CC)), but it needs proof of a tangible benefit to the general body of creditors.

The High Court Gauteng Division, Pretoria, subsequently granted leave to appeal to the Supreme Court of Appeal (para [8]).

SUPREME COURT OF APPEAL

On appeal to the Supreme Court of Appeal the EG Body Corporate argued as follows:

- Bodies corporate do not merely act to protect their own financial interests but have a statutory obligation to protect the interests of all the members who are prejudiced when a single member fails to pay his or her arrear levies (para [11]).

- A deviation from the trite principle of *concursus creditorum* is, therefore, justified so that it will be unnecessary for bodies corporate to prove actual or prospective pecuniary benefit to the general body of creditors (para [11]).
- A body corporate needs to establish only that it has exhausted all reasonable execution remedies in respect of the movable assets and immovable properties of one of its members (para [11]).

Counsel for EG Body Corporate admitted that he was not asking the court to develop the common law and acknowledged that no such case had been made out in the papers. He was also forced to concede that the insolvency law and the Sectional Titles Acts do not provide for the distinction sought (para [11]).

The Supreme Court of Appeal indicated the following elements as part of a 'fundamental problem' with the proposition (paras [12] [13]):

- The difficulty experienced by bodies corporate in collecting arrear levies was part of a socio-economic problem (*Body Corporate of Geovy Villa v Sheriff Pretoria Central Magistrate's Court & another* 2003 (1) SA 69 (T) 73 and *Barnard NO v Regspersoon van Aminie & 'n ander* 2001 (3) SA 973 (SCA) 981).
- The legislature has since 1986 effected several amendments to the Sectional Titles Act. However, in doing so it has not accorded bodies corporate any preferential treatment beyond that provided through the provisions of section 15B(3)*(a)*(i)*(aa)* of the Sectional Titles Act and section 89(1) of the Insolvency Act.
- All that section 15B(3)*(a)*(i)*(aa)* provides is that a sectional title unit cannot be transferred into the name of a new owner unless a clearance certificate is obtained from the body corporate and provision is made for the payment of all arrear contributions.
- In terms of section 89(1) of the Insolvency Act, outstanding levies due to the body corporate are treated as part of the cost of realisation (*Nel NO v Body Corporate of the Seaways Building & another* 1996 (1) SA 131 (A) 140 and *First Rand Bank Ltd v Body Corporate of Geovy Villa* 2004 (3) SA 362 (SCA)).

The Supreme Court of Appeal further indicated elements of other 'fundamental problems' EG Body Corporate was facing (para [14]):

- The debt allegedly owed to Amazing Properties CC had not been proved.
- Nedbank, which is both a major and preferential creditor, had objected to the application on the basis that its monthly instalments were being paid regularly.
- It was not clear on the papers how Sithole was able to pay for the mortgage bond, but there was no basis to conclude that a sequestration order would be to Nedbank's advantage, and hence to the advantage of the general body of creditors.

Taking all of this into account, the Supreme Court of Appeal found that it could not usurp the functions of the legislature and grant the immunity from the Insolvency Act being sought. There was thus no basis on which to make the distinction between bodies corporate and other creditors (para [13]). The court held that EG Body Corporate was seeking to obtain a preference that neither the Sectional Titles Act nor the Insolvency Act conferred upon it. It stated that this would require an amendment of the statutes concerned, which was a matter for the legislature (para [14]). The appeal was dismissed by Tshiqi JA (Wallis, Petse, Mbha JJA and Nicholls AJA concurring (para [15])).

Appointment of Trustees: Policy and Affirmative Action, Race, Gender, and Constitutionality in Terms of Section 9(2) of the Constitution

Section 18(1) of the Insolvency Act provides:

> As soon as an estate has been sequestrated (whether provisionally or finally) or when a person appointed as trustee ceases to be trustee or to function as such, the Master may, *in accordance with policy determined by the Minister*, appoint a *provisional trustee* to the estate in question who shall give security to the satisfaction of the Master for the proper performance of his or her duties as provisional trustee and shall hold office until the appointment of a trustee.

In *Minister of Justice & another v SA Restructuring and IPS Association & others* 2017 (3) SA 95 (SCA), the appeal concerned the constitutionality of a policy that sought to regulate the appointment of Insolvency Practitioners (IPs), primarily as provisional trustees and liquidators, but also as co-trustees and co-liquidators, as well as appointments to certain other comparable positions under various statutes (para [1]). Because the Minister is also empowered, in terms of section 10(1A)*(a)* of the Close Corporations Act 69 of 1984 and section 368 of the 1973

Companies Act, to determine the policy for the appointment of liquidators and provisional liquidators, the policy concerned applied to these appointments as well (para [16]).

The first respondent (Sasria) challenged the policy in a two-part application. Part A was an interim interdict preventing implementation of the policy; and Part B, review proceedings in an attempt to have it set aside. In the Western Cape Division of the High Court, Gamble J dealt with the urgent application in respect of Part A and interdicted the appellants from implementing the policy. The review application in Part B came before Katz AJ. The fundamental allegation was that the policy's rigid race and gender-based categories and ratios amounted to the imposition of quotas as opposed to numerical targets, rendering it unconstitutional. To succeed with this allegation, the applicants raised four arguments. The policy (1) unlawfully fettered the discretion of the Master; (2) infringed on the right to equality provided for in section 9 of the Constitution; (3) was *ultra vires* the Act; and (4) was irrational (para [2]).

Acting in terms of section 172(1)*(a)* of the Constitution, the High Court declared the policy inconsistent with the Constitution and invalid. An application for leave to appeal was refused. The current appeal was with the leave of the Supreme Court of Appeal ([para 3]). The appellants were the Minister of Justice and Constitutional Development (the Minister) and the Chief Master of the High Court of South Africa (the Chief Master) (para [4]).

The appellants' argument was that the policy was intended to form the basis for transformation of the insolvency industry. The respondents, on the other hand, contended that the policy would not achieve the transformation objectives and would weaken the transformation already achieved in the industry by substantially reducing the business of skilled, previously disadvantaged practitioners (para [21]).

The appellants further argued that the policy was a method contemplated by section 9(2) of the Constitution in that it endorsed the achievement of equality and was designed to protect and develop persons (and categories of persons) previously disadvantaged by unfair discrimination (para [22]).

The appointment of provisional trustees and co-trustees

The policy under discussion essentially involved section 18(1) of the Insolvency Act (quoted above), which deals with the appointment of provisional trustees and co-trustees. In terms of

this subsection the Master has the power to appoint provisional trustees. The Master's discretion is to be exercised in accordance with the policy determined by the Minister under section 158(2) of the Insolvency Act. Once a provisional sequestration order has been granted, the Master may appoint a provisional trustee. The provisional trustee will administer and control the estate until such time as the trustee is appointed at the first meeting of creditors. Nevertheless, the Master may still be involved inasmuch as he or she is authorised by section 57(5) of the Insolvency Act to appoint a co-trustee whenever he or she considers it necessary (paras [5] [16]).

The policy

The current policy was the first of its kind promulgated under section 158 of the Act (para [6]). The policy was published in *Government Gazette* 37305 of 7 February 2014. The Chief Master has also issued several directives in terms of the policy to deal with its application. He issued three such directives in 2014 (paras [10] [14]).

In terms of clause 6.1 of the policy, every Master's list must be divided into various categories. Clause 6 reads (para [12]):

> 6.1 IPs on every Master's List must be divided into the following categories:
>
> Category A: African, coloured, Indian and Chinese females who became South African citizens before 27 April 1994;
>
> Category B: African, coloured, Indian and Chinese males who became South African citizens before 27 April 1994;
>
> Category C: White females who became South African citizens before 27 April 1994;
>
> Category D: African, coloured, Indian and Chinese females and males, and white females, who became South African citizens on or after 27 April 1994 and white males who are South African citizens,
>
> and within each category be arranged in alphabetical order according to their surnames and, in the event of similar surnames, their first names. IPs added to the list after the compilation thereof must be added at the end of the relevant category.
>
> 6.2 A Master's List must distinguish between senior practitioners, being IPs who have been appointed at least once every year within the last five years and junior practitioners, being IPs who have not been appointed as such at least once every year within the last five years but who satisfy the Master that they have sufficient infrastructure and experience to be appointed alone.
>
> The senior and junior practitioners must be arranged where they fit alphabetically in Category A to D on the same Master's List.

Clause 7.1 of the policy sets out a formula, based on race and gender, for the appointment of IPs from the Master's list of practitioners (para [13]). Clause 7.3 gives the Master a discretion: he or she might, having regard to the complexity of the matter and the suitability of the next-in-line IP, appoint a senior IP jointly with the next-in-line IP. Clause 7 reads as follows:

> 7.1 IPs must be appointed consecutively in the ratio A4:B3:C2:D1, where –
>
> A represents African, coloured, Indian and Chinese females who became South African citizens before 27 April 1994;
>
> B represents African, coloured, Indian and Chinese males who became South African citizens before 27 April 1994;
>
> C represents white females who became South African citizens before 27 April 1994;
>
> D represents African, coloured, Indian and Chinese females and males, and white females, who have become South African citizens on or after 27 April 1994 and white males who are South African citizens,
>
> and the numbers 4:3:2:1 represent the number of IPs that must be appointed in that sequence in respect of each such category.
>
> 7.2 Within the different categories on a Master's List, IPs must, subject to paragraph 7.3, be appointed in alphabetical order.
>
> 7.3 The Master may, having regard to the complexity of the matter and the suitability of the next-in-line IP but subject to any applicable law, appoint a senior practitioner jointly with the junior or senior practitioner appointed in alphabetical order. If the Master makes such a joint appointment, the Master must record the reason therefor and, on request, provide the other IP therewith. . . .'

The court explained the meaning of these clauses, namely that the Master must appoint IPs consecutively in the ratio A4:B3:C2:D1 across all classes of appointment. In other words, the Master must appoint four practitioners from category A, then three from category B, then two from category C, and finally one from category D. Only then may he or she return to category A to appoint another four practitioners, and so forth. Even when appointing within a category, the Master must proceed down the alphabetical list until the end is reached and then start again at the top. An important factor is that there is no power to depart from this. The only discretion that the Master has is, in the circumstances set out in clause 7.3, to appoint an additional trustee (para [13]).

The court pointed out that the policy principally implicated the provisions of the Insolvency Act that deal with the *appointment of*

provisional trustees and co-trustees (para [15]). It indicated that unlike a final trustee appointed at the first meeting of creditors, the provisional trustee takes instructions from the Master, who in terms of section 18(2) stands in the place of the creditors of the insolvent estate (s 18(2)). The provisional trustee may be authorised by the Master or the court to sell property belonging to the estate (s 18(3)). Experience in the High Court suggests that this authority is frequently sought and granted (para [17]). In paragraph [19] the court stated that the policy does not provide for the wishes of creditors to be taken into account in these discretionary appointments.

The High Court's reasoning

Very briefly the core of the High Court's view regarding this policy was (para [20]):

- The Master becomes a rubber stamp.
- The policy creates a mechanical application.
- The Master is compelled to appoint designated persons by rote from the Master's list.
- This list is arranged alphabetically on a race and gender basis.
- It fails to appreciate and provide for the skills, knowledge, expertise, and experience of the practitioner.
- It fails to allow the Master the discretion to take these factors into account when appointing a trustee.
- The policy thus constitutes an unlawful fettering of his or her discretion.
- The policy must ensure that there is a correlation between the individual's skills set and the requirements for the role.
- The policy fails to provide clear time-lines or targets to determine whether it is likely to achieve its intended objective.
- There is insufficient evidence that the policy is likely to achieve its aim of transforming the industry within a specific period, if at all.

SUPREME COURT OF APPEAL

Equality

To comply with the principle of equality as in section 9(2) of the Constitution, any remedial measure must not only benefit the previously disadvantaged, but must also not be 'arbitrary, capricious or display naked preference'. The court indicated that a

form of arbitrariness, caprice or naked preference was the implementation of a quota system (paras [29] [32]).

A very strict distribution of appointments in accordance with race and gender was regulated in clause 7 and the Master was obliged to make an appointment according to this – therefore a 'rigid quota'. Clause 7.3 did not improve this rigidity. Clause 7.3 simply

> provides the Master with a mechanism, in an ill-defined range of cases, to compensate to some degree for the fact that the policy dictates the appointment of someone not qualified to undertake the task, either because of its complexity, or because of their unsuitability – the two are not mutually exclusive. . . . After all, the unqualified person is still to be appointed and to have their share in the fees accruing from the administration of the estate, even though the reason for invoking clause 7.3 is that they are not qualified or unsuitable to perform that task. The Master's ability to insert a backstop into the process does not detract from the need in every case to comply with clause 7.1. The system is arbitrary and capricious (para [34]).

This procedure was rigid and unavoidable and therefore unconstitutional as arbitrary, capricious, and incapable of practical application. Though this was sufficient for a declaration of invalidity, the court nevertheless chose to make the following findings on the other challenges to the policy (paras [36]–[38]).

The fettering of the Master's discretion

According to the appellants, the Master still has an unfettered discretion under the policy because he must establish whether the next-in-line practitioner is suitable. The argument advanced was that before any appointment is made, the Master considers issues such as the complexity of the matter, because the list contains categories – junior practitioners and senior practitioners. He or she must also consider whether the next-in-line practitioner has the infrastructure to deal with complicated insolvent estates (para [39]).

Respondent Saripa's submission was, among other things, that the policy goes beyond merely providing a recommendation to the Master. It serves to regulate the result of the exercise of the Master's powers as it serves to 'predetermine the outcome of the exercise of the master's powers, thus binding his decision-making powers inflexibly' para [40]). Respondents Cipa and Nama's submission was, inter alia, that no allowance is made for the skills relevant to the industry, and the needs or biddings of the creditors, and no provision is made for other persons with

interests. By excluding creditors from giving their view as to whom to appoint as provisional trustees or liquidators, creditors are potentially prejudiced. Respondent Solidarity pointed out that under the policy, the Master would 'disregard all other factors and allocate work on the basis of race and gender'. This prevents the Master's from exercising a proper discretion. Accordingly, the policy was inconsistent with section 9(2) of the Constitution (paras [40]–[43]).

The Supreme Court of Appeal stated that the parties' arguments were misconceived in that they assumed that the Master had an unfettered discretion that had been improperly fettered by the policy. However, the Master's only discretion in terms of section 18(3) is to make appointments in accordance with the policy. By leaving it to the Master to determine whether an estate is complex and to distinguish between the capabilities of different IPs, clause 7.3 contains a limited residual discretion sufficient to find that the Master's discretion was not improperly fettered (paras [44]–[45]).

Rationality

'Rationality' requires a rational connection between the policy and its objectives. According to the Supreme Court of Appeal, this connection was absent in the present case. What needed to be shown was that the policy lacked a rational connection to the objectives it was directed at achieving. In paragraph [46] the court indicated that there was no explanation in the affidavit of the Chief Master's – who also spoke for the Minister – as to the basis on which the policy had been formulated. It was the court's view that the explanation of the 4:3:2:1 ratio and how it was arrived at was unsatisfactory, and no reliable figures were put forward to support the Minister's justification. In light of this, 'one cannot say that the policy was formulated on a rational basis properly directed at the legitimate goal of removing the effects of past discrimination and furthering the advancement of persons from previously disadvantaged groups. The absence of any explanation at all for its manifestly discriminatory impact on young people is telling. The impression is given that the ratio is arbitrary and cobbled together with no apparent justificatory basis' (para [47]).

The Supreme Court of Appeal indicated other rationality weaknesses, namely the lack of a proper explanation by the appellants as to what constituted a 'complex estate' or an 'unsuitable practitioner'; the definition of 'senior practitioner' and the obliga-

tory appointment, without more ado, of the next IP in line (paras [48]–[50]).

Legality

Wallis JA, in complete agreement with the judgment of Mathopo JA above, wrote an addendum 'to deal with my concern that in formulating and publishing the policy the Minister has disregarded a significant constraint on his powers and thereby infringed the principle of legality or, as it was said in the past, acted *ultra vires'* (paras [3] [53]).

According to Wallis JA, the Minister's promulgation of the policy was contrary to the principle of legality because it deliberately disregarded the interests of the creditors of sequestrated estates or liquidated companies, which are at the heart of this insolvency legislation. The promulgation made use of a power given for a specific purpose to achieve a different, albeit legitimate, purpose (paras [53]–[66]). The court was dealing with insolvency legislation with regard to insolvent estates, companies, and close corporations. However, the Minister and the Chief Master had submitted no argument on that fact.

Wallis JA observed that the purpose of the insolvency legislation (summarised in paras [55]–[56]) necessarily affects the basis upon which trustees and liquidators are to be appointed. The principle thought must be the interests of the creditors. Serving those interests is important. A very relevant remark by the judge was that '(i)f the appointment of trustees and liquidators occurred speedily as contemplated by the relevant statutes this understanding of the situation would be even clearer, because there might not even be a need for the appointment of a provisional trustee or liquidator. Neither statute requires such an appointment to be made. Both contemplate that the first meeting of creditors will be speedily convened.' Section 40(1) explicitly provides that the Master shall immediately convene a first meeting of creditors. The Master has, in addition, only a limited basis for declining to appoint the person chosen as trustee or liquidator by the creditors (para [57]).

The problem, according to Wallis JA, was that provisional appointments had become more significant precisely because of (1) delays in progressing from a provisional to a final sequestration or winding-up order; and (2) delays in the various Masters' Offices. It was the court's view that in the past these delays had not really been a significant issue as under the requisition system,

creditors were able to play a considerable part in the selection of the provisional trustee or liquidator. There was usually a smooth transition from the provisional trustee or liquidator to the person elected or nominated for final appointment, who was usually the same person. With the system envisaged by the policy, the voice of the creditors had deliberately been removed from the process of appointment (para [58]).

In paragraph [59], the court pointed out that the relevant statutes make it clear that they exist to serve the interests of creditors. Therefore, it is not open to the Master to act in a manner that conflicts with these interests. Where the appellants had contended that no provision in the insolvency legislation obliges the Master to take the wishes of the creditors into account, the court turned this argument around and indicated the other side of the coin, namely that nothing in the statutes empowers the Master to disregard the interests of creditors. The policy explicitly empowers the Master to appoint on a roster basis, persons who, in terms of the policy itself, he or she may regard as unqualified for such appointment (either because of the complexity of the estate, or because they are unsuitable). This is not acceptable.

The court agreed that 'the most critical aspect of insolvency appointments' is to determine the persons to be appointed in a particular case, especially so since the delays in reaching the stage of final sequestration or winding-up and delays in convening the first meeting of creditors result in a growing volume of the work of liquidation or winding-up being assumed by the provisional trustee or liquidator. The reality, therefore, is that under the policy these appointees are 'able to do this without any directions from the creditors and solely on the basis of the directions of the Master'. The court found this clearly problematic (para [60] [61]).

In the court's view any policy put in place for the appointment of trustees and liquidators must be consistent with the object of the insolvency legislation and be focused on attending to the interests of creditors. In articulating the policy under discussion, taking creditors' interests into account at any point before the first meeting of creditors had deliberately been ignored. That was impermissible (paras [62] [63]).

The court (para [64]) relied on the essential principle summarised in *Gauteng Gambling Board & another v MEC for Economic Development, Gauteng* (2013 (5) SA 24 (SCA) paras [46] [47]). In brief: to admit that a power which is given by law for one purpose alone is used for another purpose is to act *in*

fraudem legis. Such a use is merely an excuse. 'In present-day jurisprudence acting with an ulterior motive or purpose is subsumed under the principle of legality' (para [64]). In the court's view it was precisely this type of breach of the principle of legality that had occurred here (para [65]).

For this reason, and for the reasons set out in his judgment, Wallis JA concurred in the order proposed by Mathopo JA (para [66]). Mathopo JA (Mpati P, Wallis, Swain, and Van der Merwe JJA concurring) dismissed the appeal with costs (para [52]).

Trustee: Sale of Property and Authorisation of Master

Section 18(3) of the Insolvency Act provides:

> A provisional trustee shall have the powers and the duties of a trustee, as provided in this Act, except that without the authority of the court or for the purpose of obtaining such authority he shall not bring or defend any legal proceedings and that without the authority of the court or Master he shall not sell any property belonging to the estate in question. Such sale shall furthermore be after such notices and subject to such conditions as the Master may direct.

Section 80*bis* of the Insolvency Act provides:

> (1) At any time before the second meeting of creditors the trustee shall, if satisfied that any movable or immovable property of the estate ought forthwith to be sold, recommend to the Master in writing accordingly, stating his reasons for such recommendation.
> (2) The Master may thereupon authorise the sale of such property, or of any portion thereof, on such conditions and in such manner as he may direct: Provided that, if the Master has notice that such property or a portion thereof is subject to a right of preference, he shall not authorise the sale of such property or such portion, unless the person entitled to such right of preference has given his consent thereto in writing or the trustee has guaranteed that person against loss by such sale.

Section 82(1) of the Insolvency Act provides:

> Subject to the provisions of sections *eighty-three* and *ninety* the trustee of an insolvent estate shall, as soon as he is authorised to do so at the second meeting of the creditors of that estate, sell all the property in that estate in such manner and upon such conditions as the creditors may direct: Provided that if any rights acquired from the State under a lease, licence, purchase, or allotment of land is an asset in that estate, the trustee shall, in his administration of the estate, act in accordance with those provisions (if any) which by the law under which the rights were acquired, are expressed to apply in the event of

> the sequestration of the estate of the person who acquired those rights: Provided that if the creditors have not prior to the final closing of the second meeting of creditors of that estate given any directions the trustee shall sell the property by public auction or public tender. A sale by public auction or public tender shall be after notice in the *Gazette* and after such other notices as the Master may direct and in the absence of directions from creditors as to the conditions of sale, upon such conditions as the Master may direct.

Section 82(8) of the Insolvency Act provides:

> If any person other than a person mentioned in subsection (7) has purchased in good faith from an insolvent estate any property which was sold to him in contravention of this section, or if any person in good faith and for value acquired from a person mentioned in subsection (7) any property which the last mentioned person acquired from an insolvent estate in contravention of that subsection, the purchase or other acquisition shall nevertheless be valid, but the person who sold or otherwise disposed of the property shall be liable to make good to the estate twice the amount of the loss which the estate may have sustained as a result of the dealing with the property in contravention of this section.

The facts in *Swart v Starbuck & others* 2017 (5) SA 370 (CC) are briefly: Swart's estate was provisionally sequestrated and the Master advised Starbuck, Van Rensburg, and Matsepe that he would appoint them as provisional trustees. A month later a final sequestration order was granted, and the Möller Trust (the Trust) made three offers to purchase immovable properties from the insolvent estate. The offers were subject to the Master's consent. The trustees had by then not yet been formally appointed as provisional trustees. Each of the three offers to purchase was accepted two weeks later by Starbuck, who signed them as the 'seller' (paras [4]–[6]).

In early January 2006 (before their formal appointment), the trustees submitted a written application to the Master in terms of section 80*bis* read with section 18(3) of the Insolvency Act for the extension of their powers to enable them to sell the properties by private treaty and before the second meeting of creditors. It included consent from the two secured creditors. A circular was sent to all known creditors regarding the decision to sell the properties. Some two weeks later the Master (the fourth respondent) appointed Starbuck, Van Rensburg and Matsepe as provisional trustees. No creditor objected to the anticipated sale of the properties. Before the second meeting of creditors, but after formally appointing the provisional trustees, the Master authorised the sales under section 80*bis* (paras [7]–[8]).

The trustees received payment and authorised the transfer of the properties to the Trust. Registration of the transfers took place shortly thereafter (para [8]). The first meeting of creditors was then held (in September 2006), and one month later, the second meeting (in October 2006), which approved the trustees' report reflecting the sales and transfers (para [8]). All of these events happened before the appointment of Starbuck, Van Rensburg and Matsepe as the final trustees. The final trustees were only appointed about a year later.

The insolvent's case

Almost ten years had passed before the insolvent decided to institute proceedings against the trustees on behalf of the estate. His assertions were (paras [9] [10]):

- The trustees lacked the necessary capacity to accept the offers to purchase made by the trust.
  - Although section 18(3) authorises trustees to sell properties, the trustees had at that stage not yet been appointed as provisional trustees.
- The section 80*bis* authorisation was invalid.
  - The section allows the Master to authorise a sale only when a *trustee* requests the authorisation.
- The sale and the resultant transfer of the properties to the trust were irregular and constituted maladministration.
  - When they requested authorisation from the Master, they had not yet been formally appointed as provisional trustees.
- The sale of the properties could consequently take place only under section 82(1) of the Act.
  - This section provides that on the authorisation at the second meeting of creditors, the trustees shall sell an estate's property in the manner and on the conditions that the creditors direct. The trustees had failed to follow the prescripts of this subsection.
- They were liable in terms of section 82(8) to make good to the insolvent estate twice its loss as a result of the contravention.
  - The properties could have been sold at a higher price.

The trustees' plea

The trustees put forward the following facts (para [11]):

- They admitted that Starbuck had signed and accepted the offers to purchase.

- They emphasised that the acceptance had been subject to the permission of the Master (by implication – according to them – subject to their formal appointment. Formal appointment as provisional trustees took place, although only some two weeks later).
- One week after their formal appointment they had been granted authority to sell in terms of section 80*bis*.
- Therefore, the properties had been validly transferred to the trust on 14 June 2006.
- They accordingly denied any maladministration on their part, and disavowed liability for the payment of any damages.

HIGH COURT

The trial court held that the trustees had been granted the necessary authorisation by the Master in terms of section 80*bis* to sell the properties to the trust. Consequently, compliance with section 82 was not required. As to the allegation that the properties could have been sold at a much higher price, the High Court found that there was no basis for such an allegation (but see the view of the minority decision in the Constitutional Court below). Consequently, there was no connection between the alleged loss which the insolvent may have suffered and the conduct of the trustees. The court dismissed the claim with costs but granted the insolvent leave to appeal to the Supreme Court of Appeal (paras [12] [13]).

SUPREME COURT OF APPEAL

The Supreme Court of Appeal found that the Master's authorisation under section 80*bis* constituted a valid administrative act with legally valid consequences until set aside, which had not been sought or done. Section 82 did not apply because the sale had taken place pursuant to the Master's authorisation. In the event, the court found that since the sale had been subject to a suspensive condition, it became binding only on the fulfilment of the condition. Therefore, it did not matter that the trustees had not yet been appointed when the offer to purchase was accepted by Starbuck. It accordingly dismissed the appeal with costs (see paras [15]–[19]).

CONSTITUTIONAL COURT

After the dismissal of his appeal by the Supreme Court of Appeal, the insolvent again sought leave to appeal. He sought

condonation, which was granted 'in the interests of justice' (paras [23] [24]). In addition to damages, he claimed that sections 18(3) and 80*bis* were unconstitutional (paras [1] [20]). More relevant here is his persistent argument that section 82 should apply, and that the Master's section 80*bis* authorisation had been irregular (para [20]).

The first to third respondents were the trustees of the insolvent estate, Starbuck, Van Rensburg and Matsepe. The fourth respondent was the Master of the High Court, Pretoria. Starbuck was the only respondent participating in the matter (para [3]).

The applicability of s 82(1) read with s 82(8) (para [2])

The majority of the Constitutional Court (Khampepe, Cameron, Froneman, Madlanga, and Mhlantla JJ, with Mogoeng CJ, Nkabinde ADCJ, and Pretorius AJ concurring) decided that both earlier judgments were well motivated and could not be questioned. The insolvency claim, based on the applicability of section 82(1) read with section 82(8), depended on the absence of a valid authorisation of the sale by the Master (para [26]). It was clear that the Master had authorised the sale of the properties in terms of section 80*bis*. This authorisation, as a binding administrative act, had legally valid consequences until set aside and had at no point been challenged by the insolvent. Consequently, section 82 did not apply (para [26]). The court continued that no claim for damages had been proven, and even if the insolvent's claim was delictual, the trustees could, on this basis, not be held liable – or not in terms of the Insolvency Act. The court stated that a mere allegation that the properties could have been sold at a higher price was insufficient (para [28]).

The constitutional challenge

Starbuck submitted that the insolvent's challenge to the constitutionality of insolvency law in general, and sections 18(3) and 80*bis* in particular, must fail as a claim of constitutionality cannot be raised for the first time in the court of final appeal (para [21]).

Having regard to the Constitutional Court's jurisprudence, the majority of the court felt that it would be imprudent to consider the insolvent's constitutional challenge (para [31]). In note 28 reference was made to *Prince v President, Cape Law Society & others* 2001 (2) SA 388 (CC), where Ngcobo J stated the following:

> Parties who challenge the constitutionality of a provision in a statute must raise the constitutionality of the provisions sought to be chal-

> lenged at the time they institute legal proceedings. In addition, a party must place before the Court information relevant to the determination of the constitutionality of the impugned provisions. . . . I would emphasise that all this information must be placed before the Court of first instance. The placing of the relevant information is necessary to warn the other party of the case it will have to meet, so as [to] allow it the opportunity to present factual material and legal argument to meet that case (para [22]).

Other cases referred to (in paras [39] [40]) were: *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC) and *Phillips & others v National Director of Public Prosecutions* 2006 (1) SA 505 (CC).

Validity of the section 80bis authorisation

Starbuck submitted that the sale of the properties had been authorised by the Master and was valid as the authorisation had been neither challenged nor set aside by a court of law (para [21]).

The majority of the court indicated that the authorisation in terms of section 80*bis* was an administrative act within the meaning of the Promotion of Administrative Justice Act 3 of 2000. Therefore, even if the Master's authorisation was unlawful, it remained valid and binding with fully legal consequences until set aside – the sale of the properties was one of those consequences (para [33]).

The majority reiterated that the sale agreements were subject to the suspensive condition that the sales would come into effect only once the Master's section *80bis* authorisation had been secured. This meant that once the Master's authorisation had been obtained, legally binding sale agreements came into effect and would stand, irrespective of the validity of the Master's authorisation, until set aside by a court (paras [34]–[36]).

The court emphasised:

> [T]he procedural safeguards applicable to mounting a review application perform an important role in ensuring that interested parties are given proper notice of the review application, and an adequate opportunity to be heard on whether the decision should be set aside. Further, they ensure that the full record of the relevant decision is placed before the court, so that the court has all the relevant facts against which to consider the lawfulness of the decision (para [38]).

Further, the founding affidavit set out no grounds of review (para [39]). What the insolvent should have done was to take the Master's decision on review. To do this he had to apply the Rule

53 process – failure to do so would be unfair on the respondent. To require the insolvent to adhere to the process prescribed in Rule 53 was not undue formalism (paras [37] [38]).

The court also indicated other principles applicable to the review of administrative action:

(a) The principle of finality

The court stated that an application for review must be brought within a reasonable time. Even if there had been a proper review application before the court, it would have been ten years overdue. Engaging with this application in spite of this time lapse and in the absence of any acceptable explanation for the delay, would, according to the majority, not only have a detrimental effect on the principle of finality, but would also ignore the potential disadvantage to the Master, the trustees, and possibly the creditors of the applicant's formerly insolvent estate (paras [41] [42]).

(b) Section 157(1)

In the view of the majority an additional obstacle to the insolvent's attack is section 157 of the Insolvency Act, which shields the Master's conduct from invalidity based on a formal defect. Subsection (1) makes it clear that nothing that has been done by the Master or the trustees pursuant to the provisions of the Insolvency Act can be deemed invalid simply because of a formal defect. This is the case unless, in the opinion of a court, it has resulted in substantial injustice that cannot be rectified by an order of court. In the present case, the insolvent had claimed but not proved that the farms could have been sold at a higher price, and had failed to point to any other substantial injustice (paras [43]–[45]).

(c) Section 157(2)

Subsection 157(2) provides that no defect or irregularity in the appointment of the trustees will invalidate anything done by them in good faith. The insolvent had not alleged bad faith on the part of the trustees – rather, the court found, the facts pointed to their good faith. The sale had been authorised by the Master and the trustees had obtained the consent of the two secured creditors. They had also issued a notice informing all the insolvent estate's creditors that the farms were to be sold (para [46]).

The majority decision

For the above reasons the majority felt that it would not be in the interests of justice to consider whether the Master's section 80*bis*

authorisation was valid or not, and leave to appeal was therefore refused (para [47]).

Zondo J's concurring judgment

Justice Zondo agreed that leave to appeal should be refused in the interests of justice (para [117]). Briefly, when the first, second, and third respondents were appointed as trustees, their application for authority to sell the farms was pending before the Master. The application remained in place after their appointment. Further, when the Master considered and decided the application for authority to sell the farms, he knew that they had not changed their minds about their application.

Justice Zondo then asked what the trustees stood to do after their appointment if they wished to avoid the alleged non-compliance with the Insolvency Act. For him the only answer was that they ought to have withdrawn the application and resubmitted it, but he emphasised that this would constitute the 'height of formalism' (para [120]). It was in order, therefore, that they had not done so (para [120]). He held that, to the extent that the first, second, and third respondents' application to the Master may not have been lawful before their appointment, it became lawful once they had been appointed as it had not been withdrawn. Consequently, granting them authority to sell the properties on 31 January 2001 was lawful in that they were by then already trustees and still sought the Master's authorisation (para [121]).

Dissenting judgment of Jafta J (Mojapelo AJ concurring)

The minority felt that leave to appeal should be granted and the appeal upheld (paras [51] [75]). Further, they felt that the matter did in fact raise a constitutional issue. According to them the matter involved the exercise of public power conferred by section 80*bis* (para [75]). The Supreme Court of Appeal had defined the exercise of power by the Master under this section as administrative action. The insolvent sought to challenge the validity of the Master's approval. This was pivotal to the outcome of the case. If that approval was invalid, the purported sale of the applicant's property was unlawful. Whether the sale remained intact despite the invalidity of the approval was a matter that might be determined only if leave to appeal should be granted (para [75]).

Apart from this, the minority identified the following issues that needed to be determined (para [78]):

(a) Whether it is competent to adjudicate the constitutional challenge raised for the first time in the Constitutional Court.
(b) Whether the Master's approval to sell the applicant's farms complied with section 80*bis* as regards the trustees' recommendation.
(c) If section 80*bis* were not complied with, what was the effect of that non-compliance on the Master's approval in the light of section 157(1) of the Insolvency Act?
(d) Whether the applicant had *locus standi* to challenge the Master's approval on review.

With regard to (a) (para [81])

The minority agreed that the applicant's case did not satisfy the test for entertaining a constitutional challenge raised for the first time in a court of final instance (para [81]).

With regard to (b) (paras [82]–[94])

The basis for the minority's view that leave to appeal should be granted and the appeal upheld was that a provisional trustee may not sell property belonging to the insolvent estate without the authority of a court or the Master. The authority contemplated in section 18(3) was a *valid authority*. Section 80*bis* outlines a process to be followed in obtaining valid authority from the Master. Briefly, this section prescribes a jurisdictional fact (a condition precedent) which must be in place before the Master grants approval. It requires the *trustee* to furnish the Master with a written recommendation incorporating reasons why authority to sell is sought (also see para [55]). *In casu,* when the trustees submitted the purported recommendation, they had not yet been appointed as provisional trustees and this meant, in the minority's view, that there was no recommendation.

The question the minority felt needed to be considered was whether section 80*bis* contemplates the present 'recommendation' (by non-trustees) as being a jurisdictional fact for the granting of an approval. They were of the view that on the crucial issue relating to compliance with section 80*bis* and the effect of non-compliance on the validity of the Master's approval, there were prospects of success. In these circumstances leave to appeal must be granted (also see para [77]).

The minority further pointed out that the Master knew when he received the so-called 'recommendation' that those who submitted it were not yet trustees as he had not yet appointed them. The

Master was, therefore, aware when he granted the approval, purportedly in terms of section 80*bis*, that he was doing so without the necessary 'recommendation'. There had, therefore, been no compliance with section 80*bis* (paras [89]–[94]).

With regard to (c) (paras [95]–[105])

In the minority's view, as there was no recommendation by duly appointed trustees, the purported approval by the Master was invalid. Non-compliance with section 80*bis* was therefore fatal as regards the Master's approval (para [98]). However, the minority acknowledged that it was important to determine whether section 157(1) of the Insolvency Act had any effect on this non-compliance.

The minority made the following observations on this section (para [102]):

- The heading 'Formal defects' suggests that the section was designed to regulate non-compliance with formalities.
- The word 'formal' qualifies both the defect and the irregularity.
- This reveals that Parliament sought to condone formal defects and irregularities.
- Even then, the defect must not cause substantial injustice which cannot be remedied by a court order.
- If the defect is not formal, this provision does not apply.
- A distinction must be drawn between the preservation of what has been done in non-compliance with formalities, on the one hand, and the wrongful consequences of the non-compliance, on the other.
- Section 157(1) does not protect functionaries who cause damage by not following its requirements from liability for their irregular conduct.
- Its focus is the protection of the act wrongly performed.
- It insulates the sale from invalidity.
- There are no reasons of principle or public policy which militate against holding those who do not follow the Act liable for any damage they cause.

However, the minority concluded that given the nature and extent of the non-compliance with section 80*bis,* the irregularity in this case could not be described as a formal defect; it did not concern a failure to follow formalities. Jafta J explained that the appointment of a trustee is a substantive matter which vests the insolvent's entire estate in the trustee. The act of appointing

a trustee alone confers on the appointee extensive powers with far-reaching consequences. Accordingly, he held that section 157(1) did not apply here (para [103]).

Nonetheless, even if it were to apply, the defect would, to Jafta J's mind, give rise to a substantial injustice which could not be remedied by any order of court. The minority had no problem accepting that the insolvent had succeeded in proving damage. For this he accepted the insolvent's contention that if the farms had been sold *after* the second meeting of the creditors, they could have realised a much higher price. This was borne out by the fact that some of the properties had been resold at a higher price before the second creditors' meeting was held (para [104]).

With regard to (d) (para [110])

The applicant had legal standing to challenge the Master's approval on review. Further, his claim for damages did not depend on a successful review of the approval.

Trustee Taking Possession of Imported Goods

Section 47 of the Insolvency Act provides:

> If a creditor of an insolvent estate who is in possession of any property belonging to that estate, to which he has a right of retention or over which he has a landlord's legal hypothec, delivers that property to the trustee of that estate, at the latter's request, he shall not thereby lose the security afforded him by his right of retention or lose his legal hypothec, if, when delivering the property, he notifies the trustee in writing of his rights and in due course proves his claim against the estate: Provided, that a right to retain any book or document of account which belongs to the insolvent estate or relates to the insolvent's affairs shall not afford any security or preference in connection with any claim against the estate.

Commissioner, South African Revenue Service v Van der Merwe NO & others 2017 (3) SA 34 (SCA) concerns an appeal to the Supreme Court of Appeal against a High Court order that the appellant (the Commissioner) clear certain imported equipment in its custody and control for release to the first to sixth respondents – the liquidators of an importer company, Pela Plant (Pty) Ltd, which had been placed in liquidation. The Commissioner had refused to do so as the company was unable to pay the value-added tax and duties due for the importation of the equipment.

Pela Plant (the company and sixth respondent) had been

liquidated as it was unable to pay its debts. The effective date of the commencement of the winding-up in terms of section 348 of the 1973 Companies Act was 18 July 2014 (para [1]).

The company had sent equipment to the value of some R25 million to the Democratic Republic of the Congo (DRC) for operations in that country. Some of this equipment was subject to credit sale agreements concluded between the company and Absa Bank Ltd, FirstRand Bank Ltd, and Bidvest Bank Ltd, the fourth, fifth and sixth respondents, respectively, in the court *a quo* (the banks). As such, those items were subject to the usual reservation of ownership. On liquidation, these items immediately became the property of the company by virtue of section 84(1) of the Insolvency Act. The banks obtained a hypothec over the equipment to secure the unpaid balance of the purchase price. The remaining nine items had always belonged to the company (para [2]).

When the company's operations in the DRC were complete the equipment was returned to South Africa. As a result, customs duty became payable in terms of section 39(1) of the Customs and Excise Act 91 of 1964 (the Customs Act) and VAT in terms of section 7(1)*(b)* of the Value-Added Tax Act 89 of 1991 (the VAT Act). UTI South Africa (Pty) Ltd (UTI), the seventh respondent, was appointed by the company as its clearing and forwarding agent for the importation of the equipment. When the equipment arrived in the country during March and June 2014, it was placed in a warehouse belonging to UTI's subagent. Customs duty and VAT were postponed in terms of section 20(1)*(a)* of the Customs Act and section 13(6) of the VAT Act respectively (para [3]).

While in this warehouse and under the control of UTI, the freight, disbursements, and storage charges costs escalated to almost R6 million. The duty and VAT said to be payable 'to clear' the equipment were R8,5 million. This was, however, disputed by the liquidators (para [4]).

On the basis of their statutory duty (in terms of s 391 of the 1973 Companies Act, and s 61 read with s 83(3) of the Insolvency Act) the liquidators attempted, unsuccessfully, to take possession of the equipment and secure its release from UTI and the Commissioner. They instituted proceedings in the court *a quo* for the equipment to be released to them without paying the duty and VAT. The Commissioner and UTI opposed the application, claiming that the equipment could be released to the liquidators only after compliance with certain provisions of the Customs Act. The

Commissioner claimed that specific sections in this Act precluded him from releasing the equipment (and the court from making an order that he do so) unless and until the customs duty and VAT owing had been paid in full. In the court *a quo,* UTI aligned itself with the SARS's contention. They did not, however, join in the current appeal (para [5]).

The liquidators' application in the court *a quo* was successful. The Commissioner appealed to this court with the leave of the court *a quo* (para [6]). The parties agreed that the question on appeal would be whether, in such circumstances, a liquidator may take possession of and deal with the property concerned under insolvency law, or instead is prevented from doing so by a statutory 'embargo' – said to be created in favour of the Commissioner by sections 20(4), 38, and/or 39 of the Customs Act, and section 7(1)*(b)* of the VAT Act – unless duty and/or value-added tax has been paid (para [7]).

Reasoning of the trial court ((para [9]) SCA)

The court *a quo* considered the scope and purpose provided for by the provisions relating to the winding-up of companies unable to pay their debts in terms of the 1973 Companies Act; the Insolvency Act; the Customs Act; and the VAT Act. The court took cognisance of the following principles:

- All creditors are subject to the provisions of the Insolvency Act, save in exceptional cases where statutes specifically provide otherwise.
- This principle is given effect to in two ways:
  - First, by the creation of a *concursus creditorum* in terms of which the claims and rights of all the creditors of an insolvent company are determined.
  - After the date of the *concursus*, one creditor is not entitled to improve its position in relation to others.
  - Second, by ensuring that the liquidator realise every asset belonging to the insolvent company.
  - Thereafter the proceeds must be distributed amongst the company's creditors in the order of preference dictated by the insolvency law and determined at the *concursus*.
- For this reason a liquidator is obliged (by s 391 of the 1973 Companies Act) to recover all the assets and property of the insolvent company.
  - 'All' has the widest possible meaning.
- The purpose of the Insolvency Act, as recorded in its Pre-

amble, is to consolidate and amend the law relating to insolvent persons and their estates.

- The aim of consolidation suggests that the Insolvency Act is intended to deal comprehensively with what will happen upon insolvency.
- Consolidation reflects and gives effect to the fundamental principle of insolvency law and encompasses an array of detailed provisions concerning the ranking of claims and how security claimed in respect of claims must be dealt with (para [9]).

The court *a quo* came to the conclusion that the ranking of claims within the Insolvency Act does not allow any creditor to be granted a preference such as that contended for by the SARS.

Arguments of the Commissioner on appeal

1. The Commissioner contended that he was not simply a creditor of the company. The Customs Act is a means of promoting the state's economic and other interests, above and beyond being principally a fiscal measure. Therefore, duty is imposed on imported goods not only for fiscal purposes, but also to protect local manufacturers. He referred to provisions in the Customs Act which deal with antidumping, countervailing, and safeguard duties. He maintained that the Customs Act is used to implement state policy, for example, the power of the national executive to conclude agreements with the government of any territory in Africa for the imposition of environmental levies (para [8]).
2. He further submitted that the Customs Act creates an embargo on the relief sought by the liquidators. The Commissioner argued that there was nothing in the Customs Act that entitled liquidators of companies to be exempted from these provisions (para [10]).
3. The Commissioner accepted that the payment of customs duty and VAT could be deferred under certain circumstances (ss 20(1), 39(1)*(b)*, and 107(2)(A)(i)). He nevertheless argued that this duty had to be paid in full at some stage in the future (para [11]).
4. Finally, if an 'embargo' was not inferred, this would result in an anomaly, since he could still hold UTI (as the licensee of the

warehouse) liable for payment of the duty and VAT under section 19(6) of the Customs Act (para [23]).

SUPREME COURT OF APPEAL

The effect of the relevant provisions of the Customs Act

The Supreme Court of Appeal held that whether there was an embargo (preventing the liquidators from taking possession of the equipment without first having to pay duty and VAT thereon), lies in sections 20(4)*(a)*, 38, 39 and 114 of the Customs Act (paras [12]–[19]):

- Section 20(4)*(a)* deals with the prohibition on removing goods from a customs and excise warehouse unless certain rules and obligations have been complied with.
- Section 38(1)*(a)* involves the entry of goods to be made within seven days of the date of importation.
- Section 38(4)*(a)* gives the Commissioner the right to permit someone to remove certain goods from a customs and excise warehouse after compliance with specified conditions.
- Section 39(1)*(a)* requires a bill of entry and declaration with full particulars by the person entering goods.
- Section 39(1)*(b)* deals with the Commissioner's right to allow the deferment of payment of the duties due in respect of such relevant bills of entry.
- Section 39(2A)*(a)* specifies the requirements for removing goods from a customs and excise warehouse and stipulates the payment to the Controller of duties due on the goods.
- Section 114 (1)(aC) provides for the creation of a lien as security for the duty on such goods.
- Section 114(1)*(a)*(iv)*(aa)*(A) provides that the SARS has the right to exercise a lien over goods which are subject to a duty whenever they may be found as further security for its debt.
- Section 114(1)*(b)*(i) stipulates that the SARS's claim over the property subject to a lien has priority over the claims of all other persons.
- Section 114(1)*(b)*(iii) involves the execution over goods subject to the SARS's lien.

The Supreme Court of Appeal indicated that all of these provisions address the ordinary situation where goods are brought into the country and attract a liability to pay customs duty. They are focused on the responsibility of the importer and others liable

to pay duty. They do not address the special situation of insolvency (para [20]).

The situation of insolvency is dealt with in the Insolvency Act. This is 'a general statute intended to deal with all cases of insolvency. In brief, when one looks at the liability to pay customs duty in the ordinary course, one looks to the provisions of the Customs Act alone. When insolvency intervenes one turns to the Insolvency Act' (para [20]).

The effect of the relevant provisions of the Insolvency Act (para [29])

Where insolvency intervenes, the following principles apply:

- In terms of the common law, a trustee must realise all the assets of an insolvent.
- These include those subject to a lien.
- The trustee is then entitled to demand their delivery.
- If it were otherwise, the lienholder would be able to frustrate the winding-up of the estate. (The court aptly referred to *Roux & andere v Van Rensburg NO* 1996 (4) SA 271 (A) 276E–277C.)
- The common-law position is preserved in section 47 of the Insolvency Act.
- The common law is somewhat altered by section 83 of the Insolvency Act. This section permits a creditor who holds any movable property as security for his or her claim to realise that security before the second meeting of creditors.
- This section is not relevant in this appeal, however, as the Commissioner was relying solely on an 'embargo'.

The court did not determine whether the statutory liens afforded by the Customs Act constitute security as specially defined in the Insolvency Act. It was unnecessary for the purposes of this judgment (para [21]).

The court concluded that there is nothing in either the Customs Act or the Insolvency Act which expressly (or by necessary implication) provides that goods subject to a lien in favour of the SARS are expressly excluded from the provisions of the Insolvency Act (para [22]).

The embargo argument

The court did not agree that an anomaly arises if an embargo is not inferred (para [23] and see point 3 of the Commissioner's arguments above). The court stated that the trustee is entitled to

demand delivery of the imported goods under the Commissioner's custody and control, despite non-payment.

The court agreed with the court *a quo*'s explanation of this view:

- Section 19(6) must be read with sections 19(7) and 19(8).
- Section 19(6) sets out the liability of the licensee of a customs and excise warehouse for unpaid duty and his obligations in this regard.
- Section 19(7) provides when such liability ceases.
- Section 19(8) spells out the consequences if the licensee fails to comply with the latter exemption (para [23]).

The court indicated that the purpose and effect of these sections are to give the Commissioner additional security. These sections do not apply where the SARS itself is obliged to release the goods from its statutory lien as prescribed by the insolvency law (para [24]).

The court also agreed with the court *a quo*'s finding that section 114 of the Customs Act was not intended to create an embargo against clearance unless duty and VAT were first paid in full. This is so because section 114(1)*(a*C*)* serves only to provide the Commissioner with additional security, and is not a bar to the relief sought by the liquidators. The court *a quo* was thus correct when it stated that the SARS had the limited preference afforded by section 99 of the Insolvency Act, and, in addition, the protection afforded by sections 83 and 95 of the Insolvency Act because of the statutory lien created by section 114(1)*(a*C*)*. This 'serves only to provide SARS with additional security and is not a bar to the relief sought by the liquidators' (para [24]).

Motivation: Legitimate property expectations of all creditors are protected

The Supreme Court of Appeal agreed with the following interpretation (para [25]):

- Interpreting section 47(1) of the Customs Act as an embargo provision would probably cause injustice to other creditors of the insolvent estate of the company.
- Ordinarily there would be no prospect of the liquidators being able to pay customs duty and VAT from the insolvent company's own resources before disposing of the equipment.
- The proceeds of the sale of the equipment itself would ordinarily be the logical source of funds to pay customs duty and VAT.

- Few purchasers would be willing first to pay the SARS before being able to take delivery of the equipment they had bought.
- No purchaser would be prepared to pay the SARS if the outstanding duties and VAT exceeded the value of the equipment itself.
- If the Commissioner's interpretation of the legislation were correct, the goods would probably never be realised because there would not be enough money to overcome the embargo.
- The equipment would then end up in a state warehouse to be sold by the SARS in terms of section 43 of the Customs Act.
- The purpose of the insolvency regime was to realise all the property of the company in the interests of all creditors and at the best value.
- The Commissioner's interpretation resulted in the anomaly that assets which form part of the insolvent estate are dealt with not by the liquidators, but by the SARS (which need not even prove a claim) without any contribution or control by the liquidators or other creditors.
- It could not have been the intention of the legislature that assets of an insolvent estate, in respect of which other creditors also have real rights, should be dealt with completely outside the machinery of insolvency (para [25]).

The Supreme Court of Appeal gave one final reason for rejecting the Commissioner's claims. It explained that a specific order of preference is provided for in the Insolvency Act (ss 95–102). Specific provision (in section 99(1)*(c*A*)* and *(c*D*)*) is made for the preference that the claims in issue in this case are to enjoy in the event of insolvency. If the Commissioner is correct that an embargo is created against clearance for home consumption, unless duty and VAT are first paid, this will nullify the effect of the preference sections and especially s 99(1)(cA) and (cD). It will give the Commissioner a right to payment in preference to all other creditors, even though the Insolvency Act specifically confers on such claims a priority over the claims here in issue. The court stated that this is neither a sensible nor a realistic interpretation of the relevant statutory provisions (para [26]).

Decision (Theron JA and Lewis JA, Wallis JA, Petse JA and Dambuza JA concurring)

Section 47 of the Insolvency Act preserves the common-law position that a trustee must realise all the assets of an insolvent –

including those subject to a lien. There is nothing in either the Customs and Excise Act or the Insolvency Act which expressly (or by necessary implication) provides that goods subject to a lien in favour of the SARS does not fall to be dealt with under the laws of insolvency. As such, a trustee of an insolvent company is entitled to demand delivery of the insolvent company's property retained by the Commissioner. The appeal from the KwaZulu-Natal Division of the High Court, Durban (Annandale AJ) was dismissed with costs, including the costs of two counsel (paras [27] [28]).

Late Proof and Expunging of Claims in Winding-up

Section 44 of the Insolvency Act provides:

> (1) Any person or the representative of any person who has a liquidated claim against an insolvent estate, the cause of which arose before the sequestration of that estate, may, at any time before the final distribution of that estate in terms of section *one hundred and thirteen*, but subject to the provisions of section *one hundred and four*, prove that claim in the manner hereinafter provided: Provided that no claim shall be proved against an estate after the expiration of a period of three months as from the conclusion of the second meeting of creditors of the estate, except with leave of the Court or the Master, and on payment of such sum to cover the cost or any part thereof, occasioned by the late proof of the claim, as the Court or Master may direct.

Section 366 of the 1973 Companies Act reads:

> (1) In the winding-up of a company by the Court and by a creditors' voluntary winding up
>
> (a) the claims against the company shall be proved at a meeting of creditors *mutatis mutandis* in accordance with the provisions relating to the proof of claims against an insolvent estate under the law relating to insolvency;
>
> (b) a secured creditor shall be under the same obligation to set a value upon his security as if he were proving his claim against an insolvent estate under the law relating to insolvency, and the value of his vote shall be determined in the same manner as is prescribed under that law;
>
> (c) a secured creditor and the liquidator shall, where the company is unable to pay its debts, have the same right respectively to take over the security as a secured creditor and a trustee would have under the law relating to insolvency.
>
> (2) The Master may, on the application of the liquidator, fix a time or times within which creditors of the company are to prove their

claims or otherwise be excluded from the benefit of any distribution under any account lodged with the Master before those debts are proved.

Section 407 of the 1973 Companies Act provides:

(1) Any person having an interest in the company being wound up may, at any time before the confirmation of an account, lodge with the Master an objection to such account stating the reasons for the objection.
(2) If the Master is of opinion that any such objection ought to be sustained, he shall direct the liquidator to amend the account or give such other directions as he may think fit.
(3) If in respect of any account the Master is of the opinion that any improper charge has been made against the assets of a company or that the account is in any respect incorrect and should be amended, he may, whether or not any objection to the account has been lodged with him, direct the liquidator to amend the account, or he may give such other directions as he may think fit.
(4) . . .
(a) The liquidator or any person aggrieved by any direction of the Master under this section, or by the refusal of the Master to sustain an objection lodged thereunder, may within fourteen days after the date of the Master's direction and after notice to the liquidator apply to the Court for an order setting aside the Master's decision, and the Court may on any such application confirm the account in question or make such order as it thinks fit.
(b) If any such direction given by the Master under this section affects the interests of a person who has not lodged an objection with the Master, such account as amended shall again lie open for inspection in the manner and with the notice as prescribed in section 406, unless the person affected consents in writing to the immediate confirmation of the account.

In *Wishart NO & others v BHP Billiton Energy Coal South Africa (Pty) Ltd & others* 2017 (4) 152 (SCA), the court first indicated that even though the 1973 Companies Act was largely repealed when the Companies Act 71 of 2008 (the Companies Act) came into force in 2011, those provisions regulating the winding-up of insolvent companies remain in force (para [1]). The issue in this appeal was the interpretation of provisions of the 1973 Companies Act, read with those of the Insolvency Act, in relation to the late proof of claims and the expungement of claims in the winding-up of a company.

The fourth appellant (Penguin Mining & Plant) and the fifth appellant (Colt Mining) were the plaintiffs in the court *a quo.* They

had sought the High Court's leave under section 44(1) of the Insolvency Act, to prove a late claim in the winding-up of the second respondent and had claimed the expungement of a claim from the liquidation and distribution account. The Gauteng Local Division of the High Court upheld two exceptions to their particulars of claim, and the appellants then sought to appeal this decision. The court *a quo* gave leave to appeal. The first to third plaintiffs in the court *a quo* (trustees of a trust) abided by the decision of the court on appeal. There were several respondents involved, but only two played an active role. The first respondent, BHP Billiton Energy Coal SA (Billiton), submitted a claim to proof in the insolvent estate of the second respondent, Euro Coal (in liquidation) (Euro Coal). The other respondents who played no role were the liquidators of Euro Coal, the Master of the Gauteng Local Division, and the Companies and Intellectual Property Commission (para [2]).

The first exception

The appellants objected to the first liquidation and distribution account of Euro Coal, and sought leave to prove a late claim (respectively) in the winding-up of the company in terms of section 44(1) of the Insolvency Act (para [4]). The exception raised to this claim was that section 44(1) does not apply in the winding-up of a company; further, that section 366 of the 1973 Companies Act, governs proof of claims in a winding-up (para [5]).

To be able to find an answer, the court looked at section 339 of the 1973 Companies Act (para [5]), which provides:

> In the winding up of a company unable to pay its debts the provisions of the law relating to insolvency shall, insofar as they are applicable, be applied *mutatis mutandis* in respect of any matter not specially provided for by this Act.

The court explained that section 366(1) regulates the proof of claims in a winding-up, and section 366(2) gives the Master a discretion to fix a time within which creditors are to prove their claims (para [6]). On the other hand, section 44 of the Insolvency Act regulates proof of liquidated claims against an insolvent estate (para [7]).

The court referred to *Mayo NO & others v De Montlehu* 2016 (1) SA 36 (SCA), where it was held that section 44(1) of the Insolvency Act directs the time period within which claims can be lodged and a late claim be proved in a winding-up. In contrast,

section 366 governs the procedure for participating in a distribution in the liquidation of a company. There the court decided that these sections are complementary rather than mutually exclusive, and consequently section 44(1) is applicable to claims against a company's being wound up (para [9]).

On appeal, Billiton agreed that section 44(1) did apply to claims in a winding-up but argued that the ratio of the *De Montlehu* decision was limited to the time period and did not affect the rest of the proviso to section 44(1). That part of the proviso permits a late claim to be proved with the consent of the Master or the court (para [11]).

Nevertheless, the court agreed with the following principles laid down in *De Montlehu* (para [12]):

- A plain reading of section 366(2) does not affect the applicability of the three-month time period in section 44(1).
- In both instances (ss 44(1) and 366(2)) the lodging of claims needs momentum driven by the factor of time.
- In the absence of the fixing of a time period, there would be no formal time period within which creditors would be required to lodge and prove their claims.
- The risk of tardiness, if not inertia, would be ever present.
- This would not be in the interest of either the creditors or the general public.
- Section 44(1)'s three-month period for the proof of claims thus remains the standard in both sequestrations and liquidations.

Billiton argued that section 366(2) itself provides for a time limit in that the subsection expressly indicates that the Master may fix a time within which creditors are to prove their claims or otherwise be excluded. On its argument that the decision of this court in *De Montlehu* was confined to the application of only three aspects of section 44(1) – the time period; the fixing of costs; and the payment of costs by a creditor that submitted a claim after the three-month period had expired – the Supreme Court of Appeal agreed with the following principles (paras [13]–[15]):

- Section 366(2) relates to participation in a distribution under a particular account, and not to the late proof of claims in general (principle spelled out by the *De Montlehu* case).
- The predecessor to the 1973 Companies Act (s 179(2) of the Companies Act 46 of 1926) did not prevent a creditor from proving a claim after the date fixed by the Master (principle spelled out by *Trans-Drakensberg Bank Ltd & another v The*

Master, Pietermaritzburg & another 1966 (1) SA 821 (N)) (thus for a later account).

- The predecessor section did not exclude debts proved after the date from the benefit of the distribution (principle spelled out by *Trans-Drakensberg Bank* above).
- There was no discrepancy between section 44(1) of the Insolvency Act and section 366(2) of the 1973 Companies Act.
- The two sections concerned are practically dissimilar and have diverse aims.
- The aim of section 366(2) is to invalidate an attempt by a creditor to delay proving his or her claim until a lodged account shows that a distribution is to occur.
- The object of the proviso to section 44(1) is to warrant that the administration of the estate is concluded promptly (principles spelled out by the court *a quo* in *De Montlehu* and endorsed by the Supreme Court of Appeal in that case).

Accordingly, Lewis JA (Cachalia, Mathopo, and Mocumie JJA, with Makgoka AJA concurring) decided that the appeal against the order upholding the first exception must succeed.

Objecting to a liquidation and distribution account

The fourth and fifth appellants approached the court directly and requested, in addition, the expungement of a claim in the liquidation and distribution account (Billiton's claim in the winding-up). In the court *a quo* the respondents had again successfully excepted (paras [17] [19]). Therefore, the issue on appeal was whether a party could bypass section 407 of the 1973 Companies Act and approach a court directly to expunge a claim. Section 407 regulates who may object to the account and the procedure for doing so.

The respondents' objection was that the appellants' particulars disclosed no cause of action. A creditor must first object to the liquidation and distribution account at the Master. Only once the Master has made a decision, can that decision be reviewed by a court (para [18]).

The appellants' case relied on *Millman & another NNO v Pieterse & others* 1997 (1) SA 784 (C), held that the court has the jurisdiction to review a decision at common law and that section 151 of the Insolvency Act does not oust that jurisdiction. In paragraph [20] the court cited what was said in *Millman*: 'There is a strong presumption against the ouster or curtailment of the

Court's jurisdiction. . . The mere fact that the Legislature has created an extra-judicial remedy is not conclusive of the question whether the Court's power has been restricted' (788G–I). The reasoning was that as the Insolvency Act did not explicitly 'oust' the court's jurisdiction, it had the authority to reject the creditors' claims in an action brought by the liquidators (para [21]).

To the Supreme Court of Appeal, it was not clear, however, what power the court had that it regarded as having been ousted (para [21]). Referring to *The Master of the High Court (North Gauteng High Court, Pretoria) v Motala NO & others* 2012 (3) SA 325 (SCA) paragraph [5], it stated that 'insolvency administration is wholly a creature of statute'. Further, the different statutes regulating the insolvency of companies and individuals have always positioned the power to reject a claim on the Master. It is only once the Master decided, one way or another, that the court may review his or her decision (para [21]).

The respondents relied on *Standard Bank of South Africa v The Master of the High Court & others* 2010 (4) SA 405 (SCA) paragraph [93], where this court held that, before resorting to review proceedings in terms of section 151 of the Insolvency Act, a liquidator is obliged to follow the procedures set out in section 45 of the Act. That section is peremptory. The Supreme Court of Appeal then dissected section 45 and identified that it provides for the following (para [24]):

- To be delivered to the trustee:
  - every claim proved against an insolvent estate at a meeting of creditors
  - all documents supporting such claims.
- The trustee must examine all available books and documents to establish whether the estate owes the claimant the amount claimed.
- If a trustee disputes a claim after proof at a meeting he or she must report on this to the Master.
- He or she must then explain why the claim is disputed.
- The Master may
  - confirm the claim, or
  - after affording the claimant an opportunity to substantiate the claim, reduce or disallow it.
- It is this decision that triggers the review procedure under section 151 (para [25]).

The Supreme Court of Appeal remarked that the court's jurisdiction is not ousted: 'the trustee has first to comply with s 45

before a decision can be reviewed, but that hardly amounts to an ouster of jurisdiction, if ever the court had the power to expunge a claim' (para [26]). Further, the court cautioned that it should not be forgotten that a review under section 151 is one where the court has the powers of appeal and review, and can hear further evidence, and decide the matter *de novo*. The court indicated that *Millman* had not taken this aspect fully into consideration (para [26]).

It was the view of the court that the appellants should have invoked the procedures set out in section 407 of the 1973 Companies Act. The power to expunge a claim or to reduce it is conferred on the Master alone. Only when the Master has made a decision in this regard may an interested person approach a court to review it. The second exception had therefore been correctly upheld by the court *a quo* (para [27]).

Accordingly, the first exception to the particulars of claim was dismissed with costs. The appeal against the order upholding the second exception was dismissed with costs including those of two counsel (para [30]).

Suspension of Liquidation Proceedings when a Business Rescue Application is made

Section 131(6) of the Companies Act provides:

> If liquidation proceedings have already been commenced by or against the company at the time an application is made in terms of subsection (1), the application will suspend those liquidation proceedings until –
> *(a)* the court has adjudicated upon the application; or
> *(b)* the business rescue proceedings end, if the court makes the order applied for.

In *Standard Bank of South Africa Ltd v Gas 2 Liquids (Pty) Ltd* 2017 (2) SA 56 (GJ), the applicant Bank obtained a provisional liquidation order against Gas 2 Liquids (G) in October 2015. A provisional liquidator was appointed. On 29 February 2016 (the return date) the Bank sought a final liquidation order. However, at the end of argument G presented an application by a third party asking for business rescue proceedings to commence and placing G under supervision (para [2]). Ordinarily, this would suspend the liquidation proceedings. However, the Bank resisted the suspension. After it had been only partially argued, the proceedings were stood down. The court requested both parties to prepare written argument. The question was whether or not the

mere issuing, out of court, of the business rescue application was sufficient to suspend the liquidation proceedings (para [3]).

This business rescue application had been lodged with the court on the return day (29 February 2016). There was no indication of any service of this application on G, either on the company in liquidation or on the provisional liquidator who had been appointed in October 2015 (para [8]). The application was served on the Companies and Intellectual Property Commission (CIPC) only at 07h00 on the morning of 2 March 2016 – ie, after Satchwell J had heard the applicant argue the application for final liquidation, and after the application for business rescue had been presented to the court (on 29 February 2016) as a ground for suspending the liquidation proceedings (para [7]).

Satchwell J had to decide on the meaning and application of section 131(6) of the Companies Act, which provides that an application for an order placing a company under supervision and commencing business rescue proceedings will suspend those liquidation proceedings at the time that the business rescue application *is made* (para [1]). Especially relevant was the meaning of the word 'made' in section 136(6). G argued that the application was 'made' when it was lodged with the court, while the Bank's view was that for the application to have been 'made', it had to have been served on both the company (including the provisional liquidator) and the Commission, and all reasonable steps had to have been taken to identify affected persons and their addresses and to deliver the application to them (para [11]).

Intention to avoid liquidation

Paragraph [5] is important. The court pointed out, referring to *Investec Bank Ltd v Bruyns* 2012 (5) SA 430 (WCC) and *Blue Star Holdings (Pty) Ltd v West Coast Oyster Growers CC* 2013 (6) SA 540 (WCC), that there is always 'the possibility that a business rescue application might be used by an obstructive debtor intent on avoiding the obviously inevitable liquidation as part of its ongoing strategy to hinder a creditor from pursuing its lawfully permissible goal of procuring the liquidation of the debtor. It seems to me that these three matters which were attempted to be placed before me, of which I am dealing only with the *Gas 2 Liquids* liquidation, is one such case.' This fact obviously had an effect on the court's subsequent approach to the matter.

Affected persons and the rescue application

The court referred to section 131, in terms of which an affected person may apply to a court for an order commencing business

rescue proceedings. The applicant is obliged to serve a copy of the application on the company and the Companies and Intellectual Property Commission, and to notify each affected person of the application (para [6]).

In addition, regulation 124 (Company Regulations, 2011 (published under GN R351 in *GG* 34239 of 26 April 2011) necessitates a copy of the rescue application to be delivered 'to each affected person known to the applicant'. In paragraph [9] the court identified 'affected persons' in section 128(1)*(a)*(i), (ii) and (iii) as creditors of the company, shareholders, and any registered trade union representing employees, or each of the individual employees. The court then noted that in the case under discussion the third-party applicant in the business rescue proceedings was aware of at least six named creditors, 'other miscellaneous service providers', at least seven fulltime employees, and numerous consultants. Nevertheless, it appeared that emails with the application attached had been sent to some but not all of the creditors and employees (para [9]).

Making of the business rescue application in terms of section 131(6)

The respondent referred the court to *Blue Star Holdings (Pty) Ltd v West Coast Oyster Growers CC* 2013 (6) SA 540 (WCC) (para [13]). In that case it was found that 'made' must be given its ordinary meaning in the context in which it appears in the statutory setting. That court indicated that a functional approach to section 131(6) leads to the obvious conclusion that 'the lodging of the application with the registrar for the issue thereof constituted the making of the application and the commencement of proceedings to place the company under business rescue (as opposed to the commencement of business rescue *per se*)'. However, in paragraph [14] this court correctly distinguished that no application for provisional liquidation had been heard in *Blue Star*; no provisional order had been granted; and no provisional liquidator had been appointed.

The court also considered *Taboo Trading 232 (Pty) Ltd v Pro Wreck Scrap Metal CC & others* 2013 (6) SA 141 (KZP), which also considered when an application can be said to have been made for the purposes of section 131(6) of the Act. Again, the court drew a distinction between the facts in *Taboo Trading* and the case under discussion, and indicated, correctly, that in *Taboo Trading* no application for provisional liquidation had been heard; no provisional order granted; and no provisional liquidator appointed (para [16]).

In paragraph [17] the court examined *Absa Bank Ltd v Summer Lodge (Pty) Ltd* 2014 (3) SA 90 (GP), where it was held that 'the mere issue and service of a business rescue application in terms of section 131(1) of the Act would suspend the liquidation process'. In that case the judge required both issue *and* service for the business rescue application to trigger the suspension of the liquidation proceedings. In the present case there had been no service on either the company or the liquidator (para [18]).

The role of provisional liquidators

The application for business rescue had not been served on the company or the provisional liquidator. The court explained the role of liquidators (provisional and final) (para [8]):

- In certain instances the liquidator steps into the shoes of the company in that he or she 'is entrusted with the functions to control and administer the property and affairs of the company and to liquidate it'.
- The acts of the provisional liquidator are 'the acts of the company itself'.
- But, regarding certain of his or her statutory powers, the liquidator does not take the place of the company.
- The reason for this is that he or she may have certain duties to creditors which the former board of directors would not have had.

With regard to the duties of provisional liquidators, the court explained (para [22]) that they have:

- those powers statutorily granted to them;
- those which the Master may specially confer; and
- those powers which they are granted by the court.

These duties cover a wide range of activities, which may include:

- the carrying on of a business;
- the institution or defence of legal proceedings; and
- the sale (or even the acquisition) of assets.

In implementing these powers, the provisional liquidator:

- may operate banking accounts;
- receive and expend funds;
- remunerate employees;
- conclude contracts; and

- generally, carry out the duties of the directors of the company in liquidation.

The effect on the provisional liquidator and the company

The court correctly indicated that if it were to find that the lodging of papers at court and the issuing of a case number (ie, the mere issue of an application out of court) instantly interrupted and postponed the provisional liquidation, 'the impact upon the work of, status of and person of the provisional liquidator and the impact upon the company itself' would be matters of grave concern (para [21]):

> Where there is no service upon the provisional liquidator of the application for business rescue, the provisional liquidator may have absolutely no knowledge of that business rescue application. In fact, knowledge alone would be insufficient. The provisional liquidator is entitled to service in terms of s 131 of the Act. Absent such service, the provisional liquidator does not officially know that he or she is 'suspended' in his or her duties and powers, if such suspension of the liquidation proceedings were to eventuate solely by reason of lodgement of papers at court and issue of a case number (para [23]).

Absent service of the application on the provisional liquidator, he or she would be carrying out his or her duties in ignorance (para [24]). He or she would be acting without authority (and perhaps unlawfully) in a multiplicity of respects, a consequence which the legislature could not have intended (para [25]).

Ultimately, the court agreed with the views of Makgoba J in *Summer Lodge* and Hartzenberg AJ in *Taboo Trading* that there must be service and notification before it can be said that the business rescue application has been 'made' as required by section 131, and that the liquidation proceedings had been suspended. Therefore, the court concluded as follows:

(a) The launch of the business rescue application on 29 February 2016 did not suspend the liquidation proceedings; and
(b) the respondent was ordered to pay the costs of the opposed application (on Monday 29 February, and Wednesday 2 March 2016 (paras [26]–[28]).

INSURANCE LAW

DALEEN MILLARD*

LEGISLATION

AMENDMENTS TO THE LONG-TERM INSURANCE ACT 52 OF 1998 AND THE SHORT-TERM INSURANCE ACT 53 OF 1998

LONG-TERM INSURANCE ACT 52 OF 1998

The penalty determined for failure to furnish the Registrar with returns, information or documents for the purposes of section 68(1)*(a)* of the Act was published and Board Notice 4 *GG* 39718 of 19 February 2016 was repealed with effect from 28 February 2017 (Board Notice 14 *GG* 40637 of 24 February 2017 95).

Notice of the proposed replacement of the Policyholder Protection Rules was published for comment (Board Notice 153 *GG* 41089 of 1 September 2017 4).

The draft determination on 'equivalence of reward' was published for comment (Board Notice 181 *GG* 41237 of 10 November 2017 296).

The Replacement of the Policyholder Protection Rules was published (GN 1407 *GG* 41321 of 15 December 2017 109).

SHORT-TERM INSURANCE ACT 53 OF 1998

The Replacement of the Policyholder Protection Rules was published (GN 1433 *GG* 41329 of 15 December 2017 4).

The penalty determined for failure to furnish the Registrar with returns, information or documents for the purposes of section 66(1)*(a)* of the Act was published and Board Notice 3 *Government Gazette* 39718 of 19 February 2016 was repealed with effect from 28 February 2017 (Board Notice 13 *GG* 40637 of 24 February 2017 94).

INSURANCE LAWS AMENDMENT ACT 27 OF 2008

The date of commencement of sections 1*(f)* and 27*(a)* was set at 1 April 2017 (GN 298 *GG* 40749 of 30 March 2017 4).

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Sections 1(1) of the Long-term Insurance Act 52 of 1998 and 1(1) of the Short-term Insurance Act 53 of 1998 were amended.

Financial Services Laws general Amendment Act 45 of 2013

The date of commencement of section 264 (in so far as it amends s 1 of the Medical Schemes Act 131 of 1998) was set at 1 April 2017 (GN 298 *GG* 40749 of 30 March 2017 4).

Section 1 of the Medical Schemes Act 131 of 1998 was amended by substituting the definition of 'business of a medical scheme'.

Financial Advisory and Intermediary Services Act 37 of 2002

An amendment notice on the Determination of Recognised Qualifications for Financial Services Providers and Compliance Officers, 2017, was published (Board Notice 51 *GG* 40785 of 13 April 2017 188).

Financial Sector Regulation Act 9 of 2017

The Act was published in *GG* 41060 of 22 August 2017 but the date of its commencement is to be proclaimed. It is an essential part of the legislation that will pave the way for the twin-peaks system of financial regulation. As a result, it effects essential changes to a variety of statutes and repeals those statutes that regulated the pre-twin-peaks dispensation.

The Act repeals the Financial Services Board Act 97 of 1990; the Policy Board for Financial Services and Regulation Act 141 of 1993; the Inspection of Financial Institutions Act 80 of 1998; and the Financial Services Ombud Schemes Act 37 of 2004.

It further amends, inserts or repeals sections in the following Acts:

* *Insolvency Act 24 of 1936*: sections 35A and 83 are amended.
* *Pension Funds Act 24 of 1956*: sections 1, 2, 18, 19, 26, 30C, 30Q–30T, 36 and 37 and the arrangement of sections are amended; sections 1A, 1B, 30AA are inserted; sections 3, 25, 33, 33A and 34 are repealed; and section 30D is substituted.
* *Friendly Societies Act 25 of 1956*: sections 1, 3, 33, 47–48 and the arrangement of sections are amended; sections 1A and 1B are inserted; sections 4, 32, 44–45 are repealed; and the word 'Authority' is substituted for the word 'Registrar', wherever it occurs.

* *South African Reserve Bank Act 90 of 1989*: sections 3 and 10–12 are amended.
* *Banks Act 94 of 1990*: sections 1, 4–6, 23, 52, 69A, 84, 90–91 and the arrangement of sections are amended; section 1A is inserted; sections 3, 8–10, and 91A are repealed; and the word 'Authority' is substituted for the word 'Registrar', wherever it occurs.
* *Financial Supervision of the Road Accident Fund Act 8 of 1993*: section 1 is amended.
* *Mutual Banks Act 124 of 1993:* sections 1, 3, 4, 21, 91–92 and the arrangement of sections are amended; section 1A is inserted; and sections 2, 6–8 are repealed.
* *Long-term Insurance Act 52 of 1998:* sections 1, 4, 9–11, 22, 26, 62, 66–67, Schedule 1, and the arrangement of sections are amended; sections 1A and 1B are inserted; sections 5 and 68 are repealed; and section 2 is substituted.
* *Short-term Insurance Act 53 of 1998:* sections 1, 4, 9–11, 21, 25, 55, 65, Schedules 1 and 3, and the arrangement of sections are amended; sections 1A and 1B are inserted; sections 5 and 66 are repealed; and section 2 is substituted.
* *Financial Institutions (Protection of Funds) Act 28 of 2001:* sections 1 and 5 are amended and sections 4A, 6, 6A-6I, 7, 9 and 9A are amended.
* *Financial Intelligence Centre Act 38 of 2001:* section 45E is amended.
* *Financial Advisory and Intermediary Services Act 37 of 2002:* sections 1, 3, 4, 6A, 8, 9, 13, 20–23, 35 and 45, and the arrangement of sections are amended; sections 1A, 1B and 20A are inserted; sections 2, 14A, 26, 32, 41 and 44 are repealed; and sections 6, 14 and 39 are substituted.
* *Collective Investment Schemes Control Act 45 of 2002:* sections 1, 15, 15A, 63, 66, 99, 112, 114 and 115 and the arrangement of sections are amended; sections 1A and 1B are inserted; sections 7, 14, 15B, 18, 22–24 are repealed.
* *Co-operative Banks Act 40 of 2007:* sections 1, 2, 4, 5, 44, 48–49, 55 and 57 and the arrangement of sections are amended; sections 1A and 1B and Chapter VIIA (ss 40A-40F) are inserted; sections 41, 43, 75 and 76 are repealed; and sections 3, 45–47, 50, 77–79, 82, 85 and 87, the word 'Authority' for the word 'supervisor', wherever it occurs, and the long title are substituted.
* *Financial Markets Act 19 of 2012:* sections 1, 3–12, 17, 25, 27–30, 33, 35–36, 39, 47–51, 53–58, 60–67, 71, 74–78, 82, 90, 91,

96, 98, 105, 108–110 and the arrangement of sections are amended; the heading preceding section 99 is deleted; sections 1A, 6A–6C, 49A and 56A are inserted; sections 86, 95, 97 and 99 are repealed; and sections 52, 59, 69, 83–85, 88 and 94, the long title and the headings preceding sections 47, 50 and 94, and of Chapter VIII, and the word 'Authority' for the word 'registrar', wherever it occurs, except in s 1 (1) and 1A (1), are substituted.
* *Credit Rating Services Act 24 of 2012:* sections 1, 5, 23, 24 and 34 and the arrangement of sections are amended; sections 1A and 1B are inserted; and sections 21, 22, 25, 26, 27, 28, 30, 31 and 33 are repealed.

Financial Sector Regulation Act 9 of 2017

The draft regulations in terms of sections 61(4) and 304 of the Financial Sector Regulation Act, 2017, are published for public comment (GN R1449 *GG* 41340 of 18 December 2017 4).

CASE LAW

Joinders in Insurance Claims

Generally speaking, joinders serve to ensure that all parties to a dispute are before the court and that litigants can ensure that a case does not run its course without the benefit of the evidence and participation of a key role player. The Uniform Rules of Court provide detailed rules on how joinders are to be effected. Rule 10(1) states as follows:

> Any number of persons, each of whom has a claim, whether jointly, jointly and severally, separately or in the alternative, may join as plaintiffs in one action against the same defendant or defendants against whom any one or more of such persons proposing to join as plaintiffs would, if he brought a separate action, be entitled to bring such action, provided that the right to relief of the persons proposing to join as plaintiffs depends upon the determination of substantially the same question of law or fact which, if separate actions were instituted, would arise on each action, and provided that there may be a joinder conditionally upon the claim of any other plaintiff failing.

In insurance litigation, it is customary for the insurance company and the policyholder to be parties to litigation. However, where insurers, agents, underwriters, and other role players are involved in insurance contracts, instances may arise where it is not quite so clear who the actual insurer is. This is particularly true where agents or underwriters fail to make a full disclosure during

the negotiations running up to the litigation. This was the issue in *Huyser v Quicksure (Pty) Ltd & another* [2017] ZAGPPHC 2, [2017] 2 All SA 209 (GP), 2017 (4) SA 546 (GP).

The applicant (and plaintiff in the main action), Huyser, entered into a written agreement with the first respondent (defendant in the main action) in terms of which the first respondent undertook to insure the applicant's motor vehicle. One of the risks insured against was accidental loss of or damage caused to the vehicle. The risk materialised when the applicant was involved in a motor vehicle accident on 1 October 2010. At the time, the value of the motor vehicle was R630 000. There was no doubt that the policy was valid at the time of the accident, and the plaintiff gave due notice of the loss. Despite all other obligations in terms of the policy having been met, the defendant refused to pay (para [6]). In addition to these crisp facts, the policy was a 'lengthy affair in fine print' 'Quicksure Personal Insurance Policy' (para [7]). The heading is followed by this text:

> Issued and administered by Quicksure (Pty) Ltd, an authorised Financial Services Provider (FSP number 16902), on behalf of the insurance companies named in the schedule which forms part of this policy. We agree to provide insurance in terms of this policy during any period for which a premium has been paid. The proposal and declaration made by you are the basis of and form part of this policy (para [8]).

There was no schedule attached to the policy, but the definition section did provide that 'we/us the insurer' referred to the insurance company named in the schedule. Each of the seventeen pages of the contract contained a logo consisting of a large Q, followed by the name 'Quicksure' (para [10]). On 8 February 2013, following the plaintiff's summons, the defendant (first respondent) entered an appearance to defend and the plea was served on the plaintiff's attorney on 20 March 2013. It is paragraph 3 of the plea which prompted the applicant to launch the application that forms the basis of this case. It stipulates:

> The Defendant denies that it entered into a written agreement with the Plaintiff as alleged or at all. The Defendant denies that it undertook to insure Plaintiff's motor vehicle being a 2010 Toyota Landrover Prado 3.0VX with registration number ZHJ [. . .] GP against the risks mentioned in the contract, one of them being accidental loss of . . . or damages caused to the vehicle. At all material times hereto the Defendant and its agents acted as insurance administrators on behalf of New National Assurance Co Ltd (registration number 1971/10190/03).

The rest of the plea consists of bare denials and, in the final paragraph, an admission by the defendant/first respondent that it refused to make any payment to the plaintiff (para [12]).

On 17 October 2013 the applicant launched the current application to join the second respondent, New National Assurance Co Ltd, as a defendant in the action, and for all costs in the application to be reserved. This application was served on the second respondent on 27 November 2013 (para [14]). The applicant's motivation in joining the second respondent was that 'the second respondent has a direct and substantial interest in the subject matter of the action and the determination of the dispute involves substantially the same question of law and fact as against the first respondent' (para [15]). This is a direct result of the first respondent's (defendant's) plea that it merely acted as 'insurance administrators' on behalf of the second respondent. The applicant had no knowledge of the identity of the second respondent until the first repondent's plea was served on 20 March 2013 (para [16]). Importantly, paragraph [7] of the founding affidavit states as follows:

> 7.1 It is essential to join the second respondent as second defendant in the main action as the second respondent has a direct and substantial interest in the subject matter of the action and the determination of the dispute involves substantially the same issues of law and fact as against the first respondent.
> 7.2 In light of the aforementioned it would be convenient as well as cost effective, were the second respondent to be joined in the main action.
> 7.3 I respectfully state that to refuse this application would substantially prejudice the applicant/plaintiff and that to grant it could not cause any prejudice to the respondents in any manner.
> 7.4 I accordingly request the Honourable Court that an order be granted as set out in the Notice of Motion' (para [17]).

In February, the manager of the second respondent's legal department opposed the action on the basis that the applicant's claim 'has already prescribed and it will serve no purpose to join the second respondent as second defendant in the action' (para [19]). In support he argued that the applicant's Toyota Prado had been included in the insurance contract in May 2010, some months before the accident occurred. As the damage to the motor vehicle occurred on 1 October 2010, it prescribed on 30 September 2013 under section 11*(d)* of the Prescription Act 68 of 1969.

In addition, the second respondent rejected the applicant's allegation that he had been unaware of the identity of the debtor until the plea was served on his attorney, as unfounded as the applicant had allegedly been aware of the second respondent's identity much earlier. It was also alleged that the applicant could have established the debtor's identity from Quicksure (the first respondent) in view of the reference in the Quicksure policy to insurance companies listed in the schedule. Among other things, the second respondent relied on a letter from Quicksure addressed to the applicant purportedly enclosing the Policy Schedule, which was also attached to the answering affidavit. This letter bears the Quicksure logo but does not refer to the second respondent under the heading 'Quicksure welcomes you'. This certificate of insurance contains a reference, in very fine print, which reads 'Underwritten by New National Assurance Co Ltd'. Other than this, there is no clear reference in the policy to the second respondent being the insurer. Also attached as an annexure to the answering affidavit was the 2010 amendment to the policy schedule containing wording identical to the other schedule under the same heading. The court noted that the replying affidavit was dated February 2016, two years after the answering affidavit, but offered no explanation for the delay (para [25]). The court further noted the lengthy process preceding the court proceedings, during which numerous complaints were made to the insurance ombudsman, again without mention of the involvement of the second respondent. The applicant's replying affidavit was, therefore, correct in that the only issue in dispute was whether the claim against the second respondent had prescribed. However, the applicant confirmed that the first time he became aware of the 'legal nexus' between himself and the second respondent was when the plea was received on 20 March 2013. Before then there was no correspondence with the second respondent that could have led the first respondent to believe that there was any connection whatsoever. As he became aware of the 'legal nexus' between himself and the second respondent on or around 20 March 2013, the current application had been launched within the three-year period after he became aware of the identity of the particular debtor. The claim could, therefore, not have prescribed (para [27]). In stating this, the applicant relied on section 11*(d)* of the Prescription Act, which provides that, save where an Act of Parliament provides otherwise, the period of prescription shall be three years. In addition, section 12(3) is also relevant. It provides:

> A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.

The crisp issue was, therefore, whether the claim against the second respondent had prescribed, which would preclude the second respondent from being joined in the action.

Counsel for the second respondent made three concessions. First, that the applicant's allegation that he had no knowledge of the second respondent's identity as a debtor until receipt of the latter's plea on 20 March 2013 was correct. Second, the argument in the answering affidavit, that the applicant could have established the identity of the second respondent as a debtor at an earlier stage by making enquiries with the first respondent, was abandoned; and third, it was accepted that the allegations in the replying affidavit, that the applicant never received the documents referred to in the answering affidavit, were correct.

In deciding the matter, Prinsloo J considered the second defendant's argument that prescription started running on 20 March 2013, when the plea was received. Three years later – on 19 March 2016 – the claim prescribed in accordance with section 11*(d)* of the Act. The matter was only heard on 25 July 2016, which was indeed after the three-year period had expired. In addition, the fact that the joinder application had been served in November 2013 did not assist the applicant in that service of the joinder did not interrupt the running of prescription under section 15(1) of the Act (para [29]).

Prinsloo J referred to section 15, headed 'Judicial interruption of prescription', which reads as follows:

> (1) The running of prescription shall, subject to the provisions of subsection (2), be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt.
> (2) Unless the debtor acknowledges liability, the interruption of prescription in terms of subsection (1) shall lapse, and the running of prescription shall not be deemed to have been interrupted, if the creditor does not successfully prosecute his claim under the process in question to final judgment or if he does so prosecute his claim but abandons the judgment or the judgment is set aside.
> (3) If the running of prescription is interrupted as contemplated in subsection (1) and the debtor acknowledges liability, and the creditor does not prosecute his claim to final judgment, prescription shall commence to run afresh from the day on which the debtor acknowledges liability or, if at the time when the debtor

acknowledges liability or at any time thereafter the parties postpone the due date of the debt, from the day upon which the debt again becomes due.

(4) If the running of prescription is interrupted as contemplated in subsection (1) and the creditor successfully prosecutes his claim under the process in question to final judgment and the interruption does not lapse in terms of subsection (2), prescription shall commence to run afresh on the day on which the judgment of the court becomes executable.

(5) If any person is joined as a defendant on his own application, the process whereby the creditor claims payment of the debt shall be deemed to have been served on such person on the date of such joinder.

(6) For the purposes of this section, 'process' includes a petition, a notice of motion, a rule *nisi*, a pleading in reconvention, a third party notice referred to in any rule of court, and any document whereby legal proceedings are commenced.

The applicant's argument revolved around section 12(3) of the Act, which stipulates that a debt shall not be deemed due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises. This means that, in the spirit of this provision, the debt only became due when the answering affidavit was filed in February 2014 as no details or documentation was conveyed to the applicant before then. She argued that, if the issue were to be ventilated before a court by means of evidence, such a conclusion could well be reached. That would lead to a finding that the three-year period would only run its course by February 2017. The judge made no pronouncement on this argument and stated that evidence could well be led at a later stage (if the matter went to trial) as to whether the 'proverbial penny dropped on 20 March 2013 when the plea was filed' (para [31]).

In dealing with whether the institution of the joinder application interrupted prescription, the judge referred to several authorities: notably *Cape Town Municipality v Allianz Insurance Co Ltd* 1990 (1) SA 311 (C); *Naidoo v Lane* 1997 (2) SA 913 (D); *Waverley Blankets Ltd v Shoprite Checkers (Pty) Ltd* 2002 (4) SA 166 (C); and *Peter Taylor and Associates v Bell Estates (Pty) Ltd* 2014 (2) SA 312 (SCA). The latter was the case on which the second defendant relied in arguing that the joinder application did not interrupt prescription.

Prinsloo J pointed out that in the first of these cases, *Allianz Insurance,* the defendant argued that for judicial interruption of prescription to have occurred, the process served upon it by the

plaintiffs would have to have been one whereby payment of the debt was *claimed.* However, as the plaintiffs had not claimed money but a *declaratory* order, the summons in question had not been one for 'payment of the debt' within the meaning of section 15(1) of the Act, and prescription had not been interrupted. The court dismissed the special pleas with costs and stated that section 15 should be given 'a wide and general meaning, consistent with a legislative intention to speak broadly rather than to define, and having regard to the spirit, scope and purpose of the Act' (334G–335B). This led the court to conclude that it 'is sufficient for the purposes of interrupting prescription if the process to be served is one whereby the proceedings begun thereunder are instituted as a step in the enforcement of a claim for payment of the debt'. The particular case also states that when interpreting the Prescription Act, it should be considered that there is 'a discernible looseness of language' when compared to the predecessor of the Act, the Prescription Act 18 of 1943 (330C-J) (para [36]).

Prinsloo J further considered *Naidoo v Lane* (above), where it was common cause that in the case of each of the plaintiffs the debt, for purposes of the Prescription Act, became due on 23 July 1992 and prescribed at midnight on 22 July 1995. It was argued on behalf of the plaintiffs that service on 24 January 1995 of the application to join the Minister of Safety and Security as second defendant *in casu* was in fact a process as prescribed by section 15(1) of the Act. This was based on the argument that by its reference to 'debt' in the Act, the legislature intended 'to refer to the obligation co-relative to the particular right of the creditor concerned, whether such obligation be one to pay money or to perform some act'. Prinsloo J stated that reference in section 15(1) of the Prescription Act to a process whereby the creditor 'claims payment of the debt' denotes 'a process by which the creditor purported to enforce the right co-relative to such obligation'. This means that the application in question should in fact have been recognised as a process for purposes of section 15(1). Prinsloo J distinguished the application in *Naidoo* (where the court held that service of an application for joinder did not interrupt prescription) from the straightforward joinder of the second defendant *in casu* and pursued this line of reasoning by submitting that the distinction between Naidoo's application and a simple joinder application was also recognised in *Waverley Blankets* (above), where it was held that a joinder application

indeed interrupted prescription. Prinsloo J quoted from *Waverley Blankets* 174E–I:

> In *Naidoo and Another v Lane and Another* 1997 (2) SA 913 (D) it was held that service of an application for joinder did not interrupt prescription. Meskin J held that it was not 'process whereby the creditor claims payment of the debt' in terms of section 15. I respectfully disagree. In that case the applicant sought leave to join. Leave was granted and directions were given for implementing the joinder. In the present matter the plaintiff sought joinder, and the order of the court, granted by consent, was that the second defendant be joined in the action. No directions were given. On this narrow and technical basis it is possible to distinguish *Naidoo*'s case. But my disagreement is more fundamental than that. The notice of motion seeking joinder was undoubtedly 'process', see section 15(6). It can also be regarded as a 'document whereby legal proceedings [were] commenced' against the second defendant (para [53]).

Prinsloo J proceeded to endorse the view in *Waverley Blankets* that Howie J in *Cape Allianz* (above) was correct in ruling (at 334H) that '[i]t is sufficient for the purposes of interrupting prescription if the process to be served is one whereby the proceedings begun thereunder are instituted as a step in the enforcement of a claim for payment of the debt'. The judge was at pains to stress that the present application is a 'straightforward application for joinder of the second respondent as a second defendant in the action' (para [41]). He relied on *SA Steel Equipment Co (Pty) Ltd v Lurelk (Pty) Ltd* 1951 (4) SA 167 (T), where the plaintiff was not certain who should be held liable for his damages. Overall, a joinder application is a 'process' in the spirit of section 15(6) of the Act (para [41])

More specifically, Prinsloo J stated that the process of joinder was served on the second respondent 'only months after the commencement of the running of the three-year prescription period in March 2013'. As it is a process aimed at joining the second respondent as a co-defendant in the trial, it would have led to interruption of prescription. If this were not the case, the plaintiff should in fact have served a fresh summons on the second defendant instead of filing a joinder application. Therefore, while the fresh summons would have interrupted prescription, the joinder application would not have had the same effect. The judge reiterated that the joinder application did not solve issues of liability but merely ensured that the correct parties were joined in the action (para [43]).

Finally, the court referred to *Peter Taylor and Associates v Bell Estates* (above). Prinsloo J summarised that the causes of action

against the two proposed defendants were quite different, as the cause of action against the insurer was for indemnification in terms of an insurance contract between the insured and the first defendant, while the claim against the broker (Peter Taylor) was for damages on the ground that he had failed to advise his client properly. Prinsloo J pointed out that this had also been the case in *Naidoo*.

However, in the present case, the causes of action are identical – indemnification based on the same contract of insurance – and the only question is the identity of the real insurer. Prinsloo J correctly remarked that this was a matter that must be resolved by evidence. On this basis, the case of *Bell Estates* (above) can be distinguished from the present case and is similar to *Waverley Blankets* (above). Therefore, the joinder in *Bell Estates* was correctly said not to be a 'process' for purposes of the Prescription Act. Prinsloo J also distinguished *Bell Estates* from the present matter, as the joinder application did not 'finally dispose' of some elements of the claim. Clearly, in the present matter the joinder simply brought the correct parties to court without commenting on the liability of any one of them. In matters such as *Naidoo* and *Bell Estates,* where the insurer and an intermediary are actors vis-à-vis a policyholder, it may be possible to determine liability at joinder stage. In fact, the party to be joined will specifically argue against such joinder with reference to contractual liability (para [53]).

It follows that as the present case is distinguishable from the *Bell Estates* case, the joinder had the effect of interrupting prescription as it can be seen as a process within the wide and general meaning of section 15 of the Prescription Act. Prinsloo J concluded that 'it would be appropriate, and in the interests of justice, to grant the joinder application in the present matter'(para [54]). Due to the complexity of the matter, the judge further ordered that the costs of the application should be costs in the cause (para [55]).

The present matter is complex indeed. In fact, the difference between joining a defendant in an action where the causes of action are similar or dissimilar goes to the very essence of liability of the respective parties and the detailed development of case law is described with conviction. It is submitted that the decision is correct and fair.

The fairness of joining the second defendant is an aspect that deserves further discussion. It is noted with some concern that

the information given to the policyholder was in fact such that no reasonable policyholder would immediately have known that Quicksure was not in fact the insurer, or at the very least not the only party who was capable of being sued. The way in which the policy, and the subsequent correspondence, was presented does not do much to enhance transparency. This, coupled with Quicksure's subsequent shenanigans before the Ombudsman for Short-term Insurance, creates the impression that both Quicksure and New National Assurance Co Ltd relied on the policyholder's confusion to avoid being sued. In the absence of any information pointing to any alternative grounds for avoiding the action, it is clear that both the respondents used delaying tactics to avoid settling a claim that should have been paid. It is suggested that the Policyholder Protection Rules should include rules on transparency that stipulate, very clearly, who the parties to an agreement are. Further, where any policies are 'issued and administered' by someone other than the insurer, that administrator has a duty at claim stage to disclose to the policyholder the identity of any insurer on whose behalf it issues or administers policies. Although it can perhaps be argued that insurers and administrators are no different from other litigants, and that a proper interpretation of the stipulations of the Prescription Act aided the plaintiff/applicant *in casu*, it remains alarming that insurers (and their administrators) still conduct themselves in so deplorable a way.

Claims for Specific Performance in Insurance Contracts

In insurance, the aim of the contract is for the insurer to carry the risk in return for payment of a premium (*Lake v Reinsurance Corporation Ltd* 1967 (3) SA 124 (W)). Failure by either party to perform in terms of the contract is breach of contract, which entitles the aggrieved party to an action to enforce the contract (*Walker v Santam Ltd* 2009 (6) SA 224 (SCA)). The reciprocal nature of the insurance contract and claims for specific performance is highlighted in *Mashele v Momentum Insurance & another* [2017] ZAGPJHC 33, 2 March 2017.

The rather uncontentious facts of this case were that the applicant and the first respondent entered into a contract of insurance on 2 September 2014, in terms of which the first respondent undertook to provide short-term insurance to the applicant for indemnity in the event of the loss of or damage to the

vehicle. The applicant and the second respondent were involved in a motor vehicle accident on 16 November 2014, and the first respondent determined that it was uneconomical to have the vehicle repaired. Despite the fact that all premiums were up to date, the first respondent repudiated the claim, and the main aim of the present application was to compel the first respondent to perform in terms of the insurance contract. The relief sought against the second respondent in the alternative depended on the court refusing the main relief (para [1]).

Although, at first glance, the matter deals with procedural issues, it is submitted that it has important implications for insurance claims for reasons that will be highlighted below. But first, the arguments before the court: the first respondent argued that the matter should have proceeded to court as an action since there was a dispute of fact. Overall, the first respondent's affidavit was 'very scanty' (para [2]). Ratshibvumo AJ remarked that the replying affidavit consisted mainly of denials and this was not helped by the two-page-long heads of argument. It was this abrupt response by the respondent that prompted the court to remark that 'not every bare denial constitutes a dispute of fact' (para [3]). The court, before it can conclude that there is a dispute of fact warranting oral evidence, must be convinced that there is a real, genuine, or bona fide dispute, and that the dispute is one that cannot be decided on the papers (ibid). Here, the court relied on *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) 634H–635A and *Miele et Cie GmbH & Co v Euro Electrical (Pty) Ltd & another* 1988 (2) SA 583 (A).

It emerged from the parties' affidavits that the first respondent's affidavit contained an assessor's report which formed the basis for the repudiation of the specific claim. This report was compiled by one 'Etienne'. It appears that the applicant was asked for information pertaining to 'beacons and billings; consent letter to obtain the police, hospital and tracker records; contact details of people to confirm his movements prior to the accident; PQ for the Nokia phone he bought at Edgars after the accident . . . and copies of his bank statement' (para [4]). The applicant was not told why he needed to provide the information and he in fact declined to provide the information as he felt that it was an invasion of his privacy (ibid). In addition, the assessor was given the details of the applicant's brother who collected him from the accident scene, but could not make contact with him. The assessor did have access to the police's accident report, and this

enabled him to confirm that the car was towed by one 'Johnny' and that the accident was caused by the other driver, a lady who confirmed that the accident had been her fault (ibid).

It appears that there was an amount of discomfort around the alleged presence of a lady in the applicant's car as she was listed as a passenger in the police report. When questioned by the assessor, she denied that she was a passenger and stated that she was taken to the scene afterwards. Despite the admission of guilt from the other driver, and the fact that the premiums were up to date, the claim was repudiated on the basis of the applicant's failure to comply with a reasonable request. He, however, received no repudiation letter (para [6]).

The applicant also attached the details of the police accident report, together with sketches, a charge sheet, and an admission of guilt, and a copy of the charge sheet that shows that the second respondent appeared in court several times before she paid an admission of guilt fine for reckless driving (para [7].

In light of these facts, the court stated that 'there is no real, genuine or *bona fide* dispute of fact on whether the applicant was involved in a collision. In the alternative, should it be that there is, such dispute is one that can easily be determined on filed papers.' This means that the only remaining dispute was whether there had in fact been non-compliance with a reasonable request to furnish further information. It appears that after his initial refusal to provide further information, the applicant had a change of heart and did in fact comply with the first respondent's reasonable request. He furnished a signed affidavit on a Vodacom letterhead in which he gave permission to Vodacom to make all the information on his cell phone available, a letter directed to Tracker in which he gave permission to make the tracking information available, and his ABSA bank statements in which he indicated that he had bought a cell phone from Edgars stores (para [9]).

Following this, the first respondent acknowledged receipt of these documents in an e-mail and confirmed that they had identified the discrepancies which they needed to clarify and that they would meet with the applicant in person. These discrepancies were never explained and the respondents did not elaborate on them in their replying affidavit (para [13].

The question *in casu* is whether the *alleged* dispute of fact is about whether there had been a collision in which the car was damaged beyond repair, and whether the applicant had com-

plied with his obligations (other than the payment of his premiums) in terms of the contract (para [4]).

In canvassing whether there was a dispute of fact as to the applicant's non-compliance, the court remarked that it is unclear why bank statements were in fact requested and it appears that the first respondent was in fact looking for a reason to repudiate the claim. Unfortunately, counsel for the first respondent remarked that there was a possible misrepresentation in that the applicant had alleged that he was alone in the vehicle, while the police accident report suggested that he was accompanied by a passenger. This reliance on misrepresentation took the court on a lengthy and seriously misguided discussion of the legal position in South Africa regarding misrepresentation in insurance.

Misrepresentation is a pre-contractual statement that is false or misleading and occurs during the pre-contractual phase, and which is material to the risk (MFB Reinecke, JP van Niekerk and PM Nienaber *South African Insurance Law* (2013) 134–5). The court quoted section 53(1)*(a)* of the Short-term Insurance Act 53 of 1998, but erroneously referred to it as section 1 of the Act (para [14]). Ratshibvumo AJ then embarked on a lengthy discussion of misrepresentation that hailed back to the Insurance Act 27 of 1943, and referred, among other things, to *Qilingele v South African Mutual Life Assurance Society* 1993 (1) SA 69 (A), only to state that these authorities were merely cited to illustrate that the first repondent's preoccupation with the applicant's *initial* failure to provide information, which had since been provided, was a 'non-issue' (para [17]).

The court proceeded to state that this was clearly a contractual claim and the policy document made it clear that when a claim was lodged, the insurer could take measures to ensure that damage was not incurred in circumstances which would have been excluded by the agreement. In doing so, a reasonable request could have been made to the policyholder to assist with information (para [21]). The contract further stipulated that the insurer had the duty to ensure the market value, pay the credit provider, and if there is a surplus, pay that amount to the applicant. The relevant clause in the policy was as follows:

> Our responsibilities:
> We have the choice to settle your claim in any of the following ways:
> - Paying out cash to you,
> - Repairing the damage at the repairer of our choice,
> - Replacing the item at a supplier of our choice,

> • Any combination of the above.
>
> Where any item claimed for is financed, we will first pay the finance company. Where a claim is settled for lost or damaged items, these items become ours.
>
> If we elect to repair, we will only do so up to the maximum insured value noted on your schedule for the specific section you are claiming under.
>
> The Insured Value
> The insured value noted on your schedule is the maximum amount we will pay in the event of a claim, less the excess and any dual insurance, betterment or any depreciation.
>
> If the vehicle is financed, we will first pay the outstanding settlement amount to the finance company up to the maximum amount of the insured value, excluding
> • Any early settlement penalties,
> • Additional finance charges,
> • Any arrear instalments and interest.
>
> We will pay you the difference if the settlement amount is less than the insured value, less the applicable excess and the charges stated above.
>
> The insured value of your vehicle and its accessories is determined by the Auto Dealers' Guide . . . . (para [20])

The court concluded as follows:

> [F]rom the Net Assess document compiled by the first respondent and filed by the applicant, the value is reflected as R405 000.00. I am not sure if this is the insured value or not. I have noted that the applicant's counsel indicated that the applicant accepts the value determined by the first respondent. The relief sought by the applicant confuses this acceptance in that R455 576.73 is claimed from the first respondent. This appears to be the closing balance owed to Mercedes Benz Financial Services as of 29 February 2016. A further R113 263.85 is claimed as a reimbursement and there is no basis laid for this. The order for specific performance sought requires that the first respondent complies with the contract entered into with the applicant, and the order shall be in those terms (para [22]).

The court therefore ordered the first respondent to determine the insured value of the car in accordance with the insurance contract. In addition, the first respondent was ordered to pay the amount of the insured value (less the necessary and agreed charges) to Mercedes Benz Financial Services within 30 days of the order and to pay the balance, if any, into the applicant's account. Finally, the first applicant was ordered to 'hand over, deliver or make available the damaged motor vehicle (insured property) in the condition it was after the collision within 15 days of this order, failing which, the first respondent would be entitled

to deduct its value as per assessment report from the insured value' (para [23]). The first respondent was ordered to pay the costs of the application.

It is submitted that most insurance claims involve some form of factual dispute. It is the duty of the insured to 'bring his claim within the four corners of the promise made to him' (*Eagle Star Insurance Co Ltd v Willey* 1956 (1) SA 330 (A) 334B) and this inevitably means that, apart from the fact that the risk must have materialised and the premiums must be up to date, it is also of paramount importance to prove that all conditions have been complied with. If the policyholder can prove this, the claim against the insurer is one for specific performance (*Walker v Santam Ltd* 2009 (6) SA 224 (SCA)).

It is further customary for insurers to investigate the circumstances that gave rise to the materialisation of the risk and, in instances such as the present one, an insurance company would have been well within its rights to repudiate a claim where the vehicle in question was, for example, not roadworthy (as this might have constituted breach of warranty), or where there was in fact a pre-contractual misrepresentation that materially affected the risk, as was explained in this judgment. In the latter instance, an example of a material misrepresentation would have been that the policyholder had never been in an accident while the opposite had in fact been the case. On the actual claims process and the furnishing of information, Reinecke et al *Insurance Law* 357, remark as follows:

> Arguably the often technical reliance by insurers on the breach of terms regulating the claims process, especially in cases where the insured acted reasonably and is blameless, provides good examples of the need for reform in this area of the law. The need for such reform to alleviate the harsh consequences of forfeiture of the insurance benefits in the event of non-compliance with terms regulating the claims procedure has been commented on judicially.

It does seem that this particular case is a typical instance where the insurer did not follow a transparent process in handling the claim. Where there was no specific reason for repudiating (save perhaps the hunch of a well-paid assessor) there was clearly no reason for the insurer simply to withhold its performance.

This brings us to the next important point that was made, namely, that in the absence of a *factual dispute* there is nothing that prevents a matter from proceeding by way of notice of motion. This is in fact confirmed by cases such as *Plascon-Evans*

Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A), and has been followed in several others. (See *Burnkloof Caterers Ltd v Horseshoe Caterers Ltd* 1976 (2) SA 930 (A) 938A–B; *Tamarillo (Pty) Ltd v B Aitken (Pty) Ltd* 1982 (1) SA 398 (A) 430–431; and *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd & andere* 1982 (3) SA 893 (A) 923G–924D.) As the court has rightly stated, mere denial by the respondent of a fact or facts does not create a factual dispute (*Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) 1163–65 and *Da Mata v Otto NO* 1972 (3) SA 858 (A) 882D–H).

The plaintiff's entitlement to specific performance in such instances can, therefore, be granted unless it becomes evident that there is a factual dispute, or if the parties could have anticipated that a factual dispute would develop. Specific performance as a contractual remedy is always available to contract parties (*Farmers' Co-op Society (Reg) v Berry* 1912 AD 343 350) and is to be distinguished from a claim for breach of contract (*Gibson's Ltd v Woodhead Plant Ltd* 1918 AD 308). In the latter instance a claim for damages is instituted as opposed to a claim for specific performance.

In claims for specific performance, the court always has an option to exercise its discretion against the granting of specific performance (*Shill v Milner* 1937 AD 101 106–7; *Baragwanath v Olifants Asbestos Co (Pty) Ltd* 1951 (3) SA 222 (T) at 227–8; *Thompson v Van der Vyver* 1954 (2) SA 192 (C) 194F). It is submitted that it is this discretion, together with the fact that a factual dispute might develop, that should guide litigants to opt for action proceedings instead of motion proceedings when bringing a matter to court.

Overall it is submitted that save for the obvious mistakes in the particular judgment, it is a case where there was clearly no dispute of fact. The insurer's foolhardy refusal to pay the claim (of which the *quantum* was easily determinable) is baffling. Were there valid reasons for such refusal, the replying affidavit failed to bring these to the court's attention. It is therefore submitted that the case again illustrates that there is a clear lack of fairness in the way in which insurance companies handle claims. Reforms are necessary, and it is hoped that the introduction of new and improved policyholder protection rules will in fact curtail arbitrary repudiations such as the one in question.

Offer and Acceptance in Insurance

In *Nkungwini v Old Mutual Assurance Co SA Ltd* [2017] ZAECMHC 10 (17 May 2017), one of the very fundamental issues in law of contract: offer and acceptance, formed the essence of the dispute.

The case is an appeal against the judgment of the magistrate for the district of Mthatha. The magistrate upheld the special plea of jurisdiction raised against the appellant's claim and dismissed the claim with costs. Consequently, the main ground of appeal was that the magistrate erred in finding that the cause of action had not arisen within the jurisdiction of the court *a quo* (para [1]).

In addition, in his amended particulars of claim, the appellant sued the respondent for R51 523,16, the amount being a refund of premiums deducted from the appellant's personal banking account (para [2]). It appears that the appellant attempted to enter into a written agreement for an insurance policy in favour of his sister, Nonesi Nkungwini. The appellant paid monthly premiums until the death of the insured. As the risk insured against had materialised, he lodged a death claim with Old Mutual (para [3]).

As no payment was forthcoming, he pursued the matter and Old Mutual disclosed the policy contract. It transpired that, in terms of the contract, the insured was one Nomanesi Nkungwini, someone he did not know at all (para [4]). In addition, the contract showed that Nomanesi Nkungwini's late sister was the policyholder, and that the appellant was a sponsor of sorts whose signature did not appear on the contract. The appellant therefore averred that the documents had been fraudulently altered by the employees of the respondent. Furthermore, he alleged that the contract was void *ab initio*, which meant that he was entitled to a full refund of the premiums paid with interest (para [5]).

The respondent's special plea raised the issue of jurisdiction, after having initially attempted (albeit unsuccessfully) to join the unknown Nomanesi (para [6]). The respondent persisted in its stance that its principal place of business is Pinelands, Cape Town, which means that the contract was entered into in Pinelands, Cape Town. In addition, the respondent maintained that the contracting party was not the appellant but his late sister, and in support of this, the unsigned document was annexed. The document fails to state where the contract was entered into and as the appellant was not the nominated beneficiary, the respondent had no obligation to pay (para [7]).

The crisp question before the court was whether the magistrate in the court *a quo* erred in finding that the court lacked jurisdiction.

In answering the question, Majiki J, with whom Jolwana AJ concurred, referred to section 28(1)*(d)* of the Magistrates' Courts Act 32 of 1944, which provides as follows:

> (1) Saving any other jurisdiction assigned to a court by this Act or by any other law, the persons in respect of whom the court shall, subject to subsection (1A), have jurisdiction shall be the following and no other: . . .
> *(d)* any person, whether or not he or she resides, carries on business or is employed within the district or regional division, if the cause of action arose wholly within the district . . . .

The magistrate found that the appellant had not alleged that the entire cause of action arose within the jurisdiction of that court. According to Majiki J, this was incorrect, as paragraph 15 of the particulars of claim averrred that 'the cause of action (fraudulent misrepresentation) arose within its area of jurisdiction'(para [8]).

According to the judge, the magistrate did quote the applicable case law when referring to *Ndlovu v Santam Ltd* ([2005] ZASCA 41 (13 May 2005)), where Mthiyane JA stated:

> In my view the starting point of the enquiry, when dealing with a challenge to jurisdiction under s 28(1)*(d)* of the Act, is to determine the presence or absence of facts which have to be proved by the plaintiff to succeed in his or her cause of action (*facta probanda*) as opposed to facts tending to prove such *facta probanda* (*facta probantia*). Thereafter one has to establish whether *facta probanda* arose wholly within the particular magisterial district (para [11]).

The magistrate evaluated the submission on behalf of the appellant that the contract was void *ab initio,* and in the absence of a contract, his claim was based on fraudulent misrepresentation. The magistrate found that the plaintiff had failed to aver where the misrepresentation had been initiated and concluded and that there were no averments supporting fraudulent misrepresentation as a cause of action. The judge did not deem it necessary to address further findings of the magistrate with regard to the necessity of a prayer by the appellant to rescind the contract (para [12]).

The attorney for the respondent argued that there was in fact a contract but finally conceded that the document disclosed by the respondent did not meet the requirements for a valid contract. Majiki J's reason for finding it invalid was that 'it is not signed by the contracting parties'. The judge also mentioned that there was no indication that the contract had been concluded in Pinelands, Cape Town, 'as the respondent would have wanted us to believe' (para [13]).

The judge deduced that in the absence of a valid contract, 'we have to accept Mr Vutula's submission that the appellant's claim is that of repayment of monies the appellant paid' (para [14]). The judge further stated that the appellant's entitlement to a refund was therefore based not on contract, but on the fact that there was no contract. The following is a verbatim quote from the judgment:

> He [the appellant] did not even require to allege misrepresentation, alteration or fraud. These are merely what he must have suspected happened, which he would not be able to prove in any case.

What this means is not clear. Nevertheless, the judge states that the necessary averments are contained in the particulars of claim.

> On 6 September 2006, in Mthatha he (sought to insure the life of his sister) and entered into an insurance contract. The contract is void *ab initio*. He is entitled to the refund of all monies deducted from his bank account in terms of that invalid contract. It is common cause that the deductions were made from his personal bank account, also held in Mthatha (ibid).

This was, according to the judge, the crux of the matter, which meant that the magistrate was wrong in ruling that the required *facta probanda,* as was held in *Ndlovu,* were absent (para [15]). All the facts which the appellant would have to prove at trial to succeed in his cause of action were present. This means, according to the judge, that the court *a quo* had jurisdiction and the appeal succeeded. The respondent was ordered to pay the costs of the appeal.

The issue *in casu* was clearly whether there was in fact a valid contract between Old Mutual and the appellant, and the strange facts appear to imply that there was a misunderstanding from the outset as to the identity of the parties. It appears that the appellant intended to insure his sister's life, which means that the contract was supposed to be between himself and Old Mutual. It is in fact possible to enter into a contract insuring the life of another. As the law currently stands,

> [t]he life insured is the object of the insurance on whose life the contract hinges. The life insured, not being the policyholder, is not a party to the contract. He has no rights and no obligations under the policy (PM Nienaber & MFB Reinecke *Life Insurance in South Africa* (2009) 195).

It is also true that the life insured does not have to give the policyholder permission to insure his or her life (Nienaber &

Reinecke 196). It stands to reason that it can be extremely problematic, as the safety of the life insured can be threatened by a policyholder who has less than pure motives. Furthermore, a person's life may only be insured by someone who has an interest in the non-occurrence of the event insured against (ibid). For instance, a husband has an interest in the longevity of his wife, or partners in that of each other. Whether siblings have such an interest is an open question, and that was not in fact part of the present dilemma. What is evident is that the appellant had every intention of insuring his sister's life.

As far as jurisdiction is concerned, the court had to determine the exact cause of action, namely, whether there was a contract between the parties, or whether there had been fraudulent misrepresentation. There appears to be an absence of information on exactly how the contract came into existence. In insurance, policies are sold either via an intermediary or by direct marketing. Conventional wisdom has it that insurance contracts come into existence through offer and acceptance. Reinecke et al hold that 'an ''offer'' is a declaration of intention stating the terms upon which the person making it (the offeror) is prepared to contract with the person to whom he has addressed his offer (the offeree)'. In order to constitute an offer, the declaration must contain sufficient and clear particulars to 'enable the offeree to conclude an agreement with a determinable content by simply accepting the offer' (Reinecke et al *Insurance Law* 96). That means that the offer must, for instance, state the nature of the cover required, the object to be insured, and the period of cover (ibid). Another important aspect is that in insurance contracts, the law normally does not prescribe formalities such as writing, and a valid insurance contract will, in fact, come into existence when the insurance company accepts the proposer's (prospective insurer's) offer (ibid). In theory, the same principles apply to so-called 'telesales' where offers and acceptances take place orally (ibid). Unfortunately, there was no information as to how the sale took place, and this all-important aspect was presumably not argued before the court.

In the absence of such evidence it is also not possible to establish the time and place when the particular contract came into existence. For contracts in general, and insurance contracts in particular, a contract comes into existence when and where the offeror learns of the acceptance (Reinecke et al *Insurance Law* 103). That means that in the case under discussion, the appellant

would have learned of the acceptance of the contract where he was situated at the time, which was, in the absence of facts to the contrary, Mthatha. This refutes the argument by Old Mutual regarding jurisdiction.

Whether there was in fact a contract is, however, the second issue. It is evident, from the policy scrutinised by the court, that the life insured was in fact someone other than the appellant's deceased sister. This means that there was no consensus on the exact nature of the contract and, in the absence of consensus, it is clear that that the basis for reclaiming the monies paid would be something other than contract. In the circumstances it stands to reason that the court relied on the fact that the payment was made *sine causa* and should be refunded to the appellant.

Proof of Loss in Insurance

So-called claim-stage fairness is an aspect that has been neglected in insurance. It must be stated at the outset that in as much as policyholders are entitled to insurers who apply their minds, insurers are also entitled to receive the correct information, and where policyholders act in a way that is less than honest, this is to the detriment of the entire insurance pool and should not be tolerated. In *Cohen v Mutual and Federal Insurance Company Ltd* ([2017] ZAGPJHC 231 (18 August 2017)) this fine balance became abundantly clear.

The straightforward facts of the matter were that the plaintiff, Ms Cohen, instituted a claim against the defendant in terms of an insurance policy held with them for an amount of R497 973, which represented the value of jewellery that was stolen from her flat on 4 June 2012 (para [1]). According to the plaintiff, on 5 July 2012 she discovered that her jewellery was missing. As the only witness in the case, she testified that the jewellery had been stolen by three plumbers who allegedly worked in her flat on 4 and 5 June 2012 (para [2]). The three plumbers, all three from MT Water Wise Plumbing, denied having stolen the jewellery (para [3]). The defendant called an independent loss adjustor, Ms Harmse, and a member of the defendant's internal special investigation unit, Mr Meyer, to testify to alleged contradictory statements by the plaintiff (para [5]).

The plaintiff, a widow, resided in two-bedroomed flat with a partner. She occupied one bedroom, and her partner the other. The room used by her partner had two metal boxes bolted to the

floor inside the cupboard. One of these boxes contained documents (the blue one) and the other one cash and jewellery. These boxes were locked and the plaintiff kept the keys in one of the wardrobes in her room. The wardrobes were locked with padlocks and she kept these keys on her person (para [6]).

The plumbers were employed to install a shower and washbasin in her bedroom and to do so, they laid water pipes from the bathroom along the passage and into ther bedroom. Ms Cohen was there when the work was carried out, but she did not supervise the plumbers (para [7]). On the first day of the work the plaintiff had to buy certain components required for the job. She went out to buy these and locked the plumbers out of the flat (para [8]).

Later in June 2012, the plaintiff decided to update her insurance on her jewellery under her policy with Mutual & Federal, and to this end obtained a quotation from Charles Greig Jewellers. The certification of valuation stated that the valuation was updated 'using a previous valuation certificate', which means that the jewellery itself was not seen. The plaintiff sent the valuation to her brokers with a request to update the policy. The brokers issued an updated policy schedule with effect from 25 June 2012, increasing the value of some items and adding new ones that were not insured before (para [9]).

On 5 July 2012, the plaintiff opened the black box to take out some cash, only to discover that the cash and all the jewellery were missing. She reported the theft to the Bramley police station on 6 July 2012. In her affidavit she accused the plumbers of the theft (para [11]). The police compiled an affidavit based on a hand-written statement by the plaintiff and both her statement and affidavit indicated that the plumbers worked at her flat on 28 June 2012 and not on 4 and 5 June, which was actually the case (para [12]). The plaintiff reported the loss to her brokers on 6 July 2012 and she completed a claim form on 16 July, together with the handwritten statement (para [13]).

The defendant appointed Ms Harmse as assessor together with Mr Francis, assisted by Mr Meyer. There were four interviews with the plaintiff on 20 July, 5 August, and 4 December 2012, and 10 January 2013 (para [14]). The defendant's claims department interrogated queries about the plaintiff's loss and these were addressed in a letter to the plaintiff on 14 December 2012, to which she responded on 21 December 2012. Mr Francis's report was dated 25 January 2013, and the defendant rejected the

claim on 1 February 2013, after which Ms Harmse reported to the defendant on 4 February 2013 (para [16]). The two matters for decision were whether the jewellery had in fact been stolen, and whether the plaintiff's claim was subject to certain limitations.

The first issue was the theft of the jewellery. According to Trengove AJ, the plaintiff consistently blamed the plumbers for the loss and made a case against them. Her affidavit and statement related that on 28 June 2012 the plumbers came to install the shower and wash basin, and when they started working, she locked her wardrobe but lost one set of keys that she could not find again. Her account implied that the plumbers must have found the lost key to her wardrobe. The tale continues that the plumbers left rubble in the other bedroom where they must have seen the security boxes. She further claimed to have seen one of the plumbers talking quietly in the other bedroom, after which he put something in the back of his truck and left (ibid).

This accusation was repeated in the claim form dated 16 July 2012, in her interviews with Harmse, Francis, and Meyer, and again in her evidence at the trial. This, despite the fact that there were also electricians and other tradesmen in the flat during that time (para [20]).

Trengove AJ stated that the main inconsistency in the plaintiff's evidence was the date erroneously given as 28 June 2012 and not 4 and 5 June. This could not be explained under oath. One explanation was that she could not in fact remember the date, despite the fact that she had reiterated the date to the insurers as 28 June 2012 and went as far as to furnish an affidavit from her partner, Standton, confirming that the plumbers had been at her home on 28 June 2012 (para [22]). These conflicting versions point to the fact that the plaintiff's error as regards the date could not have been a true and honest mistake. The plaintiff's motive for the mistake, according to the court, was that she was under-insured on 4 June 2012 before she updated her insurance on 25 June 2012 (para [24]).

Another issue that reflected badly on the plaintiff's credibility was the fact that she confused the colours of the two boxes, first stating to Harmse and Meyer that the jewellery was taken from the blue box, but later alleging that it had in fact been taken from the black box (para [26]). When pressed, the plaintiff did not explain why she contradicted herself and merely stated that she had been mistaken (para [26]).

The court also canvassed the issue of the plaintiff's lost keys and summarised the account of the plumbers discovering a lost key in the garden and figuring out that it belonged to the wardrobe as implausible (para [34]). The plaintiff's explanation of the black box did indeed describe how she discovered the broken box and then used her keys to unlock it, only to find the jewellery had been taken (para [35]). The plaintiff even produced a seriously damaged box in court, demonstrating that it was so damaged that it took two men to open it (para [36]). The court stated that even though that may be the case, the box was allegedly not as damaged when Harmse photographed it on 20 July 2012. Trengove AJ conceded that Harmse's picture of the box was of 'such poor quality' that the court could not attach any weight to it as evidence proving the state of the box on 20 July (para [37]).

Trengove AJ also stated that the plaintiff's evidence could not be accepted, as the damage (however severe) must have been apparent to her when she first laid eyes on the box. This would then not have necessitated the use of keys at all. On this third aspect of the evidence it is also clear that the plaintiff's evidence was 'inconsistent and fanciful' (para [38]).

Regarding the plaintiff's demeanour, the court observed that the plaintiff was a poor witness who seemed 'incapable or unwilling' to respond directly to questions put to her (para [40]).

Two of the plumbers testified. The court heard from Messrs Sibanda and Dube that they did not set foot in the second bedroom, had never seen the boxes, and had not taken anything from them (para [42]). Sibanda further testified that he did not have the opportunity to steal anything from the plaintiff as she sat in the kitchen and watched them all the time. Dube confirmed this, and the two witnesses were found credible by the court (paras [43] [44]). The court also remarked that the two plumbers had been vindicated by the police as the fingerprints on the black box did not match theirs (para [46]).

Overall, the court found that the plaintiff had not discharged the onus of proving that her jewellery had been stolen and dismissed the action with costs (para [48].

The second issue, whether the claim was subject to certain limitations, needed no discussion as there was no valid claim in the absence of theft.

Although the term is not used in so many words, it does appear that the plaintiff instituted a fraudulent claim. Due to lack of a

statutory definition of insurance fraud, the common-law concept of insurance fraud refers to three kinds of deceitful behavior: fabricated claims; fraudulently exaggerated claims; and valid claims accompanied by fraudulent means (Reinecke et al *Insurance Law* 375–7). The plaintiff's behaviour *in casu* is an example of a fabricated claim in that she had attempted to obtain a benefit for a claim that never arose. This instance may be distinguished from the case of *Harikasun v New National Assurance Company Limited* ((190/2008) [2013] ZAKZDHC 67 (12 December 2013), where there was in fact a valid claim, but it was accompanied by fraudulent means (D Millard (2014) 17 *Juta's Insurance L Bul* 23–31; D Millard '*PK Harikasun v New National Assurance Company Ltd* (unreported case High Court, KwaZulu Natal no 190/2008 (12 December 2013): Of red herrings, sardines, and insurance fraud: Something's fishy!' 2016 *De Jure* 155–67).

As far as the burden of proof is concerned, it is clear that the plaintiff had to prove that the loss had in fact occurred. The evidence suggests that she was unable to do so, which led to the rejection of the claim. The present case may be distinguished from *Renasa Insurance Company Limited v Watson* ((32/2014) [2016], ZASCA 13 (11 March 2016)), where the plaintiff was able to show that the risk had in fact materialised (a fire), and that there had been resultant loss (damage to property as a result of the fire). Following this, the claim was rejected and the insurance company alleged that the plaintiff had acted fraudulently by setting fire to the building. As the insurance company could not prove arson, and therefore fraud, the court stipulated that the plaintiff should be compensated (D Millard (2016) 19 *Juta's Insurance L Bul* 21ff). The present case, however, clearly required the plaintiff to prove that she had in fact incurred a loss upon the realisation of an insured risk (theft). As she was incapable of doing so on a balance of probabilities, the claim could not succeed.

It is submitted that the case was decided correctly.

Misrepresentation in Insurance Law

Misrepresentation is one of the most prevalent issues in insurance law and is the subject of frequent litigation. It refers to pre-contractual misrepresentation of facts that affect the assumptions upon which insurers take on specific risks. As such, a misrepresentation is essentially a statement of fact which is false

or misleading. It constitutes wrongful conduct and is therefore delictual in nature (Reinecke et al *Insurance Law* 134).

In *Absa Idirect Ltd v Valoyi* [2017] ZAGPPHC 601 (22 August 2017), misrepresentation was again up for discussion.

The present case is an appeal against the decision of Kubushi J in the Gauteng Local Division, Pretoria, handed down on 12 June 2014 (D Millard (2014) 17 *Juta's Insurance L Bul* 55–60). The uncontested facts were that the plaintiff (respondent *in casu*) based his claim on the defendant's (appellant's) alleged breach of an insurance contract. The appellant repudiated his claim and failed to compensate him in the amount of R297 990, the value of the cover over his motor vehicle.

More specifically, on 13 July 2010 the parties entered into a written insurance agreement for cover in respect of the respondent's BMW 525i motor vehicle. The motor vehicle was insured for R297 990. The respondent further alleged that he had complied with the terms of the agreement which required him to pay monthly premiums of R2 112,98. The motor vehicle was involved in an accident and damaged beyond repair. In the proceedings before the court *a quo*, the appellant pleaded that it was the respondent who had breached the terms of the insurance agreement because he had failed to disclose to the appellant that his previous insurance policy in respect of a BMW 330i motor vehicle had been cancelled as his previous insurer had found that the respondent presented an unacceptably high risk. In addition, the appellant also alleged that the respondent had breached the terms of the agreement by misrepresenting to the appellant that his previous policy had not come into being as a result of his high insurance risk profile.

According to the appellant, the non-disclosure and the misrepresentation by the respondent were material in that they had a direct bearing on the risk assessment in respect of the respondent's motor vehicle. Accordingly, had the respondent disclosed the fact that his previous insurer had cancelled his policy due to an unacceptable risk, the appellant would not have entered into the insurance contract with the respondent on the terms it had. For this reason, the appellant was entitled to repudiate the claim. The court *a quo* ruled in favour of the respondent, stating that it accepted the respondent's (Valoyi's) version that when entering into the contract, he did disclose that his previous insurer did not wish to insure his vehicle because he was a 'high risk'. He also stated that he did not know what this meant, but informed the

appellant's agent that they were welcome to contact the previous insurer to find out what they meant by 'high risk'. On the basis of the two telephone conversations where the 'high risk' was canvassed with the respondent, the court *a quo* ruled that there were no facts within the respondent's knowledge at the time of the conclusion of the contract that had not been disclosed to the appellant, as it was quite clear that the respondent regarded 'high risk' and 'unacceptable risk' as synonymous. On appeal, the legal question remained unchanged: whether the respondent had breached the terms of the insurance contract by failing to disclose to the appellant a material fact, namely, that his previous insurance policy had been cancelled by a previous insurer as a result of the respondent presenting an unacceptably high risk (para [6]).

Louw J, for the full court, considered the transcript presented to the court *a quo* as part of the respondent's evidence in chief. From this transcript it was evident that the respondent's previous insurance company, Auto and General, had not in fact cancelled the respondent's previous insurance policy, and did pay out for the loss of the hijacked vehicle. Auto and General was not prepared to insure the BMW 525 which the respondent wanted to purchase to replace the hijacked vehicle (para [10]).

The court considered the respondent's testimony under cross examination and pointed out that it was clear that the respondent did not understand why his previous insurer was in the process of paying him out for his stolen BMW 330i, but was not prepared to insure the BMW 525 he intended to purchase. He, therefore, had not misrepresented any facts to the appellant and had, in fact, indicated that the appellant's representative could contact his previous insurer to fill in the blanks (para [11]). The court furthermore evaluated the evidence of the other witnesses as to whether the insurance with Auto and General had in fact been cancelled. The court was in agreement with the findings of the court *a quo* that on the facts, the policy with Auto and General had not been cancelled, but had terminated upon their payment to the respondent (para [17]). This means that the respondent could not have misrepresented facts regarding the cancellation of a policy which had not been cancelled in the first place.

The court reiterated that in its judgment the court *a quo* had asked whether the respondent had 'failed to disclose what was in his knowledge at the time he concluded the agreement with the appellant' (para [20]). On the facts, the court agreed with the

court *a quo* that on the basis of the telephone conversations with the respondent, 'high risk' and 'unacceptable risk' meant the same to the respondent, and that he had not, in fact, failed to disclose any material facts to the appellant. The respondent had also not misrepresented any facts to the appellant (ibid).

Based on the above, the appeal was dismissed with costs.

It is trite law that the duty to disclose is a pre-contractual one, which is why breach of this duty amounts to the delict of misrepresentation and not to breach of contract (Reinecke et al *Insurance Law* 144–5; see also the writers' reference to *Pereira v Marine & Trade Insurance Co Ltd* 1975 (4) SA 745 (A) 755; *Rabinowitz v Ned-Equity Insurance Co Ltd* 1980 (1) SA 403 (W) 407–8; *Pillay v SA National Life Assurance Co Ltd* 1991 (1) SA 363 (D) 145 n89). This means that the insured acts by disclosing the wrong information or by failing to disclose material information. Where there is in fact a misrepresentation, this wrongful and culpable act causes the insurer to act to his detriment. This is because the insurer would not have contracted on the terms it did, or at all, but for the misrepresentation.

It is submitted that insurance companies should stop hiding behind the doctrine of disclosure where they have sufficient information at their disposal to undertake a simple investigation. In a sense, the ruling on appeal vindicates this view as it echoes the judgment of the court *a quo* that it is evident from the transcript that the respondent had not attempted to hide any information, and that the appellant could easily have established the reason for Auto and General not being keen to insure the respondent's new BMW. If insurance companies employed the same vigour in establishing facts before entering into contracts as they do when finding reasons to repudiate claims, fewer disputes would reach the High Court.

Premium Determinations

In what is in all respects a novel case, *Flemming v MMI Group* ([2017] ZAGPPHC 650 (2 October 2017)) examined how insurance companies determine premiums.

This particular case came before the court as an application. In the founding affidavit, the applicant (Flemming) sought a declaratory order from the court with the following terms: that three of the applicant's policies each contained a number of tacit terms, each compelling the respondent to disclose to the applicant how the increase in premium was calculated and who decided on these

terms; that Momentum did not have the right to increase the premium unless this duty to disclose had in fact been observed; that Momentum had no right to increase the premium for as long as there was no disclosure; and that Momentum would not have the right to impose any further premium increases after the date of the court order.

The notice of motion on the disclosure was very detailed. It asked the court to compel Momentum not only to disclose information, but also to indicate which facts and considerations were taken into account in deciding the premium increase and the amount of the increase; how Momentum arrived at the facts and the decisions the weight and numerical value attached to each fact; what methods and reasoning were used; how these numerical weights and values were put together; how and why each fact and consideration differed from the characteristics of the same considerations at the inception of the policies; and who decided, and on which grounds, to impose an increase in the premiums (para [1]). The notice of motion was in Afrikaans, and the translation was somewhat complicated, but even so, the notice of motion seems overly repetitive and drafted with a view to confuse.

Be that as it may, the gist of the applicant's case was that he relied on certain implied or tacit terms that should be read into the insurance contract (para [3]). The respondent's case was that the applicant did not make a proper case for the inclusion of these 'implied/tacit' terms in the contract, with the result that the application should fail.

In a somewhat roundabout way, Rautenbach AJ stated that the issue to be decided was whether the applicant may rely on the incorporation of certain 'implied/tacit' terms (para [9]). The judge, in an interesting turn of events, also stated that 'the enquiry does not end here' and that the court would also have to consider 'whether in terms of the General law of Contract [or] the Common Law, the development of the Common Law through the Constitution and other factors that may be present' would allow the court to grant relief to the applicant (ibid).

This second consideration was incorporated into the dispute in reliance upon *Du Toit obo Dikeni v Road Accident Fund* 2016 (1) SA 367 (FB), where the court made the following observation:

> The object of pleading is to define the issues so as to enable the other party to know what case he has to meet. The parties are, therefore, limited to their pleadings: a pleader cannot be allowed to direct the attention of the other party to one issue, and then at the trial attempt to

> canvass another. However, since pleadings are made for the court . . . it is the duty of the court to determine what are the real issues between the parties and, provided no possible prejudice can be caused to either party, to decide the case on these real issues . . . . The general principle is that the parties will be held to the issues pleaded unless there has been a full investigation of the matter falling outside the pleadings . . . . (para [43]).

In considering the matter at hand, the court first considered the insurance contract. Various provisions were quoted but the most important clause was the one dealing with premium reviews. The relevant clause stipulated that premiums would be reviewed on a regular basis to ensure that they covered the costs of all benefits. The contract proceeded to stipulate that if the premium was insufficient to cover the benefits, the policyholder would be required to increase the premium so as to ensure that the benefits would be payable. The contract further stated that the policyholder was not obliged to pay the premium, but if he did not pay it, benefits would cease at the end of the guaranteed period. In addition, failure to pay these benefits would have an influence on the investment account which meant that the policyholder would not have a cash value on the policy for a considerable period of time (para [20]). The judge remarked that the only interpretation of this part of the insurance contract was that at the end of the guarantee period of ten years, the respondent may review the premium and increase it. The applicant's failure to pay any premium whatsoever would lead to the termination of death benefits (para [21]).

On 23 October 2015 the respondent wrote to the applicant about a review that was due on 1 February 2016 that would affect his capital protector. As regards one of the three policies in particular, the applicant was informed that he had four options with regard to the increased premium, and if he selected any one of these, the guarantee period would be extended by a further ten years (para [24]). The review simply meant that the applicant faced paying double his premium on the particular policy to which the letter referred, as well as on the other two policies (para [26]).

Correspondence ensued between the applicant and the respondent and the issue from the outset was the factors that were taken into account when the premiums were calculated. The court did not discuss the correspondence any further, but drew attention to the respondent's answering affidavit in which the following is stated:

> Each insurance company adopts its own unique methodology in this regard, and the market will determine whether it conducts its business efficiently. The actuarial methods used are determined by qualified actuaries with many years of technical studies and experience. Premium determination constitutes a discretionary decision by the insurer concerned (para [28]).

The court explained that the legal position is clear: a contractual party is allowed to determine the performance in terms of the contract, and the insurance contract in question did exactly that (para [32]). The court further stated that the respondent did not rely on an unfettered discretion. Rather, the respondent relied on the fact that various factors were taken into account when exercising the discretion to increase the premiums. If a contractual, discretionary power was 'clearly intended to be completely unfettered, an exercise of such a discretion must be made *arbitrio bono viri*' (para [33]. To exercise this discretion not arbitrarily but in good faith and reasonably is, in other words, the test, and according to the court, the real issue was therefore the actual discretion exercised by the respondent. As a result, it was not necessary to determine whether the relief sought by the applicant could be established by imposing an implied and/or tacit term (para [35]).

In determining whether the respondent exercised its discretion in a way that is *arbitrio bono viri*, it had to be borne in mind that each case is different and that all contracts are governed by good faith (para [37]). In this regard, the court referred to *NBS Boland Bank Ltd v One Berg River Drive CC; Deeb v Absa Bank Ltd; Friedman v Standard Bank of SA Ltd* 1999 (4) SA 928 (SCA).

Having decided that the question was actually whether the respondent had exercised its discretion in good faith, the court next stated:

> When the Applicant was initially expected to make an election as to whether he would purchase the product of the Respondent or any other product, he knew exactly what he was in for, for at least the next ten years. The question arises as to whether the Applicant could have expected to be fully informed of how his premiums would be affected when the review period arises ten years on. I am of the view that when the time came when the Respondent exercised its discretion in relation to the increasing of the premium, there was at least a tacit term to the effect that he would be properly informed as to how the Respondent arrived at calculating the new premium. If I am wrong in this regard, I have to take into account to what extent the Constitution and Constitutional values apply to Private Law (para [38]).

This appears to be an about-turn from the initial statement that the actual legal question related to whether the discretion had been exercised freely. The court then referred to *Uniting Reformed Church, De Doorns v President of the Republic of South Africa* 2013 (5) SA 205 (WCC). This reference appears unrelated to the issue at hand as the *Uniting Reformed Church* case dealt with competing interests which should be borne in mind 'in consideration of the fairness of provisions of a lease' in paragraphs [32] and [34] (para [39]). Following on this reference, the court remarked:

> Although individuals should be left free to conclude contracts, the role of the Courts was not merely to enforce contracts but there is a public policy consideration which recognises that all persons have the right to seek judicial redress and that the role of the Court is not merely to enforce contracts but also to ensure that the minimum degree of fairness, which will include consideration of the relevant positions of the contracting parties as well (para [40]).

According to Rautenbach AJ, the court was faced with an individual and an insurance company, and the insurance company had exclusive knowledge of the reasons for increasing the insurance premium. This meant that 'as a matter of public policy, an insurance company with the absence of a contractual provision to the contrary, is entitled to increase its premiums without any explanation regarding the calculation of such increase' (para [42]).

The court referred to *Juglal NO v Shoprite Checkers (Pty) Ltd t/a OK Franchise Division* 2004 (5) SA 248 (SCA), where the court stated as follows:

> What the learned judge of appeal appears to have said is that a contractual provision may not itself run counter to public policy but that the implementation may be so objectionable that it is sufficiently oppressive, unconscionable or immoral to constitute a breach of public policy in which case public policy can be invoked in justification of a refusal to enforce such a provision (paras [12] [13]).

The next reference reverted to the determination of performance. The court quoted *Erasmus v Senwes Ltd* 2006 (3) SA 529 (T) to support the view that there is no objection to a contractual clause conferring a right on one of the parties to determine its own performance, provided that 'it is subject [to] an objective standard and thus fettered' (para [44]).

The court concluded that as the insurance contract itself made provision for an increase in premiums, this was not in fact an

unfettered discretion. Surprisingly, the court concluded that the applicant was entitled to some relief, this being limited to the prayers pertaining to the disclosure of the facts, figures, and information that informed the decision to increase the premiums. However, this would not mean that the premium may not be increased 'unless all of the information has been made available to the Applicant'. This meant that further monetary claims would depend on the outcome of the information disclosed (para [49]). It seems that the judgment oscillates between assisting the applicant on some extra-contractual basis, while at the same time assisting the respondent based on its contractual rights, by concluding that the respondent owed the applicant 'some answers especially in respect of the information he required in respect of prayer 4.1' (para [50]). By way of explanation, the court stated as follows:

> Should the Respondent make available the data and calculations as required by the Applicant, it will at least guide the Applicant as to whether the increase in his premiums were properly considered and based on rational and actuarial principles. Should this be the case, the Applicant may find himself in a situation where he either is satisfied with the Respondent's calculations and explanations, or in a position where he may be of the view that he has a proper case attacking the Respondent's calculation in coming to a decision of an increase of his premiums. In such event he may decide to take the matter further or not (para [51]).

The respondent was therefore ordered to inform the applicant about what information it took into account 'when it decided to increase the premiums and the extent of the increases for policies 089560601, 099671567 and 20052330'; to explain the method of calculation and any other information that was used to arrive at the new premiums; and to explain in which respect the facts and circumstances were different 'to those which existed at the commencement of the policies'. The court also ordered the respondent to pay the cost of the application (para [53]).

The obligation to pay an insurance premium is one of the *essentialia* of the insurance contract (Reinecke et al *Insurance Law* 86). Without a premium, there is no contract. This, however, was not the issue in the present case. The applicant's concern was about the basis upon which the proposed (and rather drastic) premium increase was arrived at by the insurer.

The determination of insurance premiums is by no means a straightforward business. They are determined largely by the

expected claim payments over the time period of the insurance contract (Nienaber & Reinecke *Life Insurance* 103). To this, margins are added for administrative costs, commissions for brokers, and profit. The authors further clarify the process by explaining that actuaries use assumptions based upon claim incidence to determine expected future claim payments. That means that if 30 men over the age of 60 died during the previous year, there is an assumption that at least 30 men over 60 will die during the following year. More specifically:

> By grouping similar lives together into homogenous risk groups assumptions can be made that are more appropriate for that risk group. For example, statistical evidence has shown that the life expectancy of females and males are different, with females typically living longer than males . . . The factors that are used to group similar risks are called rating factors (that is, factors by which premium rates differ) (Nienaber & Reinecke *Life Insurance* 104).

Typical rating factors include age, gender, socio-economic class, educational qualifications and income, smoking status, health status, occupation and lifestyle, and leisure pursuits (ibid). Premiums may be loaded in circumstances where an individual exhibits an extraordinary risk. This explains how initial premiums are calculated. A more business-oriented view is provided by Benfield. The author states as follows:

> [I]nsurance works because the losses of the few are borne by the many. In its simplest form therefore, the life insurance risk premium is calculated by dividing the expected death claims for a particular year by the number of people in that age group.' (Benfield BM *Life Insurance Company Management: A Universal Primer* (2004) 38.)

Benfield summarises the life insurance equation as: '[P]remiums + interest = mortality = expenses' (ibid). For whole life insurance, the year-by-year premium rate is relatively stable for the first twenty years if the life insured purchased the policy at, for instance, age 30. After that, the year-by-year premium rises steeply, and after 50 years the premium is nearly ten times that of the originally charged level premium rate (Benfield *Life Insurance Company Management* 42).

This explains why insurance premiums increase. If one then bears in mind that the most elementary life insurance is written on a term insurance or year-to year basis, it stands to reason that increases in premiums will at first be lower, but will increase over time (BM Benfield *Life Insurance Company Management* 38).

Other factors that may influence premiums relate to mortality tables. Benfield explains as follows:

> Based upon the expected mortality experience, a group of insureds of a given age will each be charged a premium sufficient to provide a sum that is adequate to meet all the group's death claims for the year. Each succeeding year the premium will be higher because the survivors will be older and will have a higher expected death rate (ibid).

This very simplified exposition explains why a policy such as the one in question could guarantee a specific premium over a period of ten years, but was bound to attract a significantly higher premium for the next couple of years. It is supposedly infinitely more complicated when commissions, profit, and administrative fees must be factored into the premium.

It is therefore concluded that even though there needs to be some transparency in how premiums are initially calculated and subsequently adjusted, this case opens the proverbial can of worms by compelling the insurer to provide a detailed explanation of an increase in premium. To expect an insurer to disclose detailed actuarial calculations will seriously hamper business, and will likely be too complicated to be understood by the average policyholder. It is submitted that it is sufficient to disclose to a prospective policyholder at sale stage, which factors are taken into account when calculating a premium, where there is an increased premium due to extraordinary risks such as chronic illness or lifestyle factors, and that the premium will be increased annually or after a period of time. Those who literally beat the odds, will in due course pay more for life insurance.

To return to the issues raised in the case: it is difficult to follow the argumentation as the court jumps from 'implied/tacit' terms to the insurer's 'unfettered discretion' to increase premiums. Even though the court attempts to argue along the lines of a determined or determinable performance, or, as it so strangely puts it, 'a prestation', it is submitted that there is a sound basis in insurance for imposing increases in premiums and this has to do with risk, which is inextricably linked to policy benefits. Risks change over time and so must premiums. In this respect insurance contracts must be distinguished from other contracts, and to state that the insurer should provide a detailed explanation such as the one ordered *in casu,* is problematic to say the least. It stands to reason that price determinations and increases in a commercial contract such as lease or hire-purchase should be

made in good faith and *arbitrio bono viri.* Apart from the intricate link between risk, premiums, and benefits, there is yet another argument for stating that insurance contracts are different in this respect from other commercial contracts: the legislative control of insurance premiums. Section 46(1)*(a)* of the Long-term Insurance Act 52 of 1998 states that an insurer may enter into a long-term policy only if the statutory actuary is satisfied that the premiums, benefits, and other values are actuarially sound. In addition, section 46(1)*(b)* stipulates that a long-term insurer may not distinguish between premiums, benefits, or other values of different long-term policies unless the statutory actuary is satisfied that the distinction is actuarially justified (Reinecke et al *Insurance Law* 281). It is therefore submitted that in light of the fact that long-term insurers are under strict statutory obligations as far as premiums are concerned, additional, long-winded explanations to policyholders place a burden on insurance companies that goes beyond good faith.

A further point of criticism against the case is that the court seemingly sets out to consider 'whether in terms of the General Law of Contract [or] the Common Law, the development of the Common Law through the Constitution and other factors that may be present' allows the court to grant relief to the applicant, but fails to state whether this was in fact necessary. As already indicated, it is doubtful that the insurer's failure to provide the applicant with intricate formulas is in any way *mala fide,* and that the law should be developed for this or any other reason. The relief granted somehow does not demonstrate a sound legal principle (or argument).

Duties of Financial Advisors and the Role of Professional Insurance

Financial advisors and intermediaries have a number of duties towards clients. These duties stem from the common law, and include the duty to act with care and skill (D Millard and W Hattingh *The FAIS Act Explained* (2016) 76–77). With the introduction of the Financial Advisory and Intermediary Services Act 37 of 2002 (the FAIS Act), these duties were codified, and while the FAIS Act did not materially change common law, it did provide a statutory, minimum standard of care and skill with which all providers must comply (Millard & Hattingh *The FAIS Act* 86). This became all too evident in *Oosthuizen v Castro (Centriq Insurance Company Ltd as Third Party)* [2017] 4 All SA 876 (FB), 2018 (2) SA 529.

The plaintiff in this case was Marisa Vogel Oosthuizen, and the defendant was Jose Fransisco Castro, a financial services provider. The third party to the litigation was Centriq Insurance Company Ltd (Centriq or the insurer), who provided professional indemnity insurance to the defendant as a member of the Financial Intermediaries Association of South Africa (para [6]).

According to the plaintiff's particulars of claim, she and the defendant entered into a written agreement in terms of which the defendant advised her generally in respect of investment, and in particular, to invest R2 million in the form of an investment offered by Sharemax Investments (Pty) Ltd (Sharemax) in respect of a scheme described as The Villa Retail Park Holdings 2 held in a company, The Villa Retail Park Holdings 2 Ltd (the Villa) (para [8]). Following the failure of the Sharemax investment, and the fact that there were no prospects of recovering any of the money, the plaintiff claimed damages in the form of loss of capital of R2 million together with *mora* interest on the capital amount from date of investment, less an amount of R1 400 received. In the alternative, the plaintiff claimed R2 838 600, being the capital of the investment and a yield based on seven per cent per annum over a period of six years, together with *mora* interest from 27 July 2016 to the date of payment, and costs (para [9]).

The plaintiff's alleged cause of action was breach of contract. More specifically, she alleged that the defendant had failed to act honestly and fairly in her interest in recommending the Sharemax investment; that the defendant 'misrepresented to [the] plaintiff that media criticism of investments in Sharemax was motivated by envy insofar as the criticism was intentional, negligent and not honest and fair'; that the Sharemax investment was not in keeping with her risk profile as she required minimal risk, whereas the Sharemax investment was a high-risk one; that the defendant had failed to furnish her with objective financial advice in accordance with her needs; that the defendant knew that she required a safe investment but advised her to invest in Sharemax when he ought to have known, by taking reasonable care, that the Sharemax investment was a very high-risk investment; and finally, that the defendant had failed to exercise the degree of skill, care, and diligence expected of an authorised financial services advisor furnishing investment advice (para [10]).

The defendant admitted the agreement between him and the plaintiff in terms of which he was to provide financial advice, but pleaded that the plaintiff chose the Sharemax investment despite

his having 'drawn her attention to a recent negative article pertaining to Sharemax in the Rapport newspaper' (para [11]). Accordingly, he denied any breach of contract.

The third party, Centriq, was joined in the action at a late stage. The defendant joined Centriq as indemnity insurer on the basis of a written insurance contract between Centriq and the defendant (para [12]). Centriq admitted the contract, but averred that the defendant's behaviour fell within an exclusion clause, more specifically clause 3(ii) (para [13]). This clause specified as follows:

> The Insurers shall not indemnify the Insured in respect of any loss arising out of any claim made against them . . . (ii) in respect of any third party claim arising from or contributed to by depreciation (or failure to appreciate) in value of any investments, including securities, commodities, currencies, options and futures transactions, or as a result of any actual of alleged representation, guarantee or warranty provided by or on behalf of the Insured as to the performance of any such investments. It is agreed however that this Exclusion shall not apply to any loss due solely to negligence on the part of the Insured or Employee of the Insured in failing to effect a specific investment transaction in accordance with the specific prior instructions of a client of the Insured.

Counsel for the plaintiff (Mullins) stated that the defendant was not in a position to admit liability because of condition 5 of the insurance contract entered into between him and the insurer, which provided that the insured 'shall not make any admission in respect of any claim against him without the written consent of the insurer. However, [the] defendant would not contest [the] plaintiff's evidence' (para [17]). The submission was for the third party to waive such condition 'so that the trial could continue in order for the court to adjudicate whether the insurer is liable to indemnify defendant and nothing else'. This invitation was declined. Furthermore, Mullins contended that if the insurer was not prepared to waive condition 5, the plaintiff would ask the court to award punitive costs against the insurer. Zietsman, for the defendant, confirmed that the defendant 'could not, and therefore did not, concede liability, but that defendant would not contest his liability any further'. Watt-Pringle, for the third party, stated that the third party had only learned that morning that the defendant would not put up a defence against the plaintiff's claim, but that the insurer was still not prepared to waive condition 5 (para [18]). The parties concluded a written agreement regarding the quan-

tum of the plaintiff's damages, and this was made an order of court by consent. The full agreement reads as follows:

> The parties (Plaintiff; Defendant; Third party) agree as follows on the Plaintiff's damages as against the Defendant:
> 1. They agree that the capital investment is lost, ie that there are no prospects of recovery thereof;
> 2. They agree further that the Plaintiff has suffered damage (if breach of contract or of duty of care is proven, which is still in dispute) as follows:
>   2.1 The capital of R2 000 000,00;
>   2.2 With reference to paragraphs 26 and 27 of the Rule 36(9)(b) summary of Mr Heystek (pp 34–35 of the Experts Bundle), the return which the Plaintiff would have made had she invested the capital in a relatively safe investment for the mean period of 6 years, at the mean rate of the returns mentioned by Mr Heystek (6%–8%), ie 7% *less* the R1 400,00 received on 3 August 2010.
> 3. Questions of mora interest are for the court to determine. (Para [19].)

Daffue J then proceeded to canvass the facts that were common cause between the parties and pointed out that the plaintiff's evidence was largely uncontested (para [20]). As a result, it was common cause that the plaintiff was the holder of a diploma in higher education, that she had taught for approximately twelve years, that she married a farmer, Oosthuizen, and had one child. It was further common cause that Oosthuizen was killed in a shooting accident on 13 March 2010 and that a policy of R3,4 million was paid out to her, of which she set aside R2 million to invest for the future, kept R300 000 as a reserve fund, and used the balance to purchase calves. The plaintiff experienced financial hardship following the death of her husband, and on 27 July 2010, four and a half months after she had been widowed, she had a meeting to obtain advice on how to invest the R2 million. It was agreed that the plaintiff had no experience regarding financial products and relied on the defendant for advice. It appeared from the needs analysis that the plaintiff needed a safe, high-income investment. She admitted that she understood that the capital was not guaranteed but that the advisor would do his utmost to make a safe investment on her behalf. The plaintiff also told the defendant that she could not afford to lose any money as she needed to raise her child. The defendant referred her to a Sharemax article in *Rapport,* but told her that 'the investment was ''in property'' and that ''property

cannot disappear"'. It was also common cause that the defendant did not explain any further products to the plaintiff (para [20]).

The court provided some detail on the Sharemax issue, and this portion is best quoted:

> Several prominent writers on financial matters, including the award-winning journalist, the late Mr Deon Basson, criticised the Sharemax investment strategy over many years. As early as 26 May 2004 Basson wrote for the *Beeld*, an Afrikaans daily newspaper, based on queries received from investors who invested in Sharemax schemes and had lost their capital. He warned against property syndication schemes such as Sharemax and PIC and any person reading financial magazines and the business sections of newspapers will know what eventually happened to these schemes. Another negative article was written in *Moneyweb* of 22 November 2007. *Noseweek* published an article in January 2008, mainly relying on the late Mr Basson's investigations wherein he referred to the apparent lack of transparency in respect of Sharemax property syndications. Mr Vic de Klerk, an eminent author on investment products, wrote an article in *Finweek* of 8 July 2010, a weekly publication which every FSP should read, under the heading '*House of cards collapsing*'. He specifically targeted investments in The Villa and wrote, based on prospectuses received, that Sharemax as promotor had received R1,44 billion from the public over two years and that another R2,25 billion was needed to complete the shopping mall, hopefully by the end of September 2011. He also referred to the instructions of the Registrar of Banks to Sharemax to discontinue its method of financing which was in violation of the Banks Act as deposits were taken from investors. The cut-off date was 15 July 2010. De Klerk had the following advice for FSPs: 'To the marketers of the shares on behalf of Sharemax – of course, you're all registered with the Financial Services Board (FSB) – also just a small warning. The Reserve Bank and the registrar aren't too happy with the product you're offering. Everyone knows that now . . . For your own future careers it may just be a good thing to mention that to your clients, even if it reduces your chances of earning that attractive 6% commission.' Mr Jacques Pauw also wrote a similar article for the *City Press* of 25 July 2010 and he and Ms Anna-Maria Lombard's article to the same effect appeared in the *Rapport* of 24 July 2010, the article which defendant was well aware of, stating that tens of thousands of investors might have lost their investments in Sharemax. In his evidence the financial expert, Mr Magnus Heystek confirmed the figures received and still needed to complete the shopping complex. This was never contested (para [21]).

The court further notes that the defendant decided not to testify and, therefore, his responses to some of the plaintiff's requests for further particulars were significant. In response to a question

whether the defendant offered any comment or observation regarding the newspaper article in *Rapport*, the respondent answered that she need not worry as it was another unfounded attack on Sharemax. In addition, he advised that few options could contend with Sharemax and maintained that it was a low-risk, safe investment (para [22]).

It was also common cause between the parties that the plaintiff invested an amount of R2 million on the advice of the defendant, and apart from the R1 400 that she received in August 2010, she received no further interest and/or dividends. In addition, the total amount of the capital had been lost. The court further pointed out that the defendant was appointed as a representative of the Unlisted Securities South Africa FSP Network (Pty) Ltd (t/a USSA) in order to render financial services regarding unlisted securities, such as the financial instruments provided by Sharemax, and was also a licensed financial services provider with the Financial Services Board in terms of section 8 of the FAIS Act, with effect from 10 June 2008 (para [23]). The defendant then entered into a professional indemnity insurance contract with the insurer, which included 'professional indemnity to the limit of liability of R2,5 million per claim, subject to payment of an excess in the amount of R10 000.00'. This agreement contained the exclusion clause in question (para [25]).

Two legal questions arose from these facts: first, whether the defendant was liable to the plaintiff for having rendered incorrect advice so causing the plaintiff's loss; and second, whether the defendant's resultant claim against the third party as professional indemnity insurer, fell within the exemption clause in the policy.

After having dealt with the facts that were common cause between the parties, the court proceeded to state the legal principles and authorities regarding the liability of a financial advisor and in this respect, the *locus classicus* remains *Durr v Absa Bank Ltd* 1997 (3) SA 448 (SCA), where (at 453D) Schutz JA warned that '[h]indsight is not vouchsafed the common man as he picks his course through life. This must be kept constantly in mind in a case like this one, where all is so obvious now.'

The judge correctly stated that although *Durr* preceded the FAIS Act by several years, the principles in *Durr* were still relevant and to a great extent accepted by the legislature if the wording of the FAIS Act is considered (para [27]). Schutz JA dealt with the duties of a financial advisor or broker, and the court *in casu* quoted the appellate judge at 460F–462D:

> What did the law expect of Stuart and ABSA?
>
> *Imperitia culpae adnumeratur*, says *D* 50.17.132 – lack of skill is regarded as culpable. That much is accepted by the respondents. But how much skill, they say. We have shown all the skill that an 'ordinary' or 'average' broker, or a bank employing such a one, need show. What more can be asked of us? Two questions arise in this case. (1) In general, what is the level of skill and knowledge required? (2) Is the standard required in judging that level that of the ordinary or average broker at large, or is it that of the regional manager of the broking division of a bank professing investment skills and offering expert investment advice?

In answering the question, Schutz JA quoted Innes CJ in *Van Wyk v Lewis* (1924 AD 438 at 444) with reference to medical practitioners, and repeated the old adage that the court must consider 'the general level of skill and diligence possessed and exercised at the time by *the members of the branch of the profession* to which the practitioner belongs'. Referring to brokers, Schutz JA, as quoted *in casu*, stated that it was more complicated but that the average broker would not ask for financial statements and would also not know how to assess what is known as 'institutional risk', which refers to the soundness or creditworthiness of a prospective debtor. On the other hand, 'product risk' was different, as it fell within the broker's knowledge. In *Durr,* Schutz JA proclaimed that 'the appropriate standard is that of the regional manager of the broking division of a bank professing investment skills and offering investment advice' (at 464). The court drew further parallels between the current case and *Durr,* and quoted Schutz JA at 469H–I, where the judge pronounced:

> Either he had to forewarn the Durrs where his skills ended, so as to enable them to appreciate the dangers of accepting his advice without more ado, or he should not have recommended Supreme. What he was *not* entitled to do was to venture into a field in which he professed skills which he did not have and to give them assurances about the soundness of the investments which he was not properly qualified to give (para [30]).

The court proceeded to quote several sources, including Jackson and Powell (para 15–022), Simpson (M Simpson (ed) *Professional Negligence and Liability* (2016)), and several portions of the FAIS Act, including section 16 (principles of code of conduct), and the definition of 'advice'. Unfortunately, the court did not deem it necessary to canvass the actual provisions of the general code of conduct in terms of the FAIS Act (para [33]) and this point will be discussed later.

Having disposed of the rules governing the duties and responsibilities of FSPs, the court moved to the rules of construction of contracts in general, and insurance contracts in particular. On interpretation of contracts, the court quoted Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality* (2012 (4) SA 593 (SCA) para [18]):

> Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed; and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document (para [35]).

Thus, the matter must be approached holistically and context and language must be considered together, with neither predominating over the other. See also *Bothma-Batho Transport (Edms) Bpk v S Bothma en Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) at paras [10]–[12].

The court further quoted *BP Southern Africa (Pty) Ltd v Mahmood Investments (Pty) Ltd* [2010] 2 All SA 295 (SCA), where Lewis JA stated:

> It is settled law that the contractual provision must be interpreted in its context, having regard to the relevant circumstances known to the parties at the time of entering into the contract . . . . It is also clear that the position must be given a commercially sensible meaning . . . (para [11]).

Daffue J further referred to *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* 2016 (1) SA 518 (SCA), where Lewis JA stated at paragraph [28] that a court must 'examine all the facts – the context – in order to determine what the parties intended. And it must do that whether or not the words of the contract are ambiguous or lack clarity. Words without context mean nothing.'

For some reason, the court referred to Hardy Ivamy *General Principles of Insurance Law* 6 ed (1993) and Birds et al *MacGillivray on Insurance Law* 13 ed (2015) on the construction

of contracts (paras [37] [39]), but then stated that the *locus classicus* on construing insurance contracts in South Africa was still the unanimous judgment authored by Smalberger JA in *Fedgen Insurance Ltd v Leyds* 1995 (3) SA 33 (A). Daffue J quoted Smalberger JA at 38A–E:

> The ordinary rules relating to the interpretation of contracts must be applied in construing a policy of insurance. A court must therefore endeavour to ascertain the intention of the parties. Such intention is, in the first instance, to be gathered from the language used which, if clear, must be given effect to. This involves giving the words used their plain, ordinary and popular meaning unless the context indicates otherwise . . . . Any provision which purports to place a limitation upon a clearly expressed obligation to indemnify must be restrictively interpreted [. . .] for it is the insurer's duty to make clear what particular risks it wishes to exclude . . . . A policy normally evidences the contract and an insured's obligation, and the extent to which an insurer's liability is limited, must be plainly spelt out. In the event of a real ambiguity the *contra proferentem* rule, which requires a written document to be construed against the person who drew it up, would operate against the insurer as drafter of the policy . . . (para [39]).

The relevance of the interpretation of contract lay in the difference of opinion between the plaintiff and the defendant regarding the real meaning to be attributed to the exclusion clause (para [40]). In discussing the prevalence of exclusion clauses in insurance, the court referred inter alia to the work of Enright and Jess *Professional Indemnity Insurance Law* 2 ed (2007); Merkin (ed) *Colinvaux's Law of Insurance* 6 ed; as well as *Fedgen v Leyds* (above), in which case the court held that exclusion clauses must be restrictively interpreted. At paragraph [45] the court referred to *Impact Funding Solutions Ltd v AIG Europe Insurance Ltd* ([2017] Lloyd's Rep IR 60 (SC), [2016] UKSC 57), where the English Supreme Court found that exclusion clauses do not necessarily have to be narrowly construed but rather must be given a proper meaning. A narrow meaning would often be given in the event of ambiguity or if the context suggested this. The court quoted Lord Hodge (for the majority) at 63:

> An exclusion clause must be read in the context of the contract of insurance as a whole. It must be construed in a manner which is consistent with and not repugnant to the purpose of the insurance contract. There may be circumstances in which in order to achieve that end, the court may construe the exclusions in an insurance contract narrowly.

The court then considered the argument of Watt-Pringle based on the New Zealand Court of Appeal judgment in *Trustees Executors Ltd v QBE Insurance (International) Ltd* [2010] NZCA 608 (14 December 2010), which case also aimed to interpret an exclusion clause, as the only example of a case that dealt with such a clause. The court said that there was no South African case law dealing with exclusion clauses in indemnity insurance.

In evaluating the case against the defendant, the court considered the words of Schutz JA in *Durr v Absa Bank Ltd* (above), where the judge of appeal said: 'Hindsight is not vouchsafed the common man as he picks his course through life. This must be kept constantly in mind in a case like this one, where all is so obvious now.'

Having quoted *Durr*, the judge remarked that the insurer did not try to show that the defendant was not liable to the plaintiff. Rather, the insurer aimed to invoke the exclusion clause (para [50]). The evidence presented by the plaintiff was undisputed, as there was a definite case against the defendant. More specifically, the investment that the defendant induced the plaintiff to make was a property syndication investment. The Sharemax investment known as 'The Villa' was, in fact, a dangerous investment due to the inherent pitfalls involved in property syndication. Heystek testified as to the dangers involved and stressed that a financial services provider 'should not advise an investment in something which he is not himself able to fully understand' (para [55]). The court also quoted several articles that appeared in the press at the time, and stated that the defendant should have investigated the claims made in these articles. He should have realised the enormous costs involved in completing the property in question and, therefore, should have realised that the plaintiff could not possibly have earned interest on the investment immediately after having invested the money (para [55]). The court therefore accepted Heystek's evidence and referred to an Ombud decision in which the FAIS Ombud referred to the Sharemax syndication as a 'Ponzi scheme' (para [57]). Overall, the court ruled that there were remarkable parallels between the facts *in casu* and those in the *Durr* case. To summarise:

> Defendant acted contrary to the provisions of s 16 of the FAIS Act and the Codes of Conduct published since then in accordance with the provisions of s 15 and what the law expects of FSPs when he provided the financial advice that led to the R2 million investment . . . Much

> more may be said of the defendant's actions and/or inactions, but I conclude by finding that defendant was negligent, and even dishonest, when he advised plaintiff, by placing no credence on the negative articles in the press and failing to objectively investigate the criticism. He failed to exercise the degree of skill, care and diligence which one is entitled to expect from a FSP. The facts *in casu* are very similar to that in *Durr supra* and the result should be the same (paras [59] [60]).

Having disposed of the first question, the court turned to the exemption clause. In this respect there was a serious difference in opinion between Mullins for the plaintiff and Watt-Pringle for the third party (insurer) (para [61]). The latter's argument was that the insurer could only grant indemnity to the defendant where the loss was 'solely as a result of the negligence of the insured (or his/her employee) in failing to effect a specific investment transaction in accordance with the specific prior instructions of the insured's client' (para [66]). But Mullins differed completely from the third party (insurer), stating that the insurer who relied on the exclusion had to prove that it applied (para [69]). In addition, the plaintiff's claim was not one arising from or contributed to by depreciation or a failure to appreciate in value of the Sharemax investment.

The court considered Watt-Pringle's submissions carefully but ruled that 'he placed too much emphasis on the wording of the exclusion clause and in doing so, disregarded the purpose of the insurance contract entered into between defendant and the insurer' (para [72]). The court stated that the heading of the policy was instructive. It read: 'Professional Indemnity Insurance for Members of the Financial Intermediaries Association'. The court noted that the main purpose of an indemnity policy is to permit the insured to recover for negligence and, referring to Merkin, concluded that 'an indemnity policy presumes that there will have been some misconduct on the insured's part' (ibid).

The court also remarked as follows:

> Brokers and financial advisors are now regulated by legislation as is the case with, for example, attorneys. Professional indemnity insurance for FSPs is now a reality. Insurers are comforted in that they know that FSPs who apply for indemnity insurance are professional people who have to pass stiff examinations before they may become registered as FSPs in terms of the FAIS Act. Also, insurers do not have to provide indefinite cover and may limit their potential liability as happened here. The other insured events in the particular policy, except the first, to wit professional indemnity, apply to any employer who wants to insure against such events. It is not uncommon in the

> marketplace for a shop owner to take out insurance in respect of employee dishonesty, computer crime, defamation and like issues. However, the shop owner will not take out professional indemnity insurance. FSPs on the other hand, most definitely need cover insofar as they often have to give advice that may later be found to have been given negligently. The chances of being sued for huge amounts for wrong and/or negligent advice by far exceed financial losses pertaining to the other insured events. It is thus not a valid argument to submit that defendant will not be robbed of cover if the exclusion clause is interpreted in the way contended for by the insurer (para [73]).

The court remarked that the insurer's undertaking in the policy in question was to indemnify the defendant against losses arising out of 'any legal liability arising from claims first made against the defendant and reported during the period of insurance for breach of duty in connection with his business by reason of any negligent act, error, or omission, committed in the conduct of the defendant's business'. This was evident from 'Insured Events' on page 2 of the policy. The insurer admitted this in its plea and the scope of cover was, therefore, the starting point in establishing the meaning of the contract and other clauses such as the exclusion clause. The exclusion clause did not mention anything about negligence, error, or omission, save insofar as the proviso stipulated that the insured would be covered if a specific investment instruction of a client was not carried out due to the insured's negligence. This was exactly the crux of the insurer's argument, namely that the exclusion should apply because the defendant (broker) had been negligent (para [74]). The court thus pronounced as follows:

> In my view the exclusion clause must be interpreted restrictively so that it makes business sense, ie in the eyes of both insurer and insured. It cannot be applicable where the insured advised a client to invest in a scheme that was a hopeless 'investment' from the onset, contrary to legislation and probably a fraudulent and unlawful Ponzi scheme. The purpose of the first leg of the exclusion is to prevent an insured from claiming indemnification if his client has filed a claim because his/her investment had not grown by, for example, 20% over a three-year period as expected, but only by 15%, or remained static, or worse, depreciated by 5% or 10%. We all know that financial markets are volatile, that several unforeseen market forces may affect investments and, therefore, it would be 'businesslike' for the insurer to exclude indemnification in such events. Surely, it cannot be expected of a prudent insurer to become embroiled in litigation between the client and the insured FSP in such instances. The same applies to the second leg. An eager FSP should not be heard to admit that he/she has represented or guaranteed to an investor that a particular

> investment will increase by 100% in a year's time. The insurer will be fully entitled to rely on the exclusion clause and refuse to indemnify the insured if the representation later appears to be off the mark. Again, this is not what occurred *in casu* (para [76]).

Furthermore, the court ruled that the defendant had 'breached all principles upon which a skilled and honest FSP is supposed to conduct himself' (ibid).

The court therefore ruled that the plaintiff had made out a proper case against the defendant and that the quantum as calculated by Mullins was not disputed (para [77]). It also found that the insurer should indemnify the plaintiff, subject to the limit of R2,5 million and deduction of the excess of R10 000. The insurer was ordered to pay the costs of the defendant as the successful party in the third-party action.

This case canvasses two issues: what constitutes negligence on the part of an investment broker; and what is in fact covered by indemnity insurance.

The case between Mrs Oosthuizen and the broker is, in a sense, and as the judge correctly points out with the wisdom of hindsight, quite clear-cut. The evidence shows that property syndication such as that involved in the Sharemax scheme can never be low-risk and can, in fact, be equated with a Ponzi scheme. The court seemingly relied more on common-law principles than on the stipulations of the FAIS Act, but in this particular case the outcome is the same: the broker failed to provide appropriate advice in the circumstances. Moreover, the broker was in actual fact motivated by the commission that was payable on an investment such as the one in question. *Durr v Absa Bank Ltd* (above) indeed provides an exposition of the law on this aspect, as does the general code of conduct in terms of the FAIS Act. More specifically, section 2 of the general code of conduct stipulates that a provider must at all times render financial services honestly, fairly, with due skill, care and diligence, and in the interests of clients and the integrity of the financial services industry. Section 3(1)*(a)* contains a number of very specific provisions and stipulates as follows:

> (1) When a provider renders a financial service–
> *(a)* representations made and information provided to a client by the provider–
> (i) must be factually correct;
> (ii) *must be provided in plain language, avoid uncertainty or confusion and not be misleading;*

(iii) *must be adequate and appropriate in the circumstances of the particular financial service, taking into account the factually established or reasonably assumed level of knowledge of the client;*
(iv) must be provided timeously so as to afford the client reasonably sufficient time to make an informed decision about the proposed transaction;
(v) may, subject to the provisions of this Code, be provided orally and, at the client's request, confirmed in writing within a reasonable time after such request;
(vi) must, where provided in writing or by means of standard forms or format, be in a clear and readable print size, spacing and format;
(vii) must, as regards all amounts, sums, values, charges, fees, remuneration or monetary obligations mentioned or referred to therein and payable to the product supplier or the provider, be reflected in specific monetary terms: Provided that where any such amount, sum, value, charge, fee, remuneration or monetary obligation is not reasonably predeterminable, its basis of calculation must be adequately described; and
(viii) need not be duplicated or repeated to the same client unless material or significant changes affecting that client occur, or the relevant financial service renders it necessary, in which case a disclosure of the changes to the client must be made without delay . . . . (emphasis added)

Close scrutiny reveals that the defendant failed the plaintiff and that his failure to recommend a low-risk investment did in fact constitute a breach of these statutory duties. What is not so clear from the case is what the cause of action was. If it was in fact breach of contract, this would simply have entailed the court evaluating the broker-client relationship and concluding that conduct short of what is required in the FAIS Act constitutes a breach of the duties of the broker, which in turn constitutes breach of contract. The second enquiry is the one that seeks to establish negligence in an attempt to invoke the indemnity insurance clause. It appears that the court automatically equated the defendant's failure to provide proper advice with negligence, thereby not applying the proper test for negligence as formulated in *Kruger v Coetzee* 1966 (2) SA 428 (A) 430, where it is stated that for negligence to exist, the plaintiff must prove that the reasonable person in the position of the defendant should have foreseen that his actions could cause harm and, in addition, should also have prevented the harm. It therefore seems that the case was in fact decided on the basis of breach of contract, and that the defendant negligently breached his duties towards the

defendant, although this is not stated in so many words. It is then this negligent conduct which caused the liability insurance policy to come into play.

The fit and proper requirements (para 8(7) of Board Notice 106 *GG* 31514 of 15 October 2008) and the General Code of Conduct (para 13 of Board Notice 80 *GG* 25299 of 8 August 2003; Ch 1 para 8 of Board Notice 79 *GG* 25299 of 8 August 2003 'Notice on Codes of Conduct for Administrative and Discretionary FSPs'; and s 7 of Part 2 of Board Notice 79 *GG* 25299 of 8 August 2003) provide that financial services providers must hold adequate professional indemnity and fidelity insurance cover as determined by the registrar from time to time. The minimum cover required is prescribed by statute and is in accordance with the kind of service that is rendered (Millard & Hattingh *The FAIS Act* 116). This case is the first in which the court has attempted to interpret such an insurance policy, and it is submitted that a policy of this nature is the same as any other which provides professional indemnity cover. This means that exclusion clauses should be interpreted in exactly the same way as any other exclusionary clause.

The apparent confusion on the issue of negligence aside, it is submitted that the court was correct in finding that the defendant had breached his contractual duties towards the plaintiff. In addition, if one considers that the purpose of professional indemnity insurance is to safeguard against the negligence of a broker in situations such as this one, the judgment may be supported.

INTELLECTUAL PROPERTY LAW

ROSHANA KELBRICK*
COENRAAD VISSER†

LEGISLATION

There was no legislation directly affecting this field of law during the period under review.

CASE LAW

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Dictionaries

Media 24 Books (Pty) Ltd v Oxford University Press Southern Africa (Pty) Ltd 2017 (2) SA 1 (SCA) was discussed in the 2016 *Annual Survey* at 563ff.

PATENTS

Infringement and purposive construction

The judgment in *Orica Mining Services v Elbroc Mining Products* (233/2016) [2017] ZASCA 48 (31 March 2017) (Dambuza JA writing for a unanimous court) does not add much to the existing jurisprudence relating to patent infringement, and particularly to the interpretation of the patent claims. The issue was whether the word 'between' should be read as 'linearly between'.

The court held that the dictionary meaning 'with something on each side' was preferable, as it accorded with the relational nature of the word 'between', and did not depend on the configuration of the objects being compared (para [18]). This meaning was preferred to the alternative of reading 'between' as connoting 'linearly between', which would have restricted the term to a situation where the objects compared were of a similar configuration (ibid).

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The appellant also sought to invoke a purposive construction of the claims in its favour. Unlike literalism, this approach considered the practical knowledge and experience of the person skilled in the art in which the invention was intended to be used (para [21], with reference to *Selas Corporation of America v Electric Furnace Co* 1983 (1) SA 1043 (A) at 1052-53). It asks whether a person skilled in the art would have understood whether strict compliance with a particular word or phrase was intended, and whether a variant of a word would have an effect upon the way the invention worked, so that the impugned object would fall outside the monopoly protected in the claims, and there would accordingly be no infringement (para [21], with reference to *Aktiebolaget Hässle & another v Triomed (Pty) Ltd* 2003 (1) SA 155 (SCA) para [8]). Dambuza JA quoted extensively (para [29]) from *Kirin-Amgen Inc & others v Hoechst Marion Roussel Ltd & others; Hoechst Marion Roussel Ltd & others v Kirin-Amgen & others* [2005] 1 All ER 667 (HL) at 680:

> Construction, whether of a patent or any other document, is of course not directly concerned with what the author meant to say. There is no window into the mind of the patentee or the author of any other document. Construction is objective in the sense that it is concerned with what a reasonable person to whom the utterance was addressed would have understood the author to be using the words to mean. Notice, however, that it is not, as is sometimes said, 'the meaning of the words the author used', but rather what the notional addressee would have understood the *author* to mean by using those words. The meaning of words is a matter of convention, governed by rules, which can be found in dictionaries and grammars. What the author would have been understood to mean by using those words is not simply a matter of rules. It is highly sensitive to the context of and background to the particular utterance. It depends not only upon the words the author has chosen but also upon the identity of the audience he is taken to have been addressing and the knowledge and assumptions which one attributes to that audience (original emphasis).

Dambuza JA held that *Kirin-Amgen* did not help the respondent. Purposive interpretation was not an undue extension of the wording of the patent claims. To the judge, to interpret the word 'between' as 'linearly between' was not in line with a purposive interpretation of the specification, as delineated by the claims (para [30]).

The appeal was accordingly upheld with costs.

Powers of the registrar

Trustco Group International (Pty) Ltd v Vodacom (Pty) Ltd & another 2017 (5) SA 283 (SCA) concerned the discretionary

powers of the registrar to grant an extension of time in respect of the time periods within which any act is required to be done under the Patents Act 57 of 1978. In particular, section 16(2) states: 'Whenever by this Act any time is specified within which any act or thing is to be done, the registrar or the commissioner, as the case may be, may save where it is otherwise expressly provided, extend the time either before or after its expiry.'

Here, Trustco, a patent holder, had failed to pay the prescribed patent renewal fees on time. As a result, the patent lapsed on 26 November 2011. Trustco then applied for the restoration of the patent under section 47(1). The restoration application was advertised in the *Patent Journal* on 26 June 2013 (as required by s 47(2) read with regs 49 and 50 of the Patent Regulations (GN R2470 in *GG* 6247 of 15 December 1978)). (Section 47(2) provides that '[i]f the registrar is satisfied that the omission was unintentional and that no undue delay has occurred in the making of the application, he shall advertise the application in the prescribed manner, and thereupon any person . . . may within such period as may be prescribed, give notice in the prescribed manner of opposition to the restoration of the patent'.) Vodacom opposed the restoration application. It filed its notice of opposition on 26 August 2013. Regulation 83 was central to Vodacom's submissions. It provides that '[w]ithin two months of the filing of service of the notice of opposition the applicant shall file and serve a counterstatement in the form of a plea. If such counterstatement is not lodged within the said period or within such further period as the registrar may allow the application shall be deemed to be abandoned and the opponent may apply to the commissioner for an order as to costs'. Trustco's counterstatement would ordinarily have been due on 26 October 2013; as this was a Saturday, the statement had to be filed on or before 28 October 2013. On 30 October 2013, Trustco requested the registrar for a two-month extension of time within which to file the counter-statement. The registrar granted the extension.

Vodacom appealed against the grant of the extension. It did not allege any prejudice. It submitted that the provisions of regulation 83 were peremptory, and that failure to comply with the set time limits triggered the deeming provision. When that happened, the application for restoration could be considered to have been abandoned. The deemed abandonment then precluded the registrar from exercising the power of extending the time limit in this regulation.

Makgoba J, sitting as the Commissioner of Patents, agreed with Vodacom. He held:

> The regulations . . . are to be read conjunctively and not disjunctively with the Patents Act. Reading section 16(2) of the Act conjunctively with reg 83 would then mean that the registrar cannot just grant an extension of time in terms of section 16(2) without having regard to the peremptory and deeming provisions of reg 83.

Consequently, the discretion conferred upon the registrar to extend a time period in terms of section 16(2) cannot override a specific declaration of abandonment as set out clearly in reg 83 (quoted in para [10]).

On appeal to the Supreme Court of Appeal, Navsa ADP (writing for a unanimous court), disagreed.

In the first instance, the court held that regulation 83 did not, expressly or otherwise, limit or in any way impinge on the registrar's express remedial power as provided for in section 16(2) (para [13]). So the regulation did not fall within the provision of this subsection – '[i]t is doubtful that it could' (ibid). The court referred with apparent approval to *Rossouw & another v First-Rand Bank Ltd* 2010 (6) SA 439 (SCA) (para [24]), where the court stated that '. . . it is generally impermissible to use regulations created by a minister as an aid to interpret the intention of the legislature in an Act of Parliament, notwithstanding that the Act may include the regulations. . .' (quoted in para [14]).

Secondly, a remedial power (such as the power to extend time periods) aimed at avoiding harsh results should be extended as far as the wording of a statutory provision will allow (para [15], with reference to *Slims (Pty) Ltd & another v Morris NO* 1988 (1) SA 715 (A) 734D-F).

Thirdly, the rule of statutory interpretation that a specific provision overrides a general provision applied to provisions within the same legislative instrument. Thus, a specific provision in a regulation could not override a general provision in a statute. To read the Patents Act 'conjunctively' with the regulations (as the Commissioner did), and to construe the regulations in the manner that the Commissioner did, would 'have the tail wag the dog', held Navsa ADP (para [16]).

The appeal was accordingly dismissed with costs (para [21]).

Trade Marks

Endorsements

Cochrane Steel Products (Pty) Ltd v M-Systems Group [2017] ZASCA 189 is the latest decision in the ongoing dispute between

fencing manufacturers. Previously, the Supreme Court of Appeal had held that the use of adwords by M-Systems did not infringe Cochrane's common-law rights to its as yet unregistered trade mark for the name CLEARVU (*Cochrane Steel Products v M-Systems Group & another* 2016 (6) SA 1 (SCA); see 2016 *Annual Survey* 584ff). Cochrane had to rely on passing off as a ground for this litigation, as M-Systems had vigorously opposed registration of Cochrane's mark CLEARVU. The decision discussed here flows from that opposition.

Cochrane had applied for the registration of the mark CLEARVU in two classes – class 6, essentially for metal products, and class 37 for various services in the building and construction field. M-Systems alleged that the mark was not registrable, as, in terms of section 10(2)*(b)* of the Trade Marks Act 194 of 1993, the mark 'consists exclusively of an indication which may serve in trade to designate the kind, quality, intended purpose or other characteristics of the goods or service'. Also, it was not 'capable of distinguishing the goods or services for which it is to be used' (ss 9(1) and 10(2)*(a)*).

In the court of first instance, Cochrane successfully showed that not only was the mark CLEARVU capable of distinguishing (*M-Systems Group (Pty) Ltd v Cochrane Steel Products (Pty Ltd*) [2016] ZAGPPHC 677 (here, *M-Systems*) para [40]), but it had in fact become distinctive through use (para [51]). M-Systems had, as an alternative to its request that the registration be refused, asked for endorsements to be entered in respect of the words 'clear', 'view', and 'vu' (para [6]). The court (Basson J) made the following order:

> 1.1. The registration of this mark shall give no right to the exclusive use of the word 'clear' and 'view' separately and apart from the mark; [and]
> 1.2. The trademark registrant admits that the registration of this mark shall not debar others from the *bona fide* descriptive use in the course of trade of the words 'clear view' and 'view' (para [55]).

As Navsa ADP said on appeal, the reasons given by the court of first instance were 'exceptionally brief' and consisted merely of a statement that the court agreed with M-Systems' submission that Cochrane should not be entitled to any exclusive right to the word 'clear' or 'view' (para [4], quoting *M-Systems* para [53]).

Cochrane appealed the order of the court of first instance. The liquidators of M-Systems elected to abide by the court's decision (para [5]).

The order requested by M-Systems in the court of first instance was for the refusal of the registration of Cochrane's marks; alternatively, for 'an order entering appropriate endorsements against both these trade marks to the effect that the applicant would not, by virtue of the registration of the marks, obtain the exclusive right to use the words ''CLEAR'', ''VIEW'', or ''VU'' separately and apart from the trade mark CLEARVU' (*M-Systems* para [6]).

Basson J's order contains, in trade-mark terminology, both a disclaimer and an admission – the trade-mark proprietor both disclaims that it has exclusive rights to the words and admits that others may use them in the course of trade. Surprisingly, the order is also drafted in terms wider than those sought by M-Systems: while the company asked only for the separate words to be disclaimed, the added admission relates also to the phrase 'clear view', over and above the two separate words 'clear' and 'view'. This has serious implications for Cochrane in any future infringement litigation.

On appeal, Navsa ADP included in his judgment an overview of the South African practice in respect of endorsements. Section 15 of the Trade Marks Act states:

> If a trade mark contains matter which is not capable of distinguishing within the meaning of section 9, the registrar or the court, in deciding whether the trade mark shall be entered in or shall remain on the register, may require, as a condition of its being entered in or remaining on the register –
>
> *(a)* that the proprietor shall disclaim any right to the exclusive use of all or any portion of any such matter to the exclusive use of which the registrar or the court hold him not to be entitled; or
>
> *(b)* that the proprietor shall make such other disclaimer or memorandum as the registrar or the court may consider necessary for the purpose of defining his rights under the registration:
>
> Provided that no disclaimer or memorandum on the register shall affect any rights of the proprietor of a trade mark except such as arise out of the registration of the trade mark in respect of which the disclaimer is made.

Navsa ADP described paragraph 1.1 of the order made by the court of first instance as a disclaimer, corresponding to section 15*(a)*. He pointed out that while such an entry did not allow the proprietor of the registered mark to bring an infringement action in respect of the disclaimed matter, it did not prohibit any common-law action for passing off (para [13]).

Paragraph 1.2 of the order is in the form of an admission, 'a practice which is unique to South Africa' (para [14]). Navsa ADP

relied on CE Webster & GE Morley *Webster & Page South African Law of Trade Marks, Unlawful Competition, Company Names and Trading Styles* 4 ed (Webster & Page) (looseleaf, service issue 19 § 9.18) for his statement that an admission is used when a word forming part of the relevant trade mark is misspelt, although the admission relates to the word in its ordinary meaning. (In practice, the admission is entered in respect of the ordinary spelling of the word, not the misspelling.) An admission is frequently required by the registrar even when 'the word is only remotely one which others may wish to use descriptively or whether it is in fact wholly descriptive or otherwise non-distinctive' (para [14]).

Navsa ADP's further discussion of the practice of endorsements relied at some length on quotations from *Cadbury (Pty) Ltd v Beacon Sweets & Chocolates (Pty) Ltd & another* 2000 (2) SA 771 (SCA) and *Distillers Corporation (SA) Ltd v SA Breweries Ltd & another; Oude Meester Groep Bpk & another v SA Breweries Ltd* 1976 (3) SA 514 (A) (paras [15]–[20]).

He concluded by holding that the VU in CLEARVU is not an invented word but a misspelling of the ordinary word 'view', and so an admission is appropriate in respect of the word (para [21]). In addition, because no trader is entitled to appropriate the ordinary English words 'clear' and 'view', a disclaimer is appropriate (para [22]). The order of the court of first instance is accordingly warranted, 'save that para 1.2 should be amended by the deletion of the words '[t]he trademark registrant admits that' (para [22]).

Unfortunately, this judgment does not serve to clarify the position in respect of endorsements any further. As regards disclaimers, Webster and Page explain,

> the principle is firmly established that disclaimers should not be entered indiscriminately, but only for good reason. Matter should be disclaimed where it is likely to become in use an essential feature of the mark as a whole. Where it is obvious that no exclusive rights can be obtained in a particular element of a trade mark there is no need for a specific disclaimer (§ 9.11 and cases cited there).

As the disclaimed words are clearly an essential feature of the mark, a disclaimer in respect of the two separate words is appropriate. But if the words have been disclaimed, an admission of the word 'view' becomes unnecessary. The authors add that '[w]here the feature is a word which per se is not descriptive of the goods or services but is one which in advertising or other reference to the goods may conceivably be used by other

traders, an admission would probably be appropriate' (§ 9.20 and cases cited there). They also point out that 'the strictures against unnecessary disclaimers apply equally to the entry of a memorandum since in each case the result would be that the Register would be cluttered by unnecessary endorsements' (ibid). Seen this way, it would be correct to disclaim both separate words; alternatively, to disclaim the word 'clear' and enter an admission in respect of the word 'view'. But the entry of two endorsements is clearly unnecessary. Also, as we mentioned earlier, the admission recorded in respect of the phrase 'clear view' was not requested, is uncalled for, and has serious implications for the viability of the trade mark concerned.

Passing off

It is not clear why the judgment in *Herbal Zone (Pty) Ltd & others v Infitech Technologies (Pty) Ltd & others* [2017] 2 All SA 347 (SCA) was marked reportable. The dispute concerned distribution of an imported herbal product. The product name, Phyto Andro For Men, had not been registered as a trade mark. The first appellant (Herbal Zone SA) imported the product from the alleged manufacturer Herbal Zone International, which was not a party to the action. The first respondent (Infitech) had been the sole distributor in South Africa. When this agreement terminated, Infitech commenced import of a similar product and marketed it under the same name. As was to be expected, the appellant objected. It placed advertisements in newspapers branding the opposition product as counterfeit, and sent warnings to pharmacies and outlets stocking its product to warn them against the 'counterfeit' product (paras [3] [4]). It also attempted to have the Infitech product seized in terms of the Counterfeit Goods Act 37 of 1997. This led Infitech to institute proceedings against Herbal Zone, seeking various interdicts on the basis that Herbal Zone's allegations were defamatory. Herbal Zone SA counterclaimed that Infitech was passing off its product as theirs (paras [7] [8]). The court of first instance granted some of the interdicts requested by Infitech and dismissed the counterclaim.

On appeal, the passing-off claim was viewed as the principal issue requiring determination. Wallis JA set out the essentials required for a successful passing-off action. He emphasised that, provided Herbal Zone SA could show that it had the necessary reputation in South Africa, its passing-off claim would be successful, as both misrepresentation and damage were present (para

[10]). After a lengthy analysis of the facts, the court found that any reputation in South Africa vested in the foreign company, Herbal Zone International, not in Herbal Zone SA (paras [11]-[27]). The court held that this was not the type of situation where a distributor or importer could acquire a reputation, as all the marketing and labels indicated that the product originated from the foreign company, not the first appellant (paras [28] [29]).

As regards the defamation claim, the court held that a final interdict is granted only if damages will not be an adequate remedy. As the respondents had not shown irreparable harm, they were not entitled to the interdicts granted by the court of first instance (para [36]).

Similarity of marks

In 2017, the Supreme Court of Appeal dealt with two matters where the similarity of marks was in issue. As mentioned in the 2016 *Annual Survey* 582ff, there has been some criticism of this court's previous decisions on the similarity of marks. This included a decision where the court held that YUPPIECHEF was not similar to YUPPIE GADGETS (*Yuppiechef Holdings (Pty) Ltd v Yuppie Gadgets Holdings (Pty) Ltd* [2016] ZASCA 118), and another where it was found that that KNIGHTS and KNIGHT'S GOLD were not similar to BLACK KNIGHT (*Distell Ltd v KZN Wines and Spirits CC* [2016] ZASCA 18), as the words YUPPIE and KNIGHT, respectively, were not the 'dominant' word in the trade marks concerned.

Lucky Star Limited v Lucky Brands (Pty) Ltd & others 2017 (2) SA 588 (SCA) was decided on a corresponding basis.

The appellant (Lucky Star) is a large producer of canned fish; the respondents (Lucky Brands) are a group of restaurants selling fish and chips, under the trading name of either 'Lucky Fish' or 'Lucky Fish and Chips', coupled in each instance with the area or street name where the specific restaurant is located. Lucky Star holds a number of registrations for the mark LUCKY STAR; the earliest dates from 1959 in class 29 for fish and fish products. Subsequent registrations are for a device mark covering the same goods, for another class 29 mark for goods other than fish and fish products, and, finally, in class 42 for retail services 'concerned with or relating to the provision and supply of foodstuffs'.

The respondents have no trade-mark registrations but have a registered company name, Lucky Brands (Pty) Ltd. Lucky Star

alleged trade mark infringement in terms of all three sub-paragraphs of section 34(1). It lost in the court of first instance.

On appeal, Swain JA reiterated the various tests used to determine whether infringement has occurred, in particular those applied to determine whether marks are so similar as to cause confusion or deception (paras [6]–[9]). Turning to the facts, he stated that the only common element in the parties' respective marks was the word LUCKY, which word he considered to be 'an ordinary word in everyday use, as distinct from an invented or made-up word, and it cannot follow that confusion would probably arise if it is used in combination with another word' (para [10], quoting from *Bata Ltd v Face Fashions CC & another* 2001 (1) SA 844 (SCA) also at para [10], where the word 'power' was in issue). He then held that the common element LUCKY was of 'minor significance' when the marks were looked at as a whole, as '"[t]he word "Fish", as opposed to the word "Star", is distinctive and cannot be ignored' (ibid). When the marks are compared side by side, and 'the main or dominant features of the marks are considered, namely the words "Star" and "Fish", there is no likelihood of deception or confusion' (ibid).

He disagreed with the appellant's argument that the distinctiveness of the word 'fish' is diminished because it is used in the context of the sale of fish. The judge stated that this does not occur merely because the word also serves to describe the product sold (ibid). Accordingly, as the marks did not resemble each other so closely that deception or confusion would arise, infringement in terms of section 34(1)*(a)* did not occur (ibid). The claims in terms of sections 34(1)*(b)* (para [12]) and *(c)* (para [13]) were unsuccessful for the same reason – the 'distinct lack of similarity' between the marks (ibid).

Interestingly, Swain JA had previously concurred with Wallis JA's judgment in *Pioneer Foods (Pty) Ltd v Bothaville Milling (Pty) Ltd* [2014] 2 All SA 282 (SCA), where the court stated that 'the word "STAR", and the device of a star as such, are common features of marks registered in the same class' (class 29 for foodstuffs, here maize meal) (para [21]). Why the word 'star' has now become less common, and how the word 'fish' can be distinctive in respect of the sale of fish, are not explained in the *Lucky Star* decision.

It appears that the court, in the various decisions referred to above, has misapplied the general principle that a word in common use cannot be distinctive or comprise the dominant

feature of a mark. The 'dominant feature' concept was most famously articulated by Corbett JA in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A), where he stated that 'if each of the marks contains a main or dominant feature or idea the likely impact made by this on the mind of the customer must be taken into account' (641B-D). The question then arises as to whether a word in common use can be the dominant or main feature of a mark. This was answered by Nugent JA in *Orange Brand Services Ltd v Account Works Software (Pty) Ltd* [2013] ZASCA 158, where he held as follows regarding the word 'orange' in respect of computer software:

> I accept that 'orange' is an ordinary English word, in wide use to describe a colour or a fruit, and is not a constructed word finding its distinctiveness in the word itself. But to my mind the dominant feature of the word when used as a mark in this context, is that in its ordinary meaning it has no association with computer software or computer technology. It is precisely the absence of any natural association that makes the mark distinctive and catches attention (para [15]).

Once again, Swain JA formed part of the bench that concurred in this judgment.

The same construction can be applied to the mark LUCKY STAR in respect of tinned fish. While the word 'lucky' might be in common use in respect of games or gambling, it is not a word that is commonly used in respect of food products, unlike the words 'star' and 'fish'. 'Lucky' would then be the dominant feature of both marks.

The decision of the Supreme Court of Appeal in *Pepsico Inc v Atlantic Industries* (983/16) 2017 ZASCA 109 on the similarity of marks, concerning the word 'twist', is more persuasive. The respondent (Atlantic) is a subsidiary of the Coca-Cola Company and the South African proprietor of the registered trade marks TWIST, LEMON TWIST, and DIET TWIST, all in class 32, which includes mineral and aerated waters and non-alcoholic drinks. The appellant (Pepsico) is the registered proprietor in South Africa of various trade marks in the same class comprising or containing the word PEPSI. Pepsico applied for the mark PEPSI TWIST in class 32, which was, unsurprisingly, opposed by Atlantic. Pepsico countered this by applying for the expungement of Atlantic's various TWIST registrations on the basis that they were wrongly remaining on the register as they offended sections 10(2)*(a)* and *(b)*.

The expungement application was dealt with first. Pepsico contended that the word 'twist' is a common English word that is

descriptive of the goods to which the mark is applied and not inherently capable of distinguishing them from the goods of other proprietors. The company based this assertion on dictionary definitions, which included 'a curled piece of lemon peel used to flavour a drink' and 'a drink consisting of a mixture of two different spirits. . .' (para [6]). The court pointed out that these definitions are described as slang by the dictionaries cited, and as obsolete slang by a 1961 dictionary of slang (para [7]). For South African consumers, the word 'twist' would be viewed as an arbitrary brand name. As the court held: 'Like a made-up word, a common word which is arbitrary when applied to a particular product is the exemplar of a mark inherently capable of distinguishing' (para [8], citing *Orange Works* above with approval). So the marks were not vulnerable to expungement as they were inherently capable of distinguishing Atlantic's beverages from those of other parties (para [13]).

The court then considered whether Pepsico's proposed mark could be registered, in the light of Atlantic's opposition in terms of section 10(14). This subsection prohibits the registration of a mark that 'is identical to a registered trade mark belonging to a different proprietor or so similar thereto that the use thereof in relation to goods or services in respect of which it is sought to be registered and which are the same as or similar to the goods or services in respect of which such trade mark is registered, would be likely to deceive or cause confusion. . .'.

As the court emphasised, the proposed mark PEPSI TWIST would not be identical to the mark TWIST, and the issue is then whether the marks are sufficiently similar to cause deception or confusion (para [17]). The court stated that, when testing for deception or confusion, it will usually identify the features of the marks, if any, which are dominant as, if they share a dominant feature, there is ordinarily a greater likelihood of deception or confusion (para [20]). As authority for this proposition, the court cited the following statement in *Distell Ltd v KZN Wines and Spirits CC* [2016] ZASCA 18 para [10], 'the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components'. (In this decision, which has been criticised (see 2016 *Annual Survey* 583ff), the court had held that KNIGHT was not the dominant element in the marks KNIGHTS, BLACK KNIGHT, and KNIGHTS GOLD.)

After an analysis of the notional use to which Pepsico could put its mark, the court concluded that TWIST was the 'sole distinctive

feature' of all Atlantic's marks (para [24]). A long discussion on the effect of the insertion of the mark PEPSI before the mark TWIST concluded by finding that some confusion is likely, as consumers might assume that any TWIST beverage is connected with the various PEPSI beverages (paras [24]–[31]).

Other than the court's finding on the effect of linking an extremely well-known mark with another mark, the importance of this decision to the more general question of confusing similarity between marks is the court's recognition that even common words may be distinctive in a trade-mark sense, provided that they are not generally used on the products concerned. In the decisions reached over the past two years, the court might accordingly have considered whether YUPPIE, KNIGHT, LUCKY, and TWIST were used, or might be 'legitimately desired to be used', by other traders in the same field, rather than dismissing these words as common or descriptive. In the decision under discussion, the court quoted the following test with approval: '[W]hether other traders were likely, in the ordinary course of their business and without any improper motive, to desire to use the same mark . . . in connection with their goods' (*Registrar of Trade Marks v W & G Du Cros Ltd* [1913] UKHL 588, [1913] AC 624 at 634). Had this test been applied, it is possible that some of the decisions referred to here might have had a different outcome.

Use

Westminster Tobacco Co (Cape Town and London) (Pty) Ltd v Philip Morris Products SA & others [2017] 2 All SA 389 (SCA) dealt with the concept of '*bona fide* use' in relation to an application for expungement due to non-use of a registered trade mark. Section 27(1)*(b)* states that

> . . . a registered trade mark may, on application to the court, . . . by any interested person, be removed from the register in respect of any of the goods or services in respect of which it is registered, on the ground . . . that up to the date three months before the date of the application, a continuous period of five years or longer has elapsed from the date of issue of the certificate of registration during which the trade mark was registered and during which there was no bona fide use thereof in relation to those goods or services by any proprietor thereof or any person permitted to use the trade mark as contemplated in section 38 during the period concerned.

At issue here was whether the use that had been made of the mark concerned was *bona fide.* Both parties form part of large

tobacco manufacturing companies. The appellant, Westminster, is a subsidiary of the British American Tobacco Group (BAT) while the respondent, Philip Morris, forms part of Philip Morris International (PMI). PMI is the international owner of the trade mark PARLIAMENT, which is used elsewhere in the world on one of its premier cigarette brands. However, it is unable to do so in South Africa, as Westminster has registrations dating from 1952 and 1997 for the mark PARLIAMENT for cigarettes and related tobacco products. PMI attempted to register the mark PARLIAMENT for the same goods in 2006, but was unsuccessful as a result of the presence of the two Westminster marks. As a result, it sought removal of these two marks on the ground of actual non-use for five years. According to the pleadings, the cut-off date by which any *bona fide* use had to take place was 22 July 2008. The burden of proving such use rested on Westminster (para [4]).

BAT obviously became aware of PMI's attempt to register the PARLIAMENT mark in South Africa, and so, after having never used the mark, had a million cigarettes manufactured in South Africa in September 2007 with the intention of launching cigarettes bearing this mark in late October 2007. This was delayed and a very minor launch took place in Upington in January 2008. Some few further sales occurred before the cut-off date, although after that time relatively more sales took place until use of the mark ceased in 2012. (Interestingly, the high point of sales in 2010, of 15 million cigarettes, was described by the court as 'tiny in relation to the market' (para [9]).)

Refreshingly, Wallis JA said that as the courts had considered the concept '*bona fide* use' on previous occasions, there was no need 'to rehearse the jurisprudence in this regard' and limited himself to a brief quotation from the most recent decision on this issue (*AM Moolla Group Ltd v The Gap Inc* 2005 (6) SA 568 (SCA)) (para [5]).

The court's summary of what comprises *bona fide* use is valuable. Wallis JA emphasises that while use need not be extensive, it must be genuine. Such use is not mere token use although the line is a fine one, as the use may be minimal. Importantly, he holds that, while use 'for an ulterior purpose, unassociated with a genuine intention . . .' is not permissible, the fact that use is also prompted by fear of removal, or to prevent the mark falling into the hands of a competitor, does not invalidate such use, provided it is 'principally directed at promoting trade in the goods' (para [7]).

As the court said, whether use is *bona fide* must be determined from the facts of the case (para [7]). What follows is a lengthy analysis of the evidence presented to the court of first instance. It appears that although BAT commenced use of the mark PARLIAMENT when it realised that it was vulnerable to expungement, such use was also an attempt to launch a cigarette brand into what is termed the 'low priced segment of the market' to determine its viability (para [46]). The court of first instance had relied on *Gulf Oil Corporation v Rembrandt Fabrikante en Handelaars (Edms) Bpk* 1963 (2) SA 10 (T) to hold that *bona fide* use was 'with the object or intention of protecting, facilitating or furthering trade in those goods. . . . If a mark is used on goods not with the object of promoting trade in those goods as an end in itself, but with an ulterior purpose such as disrupting the business of a competitor, or protecting its trade in other goods, such use does not . . . constitute *bona fide* use of the trade mark. . .' (para [47]).

Although not explicitly stated, the court of first instance appears to have viewed the fact that the use made of the mark was partly to prevent expungement, although other considerations were also present, as an indication that such use was not *bona fide*. The appeal court adopted a different approach. As Wallis JA had said earlier, the fact that use was prompted also by a fear of removal did not render it automatically invalid; neither did the fact that the use was limited. This would 'introduce a quantitative and qualitative element to the enquiry into *bona fide* use of a mark' which would be inconsistent with previous authorities (para [48]). On the facts, then, the use that Westminster had made of the mark was found to be *bona fide*. Although this decision once again emphasises the difficulties in proving the presence or otherwise of *bona fide* use and illustrates the fact-based approach to such a determination, the principles enunciated by Wallis JA prior to his assessment of the evidence are important and will be valuable in future litigation.

LABOUR LAW: COLLECTIVE

MONRAY MARSELLUS BOTHA*

LEGISLATION

There was no legislation dealing with collective labour law during the period under review.

CASE LAW

TRADE UNIONS

Names and acronyms

In *Independent Municipal & Allied Trade Union v Municipal & Allied Trade Union of SA* (2017) 38 *ILJ* 1283 (LAC), the Municipal and Allied Trade Union of South Africa (the MATUSA), which was formed by disenchanted members of the South African Municipal Workers Union (the SAMWU), appealed to the Labour Court in terms of section 111(3) of the Labour Relations Act 66 of 1995 (the LRA) against the decision of the Registrar of Labour Relations not to register it as a trade union in terms of sections 95 and 96 of the LRA on the basis that it had not satisfied the requirements of the LRA, and was not a genuine trade union. The Independent Municipal and Allied Trade Union (the IMATU) was joined as a respondent in the appeal because of its interest in a determination as to whether the MATUSA's name offended the provisions of section 95(4) of the LRA. The IMATU objected to the MATUSA's registration because its name and acronym could be confused with its own. The Labour Court had found that it was 'most unlikely' that the acronym 'MATUSA' would be confused with the acronym 'IMATU' given the distinct pronunciation of the acronyms (para [11]). The court added that the full names of the MATUSA and the IMATU could also be distinguished by the prefix 'Independent' in the IMATU's name. The court said that this prefix was an important signifier of the IMATU being independent of any affiliation, and that the descriptive words 'municipal' and 'trade

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union', and the generic words 'Allied Trade Union of South Africa' also appeared in the names of many other trade unions. The court found the MATUSA to be a genuine trade union. It upheld the appeal, set aside the registrar's refusal to register the MATUSA, and ordered the registrar to register the MATUSA within fourteen days. The IMATU appealed against the part of the judgment and order which dealt with whether the MATUSA's full name and its acronym so closely resembled those of the IMATU that they were likely to mislead or cause confusion as contemplated by section 95(4) of the LRA. The IMATU relied on its substantial reputation as a trade union within the local government sector and among the broader public, where it is known by its full name and acronym. The IMATU further based its appeal on: the fact that four of the five words in the MATUSA's name – 'Municipal and Allied Trade Union' – are identical to four of the words in the IMATU's name; that the last four letters in IMATU's acronym (MATU) are duplicated in four letters of the acronym 'MATUSA'; and that the name MATUSA would, therefore, mislead or cause confusion. It was also disputed that the words 'Allied Trade Union of South Africa' are generic, or conflict with the name's dominant message which is to identify a 'Municipal and Allied Trade Union'. It was also contended that 'Independent' was not a signifier peculiar to the IMATU's name, given that section 95(1)*(d)* requires a trade union to be 'independent' as intended by section 95(2).

The Labour Appeal Court, in determining whether the name 'the MATUSA' so closely resembled that of 'the IMATU' that it could mislead or cause confusion as contemplated by section 95(4), referred to the issues set out in *Staff Association for the Motor and Related Industries v Motor Industries Staff Association & another* (1999) 20 *ILJ* 2552 (LAC) with reference to *Plascon-Evans Paints Ltd v Van Riebeeck Paints* 1984 (3) SA 623 (A). In *Plascon-Evans* (641C-D), the following factors were taken into account:

> (i) the names when compared side by side and separately, including their sense, sound, and appearance, their distinctive, main, or dominant components, and their similarities and differences, without peering too closely in order to find such similarities or difference; (ii) the impact and the overall impression created by the names on the average person likely to encounter them, or the notional customer of average intelligence, having normal eyesight and adopting ordinary caution, and allowing for imperfect recollection and that names or marks are remembered by general impression, or by some significant or striking

> feature, and not by a photographic recollection of the whole; (iii) the context in which the names would be encountered and used, considered against the background of relevant surrounding circumstances; and (iv) the reasonable likelihood of a substantial number of interested people being misled or confused by the names, whether for a shorter or longer period of time, in a manner that would induce in their minds an erroneous belief, impression, doubt, or uncertainty, that the entities identified are the same entity or are connected with one another, with the reputation attached to an established name being a relevant consideration (para [18]).

This requires that if both names 'are to be used together in a normal and fair manner, in the ordinary course of business' (ibid), a value judgment must be made 'dictated by the overall impression created by the marks, given their respective characteristics, and the circumstances in which they are likely to be encountered, instead of being drawn into excessive analysis' (ibid; cf *Orange Brand Service v Account Work Software* [2013] ZASCA 158 para [14]). The court held that when the two names were compared, both side by side and separately, it was apparent that in their long form four of the five words used in the IMATU's full name – 'Municipal and Allied Trade Union' – also appeared in the MATUSA's name, with a similar repetition occurring in their respective acronyms. The court added that, when regard was had to the sense, sound, and appearance, distinctive and dominant components, and similarities and differences between the names, it was apparent that there were strong distinguishing features between the names, particularly in the use of the word 'Independent' as a prefix to the IMATU's name, and the words 'South Africa' as a suffix to the MATUSA's name. The result was that the sense, sound, and appearance of the two names were distinct despite the common words used; this was more so when the dominant impression created by the word 'Independent' in the prefix to the IMATU's name is that of an independent trade union in the sector. The court added that the dissimilar acronyms used by the IMATU and the MATUSA, in an environment in which acronyms are commonly used, did not allow for a reasonable likelihood of confusion. The visual appearance of the names did not create confusion given the use of the prefix 'Independent'. Given their different acronyms, and with due allowance for imperfect recollection, the probabilities supported a conclusion that what is likely to remain in the mind of an average person are the words 'Independent' and 'IMATU', compared with 'Municipal' and 'South Africa' and 'MATUSA'. The difference between them

would be noted by the average person, and the similarities between four words in their names do not permit a conclusion that there was a reasonable opportunity to cause confusion. The appeal was accordingly dismissed.

Collective Agreements

Extension of collective agreements

The matter of *Association of Mineworkers & Construction Union v Chamber of Mines of SA* (2017) 38 *ILJ* 831 (CC), 2017 (3) SA 242, [2017] 7 BLLR 641, concerned the extension of collective agreements in terms of section 23(1)*(d)* of the LRA. The Chamber of Mines of South Africa (first respondent), acting on behalf of its members in the gold mining sector (including Harmony Gold Mining Company Ltd, AngloGold Ashanti Ltd, and Sibanye Gold Ltd – the second, third and fourth respondents), began negotiations on wages and working conditions with unions (National Union of Mineworkers (the NUM), Solidarity and United Association of South Africa (the UASA) (the fifth, sixth and seventh respondents) who represented the majority of workers in the sector. The Association of Mineworkers & Construction Union (the AMCU) was not a party to the negotiations, and did not consider itself bound to them. On 20 January 2014, the AMCU notified the three companies that its members would strike as from 23 January 2014. In response, the Chamber successfully applied to the Labour Court to interdict the strike. On 30 January 2014, the Labour Court granted an interim interdict against the AMCU and its members which was confirmed on the return day. The AMCU then appealed to the Labour Appeal Court but was unsuccessful. On further appeal to the Constitutional Court, the AMCU contended that the definition of 'workplace' does not apply to the reference in section 23(1)*(d)*(iii) to 'the majority of employees employed by the employer in the workplace' in that the statute's definitions only apply 'unless the context otherwise indicates' (para [11]). The AMCU further argued that if the definition does apply, it can be interpreted in what it calls a 'broad' way – with the effect that 'workplace' means an individual mine and not all of an employer's operations taken together (para [11]). It followed from AMCU's argument that its members were entitled to strike at least at the individual mines where they enjoyed a majority, and also that section 23(1)*(d)*(iii) of the LRA limited the rights to strike, fair labour practices, and freedom of

association of its members. The court rejected the AMCU's arguments and held that the definition of 'workplace' focuses, first, on employees as a collective and, second, on the relative unimportance of location. Both signal that 'workplace' has a special statutory meaning. The court added that the focus in the definition of 'workplace' is on workers as a collective rather than as separate individuals. The definition encompasses one or more 'place or places where employees of an employer work' which means that 'the place or places' where workers work may constitute a single workplace (para [26]). This implies the intrinsic possibility of locational multiplicity for a single 'workplace' which excludes, from the outset, any notion – which the ordinary meaning of 'workplace' might encourage – that each individual location where a worker works is a separate 'workplace' (para [26]). The court emphasised that regardless of at how many places employees work, different 'operations' may be different workplaces only if they meet the criteria set in the definition. The key question is whether an operation is independent and not where it is located, as each independent operation which constitutes a separate 'workplace' may itself be at one or more separate locations. The court also stated that both features of the definition have 'a practical bite' because they signal that for purposes of the LRA 'workplace' does not have its ordinary meaning: the legislature has assigned a special meaning to the term (para [29]). The question was whether each AMCU-majority mine constituted a separate 'workplace'. This depends not on the mines' geographic locations or where the individual workers work, but on the functional signifiers of independence in the definition. It requires one to determine whether the employer companies conduct two or more operations 'that are independent of one another by reason of their size, function or organisation' (paras [4] [5] [28] [30]). The Constitutional Court reiterated that both the Labour Court and the Labour Appeal Court had found that each mining house operated integrally as a single workplace, and that no AMCU-majority mine qualified as an independent operation. It further emphasised that even if the AMCU's argument that the application of the statutory definition does not involve a purely factual enquiry were to be upheld, it would not result in a different finding (para [37]). The court also stated that there was no reason for it to intervene, against the grain of the statutory language, to impose what the AMCU called 'the broad interpretation' of workplace. It follows that the agreement had been validly extended to AMCU members at the five AMCU-majority mines.

The AMCU further contended that section 23(1)*(d)* of the LRA infringes the right to freedom of association, the right to collective bargaining, and the right to strike (para [41]). Its argument, both on the papers and at the hearing, focused on the right to strike. At the core of the AMCU's challenge was the LRA's endorsement of the principle of majoritarianism. The court stated in this regard that some form of majority rule in the workplace must apply if there is to be orderly and productive collective bargaining (para [44]). Section 23(1)*(d)* gives greater power to a majority union within a workplace, as defined; and it does so for powerful reasons that are functional to enhancing employees' bargaining power through a single representative bargaining agent. The court pointed out that counsel for the NUM rightly noted that to object to section 23(1)*(d)* purely on the basis that it applies majoritarianism is something of a phantom, in that the AMCU itself sought to enforce a form of majoritarianism. Although the AMCU complained of the constitutional propriety of applying majoritarianism to a sector-wide agreement under section 23, it sought to have majoritarianism apply at each individual mine (with the result that its majority at five mines could prevail) (para [45]).

The court acknowledged that the AMCU was correct in stating that the codification of majoritarianism in section 23(1)*(d)* limits the right to strike. However, the key question was whether the principle provided sufficient justification for that limitation, and the best justification for the limitation was that majoritarianism, in this context, benefitted orderly collective bargaining (para [50]). The court added that the task of judges is not to pick and choose between the rights and wrongs and advantages and disadvantages of different constituency models, but that their responsibility is much narrower – to determine whether the model Parliament has in fact chosen passes scrutiny under the Bill of Rights (para [51]). The court added that the statutory structures that enforce the majoritarian system nevertheless allow minority unions freedom of association. Minority unions have recruiting rights, organisational rights, deduction rights, recognition of shop stewards, time off for union office-bearers to do union work, and bargaining rights (all of which the AMCU had). The court further stated that although the AMCU and its members did lose the right to strike while the agreement was in force, none of the non-signatory unions or employees lost any of their organisational and collective bargaining entitlements. This means that the LRA, though premised on majoritarianism, is not an instrument of oppression;

it does not entirely suppress minority unions as its provisions allow ample scope for minority unions to organise within the workforce (para [55]). The appeal was dismissed.

In *National Union of Metalworkers of SA obo Members v SA Airways SOC Ltd* (2017) 38 *ILJ* 1994 (LAC), [2017] 9 BLLR 867 SA Airways SOC Ltd (the SAA, the respondent) embarked on a massive retrenchment drive after suffering a loss of R2,6 billion in the 2013/2014 financial year. This resulted in many job losses. The appellant trade union (the NUMSA), after lengthy facilitation in terms of section 189A of the LRA, requested information on the SAA's financial state. The request was opposed by the SAA and was not supported by the other union's party to the consultation process, who represented the vast majority of employees employed by the SAA. The NUMSA referred an application to the CCMA. After further consultation regarding the economic rationale for the proposed retrenchments (which was not attended by the NUMSA), an agreement was reached between the SAA and the remaining unions who jointly represented 80 per cent of the SAA's employees. In this agreement, the need for retrenchment was accepted, and agreement was reached on issues including severance pay, selection criteria, and retraining of retrenched employees. The agreement was extended to non-parties under section 23(1)*(d)* of the LRA and a further agreement dealing with the SAA's organisational structure was also extended to non-parties (para [15]). The NUMSA then launched an urgent application in the Labour Court, seeking orders declaring that the SAA had not complied with a fair procedure and setting aside the collective agreements with the majority unions. The court held that while it may seem objectionable that section 23(1)*(d)* may be used in a way that appears to deprive individuals and their unions of the right to challenge a retrenchment process, it permits all collective agreements to be extended (para [19]). The court added that section 23(1)*(d)* is not limited to agreements that do not involve deprivation of rights, and that most collective agreements extended in terms of this section involved depriving non-party employees of some or other right (eg, the right to strike). The fact that this is permissible is underscored by section 189(1)*(a)* of the LRA, which has been interpreted as meaning that an employer and a majority trade union may enter into a collective agreement upfront to the effect that, in the case of a retrenchment exercise, the employer will only consult with the majority union (para [19]). The court added that such a collective agreement

can be extended in terms of section 23(1)*(d)* if the requirements are met. The Labour Appeal Court agreed with the Labour Court and, with reference to *Association of Mineworkers & Construction Union v Chamber of Mines of SA* (2017) 38 *ILJ* 831 (CC), [2017] 7 BLLR 641, found that the retrenchment agreement met the requirements as set out in the LRA and was a collective agreement capable of extension in terms of section 23(1)*(d)* of the LRA (paras [38] [39]). The appeal was dismissed.

Cancellation of collective agreements

Imperial Cargo Solutions v South African Transport and Allied Workers Union & others (Road Freight Association as amicus curiae) (2017) 38 *ILJ* 2479 (LAC), [2017] 12 BLLR 1189 dealt with whether drivers would perform work previously done by assistants whose positions had been abolished by the appellant. The appellant concluded a collective agreement with the respondent union, the SATAWU, in terms of which the drivers would fulfil these functions in return for additional payment over and above their normal salaries. During negotiations, the SATAWU sought an increase in the additional amount, and when the appellant refused to meet the demand, the SATAWU informed it that it was cancelling the collective agreement on one month's notice, and that the drivers would no longer perform the ancillary duties provided for in the collective agreement (para [5]). The appellant viewed the cancellation of the collective agreement and the refusal to perform ancillary duties as unprotected strike action and sought urgent interim relief directing the drivers to perform these ancillary duties on the basis that their refusal to do the work amounted to unprotected strike action (para [6]).

The court held that the ancillary duties did not form part of the drivers' terms and conditions of employment given the absence of any other agreement obliging the employees to perform the ancillary duties. As the drivers were entitled to cancel the collective agreement on notice, the obligation fell away upon cancellation of the agreement and consequently the obligation of the employer to pay the employees in lieu of ancillary functions in terms of the collective agreement also fell away (para [20]). The court added that the obligation relating to ancillary duties was based solely on the collective agreement and not on the main collective agreement. The appeal was dismissed with costs.

Interpretation of collective agreements

In *Public Servants Association & others v Minister of Correctional Services & others* [2017] 4 BLLR 371 (LAC), the appellant

union and others concluded an 'Occupation Specific Dispensation' (OSD) regarding salaries which was made a collective agreement of the General Public Service Sectional Bargaining Council (the GPSSBC). The OSD was to be implemented in two phases. Phase one entailed that all employees not previously accommodated by the OSD would be moved from their old (existing) salary scales and notches to new scales and notches provided that they would not be worse off than before the transfer. Phase two entailed financial recognition of past experience in the Department of Correctional Services, with a notch increase for each five years worked 'based on the new notch of the OSD' (para [6]), giving rise to two competing views of interpretation and, therefore, the implementation of phase two of the OCD. The General Public Service Sectional Bargaining Council arbitrator, after repeating the different arguments, held that the interpretation advanced by the appellants properly set out the intention of the drafters, and found that the 'new notch of the OSD' meant the new OCD notch to which the employees had been transferred during the first phase (para [10]). On review, the Labour Court found that the arbitrator was supposed to interpret the words 'new notch of the OSD' but that he did not give any meaning to the words and only repeated the arguments and reached a conclusion without giving proper reasons and so failed to carry out his duties (para [13]). The court noted that the factual matrix is important because each agreement must be placed in proper context as agreements are not made in a vacuum; they are products of a particular background, context, and knowledge of the parties – words without context mean nothing and context means everything (para [17]). The court also stated that the absence of a factual plinth on which to build his interpretation rendered the arbitrator's conclusion unreasonable because he could not apply his mind properly to the issue before him without a factual substratum (para [19]). The appeal was dismissed.

Organisational Rights

The appeal in *SA Correctional Services Workers Union v Police and Prisons Civil Rights Union* (2017) 38 *ILJ* 2009 (LAC), [2017] 9 BLLR 905 concerned the question of whether an employer is precluded from according certain limited organisational rights to a minority union when it falls short of the representation threshold agreed upon between the employer and a majority trade union in the workplace in terms of section 18(1) of the LRA. The Police and

Prisons Civil Rights Union (the POPCRU), as the majority union in this matter, concluded an agreement establishing representation thresholds with the Department of Correctional Services (the DCS) for the acquisition of section 12, 13 and 15 organisational rights by minority trade unions in the workplace. Thereafter, the DCS concluded a collective agreement with the SA Correctional Services Workers Union (the SACOSWU, the appellant) a minority union which had not attained the stipulated representativeness threshold, granting the union stop order facilities for a limited period and the right to represent members in grievance and disciplinary proceedings. The POPCRU referred a dispute on the interpretation and application of its collective agreement with the DCS to the GPSSBC for conciliation and then arbitration. The arbitrator (third respondent) found that by virtue of section 20, the employer was entitled to enter into a collective agreement with a minority union despite a representation threshold having been agreed upon under section 18(1) (para [1]). The arbitrator relied on *NUMSA v Bader Bop (Pty) Ltd* (2003) 35 *ILJ* 1037 (LC) and concluded that the LRA should not be interpreted to preclude non-representative trade unions from obtaining organisational rights, either by agreement with the employer or through industrial action (para [10]). The arbitrator stated that as the statute is capable of a broader interpretation which does not limit fundamental rights, the broader interpretation which entitled the SACOSWU to organisational rights in terms of sections 12 to 16 of the LRA should be followed. The arbitrator found that the collective agreement between the SACOSWU and the DCS was valid and enforceable (para [11]).

The Labour Court on review set aside the arbitration award on the basis that the threshold agreement was binding on the employer, and found that the collective agreement with the minority union was invalid and unenforceable as it was entirely incompatible with the threshold agreement entered into between the DCS and the POPCRU. The court reiterated that an employer may decide whether it wishes to bargain with a minority union, the extent to which it will do so, and whether it will conclude a collective agreement. The LRA does not prohibit bargaining with a minority union on such matters, nor does the employer breach an existing section 18(1) collective threshold agreement by doing so (paras [14] [15]). The court added that the effect of an agreed section 18(1) threshold is to oblige the employer to confer section 12, 13 and 15 organisational rights on unions that have met that

threshold, but not to constrain the employer's entitlement to bargain with unions that have not. The court added that the employer's election to bargain with the minority union in such circumstances may have consequences for the relationship with the majority union. Such a consequence, the court stated, may play out either in the course of the collective bargaining relationship, or through the exercise of other legal remedies (paras [17] [18]). The court further stated that the threshold agreement did not provide a bar to the conclusion of a section 20 collective agreement with the minority union regarding section 12, 13 or 15 organisational rights, and that the existence of the threshold did not distinguish the matter from *Bader Bop* (para [34]). In light of this, the court added that minority unions are entitled to co-exist, to organise members, to represent members in relation to individual grievances, and to seek to challenge majority unions. It followed that the Labour Court had erred in approaching the matter on the basis that section 18 seeks to avoid the proliferation of minority trade unions in a workplace through regulating the admission of trade unions to the bargaining relationship and that the provision would serve no purpose if section 20 were permitted to override it (para [36]). The Labour Appeal Court stated that an agreed threshold does not absolutely bar a minority trade union from access to the workplace because the majoritarian system is compatible with the right to freedom of association, provided that minority unions are not prevented from functioning, making representations on behalf of their members, and representing members in individual grievance disputes (paras [37] [40]). The court further held that the section 18(1) agreement had been correctly interpreted by the arbitrator to permit the conclusion of the agreement with the SACOSWU in order to serve members' interests by representing employees in disciplinary and grievance hearings, as well as the right to have subscriptions deducted for a limited period (para [43]). The appeal succeeded.

In *Independent Municipal and Allied Trade Union v Commission for Conciliation, Mediation and Arbitration & others* [2017] 6 BLLR 613 (LC), the MATUSA was formed as a breakaway trade union from the SA Municipal Workers Union. The MATUSA referred a dispute in terms of section 21(8C) of the LRA to the Commission for Conciliation, Mediation and Arbitration (the CCMA) after the Stellenbosch Municipality refused to grant it organisational rights. At the time of referral of the dispute the MATUSA enjoyed fifteen per cent representation of the municipality's

workforce, whereas the SAMWU and the IMATU respectively enjoyed 25 per cent and 29 per cent representation. A collective agreement stipulated (at the time of the dispute) that a membership threshold of fifteen per cent for the acquisition of organisational rights was required in the municipal sector nationally, a requirement which the MATUSA failed to meet. The commissioner held that in view of the new section 21(8C) (inserted by the 2014 amendments to the LRA) the MATUSA should be granted organisational rights in terms of sections 12, 13 and 15 of the LRA. The arbitrator considered the new section 21(8C) and stated:

> The rationale for the new amendments of section 21 of the LRA is an attempt to adopt a more holistic approach by broadening/adjusting the scope to grant organisational rights to unions that do not enjoy a majority at the workplace. The amendments give effect to the principles of freedom of association in that employees have the right to choose their representation and that minority unions can approach the CCMA where they have not been granted organisational rights. The amendments are also an attempt to provide for the recruitment and protection of workers in atypical forms of employment taking cognisant [sic] of the ideal of decent work (para [10]).

The IMATU contended that the commissioner had misconstrued the issue by failing to consider whether the MATUSA was 'sufficiently representative' in terms of the criteria as set out in section 21(8) of the LRA. The court noted that the MATUSA's quest to secure organisational rights should be considered in context of the LRA and the collective bargaining regime in the local government sector and that the current parties to the South African Local Government Bargaining Council (the SALGBC) are the SALGA (which represents the employers) and the IMATU and the SAMWU (para [15]). The SALGBC agreed in its constitution that another registered trade union (such as the MATUSA) could be admitted only if it met the threshold of not less than fifteen per cent of the total number of employees falling within the scope of the SALGBC. The court was of the view that the commissioner's decision to grant the MATUSA organisational rights was based solely on the fact that the MATUSA had a 'significant interest' in the municipality (the workplace) and that he had disregarded the considerations as set out in section 21(8C) of the LRA (para [18]). The court further noted that the requirement of section 21(8C)*(b)* of 'a significant interest or a substantial number of employees' serves as a basis for granting minority unions organisational rights (para [19]). The court added that a commissioner may only grant organisational rights in terms of sections 12, 13 and 15 if he

or she has considered other factors set out in section 21(8) (para [20]). These include that the commissioner should have (i) sought to minimise the proliferation of trade union representation in a single workplace; (ii) sought to minimise the financial and administrative burden on the municipality to grant organisational rights to a third trade union; (iii) considered the nature of the workplace, being a single municipality within the local government sector; (iv) considered the nature of the organisational rights that the MATUSA sought to exercise (eg, the deduction of trade union subscription fees in a workplace where there is already an agency shop agreement in place); (v) considered the nature of the local government sector; (vi) considered the organisational history at the workplace (eg, the Municipality and the SALGA's agreements with the IMATU and the SAMWU); and (vii) considered the composition of the workforce. The court held that none of these factors had been considered by the commissioner and the award, therefore, was reviewable (para [21]). It held further that the review should be set aside, but noted that it was not in a position to substitute its decision for that of the commissioner. The court ordered that a different commissioner would have to be appointed to consider afresh the evidence and submissions of the MATUSA, the SAMWU, the IMATU and the municipality before applying his or her mind to all the factors set out in section 21(8) and 21(8C).

Industrial Action

Strike notice

In *City of Johannesburg Metropolitan Municipality v South African Municipal Workers Union & others* [2017] 12 BLLR 1244 (LC) the applicant municipality transferred 94 bus drivers to other positions pending disciplinary action against them. The SAMWU referred a dispute to the South African Local Government Bargaining Council, claiming that the municipality had unilaterally changed the employees' contracts of employment and that it should, therefore, restore the terms and conditions. After failure to resolve the dispute the SAMWU issued a five-day strike notice of its commencement with strike action. The municipality launched an urgent application for an order interdicting the strike on the following grounds: (1) insufficient notice had been given to the municipality, as a state organ which requires at least seven days' notice of a strike in terms of section 64(1)*(d)* of the LRA;

(2) where section 64(4) is invoked, it is not competent to strike after the lapse of the period referred to in section 64(1)*(a)*; (3) the precautionary transfer does not constitute a unilateral change to terms and conditions of employment; (4) the precautionary transfer involved a contractual dispute between the parties which the SAMWU has the right to refer to court in terms of section 77(3) of the BCEA, which means that the strike was hit by the section 65(1)*(c)* limitation to the right to strike; and (5) the dispute amounted to an unfair labour practice in terms of section 186(2)*(b)* of the LRA with the result that the strike was once again hit by the limitation in section 65(1)*(c)* (para [3]). The court stated that section 64(1)*(d)* applied to the municipality as it fell within the phrase 'the State is the employer' (para [4]). The question was whether the strike would only be unprotected until the seven days' notice ran out, or whether SAMWU was obliged to give the municipality seven days' notice afresh in order for the strike to be protected. The court added that a fresh notice would have to be issued as the municipality was entitled to know when the strike would start, and the time for the commencement of the threatened strike – which was unlawful – had come and gone (para [5]). The court then stated that it should be noted that section 65(1)*(c)* of the LRA had been amended by 2014 amendments to the LRA to read (the amendment is in italics) 'the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of this Act or *any other employment law*'. The court added that this would cover the Basic Conditions of Employment Act 75 of 1997 (the BCEA), and section 77(3) thereof, which grants the court (employment) contractual jurisdiction.

The court considered two conflicting approaches by different judges: the first by Murphy AJA in *Mawethu Civils (Pty) Ltd & another v National Union of Mineworkers & others* (2016) 37 *ILJ* 1851 (LAC), and the second by Van Niekerk J in *Sibanye Gold Ltd v AMCU & others* (2017) 38 *ILJ* 1193 (LC) (*Sibanye (2)*). Although for present purposes, the court was of the view that the municipality had succeeded in at least establishing a *prima facie* right to relief on this ground, it is still worth noting the two approaches for purposes of this discussion. The court pointed out that the approach of Murphy AJA in *Mawethu* (albeit tentative and at best *obiter*) is that the strike herein is unprotected because, although styled as a dispute about a unilateral change to terms and conditions of employment, the dispute is actionable in terms of section 77(3) of the BCEA as a breach of contract. The result

of this approach is that the strike is hit by the section 65(1)*(c)* limitation of the right to strike. On the other hand, the approach of Van Niekerk J in *Sibanye (2)* must also be considered. The fact that the SAMWU might otherwise have characterised the dispute as a breach of contract does not detract from the fact that the actual nature of the dispute was a dispute about a unilateral change to terms and conditions of employment. This approach means that there was nothing that provides that such a dispute may be referred to arbitration, or to the present court for adjudication; the strike was, accordingly, not hit by the section 65(1)*(c)* limitation of the right to strike. The court found that the municipality had *prima facie* established that the strike was unprotected on the first and fourth grounds mentioned above.

Strike interdicts

In *South African Breweries (Pty) Ltd v Professional Transport & Allied Workers Union of SA aka PTAWU & another* (2017) 38 *ILJ* 2463 (GJ), SA Breweries (the SAB) had a contract with truck owners to transport its products from its depots to retail outlets. The truck owners in turn employed crew members to fulfil their obligations. The crew members, who included the second respondent, were members of the first respondent (the Professional Transport & Allied Workers Union (the PTAWU)). After a labour dispute arose, the truck owners' drivers and crew embarked on violent strike action which resulted in the SAB's products being destroyed by protesting members of the PTAWU. The SAB approached the court seeking an interdict against the PTAWU members. The second respondent raised a point *in limine*, contesting the jurisdiction of the High Court and arguing that the Labour Court had exclusive jurisdiction over this matter as it concerned a strike by employees (para [7]). The High Court agreed with the SAB that the application was aimed at protecting the applicant's property against damage by the employees of the truck owners and preventing financial loss to the business. The application had nothing to do with the strike to compel the truck owners to meet the demands of their employees (para [8]). The court noted that section 239(2) of the Constitution of the Republic of South Africa, 1996 (the Constitution) read with section 17 provides for a peaceful strike or protest and that the reason is to protect the rights which are provided in section 12(1)*(c)* of the Constitution and to ensure that public and private property is not damaged or destroyed by those participating in the strike (para

[28]). The court rejected the second respondent's argument that the members of the first respondent could not be held liable for the damage to the SAB's products which occurred outside the workplace, as any valuable property needs protection whether at the workplace or elsewhere. The court emphasised that the SAB's products had often been destroyed en route to customers, and that the SAB had incurred substantial financial costs arising from the employment of a private security firm to protect its products. The court granted an interdict against the strikers.

Secondary strikes

Nyambi & others v HC Shaik Investment CC & another (2017) 38 *ILJ* 2806 (LC) dealt with a referral by the applicant employees of a dispute concerning their employment status to arbitration under section 198D of the LRA. They claimed that they had become 'deemed' employees of the first respondent's client (Nampak). In terms of section 198D of the LRA, any dispute as to the employment status of employees in relation to a temporary employment service (TES) or the client of such a service may be referred to arbitration. The object of the application is to preserve the ability of the applicants to engage in protected strike action against the true employer or employers in terms of section 64(4) of the LRA. The applicants argued that even though there was no question as to whether the first respondent (HC Shaik) was their employer, it was, pending the outcome of the arbitration, uncertain whether the second respondent was also their employer. By obtaining an interdict, the applicants would be able to prevent the respondents from implementing any changes until they were in a position to know what the ambit of potential strike action under section 64(4) was. They therefore wished to be able to exercise their rights under section 64(4) only once there was certainty about whether or not the second respondent was their employer.

The Labour Court held that if the second respondent (Nampak) was also the applicants' employer, they would have a clear right to embark on primary strike action against it by utilising the procedure under section 64(4) if the changes intended by the first respondent amounted to changes to their terms and conditions of employment (para [8]). The court noted that a primary strike against Nampak would allow employees of Nampak who were not applicants to participate in the strike in support of the applicants' demands. It added that it was well established that it is not only employees who are directly affected by strike demands

made on an employer who may participate in a protected strike in support of those demands (para [9]). Nampak and HC Shaik argued that nothing prevented the applicants from initiating a primary strike against HC Shaik, provided they followed the procedural requirements of section 64(4) and then gave Nampak seven days' notice of a secondary strike in accordance with the requirements of section 66(2)*(b)* of the LRA (para [10]). The court added that provided these procedural requirements and the requirements of section 66(2)*(c)* were also satisfied, other employees of Nampak would be entitled to participate in the strike action in support of the applicants' demands even if the applicants were not employees of Nampak. The court held that, when regard was had to the inextricably close connection between the work performed by the applicants as employees of HC Shaik, and the operations of Nampak, there could be little doubt that such strike action would be reasonable having regard to the direct and material impact on the operations of Nampak, and would fulfil the requirements of section 66(2)*(c)* (para [11]). The court also noted that the economic pressure that such a strike would bring to bear on Nampak would be indistinguishable from the economic effect of a primary strike by the same employees in support of the same demands. It noted further, that the applicants had advanced no grounds why this was not a reasonably suitable alternative to a primary strike against Nampak. The court saw no reason for the applicants to await the outcome of the pending arbitration award in order effectively to exercise the right to strike in support of demands made pursuant to a referral made under section 64(4) and in order to afford the employees of Nampak the right to participate in a strike in support of those demands. The court held that the applicants had a suitable alternative remedy (the secondary strike) and the application failed on that basis.

Dispute Resolution

Interest arbitration: Essential services

National Union of Mineworkers & another v Commission for Conciliation, Mediation and Arbitration & others [2017] 4 BLLR 405 (LC) was an application to set aside an unusual arbitration award following an arbitration to settle a wage dispute. It involved a dispute of interest in an essential service that may, if conciliation has failed, be referred to arbitration by either party in terms of section 74(4) of the LRA. The respondent commissioner upheld

the final wage offer by Eskom (the respondent employer) of 5,6 per cent and, in a subsequent 'variation ruling', a further offer that approved changes in other conditions of service proposed by Eskom. The applicant unions (the NUM and the NUMSA) contended on review that the commissioner has misconceived the nature of the enquiry and ignored his terms of reference because he had declined to consider an increase beyond that offered by Eskom, had incorrectly found that the unions had advanced 'insufficient reasons' for their proposed increase, and had also ignored factors such as affordability and comparability as well productivity and disparities in the wage gap. The Labour Court noted that the arbitrator had considered two main approaches to interest arbitrations: the 'hypothetical approach' and the 'fairness approach' (para [7]). In terms of the 'hypothetical approach' an estimate is made of where the parties might have settled had they engaged in industrial action, while the 'fairness approach' requires the parties to justify their respective positions in order to allow the arbitrator to choose between the two positions or decide on a different position regarding an increase. The court noted that the arbitrator had adopted the 'fairness approach', even though his terms of reference required him to follow the 'hypothetical approach' (para [9]). Although he had considered the 'hypothetical approach' he had rejected it. The court further noted that on the issue of affordability, the commissioner had accepted that Eskom was facing severe financial restraints and that the union's expert had only focused on inflation and productivity. He had also accepted that Eskom's general conditions of service (even without the proposed increase) compared favourably with the rest of the market and that productivity was in fact decreasing (para [15]). The court further noted that in neither of the awards which were used to extract the 'hypothetical' and 'fairness' approaches to interest arbitrations was the arbitrator bound by any agreed terms of reference, as the LRA does not prescribe any specific approach or methods of evaluation when dealing with interest arbitrations. The court noted that the special provisions dealing with interest arbitration disputes in section 139 of the LRA only deal with the conduct of the proceedings and not with the approach an arbitrator should adopt in dealing with an interest dispute (para [20]). The parties are, however, expressly invited to determine the terms of reference for the arbitration under section 135(6)(ii) of the LRA. The court noted that the parties had agreed to terms of reference and,

accordingly, the correctness of the arbitrator's approach depended primarily on the correct interpretation of those terms; he was not at large simply to elect which approach to adopt as the arbitrators had done in the two cases he cited (para [20]). The court noted that on a very superficial reading of the terms of reference it might be argued that both the fairness and hypothetical approaches had been equally weighted by the parties in drafting the terms of reference and, therefore, the terms of reference clearly identified values and objective factors as well as the hypothetical approach. Consequently, the court noted, the commissioner could not determine where the parties might have settled had they both been forced to compromise using the 'hypothetical approach', but had to assess which of the respective offers he found most reasonable. At best, the 'hypothetical approach' could only have been an indirect aid in deciding whether it was more likely that the parties might have settled closer to one offer rather than others, but it could not be applied in the sense normally intended, namely, to craft the outcome at which the parties ought to have arrived (para [23]). The court found that the commissioner had not misconstrued the issue in the manner alleged, as he had been deprived of the choice of a *via media,* and was required to choose between the parties' respective proposals which was effectively the final-offer arbitration. The review failed.

'Once-and-for-all' rule

In *Shozi & others v Petcon Investments CC t/a Petcon Outsourcing Solutions & another* [2017] 1 BLLR 54 (LC), the first respondent (Petcon) supplied labour to the second respondent (Unilever) in terms of a temporary employment contract. The second respondent informed the first respondent that it was no longer prepared to pay the employees at the prevailing hourly rate, and offered to pay them at a reduced rate. The employees' wages were reduced accordingly and the applicants subsequently referred a 'mutual interest' dispute to the CCMA and embarked on strike action. The second respondent subsequently cancelled its TES contract with Petcon after which Petcon terminated the employees' services. The applicant referred a dismissal dispute to the CCMA. On review, the Labour Court found that the dismissal should have been referred to it for adjudication.

An appeal was lodged against the review judgment and the applicants sought relief that predated their dismissal. They

sought to enforce payment of the higher wage rates up until the date of their dismissal and, therefore, wished to cast the reduction in wages not as an unfair labour practice, but as a breach of contract. The first respondent contended that the true dispute concerned an alleged unfair labour practice, over which the Labour Court lacked jurisdiction, and that the applicants should have realised their present claim in their unfair dismissal dispute. The Labour Court held that the pleaded dispute was one that fell within its jurisdiction by virtue of section 77(3) of the BCEA and that a litigant was entitled to frame a dispute in terms of the statutory provision which he thinks will best assist him (para [10]). It was not persuaded that the 'once-and-for-all' rule applied in this matter as it was undesirable that disputes be decided in a piecemeal fashion; and as the CCMA (which determined the dismissal dispute) did not have jurisdiction to entertain a contract law dispute in terms of section 77(3) of the BCEA, the applicants could hardly be expected to have brought this claim 'once-and-for-all' (para [12]).

The court noted that a further issue was whether the applicants should be denied the right to pursue their contractual claim because they had referred a mutual interest dispute to the CCMA. A rule against changing a cause of action mid-stream is closely related to the once-and-for-all rule in terms of which a party who elects to pursue a matter in a particular manner is held to that election and is confined to the fruits his or her chosen route may yield. In light of this, the court noted that because the applicants had been dismissed in the midst of their mutual interest dispute, the court would have found that their 'changing tack was impermissible' (para [18]). However, a countervailing policy issue arises in cases where a dismissal interrupts the pursuit of a matter of mutual interest. The case at hand represented one exception where allowing a party to reframe its case mid-stream would be in the interests of fairness, as one cannot meaningfully engage in industrial power play if already dismissed. The court held that it is permissible for a party who initially sought to resolve a dispute by means of power play to change tack and seek adjudication of the same dispute (para [19]). The court further noted that this exception is necessary to prevent dismissal being used cynically to avoid dealing with demands to reverse a unilateral variation of terms and conditions,

'especially when a TES is involved' (para [19]). The respondents' points *in limine* were dismissed with costs.

Prescription of arbitration awards

In *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Ltd t/a Metrobus & others* (2017) 38 *ILJ* 527 (CC), *2*017 (4) BCLR 473, [2017] 3 BLLR 213, the applicant employee was dismissed for allegedly receiving money from passengers without issuing them with tickets. After declining an invitation to plead guilty and accept a final written warning, the employee was called to a disciplinary hearing and dismissed *in absentia.* A bargaining council arbitrator found the dismissal to be unfair and ordered the first respondent employer to reinstate him. The employer launched an application for review, but the matter was still pending seven years later. When the employee finally launched an application to enforce the award, the employer contended that the claim had prescribed. An appeal to the Labour Appeal Court failed (para [10]).

The employee's application for leave to appeal to the Labour Appeal Court was heard in two matters. In *Concor Holdings (Pty) Ltd v Mazibuko & others* [2013] JOL 30655 (LC), the Labour Court held that claims on arbitration awards prescribe after three years, while in *Cellucity (Pty) Ltd v Communications Workers Union obo Peters* [2014] 2 BLLR 172 (LC) it was held that they do not. After the Labour Appeal Court concluded that an arbitration award is considered to be a 'debt' as envisaged in the Prescription Act 68 of 1969, it proceeded to consider whether the LRA made provision for time limits within which an award should be enforced (para [15]). The court had to determine whether the arbitration award is a judgment debt that will prescribe after 30 years, or a simple debt that will prescribe after three years. The court concluded that it was a simple debt which prescribed after three years. Referring to section 15 of the Prescription Act, the court came to the conclusion that the lodging of review proceedings does not interrupt the running of prescription because review proceedings are not considered to be a process where a creditor claims the payment of a debt (para [16]). The court, therefore, concluded that the arbitration award had prescribed and dismissed the appeal.

In order to consider whether the Prescription Act and the LRA are inconsistent, one needs to look at section 16 of the Prescription Act. This section recognises that there is legislation that

regulated prescription before the implementation of the Prescription Act. Jafta J held that the core issue raised by the appeal was whether the award in favour of the employee had prescribed under the Prescription Act, and the subsidiary issues were whether the award constituted a 'debt' as envisaged by the Prescription Act, and whether the running of prescription had been interrupted by the filing of the review application (paras [19] [21]). Jafta J emphasised that the differences between the Prescription Act and the LRA run deep and that the two Acts differ in what they seek to achieve and how they operate. The Prescription Act recognises only civil courts as forums where debts may be enforced, while the LRA recognises the CCMA and bargaining councils as forums to resolve disputes more timeously than the courts. The Prescription Act bars creditors from instituting legal action within a certain period if they fail to enforce the debt, and these periods are longer than those provided for in the LRA. Lastly, an arbitration award issued by the CCMA or bargaining council is considered an outcome that settles a dispute between the parties, while the Prescription Act is applicable to a claim that is still be determined by the court (para [21]). The Prescription Act will not apply where the claim has been settled between the parties, and the outcome is not binding on the parties before it is made an order of court. The three-year period provided for in the Prescription Act is aimed at disputes that should be determined by a court (paras [43] [44]). It is also difficult to determine when prescription will start to run. In terms of section 12 of the Prescription Act it starts the moment the debt becomes due. It is clear that section 12 of the Prescription Act is not applicable to arbitration awards because the debt becomes due before the dispute has been conciliated and arbitrated (para [47]). The prescription, also, cannot start to run from the date of the arbitration award because the party against whom the award was made is afforded six weeks in which to challenge the award in terms of section 145 of the LRA (para [47]). The judge added that section 15 of the Prescription Act supports the fact that judicial interruption relates to claims that are awaiting final judgment, or where a judgment has been set aside, which does not accord with an arbitration award which itself is a final and binding decision (para [49]). Jafta J also stated that the LRA makes provision for shorter periods within which to enforce awards. The arbitration award may be enforced within a stipulated period as provided for in the award, unless the award is taken on review. In terms of section

145 of the LRA the review application should be lodged within six weeks and heard within six months. This period may be extended by the Labour Court on good cause shown. Where a review application is unsuccessful the award should be enforced within one year (para [51]). If the Prescription Act were applicable, Jafta J added, the award could not have been enforced within that period. The party in whose favour the award was made may then wait three years and only enforce the award to interrupt the running of prescription. The party may then discover that the award may no longer be enforced under the LRA because of the long delay. This will be the position despite the award not prescribing. There would be no sense in applying the Prescription Act to arbitration awards that are not enforceable under the LRA. These awards are not enforceable (para [51]). If the Prescription Act were to be applied to arbitration awards it would defeat the purpose of the LRA, which makes provision for the expeditious resolution of labour disputes. This also means that the party that failed to challenge the arbitration award by a review application may still rely on the Prescription Act to avoid the obligations imposed by the arbitration award. This further undermines the provision of six weeks within which a review application should be made (para [52].

Jafta J emphasised that the purpose of the LRA is not to regulate the time limits that apply to the enforcement of debts, but rather is to give effect to sections 23 and 33 of the Constitution (para [53]). One of the primary objects of the LRA is to resolve labour disputes effectively, and both the CCMA and bargaining councils are considered to be organs of state and were established to realise the objectives of the LRA speedily and cheaply. Awards issued by the CCMA and bargaining councils resolve labour disputes and do not enforce debts (para [53]). Jafta J added that a debt as provided for in the Prescription Act cannot be reviewed or appealed against unless it is a judgment debt. A debt in terms of the Prescription Act (save for a judgment debt) does not earn interest unless it is by agreement between parties to a contract, whereas an arbitration award earns interest from the date it is made and can be reviewed under section 145 of the LRA or appealed against under section 24(7) of the LRA (para [55]). Jafta J held that all these differences confirmed that the LRA is not consonant with the Prescription Act. This inconsistency, Jafta J added, does not flow solely from the LRA and the Prescription Act prescribing different prescription periods, but

also from the fact that section 158 of the LRA empowers the Labour Court to make an arbitration award an order of court in order to enforce it. The application of the Prescription Act to such awards effectively achieves the opposite outcome (para [56]). Jafta J added that once awards prescribe they become unenforceable, and the Labour Court may not exercise its power to make the award an order of court. In these circumstances, the Prescription Act defeats the LRA process that was specifically designed to enforce the right to fair labour practices (para [57]). Jafta J further stated that this problem is resolved by section 210 of the LRA, which provides that the LRA will take precedence over any other legislation that is in conflict with it on the basis of the LRA's aim of promoting section 23 of the Constitution. The Prescription Act will also prevent the Labour Court from exercising its jurisdiction established under section 158*(c)* of the LRA. Jafta J reiterated that the LRA established the CCMA and bargaining councils as some of the mechanisms for enforcing the right to fair labour practices, and that it prescribes remedies which may be granted to vindicate the right to fair labour practices (para [58]). He added that if an arbitrator finds – as in the current matter – that a dismissal was unfair, he or she must issue an award in terms of which reinstatement of the dismissed employee may be ordered. This award constitutes the means of enforcing the employee's right to fair labour practices. Jafta further stated that the LRA requires a further step to be taken before the award may be enforced, namely, making it an order of court. Once it has been made an order of court, execution can be effected which constitutes the last stage in the enforcement chain (para [58]). He added that the Prescription Act (which is apartheid-era legislation) should not be invoked to frustrate the wishes of the democratic Parliament set out in the LRA (para [58]). Even if the Prescription Act were to apply, the main award granted in favour of the applicant could not prescribe as there was no obligation to pay money, deliver goods, or render services by Metrobus to the applicant (para [59]). The Labour Appeal Court's reliance on *Desai NO v Desai & others NNO* 1996 (1) SA 141 (SCA), where it was held that the word 'debt' means that something should or should not be done, was overruled in *Makate v Vodacom* 2016 (4) SA 121 (CC).

Jafta J then moved on to the last point to consider: section 145(9) of the LRA, which came into force in January 2015. This section provides that an application to set aside an award will

interrupt the running of prescription. This provision does not apply to the present arbitration award, which was made and challenged on review long before section 145(9) was enacted. Jafta J noted that it was doubtful that the amendment sufficiently supported an indication that the Prescription Act was intended to apply to arbitration awards, and that it appeared that the amendment constituted a response by Parliament to numerous decisions by the Labour Court and the Labour Appeal Court which had applied the Prescription Act to labour disputes and arbitration rewards (para [61]). Section 145(9) of the LRA does not apply to the present proceedings and therefore the appeal to the Constitutional Court succeeded. The review application was not prosecuted to finality and the pleadings were closed. The Constitutional Court proceeded to make the award an order of court.

Froneman J agreed with the judgment of Jafta J but disagreed with the finding that the Prescription Act was inconsistent with the LRA. Froneman J was of the opinion that the two Acts may very well complement each other in a way that protects the right to access to justice and the expeditious resolution of labour disputes under the LRA (para [66]). Froneman J was also of the opinion that it would be unfair towards an applicant if review proceedings were instituted and the respondent then relied on prescription. This unfairness may be resolved by the principle that prescription will only start to run once the court proceedings have been finalised. Both Acts may be accommodated by a re-interpretation of the Prescription Act. The re-interpretation will rely on four building blocks: (i) in terms of the Prescription Act prescription will only be interrupted by the start of adjudicative proceedings and will be interrupted until it has been concluded; (ii) the CCMA and bargaining councils are considered to be independent and impartial forums that may resolve matters by applying the law; (iii) the institution of claims before the CCMA is considered to be adjudicative proceedings and will interrupt prescription; and (iv) review proceedings are considered to fulfil the same role to finalise court proceedings as an appeal (para [68]). In terms of section 15(1) of the Prescription Act, it is important to determine whether the commencement of proceedings in the CCMA is regarded as a 'process' in terms of the LRA, and whether a claim before the CCMA is considered a 'debt'. It is difficult to determine the meaning of 'debt'. According to Froneman J the word should be considered in close harmony with the demands set out in section 34 of the Constitution. In light of this

section, the starting point will be that it should be a claim that can be resolved by the application of the law. In other words, this means that in order to qualify as a 'debt' it should be a claim for the enforcement of any legal obligation (para [78]). These obligations are generally regarded as an obligation to do something, or an obligation not to do something. They usually entail an execution by warrant of execution for outstanding amounts, contempt of court proceedings, or an order to do or refrain from doing something. As regards whether a referral of an unfair dismissal dispute constitutes a 'debt' as envisaged in section 15(1) of the Prescription Act, the court held that a claim to enforce a legal obligation will qualify as a 'debt' as envisaged by the Prescription Act (para [79]). An unfair dismissal may place three possible legal obligations on an employer: compensation, re-employment, or reinstatement. In each of these cases there is an obligation on the employer to do something. Therefore, they can be considered to fall within the meaning of the word 'debt' as envisaged by the Prescription Act (para [79]). According to Froneman J, the process commencing the proceedings in the CCMA serves to interrupt the running of prescription as envisaged in section 15 of the Prescription Act. It is a common principle that the running of prescription should not commence until court proceedings have been finalised. It may then also be considered that the institution of review proceedings extends the finalisation of the judgment (para [83]). There is no statutory time limit for the lodging of a common-law review as is the case with appeals. The position for the review of arbitration awards under the LRA differs vastly from the common-law position. The lodging of a review application interrupts prescription as envisaged by section 15(1) of the Prescription Act. Until the review application has been finalised, prescription cannot run. According to Froneman J, the new section 145(9) of the LRA provides that the lodging of a review application will interrupt the running of prescription (para [88]). An alternative may be that an opposition to the review application may be considered as a further interruption of the running of prescription, as the respondent may have a defence to the claim. A defence to a claim is also considered to be the commencement of a process for the payment of a debt as envisaged by section 15(1) of the Prescription Act. An arbitration award may further be considered a judgment debt. Irrespective of which way the arguments are directed, the applicant's claim cannot prescribe until the review application has been finalised.

The 30-day time period for the referral of unfair dismissal disputes is a time-bar clause and is not the same as the normal prescription periods in the Prescription Act. These time-bars are not seen as replacing the prescription periods in the Prescription Act. To replace the time limits as envisaged in the LRA will undermine the speedy resolution of disputes. There is no reason why these situations under the LRA should be reinvented (para [96]).

Zondo J (concurring with Jafta J) considered whether the Prescription Act applied to unfair dismissal disputes under the LRA. If the answer is that it does not apply, the appeal in the matter should succeed. If the answer is that it does apply, the next question is whether the arbitration award should be deemed a 'debt' as envisaged by section 11(d) of the Prescription Act. If not, that would be the end of the matter and the appeal must succeed. If the answer was positive, the next question is whether that debt had prescribed by the time the applicant instituted an application in the Labour Court to have the arbitration award made an order of that court. If it had prescribed, the appeal fell to be dismissed, and if it had not prescribed, the appeal stood to succeed (para [99]).

Zondo J also considered whether an arbitration award is considered to be a 'debt'. If section 11 of the Prescription Act is properly read, it is clear that all the debts listed are debts where there has as yet been no judgment to determine whether the debtor has any liability for the debt. This means that debts other than a judgment debt are in respect of instances where no proceedings have been instituted to determine the liability of the debtor for the debt. For prescription to start running, the debt should be due, and the debt should be due before the proceedings may be instituted to recover it. For example, a summons cannot be issued before the debt becomes due and payable. Section 15 of the Prescription Act is vitally important to the application of the Prescription Act to unfair dismissal disputes. This section clearly deals with judicial interruption. Consequently, it must involve a judicial process, which we understand to mean a court process. From this section, it can be seen that the running of prescription will only be interrupted by a court process that will lead to a judgment by a court. According to Zondo J prescription can only be interrupted in one of two ways: either by the debtor or by the creditor. Interruption by the debtor will take place where he or she acknowledges liability, and by the creditor when he or she institutes proceedings and claims payment from the debtor (para [112]).

In the current matter, it was contended that the applicant had failed to lodge the review application within three years which would have interrupted the prescription of the arbitration award. Section 15(1) of the Prescription Act, however, is not a true reflection because a review application in terms of section 158(1)*(c)*, is not a process where the applicant claims payment of a debt. The debt as envisaged by section 11(d) of the Prescription Act is a debt which will be interrupted by the service of a process in which payment is claimed. The three-year period will also apply to such a debt. This debt does not include an arbitration award. The Prescription Act reveals three important principles. The first is that once the debt is due the prescription will start to run. Secondly, the running of prescription should be interrupted before it runs for the entire period of prescription. Thirdly, in the event that the creditor fails to interrupt the running of prescription and the debtor does not acknowledge his or her liability, the debt will be considered to have prescribed. The debt will then be extinguished by the running of prescription. Zondo J did not agree with Froneman J that the Prescription Act plays a role in the LRA dispute resolution system (para [131]). The LRA dispute resolution system is a special stand-alone dispute resolution system with its own prescribed periods within which various steps are required to be taken. It is a system for specific disputes and is based on special processes and principles underlying the LRA, which were specially created for their appropriateness to that system (para [131]). The Prescription Act, with its own prescription periods, has no application between the dismissals and the handing down of a judgment if the Labour Court makes an arbitration award an order of that court. When an employee is dismissed and seeks to institute civil action for wrongful or unlawful dismissal in the civil courts to secure damages or reinstatement, or for an order declaring that the dismissal is unlawful, invalid and of no legal force and effect, the Prescription Act may be applicable. It, however, finds no application if the employee seeks to refer a dismissal dispute to the CCMA or a bargaining council for conciliation.

There are a number of reasons why the Prescription Act does not apply between the dismissal and the final step in the LRA dispute resolution system. The first statutory step in the LRA dispute resolution system concerning dismissal disputes is the referral of a dismissal dispute to either the CCMA or a bargaining council for conciliation, and the last step is either a judgment of

the Labour Court in regard to a dismissal dispute in respect of which that court has jurisdiction, or an order of the court making an arbitration award an order of that court if the dispute is one that has to be referred to arbitration after an unsuccessful conciliation process (paras [131] [132]). Zondo J added that a dismissed employee has no right to sit back and do nothing about his or her dismissal dispute until just before the expiry of three years. If the Prescription Act applies to the LRA dispute resolution system, but a dismissed employee is not able to enjoy this benefit which a creditor in the civil courts enjoys, namely, of not needing to do anything for close on three years before commencing proceedings, what benefit does the application of the Prescription Act to the LRA dispute resolution system bring for employees? This comparison of the situation of a dismissed employee who wishes to sue in the civil courts to recover his or her debt shows a clear conflict between the LRA and the Prescription Act, at least in respect of the period from the date of dismissal to the date of the judgment or order of the Labour Court (para [139]).

LABOUR LAW: INDIVIDUAL

JACQUI MEYER*

LEGISLATION

The proposed National Minimum Wage Act, 2017, the Labour Relations Amendment Bill, 2017, and the Basic Conditions of Employment Amendment Bill, 2017, were all tabled for deliberation and public comment in 2017. The most salient amendments that have been proposed are set out briefly below.

National Minimum Wage

During February 2017, an agreement was reached to set a new national minimum wage at R20 per hour worked or approximately R3 500 for an employee who works 45 hours per week. The purpose is both to protect vulnerable employees and, at the same time, to avoid job losses. Other interventions include a new code of good practice for collective bargaining, industrial action and picketing, and other measures aimed at mitigating violent and lengthy strikes. Section 51 of the Basic Conditions of Employment Act 75 of 1997 (the BCEA) provides that the Minister of Labour may make a sectoral determination establishing basic conditions of employment for employees in a sector and area. This includes minimum wages. Sectoral determinations are in place in areas of economic activity where labour has been deemed vulnerable. Once the Minimum Wage Act becomes operational, sectoral agreements, collective agreements, bargaining council agreements, and employment contracts must comply and be aligned with the Minimum Wage Act, 2017.

To accommodate entrepreneurship, the Basic Conditions of Employment Amendment Bill, 2017, provides for exemptions of up to twelve months from the national minimum wage for start-up businesses and small and medium-sized enterprises.

Labour Laws Amendment Bill

This is the first private member bill to be passed by the South African Parliament. The Labour Laws Amendment Bill, 2017

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(B 29–2017), was passed by the National Assembly in November 2017. It provides for unpaid paternity leave, adoption leave, and surrogacy leave for all employees who do not qualify for maternity leave.

As this Bill is gender neutral it is of great significance in terms of recognising the rights of the Gay, Bisexual, Transgender, Queer and Intersex communities. The Bill also seeks to limit strike action to prevent violent strikes. It makes provisions for the resolution of strike disputes through arbitration awards at the Commission for Conciliation, Mediation and Arbitration (the CCMA).

Unemployment Insurance Amendment Bill

The Unemployment Insurance Amendment Bill (the UI Bill) was passed in January 2017 but is yet to come into operation. The UI Bill aims to improve service delivery by the Unemployment Insurance Fund (the UIF). Under the UI Bill, persons employed under learnerships as contemplated in the Skills Development Act 97 of 1998, and their employers, government employees, and fixed-term workers who are required to leave South Africa on expiry of their terms of employment, will now benefit from the UIF as it is unconstitutional to do otherwise.

The UI Bill will also enable the Minister of Labour to vary both the minimum and maximum Income Replacement Rates without the need to approach Parliament.

CASE LAW

Who is an Employee?

The applicant in *National Bargaining Council for the Clothing Manufacturing Industry (KZN) v Glamour Fashions Worker Primary Co-operative Limited & others* (2017) 38 *ILJ* 1849 (LC) was a bargaining council (BC) registered in terms of section 29 of the Labour Relations Act 66 of 1995 (the LRA). The respondents were worker co-operatives, registered in terms of section 7 of the Co-Operatives Act 14 of 2005 (the COA). Whitcher J was required to determine whether the COA enjoys precedence over the provisions of the LRA because of the operation of section 210 of the LRA. If indeed this was found to be the case, it would mean that the members of worker co-operatives who would otherwise fall outside of the definition of 'employee' in section 213 of the LRA would be employees for the purposes of the LRA, and that the co-operatives and their members are bound by the LRA. The

necessity for the declarator arose from a dispute after the proliferation in the registration of worker co-operatives in the clothing manufacturing industry falling within the BC's registered scope. This affected individuals who had previously been engaged as employees by companies that were converted into worker co-operatives, but that for all other purposes operated no differently from the way they did before. This raised a jurisdictional question: Did the proliferation have the effect of circumventing the application of the LRA, and the BC's main collective agreements?

Whitcher J held (para [21]) that looking at the definition of 'employee' in the LRA, it is not self-evident that all members of workers' co-operatives are employees. Also, the judge held that any declaration she might make regarding the LRA's precedence over the COA would apply to those members of sham co-operatives who are in fact employees as defined in the LRA only. The COA appears to regulate work of another variety: the mere fact that co-operative members are employed, or receive remuneration, is not sufficient for the LRA to cast its net over them. The nature of the relationship between the parties performing co-operative work on the one hand, and directing and paying for it on the other, must be considered (para [22]). If the relationship between the parties to production transcends the traditional employment hierarchies, where those providing their labour also jointly own the enterprise, share in any surplus, and have a democratic say in the running of the operation, then the labour legislation should not, and does not, apply (para [22]). Should the situation arise where the termination of the membership of a member is sought, that member has democratic channels at his or her disposal to resist this outcome. He or she also has the right to be heard in terms of the COA (Items 4 and 5 of Sch 1, Part 2). Given that the nature of a member's relationship with others in a legitimate co-operative is based on voluntary association underpinned by democratic decision-making, the substantive and procedural protection in the LRA against unfair dismissal is out of place. Section 22 of the Constitution of the Republic of South Africa, 1996 (the Constitution), illustrates that sensitivity to the spirit, purport, and object of the Bill of Rights does not inexorably lead to an interpretation of 'employee' in the LRA which extends the reach of labour law over as many varieties of work as reasonably possible. A countervailing freedom is also at play in declaring that joint owners of a workers' co-operative are not, *in substance*, employees (para [32]).

Whitcher J found that members of a legitimate workers' co-operative do not fall under the definition of 'employee' in the LRA for reasons arrived at on a constitutionally sound interpretation of the statutes concerned. The Labour Court held that a court is unable to issue a blanket declaratory order stipulating that all workers' co-operatives are subject to the LRA. The LRA applies only to 'employees', as defined. There is also no direct *a priori* conflict between the LRA and the COA, as these laws serve different purposes: the COA seeks to create and regulate a new variety of economic enterprise in which members work *with* others for mutual gain; while the LRA is not suited to regulate this form of enterprise and does not apply to them (para [39]).

Whether Uber drivers qualify as 'employees' for purposes of the application of the LRA was also considered in 2017. In *Uber South Africa Technological Services (Pty) Ltd and NUPSAW and SATAWU obo Morekure & others* [2018] 4 BLLR 399 (LC), (2018) 39 *ILJ* 903, it was found that Uber drivers are indeed 'employees'. The respondent employees, Uber drivers, after having been 'deactivated', referred unfair dismissal disputes to the CCMA for conciliation and arbitration. However, before the merits could be heard, Uber South Africa Technological Services (Pty) Ltd (Uber SA), the alleged 'employer', raised a point *in limine* challenging the CCMA's jurisdiction to hear the disputes on the basis that the Uber drivers were not 'employees' of either Uber BV, its holding company, which is registered in the Netherlands, or its subsidiary, Uber SA.

The court applied the 'realities of the relationship' test which includes the 'dominant impression' test. The court noted that this approach is underscored by the 'Code of Good Practice: Who is an employee?' (para [9]). In applying the test, the presiding officer must consider all the circumstances and reach a conclusion based on the realities of the relationship between the parties. Having considered the facts, the court concluded that Uber drivers are economically dependent on the use of the app and on their ability to drive para [48]).

The agreement concluded between each driver and Uber SA indicates that the driver is an 'independent contractor'. Therefore, several factors indicative of and opposing the premise that Uber drivers are 'employees' had to be weighed up. Factors in favour of a conclusion that they are employees include: (a) Uber drivers are expected to perform their services personally; (b) the fare is paid by the passenger to Uber, who then pays the driver; (c) Uber

SA monitors the performance of the drivers and requires a certain performance standard (if the performance standards are not improved after Uber's instructions to do so, the driver is after a simple notification, 'deactivated' para [3]); (d) Uber controls the drivers' performance and there is a negotiated incentive scheme. Factors indicative of a relationship other than an employment relationship include: (a) the drivers control their own level of activity; (b) there are no minimum hours that the drivers are required to drive per day; (c) the drivers are free to accept or reject potential rides; and (d) the drivers are not required to drive an Uber vehicle at all times.

The agreement concluded between Uber SA and each driver indicates that the law of the Netherlands applies to the relationship, and that disputes must be arbitrated by the International Chamber of Commerce for Mediation and Arbitration. Moreover, the Uber app is provided to the drivers by the holding company. This, Uber SA argued, bolsters its argument that as subsidiary of Uber in the Netherlands, it is not the employer of the employees in South Africa.

The appellant in *Vermooten v Department of Public Enterprises & others* (2017) 38 *ILJ* 607 (LAC), [2017] 6 BLLR 606 appealed against a judgment of the Labour Court delivered by Fourie AJ. He had reviewed and set aside an award providing that the appellant was an employee of the Department of Public Enterprises (the DPE).

During the interview it was stated by the DPE that the Personnel and Salary Information System (the remuneration system applied by a state department such as the DPE, known as PERSAL) did not allow for the remuneration amount that appellant sought. The appellant suggested that the remuneration issue could be solved by approaching it as a specialist function because the DPE had in its service several specialists who operated outside of the formal structure. The appellant would be obliged to submit a monthly invoice to receive payment and be paid in accordance with the rules set for the PERSAL system (para [10]). The appellant accepted the contract. The appellant testified that he took the lead for the DPE in several transactions, including routine matters and those relating to the annual business plan of the South African Airways (the SAA). He was engaged in the monthly monitoring of the SAA and of its quarterly reports. He was also involved in financial transactions. He reported to the Deputy Director-General of the DPE. His reports were supervised and

edited by the Deputy Director-General. He was provided with a cell phone, a 3G card, and a computer. Staff and files were allocated to him and he was required to apply for leave. He did not receive a pension or medical aid, but income tax at 25 per cent was deducted from his remuneration. He was at times designated as an acting Deputy Director-General in submissions to Parliament.

The appellant referred a dispute to the Bargaining Council concerning a unilateral variation of his employment contract, but in the arbitration, he alleged that he had been unfairly dismissed. At the commencement of the arbitration, the DPE raised a point *in limine* that the appellant was not an employee of the DPE, but an independent contractor, and that the Bargaining Council lacked jurisdiction to entertain the dispute. The question whether an applicant is an employee is a jurisdictional fact that must be determined, in the event of a dispute, by a competent court. On what facts must this decision be made? In referring to *Distinctive Choice 721 CC t/a Husan Panel Beaters v The Dispute Resolution Centre (Motor Industry Bargaining Council) & others* (2013) 34 *ILJ* 3184 (LC), Landman JA held that the Labour Court determines the question of jurisdiction based on the evidence before it (para [7]).

Landman JA observed that, unlike the private sector, a state department like the DPE may not remunerate employees as it sees fit. The doctrine of legality and legislation dictate that only the prescribed remuneration may be paid. A civil servant may only be remunerated through the PERSAL system. The PERSAL also functions as a means of ensuring that state departments abide by the law as regards the remuneration of their officials. There were several legitimate ways for the DPE to utilise the special knowledge and experience of the appellant. The two methods that the DPE considered were: to employ the appellant as an employee on a contract basis; or as a consultant on a different contract (para [21]). The appellant declined the first option because he was still not satisfied with the amount of the remuneration that he would receive given his qualifications and level of expertise. The DPE wished to acquire his labour and expertise, but it was not legally possible to remunerate him on a salary scale other than the one prescribed by the PERSAL system. The DPE accepted the appellant's suggestion that he be appointed as a consultant at a higher rate than that applicable to the post envisaged. The appellant was clearly in a good bargain-

ing position and able to influence his rate of remuneration. Finally, there can be no doubt that the appellant and the DPE consciously and deliberately elected to structure their relationship as one other than an employment relationship. And there is nothing wrong with this (*Universal Church of the Kingdom of God v Myeni & others* [2015] 9 BLLR 918 (LAC), (2015) 36 *ILJ* 2832 para [25]). See, too, LL Kubjana & B Khumalo 'A rose by any other name would smell as sweet: *Universal Church of the Kingdom of God v Myeni and Others* (2015) 36 *ILJ* 2832 (LAC)', (2017) 29/1 *SA Merc LJ* 140.

The court confirmed that where the employer and employee are in a relatively equal bargaining position and elect one relationship over another, legal effect should be given to their choice. The appellant now sought to be defined as an employee, but this election did not correlate with the reality. The appellant wished to become part of an organisation which could not, and still cannot, accommodate him at his desired remuneration level (para [26]).

Contract of Employment

Incorporation of terms in a collective agreement in employment contracts

The question before Tlaletsi AJP in the Labour Appeal Court matter of *Imperial Cargo Solutions v SATAWU & others* (2017) 38 *ILJ* 2479 (LAC), [2017] 12 BLLR 1189, was to determine whether ancillary duties, contained in a collective agreement, were incorporated into the employment contracts of employees and survived cancellation of that collective agreement. Tlaletsi AJP held that to hold employees to the ancillary obligations in these circumstances, the parties must have specifically agreed to it. This had not been done, so the ancillary duties fell away, as did the employer's duty to pay the workers for performing these duties when the collective agreement was cancelled.

As to whether the obligation to perform the ancillary duties terminated with cancellation of the collective agreement, Imperial Cargo relied on *SA Municipal Workers Union v City of Tshwane & another* (2014) 35 *ILJ* 241 (LC) (*SAMWU*). It was argued that the ancillary duties had been incorporated in the individual employment contracts. In any event, it was argued, the ancillary duties were not additional to the duties of the employees in the main agreement. It was contended that in accordance with the *SAMWU* judgment, the ancillary duties would form part of the employees'

contracts of employment and remain applicable unless it was provided, expressly or by implication, that upon cancellation an obligation would fall away. Without deciding the correctness of the *ratio* in *SAMWU*, Tlaletsi AJP noted that the case was distinguishable from the case under consideration in both its facts and circumstances.

The ancillary duties were not additional. On the evidence they were not part of the normal duties of the employees who were remunerated separately for performing them. There was no other agreement creating an obligation to perform the ancillary duties (para [20]). The employees were entitled to cancel the collective agreement on notice. The obligation to perform ancillary duties was based solely on the collective agreement. Therefore, the Labour Court had correctly held that the employees were not obliged to perform the ancillary duties. The appeal was dismissed with costs.

Breach of contract

The employees, in-house counsel representing the employer in litigation upon briefings of the State Attorneys, had to be moved to different positions in the employer's various departments pursuant to a transformation process. The employees were not comfortable with the proposed move. After they failed to fill the new posts that they were transferred to, they were informed that the employer would be deducting certain amounts from their salaries as they had not manned their new posts. The employees subsequently initiated the application in *Mpanza & another v Minister of Justice and Constitutional Development and Correctional Services & others* (2017) 38 *ILJ* 1675 (LC), [2017] 10 BLLR 1062. The Labour Court was required to determine whether the placement made by the employer was lawful in terms of section 15 of the Public Service Act 103 of 1994 (the PSA), and whether the deductions made by the employer followed section 34 of the BCEA read with section 34 of the PSA. The employer contended that the employees were not entitled to remuneration because they had not reported for duty at the material times. Therefore, it claimed, the corresponding duty to pay remuneration did not apply. On the evidence, the deductions were made solely on the basis that the employees had failed to honour their secondment or temporary placements to the new units. Therefore, they were absent from duty. The employees argued that they had always honored their contractual obligations, but that their contracts of

employment had been changed unilaterally by the employer through its secondment or temporary placement. In the process of balancing the probabilities and selecting one conclusion which seemed to be the more natural and plausible, Cele J found that the employer's version was compelling and that the employees had failed to tender their services as regularly as they had to in terms of their contract of employments (para [29]); *Coin Security (Cape) v Vukani Guards & Allied Workers' Union*, 1989 (4) SA 234 (C) 230I). The employees were not legally entitled to refuse to carry out their side of the employment contract. In fact, they were in breach of their employment contract by unlawfully failing to perform their obligations. As to whether the employer could deduct amounts from the employees' salaries, Cele J considered the procedure that the employer had followed against the prescripts in the BCEA and the PSA. He concluded that the employer had indeed followed a fair procedure. It had provided the employees with a reasonable opportunity to show why the deductions should not be made, to which they had responded (para [35]). Consequently, the employers had followed a fair procedure in making the deductions against the salaries of the applicants (para [36]).

Dispute resolution mechanism in contract

Professional football is conducted internationally under the auspices of the International Federation of Association Football (FIFA) and the South African Football Association (SAFA). SAFA is an affiliate of FIFA. The National Soccer League of South Africa (the NLS) is the Association of Professional Clubs and a special member of SAFA. The employer in the matter of *SAFPU & others v Free State Stars Football Club (Pty) Ltd* (2017) 38 *ILJ* 1111 (LAC) is a member of the NSL and was at all material times bound by its constitution, read with the constitutions of SAFA and FIFA (the Football Rules). The appellants were professional football players who had concluded fixed-term contracts of employment with the employer, a professional football club. They were employees as defined in terms of the LRA and professional footballers as contemplated in the 'Employee Handbook' and the Football Rules were incorporated into their contracts. The employees referred a dispute to the CCMA alleging that they had been unfairly dismissed for operational reasons. Meanwhile, they referred an application to the Labour Court claiming outstanding and owing payments. The employer contended that the dispute should have

been referred to the Dispute Resolution Chamber of the NSL (the Chamber) as agreed to in their contracts of employment, and that the employees were not entitled to the any of the payments they claimed or, in the alternative, that they had referred the dispute to the Labour Court prematurely. The employer sought an order for the stay of the proceedings in the Labour Court pending the outcome of proceedings in the Chamber. In this regard, and for purposes of determining the appropriate forum for a dispute, the employer intended to rely on the NSL Constitution, the National Soccer League Football Rules, the employment contracts of the applicant employees, and the Constitution of the South African National Bargaining Chamber for the Sport of Professional Football.

Landman JA of the Labour Appeal Court found that the Labour Court had considered aspects which arose from the contractual obligation (para [23]). The Labour Appeal Court judge stayed the employees' referral and ordered them to refer the dispute to arbitration in the dispute resolution forum as indicated in their contract of employment. The court reasoned that only in exceptional circumstances may a Labour Court exempt the employees from complying with an agreement to refer a dispute to the dispute resolution forum agreed upon. The Labour Court has a discretion in this regard, and the Labour Appeal Court may only interfere with the decision if the exercise of the discretion is irrational, capricious, or unreasonable (*Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited & another* 2015 (5) SA 245 (CC), 2015 (10) BCLR 1199 para [83]; and *Clipsal Australia (Pty) Ltd & others v Gap Distributors & others* 2010 (2) SA 289 (SCA)). Landman JA pointed out that the evidentiary burden rests on the party who institutes the legal proceedings (*Kathmer Investments (Pty) Ltd v Woolworths (Pty) Ltd* 1970 (2) SA 498 (A) 504H; *Universiteit van Stellenbosch v JA Louw (Edms) Bpk* 1983 (4) SA 321 (A)). The discretion of the court to refuse arbitration may only be exercised when a 'very strong case' is made out (*Rhodesian Railways Ltd v Mackintosh* 1932 AD 359, 375; *National Bargaining Council for the Road Freight Industry & another v Carl Bank Mining Contracts (Pty) Ltd & another* (2012) 33 *ILJ* 1808 (LAC) para [34]). Moreover, there should be 'compelling reasons' for refusing to hold a party to a contractual undertaking to have a dispute resolved by arbitration (*Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd* 1971 (2) SA 388 (W)). The

court must also be satisfied that 'there is no sufficient reason why the matter should not be referred to arbitration in accordance with the agreement' (*Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd* relying on *Bristol Corporation v John Aird & Co* 1913 AC (HL (E)) 241, 252–257, 260). It was found that *in casu* the process prescribed for dispute resolution before the Council was more onerous and prejudicial to the individual employees than is a referral to the Labour Court. Making use of the dispute resolution mechanisms as provided for in the LRA is not only cheaper for the employees, but resolving the dispute in this fashion would also be far more expedient than following the process before the Council. For these reasons, the Labour Court was found to be more suitable than the dispute resolution forum prescribed in the agreements. This was deemed sufficient to qualify as exceptional circumstances warranting interference in the exercise of its discretion by the Labour Court. Landman JA upheld the appeal and the employees were directed to proceed with their dispute in the Labour Court.

Collective agreements

Tlaletsi DJP in *Vanchem Vanadium Products (Pty) Ltd v National Union of Metalworkers of South Africa obo Members* (2017) 38 *ILJ* 926 (LAC) had to decide whether the employees in this case were bound to the terms of the Main Agreement concluded between the parties to the Metal and Engineering Industries Bargaining Council (the MEIBC). The consequences of a finding that they were bound would be that the employer had acquired the right to implement lay-offs and short-time affecting the workers (paras [1] [12] [18]). A finding to the contrary would mean that the employer would not be in a position to do so.

The Labour Court (Nkutha-Nkontwana AJ) essentially found that the employer's business operation was clearly excluded from the Main Agreement and, as a result, its unilateral implementation of the lay-off and short-time provisions was unlawful. On appeal, the Labour Appeal Court considered whether the Main Agreement expressly excluded enterprises engaged in the production of iron and/or steel and/or ferro-alloys from its application. As the employer's operations fell within these exclusions, the Main Agreement would not be applicable to it. However, in other proceedings between the same parties unrelated to the case under consideration, it had been assumed that the employer was bound by the Main Agreement. In addition, the parties had

concluded a collective agreement, termed 'Agreement on Conditions of Employment', which expressly marked the provisions of the Main Agreement relating to the conditions, as well as those relating to wage increases, applicable to the parties. Tlaletsi DJP, after considering subsequent documents concluded between the parties which spoke to the Main Agreement and collective agreement, decided that the parties were bound by the terms of the Main Agreement and the Labour Court had misdirected itself in finding to the contrary.

Restraint of trade

The urgent application in *Aquatan (Pty) Ltd v Janse Van Vuuren & another* (2017) 38 *ILJ* 2730 (LC) concerned an order to enforce a restraint-of-trade agreement in terms of which the employee agreed to refrain from accepting employment from a competitor of the employer for a period of three years after termination of his employment. The restraint that the employer sought to enforce was unlimited in practical terms, notwithstanding that the restraint agreement referred to defined territories: the Republic of South Africa, Botswana, Lesotho, Swaziland, Zimbabwe, and Namibia. Ultimately, Whitcher J found that the degree of restriction was not reasonable and rational (paras [27] [43]). The question, however, was whether the information that the employee had acquired while working at Aquatan (Pty) Ltd was worthy of protection and qualified as trade secrets, and whether the information that he had at his disposal would place him in a position to take advantage of the employer's trade connections.

Whether knowledge acquired constitutes trade secrets worthy of protection was considered in *Experian SA (Pty) Ltd v Haynes & another* (2013) 34 *ILJ* 529 (GSJ). In *Experian SA* it was held that this is a question of fact. For information to qualify as confidential, it must 'be capable of application in the trade or industry, that is, it must be useful and not be public knowledge and property; known only to a restricted number of people or a close circle; and be of economic value to the person seeking to protect it' (para [19]). The employee's technical skills, and the experience he had gained whilst employed, enabled him to give whoever employs him next a competitive advantage in marketing their services and drafting attractive tender proposals. This ability, however, has a value without reference to any of the employer's secrets. It is an ability to apply general technical knowledge and experience strategically to the advantage of an employer and does not

belong to the employer. As stated by the Labour Appeal Court in *Labournet (Pty) Ltd v Jankielsohn & another* (2017) 38 *ILJ* 1302 (LAC), [2017] 5 BLLR 466:

> Even if an employer spent time and effort and money to train or 'skill' an employee in a particular area of work the employer has no proprietary hold on the employee, or his, or her, knowledge, skills and experience, even if those were acquired at that employer.

Turning to the issue of customer connections, in *Rawlins v Caravantruck (Pty) Ltd* 1993 (1) SA 537 (A) it was held that whether there is an attachment between an employee and customers to an extent that the employee would be able to induce those customers to follow him or her to another company, is a question of fact. Each case differs and various factors come into play, including the particular employee's duties, his or her personality, the frequency of his or her contact with clients, the duration of such contact, what knowledge the employee gained of their requirements and business, the general nature of the relationship the employee had with clients, whether the employee is involved in canvassing of customers, and whether any customers were lost after the employee left his or her employment. This is clearly not a closed list (para [24]). See also *Northern Office Microcomputers (Pty) Ltd v Rosenstein* [1981] 4 All SA 509, 1981 (4) SA 123 (C*); Knox D'Arcy Ltd v Jamieson* [1992] 4 All SA 275 (W), 1992 (3) SA 520). In *Automotive Tooling Systems (Pty) Ltd v Wilkens* 2007 (2) SA 271 (SCA) 282E–G, it was held that, even though it is difficult to distinguish between the employee's use of his or her own knowledge, skill, and experience, and of his or her employer's trade secrets, it is accepted that an employee cannot be prevented from using what is in his or her head. Whitcher J found that the employer in the case under consideration had a protectable interest on the ground of confidentiality in that he had knowledge of the company's products and costings. including its mark-up or margin policies, overhead costs, and supplier-pricing arrangements (para [23]). Nonetheless, the application was dismissed with costs as it was found that the employee had discharged the onus of showing that the restraint of trade provisions in his contract were unenforceable. Even on the request for only partial enforcement of the restraint period, Whitcher J referred to *Henred Freuhauf (Pty) Ltd v Davel & another* (2011) 32 *ILJ* 618 (LC), where Lagrange J correctly cautioned against the development of a practice in terms of which wide-ranging restraints are drafted, only to be reformulated

into more reasonable restrictions when the matter comes to court (para [23]).

In another case heard in 2017, the High Court had to consider whether a restraint of trade agreement is transferrable in terms of section 197 of the LRA after a business has been sold as a going concern. Pillay J, presiding in *Laser Junction (Pty) Ltd v Fick* (2017) 38 *ILJ* 2675 (KZD), found that section 197 of the LRA does not permit a transfer of agreements other than contracts of employment, unless they are favourable to the employee. The reasoning is that the purpose of section 197 is to protect employees (para [29]).

Laser CNC (Pty) Ltd employed Fick (the employee) from 2010 as an internal sales clerk. After he had completed three months' probation, the employee signed a Memorandum of Agreement of Secrecy and Restraint. Three months later, the parties concluded a contract of employment which also prohibited the employee from using confidential information 'not only for the currency of [that] agreement, but for an indefinite period after its termination as well' (para [2]). Laser Junction (Pty) Ltd purchased the business of Laser CNC as a going concern, Laser Junction (Pty) Ltd (Laser Junction). The employee signed a new contract of employment with Laser Junction. Later he was promoted from a sales position to a position in procurement. After employees working at Laser Junction were offered voluntary retrenchment packages and it became evident that the business was going under, the employee started sending out his *curriculum vitae* to secure alternative employment. By the beginning of February 2017, although having received no job offers, the employee resigned. In his letter of resignation, he indicated that his services would end on 28 February 2017, and that he would take eighteen days' leave. On the same day, the employee accepted an offer for a position at Pinion and Adams (Pty) Ltd with effect from 1 March 2017. Laser Junction contacted the employee again in May 2017 and made him an improved offer of employment, which he rejected. In retaliation, Laser Junction sought an order in the High Court preventing the employee from acting in contravention of the restraint of trade agreement, arguing that when it bought the business from Laser CNC, all the contracts, including the restraint agreement, were transferred to it.

The employee argued that the new contract of employment he had signed with Laser Junction superseded the previous agreement with Laser CNC, and that the new contract did not contain a

restraint of trade. Although the employee was unable to provide the full terms of the new contract of employment, the court noted that this did not prove that no contract existed. Significantly, Laser Junction failed to prove that any of its other serving and departed employees were under a restraint, which fortified the impression that the employee was not restrained. Moreover, the restraint agreement applied specifically to the employee in his position of internal sales clerk as he then was. Therefore, no restraint agreement was in force in February 2016. As a limitation of fundamental rights, a restraint agreement must be strictly construed. The restraint of trade lapsed either when the business was transferred as a going concern and a new contract was concluded, or when the employee was promoted from a sales position to procurement. In the result, the application was dismissed with costs.

In *Labournet (Pty) Ltd v Jankielsohn & another* (2017) 38 *ILJ* 1302 (LAC), [2017] 5 BLLR 466, Coppin JA heard an appeal against an order handed down by Prinsloo J in the Labour Court. Prinsloo J had dismissed an urgent application brought by the appellant to enforce a restraint agreement against its employee at the time, and to interdict the second respondent from employing the employee. On appeal, the Labour Court's judgment was upheld, and the appeal dismissed on the following grounds. Coppin JA reiterated the principles laid down in *Magna Alloys and Research SA (Pty) Ltd v Ellis* 1994 (4) SA 574 (A). A restraint of trade is reasonable and enforceable only if it serves to protect an interest. Consequently, the reasonableness and enforceability of a restraint depends on the nature of the activity sought to be restrained, the purpose of the restraint, the duration of the restraint, the area of the restraint, and the parties' respective bargaining positions. Because the right of a citizen freely to choose a trade, occupation, or profession is constitutionally protected, the onus to prove the 'reasonableness' of a restraint might well have been affected.

In this case the employee held a junior position, which meant that he could not have access to confidential documents and tools used for work, besides those available to the public via the internet. Also, the employee had no special attachments to the employer's clients. The employer could not prove that its relationship with its clients was being endangered as the employee had started working for the competitor. Overall, the employer could not prove that it had any interests requiring protection. The court

restated that an employee cannot be interdicted or restrained from taking away his or her experience, skills, or knowledge, even if they were acquired through training provided by the employer (*Northern Office Microcomputers (Pty) Ltd v Rosenstein* [1981] 4 All SA 509 (C), 1981 (4) SA 123; *Knox D'Arcy Ltd v Jamieson* [1992] 4 All SA 275, 1992 (3) SA 520; *Automotive Tooling Systems (Pty) Ltd v Wilkens* 2007 (2) SA 271 (SCA) 282 E–G). Lastly, the Plascon-Evans rule dictates that disputes of fact must be resolved in favour of the employee. In terms of that approach, where there are genuine disputes of fact as to the reasonableness of a restraint of trade, they must be resolved in favour of the party sought to be restrained by applying the *Plascon-Evans* rule as laid down in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) 634; cf *Fry's Metals (Pty) Ltd v Numsa & others* [2003] 2 BLLR 140 (LAC); *Ball v Bambalela Bolts (Pty) Ltd & another* (2013) 34 *ILJ* 2821 (LAC) para [14]. If on the facts the restraint is reasonable, the applicant must succeed, but if they show that the restraint is unreasonable, the respondent must succeed (*Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 406 (SCA) 496B–D; *Ball v Bambalela Bolts (Pty) Ltd & another* para [14]).

In 2017, the Labour Appeal Court (Sutherland AJ) considered the enforceability of a restraint of trade agreement in circumstances where the employer was unable to produce proof of the existence of the restraint agreement, in the matter of *TIBMS (Pty) Ltd t/a Halo Underground Lighting Systems v Knight & another* (2017) 38 *ILJ* 2721 (LAC).

The Labour Court considered the application by TIBMS (Pty) Ltd t/a Halo Underground Lighting Systems (Halo) for an interdict against two of its former employees (the employees) to protect its confidential information and customer connections as envisaged in alleged restraint of trade agreements concluded between Halo and the employees. Halo contended that in terms of the restraint of trade agreements the employees were prohibited from being involved with competitors in any manner for a period of two years. The employees had attempted to hijack Halo's business by setting up a new business in direct competition. But the employees alleged that no such restraints of trade existed. Halo was unable to produce the restraint of trade agreements but argued that this was because the employees had taken the documents from the company records and destroyed them. As proof of the theft and destruction, Halo adduced two affidavits from one of the

employees in which he had admitted to these actions. It was also emphasised that in 2013 fresh contracts for all staff were drafted but that Halo was able to provide to the court a draft template of the restraint of trade which had allegedly been concluded between it and the employees. However, no acceptable proof was adduced that such a document was ever signed by the employees. The court considered Halo's contention that the reason for this was confidentiality, implausible. Halo's failure, despite being requested to do so, to produce other staff members' restraint of trade agreement did not bode well. Had this been done it would have added weight to the claim that the restraint of trade existed. Rejecting Halo's contention that on the facts as deduced from the papers, the existence of restraint of trade agreements had been proved, the Labour Court dismissed the application and ordered Halo to pay the employees' costs. Halo lodged an appeal against the decision.

On appeal, the Labour Appeal Court noted that this dispute of fact could not have been resolved on the papers. Consequently, the Labour Court had been correct in dismissing the application. However, the employees did not come with clean hands. Due to their conduct, the cost order that had been made by the Labour Court in favour of the employees was set aside in the interest of equity and they were ordered to pay their own costs.

Basic Conditions of Employment

Unlawful termination of an employment contract

The employee party in *Vakalisa v South African Weather Service & others* [2017] ZALCJHB 320 sought an order of specific performance of his employment contract and the terms incorporated in it as contained in the employer's disciplinary policy. The disciplinary policy set out procedural rights for an employee. The employee pleaded his case based on breach of contract in terms of sections 77(3) and 77A*(e)* of the BCEA. In terms of these provisions, the Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment. The Labour Court is empowered to make any determination it considers reasonable, including an order for specific performance. The employer opted to convene a formal disciplinary process before an independent chairperson. The hearing was suspended and never reconvened. When the hearing was suspended, the employee had not

closed his case. Therefore, he had not had the opportunity to cross-examine all of the employer's witnesses and he had not opened his case. On the day the enquiry was suspended, the employer applied for the termination of the disciplinary enquiry, a finding on the charges against the employee, and a finding on the appropriate sanction. The application was supported by an affidavit drafted by another employee (employee B) who had levelled the charges against the employee.

On receipt of this application, the chairperson decided to suspend the disciplinary hearing and to follow the route of written submissions. At that stage no final decision was made regarding the termination of the enquiry. In response, the employee indicated that since employee B and the employer had both requested that the enquiry be terminated, the charges against him had fallen away. He sought confirmation that in light of the request to terminate the enquiry, the charges levelled against him had been abandoned.

The chairperson replied that the purpose of allowing the employee to respond to the submissions of the employer is to state which aspects of the employer's submissions the employee disputes and why. Moreover, employee B had the opportunity to place any other information before the chairperson that he might consider relevant to the determination of the matter. The chairperson noted further that the charges against the employee had not been dropped, and that the opportunity to make submissions was still open in that no final decision on the question of the disciplinary enquiry had been taken. In reply to this communication, the employee stated, among other things, that the hearing had been initiated to prove their respective cases and that the termination of the enquiry had denied the parties this right. The decision was made to conclude the enquiry, and the employee was found guilty of the charges against him and summarily dismissed.

On review, Rabkin-Naicker J was required to decide whether a contractual right falling outside the auspices of the LRA is enforceable. The contractual clause provided that the employee had to be conversant with the employer's policies and procedures as amended from time to time. The employee submitted that the clause was relevant to disciplinary policy. Reference was made to *Ngubeni National Youth Development Agency & another* (2014) 35 *ILJ* 1356 (LC), in which the applicant had brought his case precisely on the grounds pleaded *in casu* and had suc-

ceeded. However, in *Ngubeni* the contract of employment contained a clause which Van Niekerk J was guided to interpret by the principles as set out in the *obiter dictum* of Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) paragraphs [18] and [26], which provide that interpretation is the objective process of attributing meaning to the words used in a document having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole, together with the circumstances attendant upon its coming into existence. Cognisance must be taken of the language used, in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed; and the material known to those responsible for its production. If more than one meaning is possible, each possibility must be weighed in the light of all these factors. Preference is given to a sensible meaning as opposed to a meaning that is not sensible or unbusinesslike; or which undermines the apparent purpose of the document.

In applying this *obiter dictum* to the contractual provisions in the case under discussion, Rabkin-Naicker J held that the interpretation of the clause advocated by the employee – that it incorporates the disciplinary policy by reference – must also mean that it incorporates all of the employer's policies as amended from time to time by reference as no single policy is specifically mentioned. The court felt that, considering that *'*conversant with*'* means 'having knowledge or experience with', this was not the correct interpretation of the clause in question. The approach to statutory interpretation favoured by our courts originates in from English law, which emphasises loyalty to the text of a commercial contract, instrument, or document read in its contextual setting. But in the process of interpreting the language of a commercial document, the court ought generally to favour a commercially sensible construction (para [11]) as this approach results in a commercial construction which is likely to give effect to the intention of the parties. Words ought, therefore, to be interpreted in a way in which a reasonable commercial person would construe them, and the reasonable commercial person can safely be assumed to be unimpressed by technical interpretations and undue emphasis on niceties of language. (Lord Clarke SCJ in *Rainy Sky SA v Kookmin Ba*nk [2011] UKSC 50, [2012] Lloyd's Rep 34 (SC) para [21], referred to in *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* 2016 (1) SA 518 (SCA) para

[29]). Therefore, the commercial construction of the clause in issue is that the employee was expected to be familiar with the policies and procedures of the employer and keep abreast of any amendments to them. Further, the use of the disciplinary policy did not amount to the employer 'electing' to be bound by it as submitted by the employee. The application of the disciplinary policy by the employer is mandatory in its own terms. For these reasons, the clause of the contract did not incorporate the disciplinary policy by reference, and a claim for specific performance of the policy's terms was, therefore, unsustainable.

Principles of Practice

Delays in finalisation of the dispute

The Labour Appeal Court in *City of Johannesburg Metropolitan Municipality & others v Independent Municipal and Allied Trade Union & others* LAC (2017) 38 *ILJ* 2695 (LAC) considered the factors that the Labour Court should consider when deciding if proceedings should be dismissed based on inordinate delay in finalisation of the dispute. The court held that even if there is a very lengthy delay, it may still be in the interests of justice to proceed with the hearing of the dispute.

This case concerned a dispute between trade unions and the local government employer's organisation regarding the validity and enforceability of a settlement agreement. The Labour Court dismissed the application for an order declaring that the settlement agreement entered into and an arbitration award, in terms of which the settlement agreement had been made an award, were not binding. In reaching this conclusion the court noted that the applicants 'have been less than diligent in pursuing' the application, and rejected the explanation for the delay in finalising the dispute. The dispute was caused by events that had occurred more than seven years earlier, and the application was launched more than six years before the hearing. The matter had been ripe for hearing since May 2008, but no progress had been made in its finalisation. Following an unsuccessful application for leave to appeal, leave to appeal was granted on petition. On appeal, the Labour Appeal Court was required to determine whether dismissing the application on the ground of delay was merited.

The Labour Appeal Court noted that the LRA and the rules of the Labour Court set time limits in order to avoid unreasonable delays. If no time period is stipulated for the bringing of certain

kinds of proceeding, the requirement is that they must be brought or prosecuted within a reasonable time. The court noted that no time limit is stipulated for the bringing of this application. The Labour Court had applied the six-week period within which an application for the review of an arbitration award in terms of section 145 of the LRA may be filed (para [54]). Whether using a six-week period as a benchmark for the reasonable time within which to bring such an application was reasonable, was not considered by the Labour Appeal Court. Instead, the Labour Appeal Court held that the Labour Court has inherent power to protect and regulate its own process and to develop the common law, taking into account the interests of justice. This implies that it can dismiss proceedings on the basis of delay. However, this power should be used sparingly and in exceptional circumstances only. Factors to be considered in deciding whether it is apt include: the right of the parties to access to justice under section 34 the Constitution; the importance of the matter; the prospects of success; the potential prejudice to the parties; the consequences of granting or not granting the relief sought; and of not finalising the matter on its merits. The Labour Appeal Court held that the Labour Court had erred by ignoring that adjudication of the merits of the dispute was in the public interest, and by not considering that dismissing the application would prejudice members of the SALGA. Moreover, it was in the public interest to hear the matter. In the result, the Labour Court had failed properly to exercise its discretion when it decided to dismiss the application on the ground of delay (para [47]). Despite the unreasonable delay, the Labour Court ought to have considered the application on its merits. The court had erred by viewing the delay in isolation, without considering the potential prejudice to affected parties, the possible consequences of granting the relief sought, and the effect of not granting it or not dealing with the matter on its merits. The nature and importance of the matter, and the prospects of success, made it necessary for the court to consider the merits of the application despite the delay. The appeal was upheld.

This is one of two cases decided by the Labour Appeal Court on the same day concerning dismissal of an application on the ground of delay, although the cases are distinguishable based on their particular facts. Although the outcome is different from that in *NUMSA & Others v Paint and Ladders (Pty) Ltd & Another* (2017) 38 *ILJ* 2285 (LAC); [2017] 11 BLLR 1105 (*Paints & Ladders*), the factors applied by the court are the same. The fact

that there is no closed list of factors to be considered is stressed (para [51]), as is the public interest element in determining whether a case should be dismissed. Both this case and the *Paints & Ladders* decision make it clear that the interests of all parties involved in the resolution of a dispute – employers, employees and the public, where applicable – should be considered by the court when deciding whether the case should be determined on its merits.

In another application for the retrieval of an archived file, *Samuels v Old Mutual Bank* [2017] 7 BLLR 681 (LAC), (2017) 38 *ILJ* 1790, the Labour Court (Whitcher J) had dismissed the application by an employee who sought to have her file on an application for review reinstated. The employee's court file had been archived in terms of clause 11.2.7 of the Practice Manual of the Labour Court of South Africa. In order for a file to be reinstated, an interested party must bring an application on affidavit in terms of clause 16.2, for the retrieval of the file on notice to all other parties. The provisions of Rule 7 apply to such an application. In the Labour Court, the judge had rejected the employee's contention that the Practice Manual should not apply to her case because the manual only came into operation in April 2013 whereas her review application was filed in May 2011. Whitcher J reasoned that the Manual is based on the Rules of the Labour Court and on principles established by case law before the Manual came into effect. Further, even if the 60-day period operated only from April 2013, the record was still filed a year late. Whitcher J was further concerned that the dismissal had occurred seven years earlier, and that the entire purpose of the review application was to secure reinstatement; that for the appellant to succeed with the application she was required 'to prove an exceptional explanation, exceptional prospects of success, a material injustice and no prejudice to the respondent' (para [11]). The judge accepted that the CCMA was partly to blame for the delay in that it had failed to provide the full record on time, and the employee had to conduct a search for parts that were missing. However, her legal representatives could have approached the employer's representatives for collaboration on 'crafting an appropriate record'. Further, there had been various stages of inactivity during which no steps had been taken by the employee and she had provided no real explanation for this. The present application had also only been brought almost two months after being directed to do so. Therefore, the employee

had not complied with the requirements in the Practice Manual. The employee then lodged an appeal before Tlaletsi DJP.

The Labour Appeal Court noted that the Practice Manual is aimed at, among other things, providing access to justice for all those whom the Labour Court serves; promoting uniformity and/or consistency in practice and procedure; and setting guidelines on standards of conduct expected of those who practise and litigate in the Labour Court. Its aim is to improve the quality of the court's service to the public and promote the statutory imperative of expeditious dispute resolution (para [14]), and not to change or amend the existing Rules of the Labour Court, but to enforce and give effect to these rules, the LRA, and various decisions by the courts. Its provisions, therefore, are binding (para [15]). The Labour Court's discretion in interpreting and applying the provisions in the Practice Manual remains intact, depending on the facts and circumstances of a particular matter before it (*Tadyn Trading CC t/a Tadyn Consulting Services v Steiner & others* (2014) 35 *ILJ* 1672 (LC) paras [10] [11]; *Edcon (Pty) Ltd v CCMA & others: In re Thulare & others v Edcon (Pty)* Ltd (2016) 37 *ILJ* 434 (LC) paras [23] [24]). An application for the retrieval of a file from the archives is a form of the application for condonation of failure to comply with the court rules, timeframes, and directives. Showing good cause demands that the application be *bona fide*; that the applicant provide a reasonable explanation which covers the entire period of the default; and show that he or she has reasonable prospects of success in the main application (*Van Wyk v Unitas Hospital & another* 2008 (4) BCLR 442 (CC) para [22]; *Superb Meat Supplies CC v Maritz* (2004) 25 *ILJ* 96 (LAC) paras [19]–[23]; *Edcon (Pty) Ltd v CCMA* (above) para [26]). Lastly, it must be in the interest of justice to grant the order.

Tlaletsi DJP held that the applicant need not deal fully with the merits of the dispute to establish reasonable prospects of success; it is sufficient to set out facts. Ultimately, the decision to grant or refuse condonation is a discretion to be exercised by the court after hearing the application (para [17]). The Labour Appeal Court held that the court below had misdirected itself in dismissing the application to retrieve the file from the archives. It would be in the interest of justice and fairness that the non-compliance be condoned in this instance. The appeal, therefore, succeeded.

Jurisdiction of the Labour Court

Jurisdiction is determined with reference to the allegations in the pleadings and not the substantive merits of the case. The

court must scrutinise the founding affidavit to establish the legal basis of the claim. To identify the true and real issues in dispute, the substance of the dispute must be considered over the form in which it is presented. The Labour Appeal Court in *Rukwaya & 31 others v The Kitchen Bar Restaurant* (2018) 39 *ILJ* 180 (LAC), [2018] 2 BLLR 161 confirmed the decision of the Labour Court that it had no jurisdiction in matters which must be referred to another forum under a collective agreement.

In this case, the appellant employees were waiters who worked at the Kitchen Bar Restaurant. They approached the Labour Court under section 77(3) of the BCEA claiming payment of outstanding wages and weekly bonuses, and a refund of certain deductions, purportedly owing to them. The parties were bound by a collective agreement regulating all wages and conditions of employment in the industry (the collective agreement). The employees contended that the employer had contravened certain clauses of the collective agreement. After considering the true nature of the dispute – the interpretation and application of the collective agreement, and not a breach of the employees' employment contracts – the Labour Court held that it lacked jurisdiction. In terms of the collective agreement, the matter ought to have been referred to the Bargaining Council for the Restaurant, Catering and Allied Trade Industry.

On appeal, the Labour Appeal Court noted that section 24(1) of the LRA requires that collective agreements provide for a procedure to resolve any dispute on the interpretation and application of the collective agreement through conciliation, and if the dispute remains unresolved, through arbitration dealt with by the Bargaining Council. The clause in the collective agreement is peremptory and is not intended to be an alternative to other procedures. The aim is to ensure a speedy and cost-effective resolution to a dispute arising from a contravention of the collective agreement.

From the pleadings it was evident that the Labour Court had been correct in finding that the employees' claims were based on the collective agreement, which ultimately also provided the dispute resolution processes. Accordingly, the appeal was dismissed.

Absolution of instance

In *Commercial Stevedoring Agricultural and Allied Workers Union v Robertson Abattoir* [2016] 12 BLLR 1163 (LAC), (2017)

38 *ILJ* 121, abattoir employees (the employees) were dismissed. The respondent (employer) conceded that it had dismissed the employees but alleged that this was for misconduct in the form of insubordination. By contrast, the employees claimed that they had been dismissed as contemplated in section 187(1)*(c)* of the LRA. The court *a quo* found that the appellants had presented no evidence upon which a court 'could or should' find that they had been dismissed and that the dismissal, therefore, fell within the scope of section 187(1)*(c)* of the LRA. Consequently, absolution from the instance was granted in favour of the employer. However, in the Labour Appeal Court, Davies JA found that an alleged automatically unfair dismissal claim could possibly be proven by the trial court which should decide on the merits of the section 187(1)*(c)* claim.

During a meeting discussing among other things slaughtering targets, the employer requested the employees to increase the targets for the number of carcasses to be slaughtered, and in return, proposed to pay an increase subject to 100 per cent attendance from the employees. To meet this increased number of carcasses, the employees had to work overtime. After this meeting, the employees completed their work in accordance with their contracts, and not, as requested, with the increased number of carcasses. They were of the opinion (as declared by their trade union) that no particulars had been written down or agreed upon during or after this meeting.

The employees received no written notices of, or written charges from the respondent to report for a disciplinary hearing. This notwithstanding, the employees reported for duty at the respondent's premises but were locked out and not permitted to start working. The employees were ultimately disciplined and found guilty of insubordination by refusing to slaughter the agreed number of carcasses or to work overtime. The employees claimed automatically unfair dismissal by the employer.

In the Labour Court, the respondents applied for absolution from the instance as there was no ground for an automatically unfair dismissal as alleged by the employees. The test for absolution from the instance involves determining whether, first, there has been a dismissal, and second, whether the appellant has provided evidence which raises a credible possibility that the dismissal in question falls within the scope of section187(1)*(c)* of the LRA. This approach was confirmed by the Labour Appeal Court in *Kroukamp v SA Airlink* (Pty) Ltd 2005 (26) *ILJ* 2153 (LAC)

paragraph [28], read with the approach to be followed when absolution from the instance is sought at the close of the plaintiff's case, as set out by Harms JA in *Gordon Lloyd Page and Associates v Rivera & another* 2001 (1) SA 88 (SCA). Judge Harms held that 'in the ordinary course of events, absolution will be granted sparingly but when the occasion arises, a court should order it in the interest of justice' (paras [2] [92]–[93]).

Ultimately, had the appellants produced evidence on which a court, applying its mind reasonably, could or might have found a sufficient credible possibility that there had been an automatically unfair dismissal? Davies JA found that, reading the evidence of witnesses within the broader context of the dispute – how many carcasses the employees had to slaughter daily – the conclusion was justified that the appellants had negotiated the initial evidential hurdle, and that absolution from the instance could not be granted. Further, the so-called 'termination lockout' is now part of section 187(1)*(c)* of the LRA and must be interpreted within the framework of two fundamental propositions (para [31]). These are that: the LRA distinguishes between a dispute of interest and a dispute of right; and the concept of dismissal in section 186(1) of the LRA means that the employer has terminated employment with or without notice. However, the present case dealt with absolution, and the question of automatically unfair dismissal had to be left for the trial court. The Labour Court's judgment was set aside and the appeal upheld.

Reinstatement as primary remedy

The Labour Appeal Court (Sutherland JA) in *Glencore Holdings (Pty) Ltd & another v Sibeko & others* (2018) 39 *ILJ* 138 (LAC), [2018] 1 BLLR 1, confirmed the finding of the Labour Court that reinstatement as the primary remedy for unfair dismissal can be deviated from only in the instances envisaged in section 193(2) of the LRA. In determining whether the circumstances surrounding the dismissal of the employee rendered reinstatement inappropriate or impracticable, only events leading up to the dismissal may be considered, and not the conduct of the employee during the subsequent arbitration proceedings.

The employee in this case was a dozer driver. After he refused to wear the required earmuffs while working, he was charged with: misconduct for refusing to comply with a reasonable instruction; insubordination; and dishonesty. He was dismissed. During an arbitration regarding his alleged unfair dismissal, the

arbitrator agreed with the employee that the dismissal had been substantively unfair. But during the arbitration the employee was disruptive, alleged bribery and that the employer's representatives were prompting one another and the arbitrator; and declared that the battle between himself and the employer had only just begun. Consequently, the arbitrator decided not to order retrospective reinstatement as sought by the employee as he was of the view that the employee's behaviour during the arbitration proceedings had demonstrated a breakdown in the employment relationship which rendered reinstatement inappropriate. On review the Labour Court noted that the arbitration award made no reference to which part of section 193(2) the arbitrator had relied on to justify his 'deviation' from the primary remedy. The decision was set aside and substituted with an order of reinstatement. On appeal, it had to be determined whether this substitution was appropriate.

The Labour Appeal Court reiterated the reasoning of the Labour Court (above) and found that the Labour Court had correctly held that section 193(2)*(b)* was excluded because the phrase 'circumstances surrounding the dismissal' was limited to events up to the point of dismissal but not afterwards. That the employee had acted badly during the arbitration was not unusual in adversarial proceedings, or valid reason for excluding his reinstatement. His reinstatement was also not, as imagined by the arbitrator, 'impracticable' under section 193(2)*(c)* as his functional role as dozer driver in the employer's organisation, and the rapport or lack therefore with his superiors, had not been adversely impacted by his conduct as envisaged in section 193 of the LRA. The lower court's finding was correct, and the appeal was dismissed with costs.

Reasonable apprehension of bias

During 2017, in *Grindrod Logistics (Pty) Ltd v SATAWU obo Kgwele & others* (2018) 39 *ILJ* 144 (LAC), the Labour Appeal Court considered whether granting a postponement to allow one of the parties to a labour dispute the opportunity to call further witnesses, which it had never intended calling, pointed to bias on the part of the commissioner.

In 2006, the employee started working at Grindrod Logistics (Pty) Ltd (Grindrod) as a carrier truck driver. In 2013, he was assigned a carrier truck to deliver vehicles at two destinations in Namibia. On his way to Walvis Bay the employee was stopped by

police at a roadblock. The police gave him directions and informed him that a portion of the road ahead was under construction. The employee took a calculated risk by crossing a drift where he got stuck. The carrier and some of the cargo were damaged. Consequently, the employee was charged for driving off-route and for driving recklessly and negligently and in a manner that resulted in substantial loss. He was found guilty on the charge of reckless and negligent driving and dismissed. The South African Transport and Allied Workers Union (the SATAWU) referred the employee's unfair dismissal dispute on his behalf to the CCMA. After Grindrod had called its first witness, the commissioner enquired from Grindrod's representative whether he had further witnesses to call to which he replied in the negative. On resuming the arbitration after a brief adjournment, the commissioner again enquired whether Grindrod would be calling further witnesses, whereupon its representative replied that it intended to do so. The SATAWU contended that the commissioner had adjourned the arbitration proceedings in order to afford Grindrod an opportunity to call a further witness. After hearing further testimony, the commissioner concluded that the employee had failed to exercise the standard of care and skill that could be expected of an employee in his position, and that he had breached the relationship of trust. Consequently, he ruled the dismissal substantively fair.

On review, the Labour Court reasoned that the commissioner's conduct in adjourning the arbitration sent a clear message to Grindrod's representative to call a further witness. The court held that in so doing the commissioner had advanced Grindrod's case and given it an unfair advantage. In addition, the Labour Court perceived the questions the commissioner posed to the employee as falling outside the powers of the commissioner as they were not clarity-seeking questions. This was dispositive of the matter and the award stood to be reviewed and set aside on this ground alone. In order to avoid further delays in finalising the dispute, the Labour Court did not remit the matter to the CCMA to be heard afresh before a different arbitrator, but itself considered the merits. Ultimately, the Labour Court set the award aside, declared the employee's dismissal substantively unfair, ordered retrospective reinstatement, and issued a final written warning valid for a period of six months. The employer lodged an appeal.

The Labour Appeal Court noted that the test for bias is whether a reasonable, objective, and informed person would, on the

correct facts, reasonably apprehend bias. To succeed on these facts, it had to be proven that when he adjourned the arbitration, the commissioner had acted *mala fide* and in breach of his duties by affording Grindrod an unfair advantage. The Labour Appeal Court held that the court below had erred in concluding that the employee reasonably perceived or reasonably apprehended bias. The commissioner's questioning was not aimed at advancing Grindrod's case. Overall, there was nothing sinister in the conduct of the arbitration proceedings. Generally, after finding bias on the part of the commissioner, the arbitration proceedings would be nullified, and the matter would be referred to be heard afresh before a different arbitrator. Instead, the Labour Court had proceeded to hear the matter on the merits, which was another clear misdirection.

The employee's dismissal was found to have been substantively unfair for reasons other than those which formed the basis of the Labour Court's decision. Nevertheless, the outcome was left unchanged. In the result, the appeal was dismissed with no order as to costs.

Condonation

The Labour Appeal Court's 2017 ruling in *G4S Secure Solutions (SA) (Pty) Ltd v Gunqubele NO & others* [2017] 12 BLLR 1181 (LAC), (2018) 39 *ILJ* 131, considered what qualifies as a 'reasonable time' for a review application under section 158(1)*(h)* of the LRA, and when a condonation application is appropriate in both arbitration and review proceedings. The facts of the case were briefly as follows.

The employee was employed by G4S Secure Solutions (SA) (Pty) Ltd (G4S) as a Supervisor grade B. During August 2013, he was demoted to Supervisor grade D. G4S alleged this was done by agreement in order to avoid his retrenchment. However, the employee referred a dispute to the CCMA. After a failed attempt at conciliation, the matter was enrolled. G4S failed to attend the arbitration, as it had allegedly not received the notice of set down. An award was issued which the employee served on G4S's receptionist on 13 December 2013. Shortly after this, G4S's offices closed. In 2014, G4S delivered an application to rescind the award. The date of delivery was disputed. It also appears that the employee was not aware of the rescission application. The commissioner dismissed the rescission application, noting that G4S had received the award on 13 December 2013 but only

applied for its rescission on 7 January 2014 which, by her calculations, fell outside of the fourteen-day period in which the application should have been brought. As G4S did not apply for condonation, the commissioner concluded that the CCMA had no jurisdiction to entertain the application. G4S took the matter on review. The Labour Court held that although an application should be brought within a reasonable time, an applicant should apply for condonation if the application was made after six weeks. The Labour Court observed that G4S had filed an application for condonation so late that counsel had to hand up the application in court. For this reason, the Labour Court declined to condone G4S's late application and dismissed it. On appeal, the Labour Appeal Court considered: whether condonation for the late filing of the entire record should be condoned; whether the late filing of the notice of appeal should be condoned; whether the application to review the refusal by the commissioner to rescind the award was indeed brought out of time; and if so, whether the Labour Court ought to have condoned the late application with due regard to the facts of the case, and rescinded the commissioner's award.

Regarding the late filing of the section 158(1)*(h)* application, the court reiterated the principles used to establish whether an application has been brought within a 'reasonable time'. It stated that it is not a set time, but that after six weeks as required for section 145 applications has elapsed, a condonation application should accompany the application. The court held that where there is an unreasonable delay, an application for condonation is appropriate, and it must then be made at the earliest opportunity. Whether a delay is unreasonable depends on the facts of the particular case. The purpose of the LRA is to provide a mechanism for speedy resolution of labour disputes, including applications for review, which must be brought within a reasonable time in terms of section 158(1)*(h).* This section does not set a particular time. The delay in this case was less than two months, which the court did not consider unreasonable. In any event, the court accepted the reasons for the delay as sufficient and the last issue that stood to be determined was the prospect of success.

As for the late filing of the entire record, the court considered the explanation that G4S provided for the late filing satisfactory. If G4S could show that there were good prospects of success, the condonation should be granted. The Labour Court had not been satisfied with the reason for the delay and so had failed to

consider the prospects of success. The Labour Appeal Court felt that the Labour Court's approach was too strict, because there was a reasonable and acceptable reason for the delay and it should have considered the prospects of success. This depends on whether the rescission application should have been granted by the commissioner. The reason why the commissioner declined to rescind the award was that the application for rescission was late, and there was no application to condone this defect. However, on the facts, the application was not late due to the recess period stipulated in the CCMA rules between 16 December and 7 January.

G4S provided a sound reason for not attending the arbitration proceedings. On the facts it did not receive the notice of set down. Consequently, the decision of the commissioner was unreasonable, and she should have rescinded the award. Consequently, G4S's failure to file the entire record was condoned and the appeal reinstated. Moreover, the late filing of the notice of appeal was condoned and the Labour Court's order set aside and replaced with an order that on reviewing the commissioner's award the arbitration award should be rescinded with no order as to costs.

Dispute of right or interest

The distinction between 'rights disputes' and 'interest disputes' was not addressed conclusively in the matter of *Department of Home Affairs v Public Servants Association & others* (2017) 38 *ILJ* 1555 (CC), 2017 (9) BCLR 1102, a judgment penned by Froneman J. Rather, the judges, in a unanimous judgment, concluded that disputes as to matters of mutual interest referred for conciliation must be conciliated, whether they are disputes involving 'rights' or 'interest'. It is not the function of the conciliator to pronounce on whether the dispute is one of 'rights' or one of 'interest'.

During March 2015, two public sector unions referred a dispute of alleged mutual interest to the bargaining council for conciliation. The second respondent, also a union, joined the application (the unions). The dispute arose when, in February 2015, the Department of Home Affairs (the DHA) proposed changes to the scheduling of working hours for employees by introducing Saturday work days. It adopted the position that the proposal was open to consultation, but not to collective bargaining (para [3]). The unions opposed the proposed changes and contended that

they should be allowed to bargain collectively. The parties could not reach agreement and the DHA subsequently issued a circular confirming that the proposed new arrangement would come into effect on 23 March 2015.

At the hearing, the DHA challenged the bargaining council's jurisdiction on the basis that the alleged dispute did not involve a matter of mutual interest. The panellist agreed, finding that the matter referred to conciliation 'is not a matter of mutual interest; consequently, the Bargaining Council lacks jurisdiction in this matter' (para [4]). The unions took this decision on review to the Labour Court. The review application was successful. The Labour Court held that the dispute did involve a matter of mutual interest and that it had to be conciliated. Leave to appeal to the Labour Appeal Court was refused, and the application for leave to appeal to the Constitutional Court was the final step in the process.

The court noted that what constitutes a matter of mutual interest is not defined in the LRA. The term 'serves to define the legitimate scope of matters that may form the subject of collective agreements, matters which may be referred to the statutory dispute-resolution mechanisms, and matters which may legitimately form the subject of a strike or lock-out'. 'Interest' and 'rights' disputes are both matters of mutual interest. Whether the matter is a dispute of interest or of right, and, therefore, whether it may legitimately form the subject of a strike, is irrelevant for the determination of whether it may trigger conciliation under the LRA (para [7]). It is the failure to make this distinction that led the then counsel for the DHA and, in turn, the conciliator at the bargaining council, astray.

The union had ticked the 'matters of mutual interest' box when asked to describe the nature of the dispute as the unions considered the dispute to be one over which a protected strike can be called a 'strike' in terms of section 213 of the LRA (para [8]).

In the bargaining council the DHA framed its case as a jurisdictional one: that the dispute was not one of mutual interest. The conciliator agreed, stating that the dispute was merely about a 'work practice' in the employer's prerogative. The Labour Court concluded that disputes about matters of mutual interest may be referred to conciliation by a commissioner or a bargaining council. In similar vein, disputes concerning employment practices and their alteration by management would qualify as

matters of mutual interest capable of being referred to conciliation under the LRA.

In the subsequent appeal in the Constitutional Court, the DHA conceded, in concurrence with the bargaining council, that the dispute concerned a matter of mutual interest. But the justices considering the argument that the efficacy of conciliation is dependent on a correct characterisation of the dispute disagreed. The DHA argued (para [12]) that conciliating a 'rights dispute' that can be resolved by law differs from conciliating an 'interest dispute' which depends on economic power play, and that without that clarity beforehand, the purpose and the effectiveness of conciliation would be undermined. The Constitutional Court held (para [13]) that this submission could not be sustained, and that the LRA does not differentiate between 'rights disputes' and 'interest disputes'. Although a strike about a matter of mutual interest may not be protected, it does not mean that a conciliator lacks jurisdiction to conciliate the dispute.

Qualified privilege during arbitration proceedings

During 2017, Mbenenge J had to decide on the issue of qualified privilege which our law confers on witnesses and litigants in respect of defamatory statements made during quasi-judicial proceedings. The appeal in *Clover SA (Pty) Limited & another v Sintwa* (2017) 38 *ILJ* 350 (ECG), [2016] 12 BLLR 1265, succeeded against the following background.

The respondent employee had been in the employ of the employer as a team leader tasked, among other things, with conducting checks on machines and products to ensure that they passed the health and safety standards. To that end, the employee had to certify on the relevant form that the necessary checks had been completed. The employee was charged with and found guilty of misconduct and dismissed, as he had allegedly signed the form certifying that certain products passed the health and safety standards without having performed the requisite test. The employee referred an unfair dismissal dispute to the CCMA. The arbitrator agreed with the employee that the employer had failed to substantiate that the employee was guilty of fraud. Instead, the arbitrator concluded that he had been guilty of negligence. The dismissal was ruled substantively unfair, and the employer was ordered to pay compensation to the employee.

The employee lodged an application in which he sought to recover damages in the amount of R100 000. This was founded

on the contention that during the arbitration proceedings the employer had wrongfully and unlawfully alleged that the employee had committed fraud.

The employer contended that the allegations complained of were made in quasi-judicial proceedings and, therefore, enjoyed qualified privilege. It was found that the employer had exceeded the bounds of qualified privilege, and that he was liable for the damages as claimed (para [10]). The statement implicating the employee as having committed fraud was irrelevant and unconnected to the arbitration proceedings and the employee could easily have been referred to as negligent.

On appeal, what had to be determined was whether the defamatory utterance made by the employer was privileged, and whether there were facts supporting of an inference of malice on the employer's part.

The court noted that it is trite that publication of defamatory material in privileged circumstances is justified and lawful. As this case concerned qualified privilege, it was necessary for Mbenenge J to draw a distinction between 'discharge of a duty or furtherance of an interest' and 'judicial and quasi-judicial proceedings' as part of the categories of qualified privilege in our law (para [14]). In both categories, the plaintiff may, even if the defendant establishes provisional protection, show that the defendant exceeded the limits of the privilege because he acted with an improper motive (malice).

'Discharge of a duty or furtherance of an interest' is where a person has a legal, moral, or social duty, or a legitimate interest, in making defamatory assertions to another person who has a corresponding duty or interest to learn of the assertions. If it is proved by means of the reasonable man test that both parties had a corresponding duty, the defendant must prove that he or she acted within the limits of the privilege by proving that the defamatory assertions were relevant to, or reasonably connected with, the discharge of the duty or furtherance of the interest (para [15]).

In an instance of defamatory statements made during judicial or quasi-judicial proceedings, however, the position is significantly different. To enjoy protection, the defendant need only prove, on a balance of probabilities, that the statements were relevant to the matter at hand; the onus then shifts to the plaintiff to prove that, notwithstanding the statements' relevance (para [16]), they were not supported by reasonable grounds.

Even though the CCMA is an administrative tribunal and, therefore, not part of the judiciary, its proceedings are quasi-judicial in nature (*Phalaborwa Mining Company Ltd v Chectam & others* [2008] BLLR 553 (LAC)). On answering the question of whether the statements made by the employer were indeed necessary during the arbitration, it was found that the employer had to prove that the employee had been dismissed for committing fraud. This was indeed relevant to the issue for determination by the arbitrator and covered by qualified privilege. The court *a quo*'s finding that 'the statement of fraud made was irrelevant, unconnected to the matter and it was unnecessarily dragged into the matter that could easily be referred to negligence' (para [27]) was accordingly incorrect.

To answer whether the employee had proved that, notwithstanding its relevance, the impugned statement was not supported by reasonable grounds, Mbenenge J referred to *Joubert & others v Venter* [1985] 1 All SA 443 (A), where it was held that alternative grounds on which the plaintiff can do this is by proving that the defendant did not have 'some foundation' in the evidence or the surrounding circumstances for making the statement in issue (704B-C), that the defendant knew that his statement was false, that there was no evidence to substantiate it, or that the defendant's real motive was personal spite or ill-will. *In casu* the employee had not proved that the impugned statement was not supported by reasonable grounds (para [28]).

The final question was whether the employee had shown that the employer exceeded the limits of the privilege by acting with malice. Here, too, it is evident from the answers given by the employee during cross-examination that the employer acted out of a sense of duty or was bent on protecting an interest. The court *a quo* assumed the existence of malice by inference (para [32]); the fact that the operator who had also signed the relevant form had not been charged was, according to the court *a quo*, a basis for inferring malice. The Labour Appeal Court found this conclusion to be illogical as a proper cause of action in such an instance would have been for the employee to complain of unequal treatment or discrimination.

Vicarious liability

Having held that the victim (M) had been constructively dismissed in that she had been sexually harassed by a manager in the workplace on four different occasions, and that, after the

harassment had been reported, the employer had failed to take the necessary steps, the Labour Court (Sono AJ) held the employer vicariously liable in terms of section 60 of the EEA for unfair discrimination. The Labour Court's decision was taken on appeal in *Liberty Group Limited v M* (2017) 38 *ILJ* 1318 (LAC), [2017] 10 BLLR 991.

The Labour Appeal Court held that there is a positive duty on management and human resources to ensure that employees who have been subjected to sexual harassment receive support on a confidential basis as soon as possible after the event is reported. This duty includes seeking to clarify whether the offending behaviour in fact constitutes sexual harassment. This involves discussing alternatives and providing advice regardless of the course of action the employee chooses to take. Moreover, employers must react swiftly should an employee resign for having been sexually harassed. If the employer cannot show that these steps have been taken it might very well be found vicariously liable for the sexual conduct as envisaged in section 60 of the EEA and the 2005 Amended Code on the Handling of Sexual Harassment Cases in the Workplace.

The Labour Appeal Court held that, while it is clear that section 60 imposes liability on an employer where a provision of the EEA has been contravened, in its construction and wording there are some grey areas resulting in confusion regarding what a victim must prove. In *Matambuye v MEC for Education & others* [2015] ZALCJHB 455 paragraph [22], the Labour Court noted that it was not required to decide whether section 60(2) of the EEA refers to steps the employer must take immediately following a report of harassment, and whether section 60(4) refers to reasonable steps that the employer must take beforehand to eliminate and prevent acts of unfair discrimination. Two other similar matters may provide clarity on which interpretation of section 60 should be followed.

A narrow approach was followed in *Mokoena & another v Garden Art (Pty) Ltd & another* [2008] 5 BLLR 428 (LC), (2008) 29 *ILJ* 1196 paragraphs [42] [43]. In that case it was concluded that liability arises only where the harassment is repeated after an initial complaint has been lodged, and then only where the employer has failed to take reasonable steps to prevent further harassment. This view has been widely criticised. This narrow interpretation is disconnected from the purpose of the EEA, ie, providing equal opportunities and eliminating unfair discrimina-

tion in any employment policy or practice on one or more grounds, including harassment. That this approach is not correct is supported by section 6(3) of the EEA, which confirms that such conduct is contrary to the achievement of substantive equality in the workplace, as it creates an arbitrary barrier to the full and equal enjoyment of an employee's rights, violates the person's dignity, and limits his or her right to equality at work. The preferred approach may be found in *Biggar v City of Johannesburg, Emergency Management Services* [2011] 6 BLLR 577 (LC), (2011) 32 *ILJ* 1665. The court found that the employer had failed to take all steps necessary to eliminate racial abuse perpetrated by its employees and failed to do everything reasonably practicable to prevent continued harassment. As regards the factors that must be proved in order to hold an employer vicariously liable for sexual harassment in particular, the Labour Appeal Court referred to *Potgieter v National Commissioner of the SA Police Service & another* (2009) 30 *ILJ* 1322 (LC) paragraph [46]. After applying these criteria to the facts under scrutiny, Savage AJA found that the employer in this case was indeed vicariously liable due to lack of evidence that it had complied with its duty to the employee. The Labour Court's decision was confirmed.

Sanction for misconduct

The employer, CVO School, sought to review and set aside two arbitration awards in terms of section 145 of the LRA. The first award concerned dismissal of a husband for misconduct, and the second the dismissal of his wife for operational reasons. The couple had been employed by the same employer and were dismissed simultaneously. Two separate unfair dismissal disputes ensued in the CCMA and were heard by two different arbitrators. Individual arbitration awards were handed down in favour of each of the two employees, and two separate review applications were referred to the Labour Court. Ultimately, the matter was entertained as a consolidated dispute in *CVO School Vivo v Pretorius & others; CVO School Vivo v Pretorius & others* [2017] ZALCJHB 412.

The facts leading to the dismissals are as follows. The husband was summoned for a disciplinary hearing on charges of misconduct as he had allegedly failed to attend to his duties as caretaker. He was reminded by the employer that he was employed in a combination post with his wife. This meant that if he was guilty on the charges and dismissed, his wife's employment

would also be terminated based on operational requirements. The husband was found guilty at the disciplinary hearing and the school governing body had to vote whether to dismiss him. The husband was not given an opportunity to address the school governing body, or the chairperson, on the issue of an appropriate sanction. In a letter, the husband was informed that it had been decided to terminate his employment with immediate effect, and that his wife's employment would also terminate based on operational requirements. Subsequently the wife was informed in person of the decision against her husband and that he had been dismissed. It was explained to her that she held a combination position which terminated simultaneously with that of her husband. The two arbitration awards handed down in the CCMA were in favour of the employees. The employer sought to review the two awards in the Labour Court

Snyman AJ considered the reasonableness test as laid down in the watershed matter of *Sidumo & another v Rustenburg Platinum Mines Ltd & others* (2007) 28 *ILJ* 2405 (CC). The judge highlighted the *dictum* of Navsa AJ that, when applying the reasonableness standard, the standards as contemplated by section 33 of the Constitution must be encapsulated into the review grounds in section 145(2) of the LRA. Therefore, for the review to succeed, the error or failure during the arbitration must affect the reasonableness of the outcome to the extent of rendering the award unreasonable. To determine whether this is the case, all the evidence and issues before the arbitrator must be considered to assess whether the outcome that the arbitrator arrived at can nonetheless be sustained as a reasonable outcome, even if it may be for different reasons or on different grounds.

In considering the husband's case, which was heard by Commissioner Maake, Snyman AJ had to determine whether the departure from what must be complied with in order to ensure procedural fairness may competently spill over into the substantive fairness consideration as well, rendering the dismissal substantively unfair for this reason (para [30] and *SA Revenue Service v Commission for Conciliation, Mediation and Arbitration & others* (2016) 37 *ILJ* 655 (LAC) (para [33]). With reference to *De Villiers v Fisons Pharmaceuticals (Pty) Ltd* (1991) 12 *ILJ* 1087 (IC) 1092G–I, the Labour Court confirmed the stance taken by Commissioner Maake that the manner in which a dismissal was brought about, even if it could later be said that the employee may have deserved to be dismissed, could still render the

dismissal substantively unfair. This entails a critical enquiry into the extent and manner in which the employer departed from what was required for procedural fairness, to ultimately determine substantive fairness (*Moodley v Fidelity Cleaning Services (Pty) Ltd t/a Fidelity Supercare Cleaning* (2005) 26 *ILJ* 889 (LC) para [36]). A value judgement on procedural fairness can only be made where it can be justifiably said that the employee was indeed guilty of misconduct. And this can only take place with full participation of the employee. Further, and in the exercise of this value judgement, the totality of the evidence must be considered, with specific reference to a number of pertinent factors, such as the importance of the rule breached, the reason why the employer is seeking dismissal, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect that the dismissal would potentially have on the employee, the employee's length of service and his or her service record, the issue of the breakdown of the trust between the employer and employee, the existence of dishonesty, the possibility of progressive discipline, the existence or absence of remorse, the job function, and the employer's disciplinary code and procedure. Snyman AJ referred to *Satani v Department of Education, Western Cape & others* (2016) 37 *ILJ* 2298 (LAC) paragraph [16], where it was stated that abiding by the principle of *audi alteram partem* is essential in order to ensure that the rules of natural justice prevail. Failure to afford an employee such an opportunity, where it comes to imposing a sanction, would constitute a procedural irregularity and result in procedural unfairness which would have a direct and material impact on the decision to dismiss. A finding that dismissal is unfair because the sanction of dismissal is inappropriate, harsh, or unfair, is an issue of substantive fairness (*Baloyi v Member of the Executive Committee for Health and Social Development, Limpopo & others* (2016) 37 *ILJ* 549 (CC) paras [24] [25]).

The grounds for procedural unfairness considered by Commissioner Maake were confirmed in the Labour Court. The court noted that where there was a reasonable apprehension or 'outward perception' of bias, the actual existence of bias need not be proven (*BTR Industries SA (Pty) Ltd & others v Metal and Allied Workers Union & another* (1992) 13 *ILJ* 803 (A) 817F–I). The husband was not made aware of the guilty finding at the internal disciplinary hearing, nor was he informed that the decision on the

sanction had been delegated to the school governing body and that they had decided on dismissal. All of this had taken place without providing him an opportunity to argue for an appropriate sanction. Lastly, dismissal as sanction was not justified on the evidence. The dismissal of the husband had, therefore, been substantively and procedurally unfair.

Turning to the award of Arbitrator Ramotshela, who decided on the fairness of the wife's dismissal for operational reasons, Snyman AJ commented that the dismissal was for a sound reason relating to operational requirements, as her appointment was accessory to that of her husband. However, in dismissing her, the employer did not follow a fair procedure as contemplated in section 189 of the LRA. She should, at the very least, have been given proper notice of termination and the opportunity to prepare for the consultations and the opportunity to address the employer on these issues in a meaningful manner. This was in line with Arbitrator Ramotshela's ruling. Snyman AJ in the Labour Court agreed with the finding that there had been a complete failure of process as contemplated in section 189 of the LRA. Among other things, the employer's reasoning that it was not required to follow section 189 of the LRA as the termination took place in accordance with a contractual stipulation was incorrect. The wife's employment contract did not provide for automatic termination of her employment if her husband lost his job. This would have been impermissible as parties to employment contracts are prohibited from contracting out of their rights afforded by the LRA (*SA Post Office Ltd v Mampeule* (2010) 31 *ILJ* 2051 (LAC) (para [23]. See too J Geldenhuys 'The effect of changing public policy on the automatic termination of fixed-term employment contracts in South Africa' (2017) 20 *PER/PELJ* DOI *http://dx.doi.org/10.17159/1727-3781/2017/v20i0a1704*). The contention that following a process was irrelevant as the retrenchment was inevitable, and that this constituted an 'exceptional circumstance' justifying departure from the process required by section 189, has no merit. The 'no difference' principle was rejected by the Labour Appeal Court in *Kotze v Rebel Discount Liquor Group (Pty) Ltd* (2000) 21 *ILJ* 129 (LAC) paragraph [29], and the court was obliged to follow that decision. The fact that the wife did not contest her retrenchment also did not absolve the employer from following a fair procedure. Snyman AJ, referring to *Adams v DCD-Dorbyl Marine (Pty) Ltd* (2011) 32 *ILJ* 2472 (LC) paragraphs

[71] [72], rejected the argument. In the result, the wife's dismissal was found to have been procedurally unfair.

Review of arbitration award: appropriateness of sanction

During 2017, the Labour Appeal Court pronounced on the fairness of a sanction of unfair dismissal. The court confirmed that what sanction is justified depends on the facts of each case, and that the sanction must be individualised. In *Sasol Nitro v National Bargaining Council for the Chemical Industry & others* [2017] 9 BLLR 883 (LAC), (2017) 38 *ILJ* 2322, the court held that an important factor that the commissioner ought to have considered was the employee's unblemished 18-year work record.

Briefly, the employee, Reddy, in an internal hearing and subsequent internal appeal conducted by the employer (Nitro), was found guilty on the grounds of dishonest conduct, gross negligence, and disorderly conduct. Reddy referred a dispute based on alleged unfair dismissal to the bargaining council. The arbitrator accepted that Reddy's conduct was wrong, but considering that he had eighteen years of service, held that Reddy had been unfairly dismissed. The arbitrator felt that the misconduct did not warrant his dismissal. He ordered that Reddy be reinstated without back pay. The effect was that Reddy was without pay from the date of his dismissal until the date of his reinstatement, some ten months, as a fine for his conduct. The Labour Court agreed that the conduct of which Reddy was guilty did not constitute dishonesty and dismissed Nitro's review application. On appeal, Sutherland JA in the Labour Appeal Court had to consider whether the arbitrator's award stood to be reviewed.

The test for review as laid down in *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC) is whether a reasonable arbitrator could not have reached the same conclusion. In applying this test, the Labour Appeal Court concluded that the arbitrator's sanction had been reasonable. Although he had got the facts wrong, this did not amount to a procedural 'irregularity' which rendered the award reviewable. The alleged confusion and mistakes had not affected the outcome.

The court reiterated that reinstatement as primary remedy in case of unfair dismissal must be ordered unless the employer proves that, considering the circumstances and the nature of the misconduct, continued employment has been rendered intolerable (see, too, J Geldenhuys 'The reinstatement and compensa-

tion conundrum in South African labour law' (2016) 19 *PER/PELJ* – DOI *http://dx.doi.org/10.17159/1727-3781/2016/v19i0a1172*). Nitro did not show that it was impracticable or intolerable to continue employing Reddy. The misconduct did not amount to acts of 'dishonesty'. Nitro was ordered to pay Reddy back pay for the six-year period that elapsed while the appeal was pending. The appeal was for the remainder, dismissed with costs.

Recusal application

In *Premier Foods (Pty) Ltd (Nelspruit) v Commission for Conciliation, Mediation and Arbitration & others* (2017) 38 *ILJ* 658 (LC), Snyman AJ had to decide whether an application in terms of section 145 of the LRA for the review and setting aside of an arbitration award should succeed. The basis of the application was that the CCMA commissioner who presided in the arbitration had allegedly been guilty of misconduct in conducting the arbitration proceedings, and in so doing had deprived the employer of a fair hearing. After an attempt at conciliation had failed, the Commissioner made statements which alluded to the fact that he had already made up his mind in the matter and decided against the employer. He also did not allow the employer to bring a recusal application. The transcript showed that the employer had at no point agreed to continue with the arbitration after having requested the Commissioner's recusal.

With reference to the test for review as confirmed in *Sidumo & another v Rustenburg Platinum Mines Ltd & others* (above), Snyman AJ confirmed that, considering the constitutional requirement contained in section 33(1) of the Constitution, everyone has the right to administrative action that is lawful, reasonable, and procedurally fair. The reasonableness standard should suffuse section 145 of the LRA. The judge went further to state that the judgment in *Sidumo* does not contemplate that the review grounds listed in section 145(2)*(a)* have been abolished – a review application can still succeed even if the applicant has not proved that the outcome arrived at by the arbitrator is unreasonable, where the review grounds are founded on the text of section 145(2)*(a)* itself (para [14]). The determination of review grounds in section145(2)*(a)* was articulated in *Baur Research CC v Commission for Conciliation, Mediation and Arbitration & others* (2014) 35 *ILJ* 1528 (LC) paragraph [18]; *Naraindath v Commission for Conciliation, Mediation and Arbitration & others* (2000) 21 *ILJ* 1151 (LC) paragraph [27]. Against the principles and the test

laid down in the jurisprudence, the Labour Court held that the commissioner, when he was confronted with the application for recusal, should have considered the relevant principles applicable to deciding this type of application (*President of the Republic of SA & others v SA Rugby Football Union & others* 1999 (4) SA 147 (CC) para [48] as cited in *SA Commercial Catering and Allied Workers Union v Irvin & Johnson Ltd* (*Seafoods Division Fish Processing)* (2000) 21 *ILJ* 1583 (CC) para [14]). The court added that the the test for recusal imports a double requirement of reasonableness. Not only must the person apprehending bias be a reasonable person, but the apprehension itself must, considering the circumstances, also be reasonable. As to how this test must be applied, Snyman AJ referred to *Irvin & Johnson* (above) paragraph [14]:

> [T]he court superimposes a normative assessment on the litigant's anxieties. It attributes to the litigant's apprehension a legal value, and thereby decides whether it is such that should be countenanced in law.

As the commissioner had not even allowed the issue to be properly ventilated, Snyman AJ concluded that the apprehension of bias was reasonable and justified recusal. For a judicial officer deciding a matter during a CCMA dispute resolution proceeding to say from the very outset to a litigating party that they would lose, and then in effect prevent the issue from being ventilated on the commencement of the arbitration, satisfies the double reasonableness requirement of recusal. The court also noted that in his award the commissioner had given, as one of the reasons for refusing the recusal application, that the employee would be prejudiced by the delay in resolving the dispute that would result. This, of course, is not part of the test to determine whether recusal is appropriate. Prejudice caused to the other litigant is irrelevant in this assessment. If it is justified for a presiding officer to recuse him- or herself, that should be the end of it, as the presiding officer is simply not competent to decide the matter.

Snyman AJ concluded that the events during the conciliation part of the conciliation/arbitration proceedings had deprived the employer of a lawful, reasonable, and procedurally fair hearing in the arbitration that followed. The situation was exacerbated by the way in which the commissioner, virtually arbitrarily, disposed of the concerns raised by the employer in the form of a recusal application. He had also recorded in his award that the arbitration proceeded by agreement, which had not been the case. This all

constituted misconduct by the commissioner as contemplated by section 145(2)*(a)*(i) of the LRA. This meant that the arbitration award itself was vitiated, and the award was set aside.

Postponement of arbitration

The central issue before Myburgh J in *Wade Walker (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & others* (2017) 38 *ILJ* 2842 (LC) was whether the commissioner had committed a reviewable irregularity by refusing the employer a postponement during a CCMA arbitration. Ultimately, the Labour Court reviewed and set aside the arbitration award for the following reasons.

Following his dismissal by the employer, the employee referred a dispute to the CCMA. The commissioner first attempted to conciliate the matter and after having issued a certificate of non-resolution, proceeded to the arbitration phase. At this point, the employer applied for a postponement. It justified its application for postponement by stating that the notice of set down had not come to the attention of the persons dealing with the matter, and that the employer was unprepared. The employee had also agreed to the postponement. Nevertheless, the commissioner refused the postponement, and stated that he would give reasons in his award (para [3]). In his award the commissioner held that the proof before him indicated that the employer had been notified of the date of set-down some 21 days before the hearing, and that no evidence indicating the contrary had been submitted. The arbitration then proceeded, but the employer was unable to call any witnesses or produce the documentation it needed properly to defend the matter. The commissioner found in the employee's favour, ruled the dismissal substantively unfair, and ordered retrospective reinstatement.

On review, the Labour Court rejected the commissioner's brief explanation of why no postponement should be granted as without merit or substance. The Labour Court noted that considerations of prejudice will ordinarily constitute the 'dominant component' in the evaluation of an application for a postponement (*Insurance & Banking Staff Association & others v SA Mutual Life Assurance Society* (2000) 21 *ILJ* 386 (LC) para [44]). The commissioner 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 (para [6]). When assessing prejudice, the

commissioner should consider whether any prejudice caused by the postponement can be compensated by an order of costs or any other ancillary mechanism. Cognisance must be taken of the fact that the function of a commissioner is less open to the granting of postponements than is the case in a court of law (*Carephone (Pty) Ltd v Marcus NO & others* (1998) 19 *ILJ* 1425 (LAC) para [57] (Carephone)). However, as found by Van Niekerk AJ (as he then was) in *Fundi Projects & Distributors (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2006) 27 *ILJ* 1136 (LC) paragraph [14], commissioners had very limited powers when *Carephone* was heard. Since the amendments to the LRA in 2002, commissioners have been empowered to address the policy concerns.

Reverting to the facts in the case under consideration, Myburgh J held that while the dominant component of the commissioner's evaluation of the application for a postponement ought to have been the issue of prejudice, the commissioner had failed to consider that the balance of prejudice favoured the granting of the postponement. This was so, particularly, because the employee had agreed to a postponement. In failing to allow the postponement, the commissioner had committed a material misdirection in three respects: first, his actions were procedurally unfair (*Arends & others v SA Local Government Bargaining Council & others* (2015) 36 *ILJ* 1200 (LAC) para [19]); secondly, he misconceived the nature of the enquiry as he failed to undertake an assessment of the balance of prejudice which ought to have been the dominant component in the evaluation (para [9]; cf *Herholdt v Nedbank Ltd (COSATU as Amicus Curiae)* (2013) 34 *ILJ* 2795 (SCA) para [25]); and thirdly, the commissioner acted unreasonably (see the test for reasonableness laid down in *Sidumo* above para [110]).

Hearsay evidence

The employee in *Minister of Police v M & others* (2017) 38 *ILJ* 402 (LC) was employed in the VIP protection unit of the South African Police Services (the SAPS). In a disciplinary hearing the presiding officer found the employee guilty. Mitigating and aggravating factors were then presented, and the presiding officer decided that the employee should be dismissed. The entire disciplinary hearing was recorded electronically. The employee launched an internal appeal which failed. He proceeded to refer an unfair dismissal dispute to the Safety and Security Sectoral

Bargaining Council and the matter was set down for arbitration. At this point the victim (K) ceased cooperating with the SAPS. Despite the employer requesting subpoenas for the victim and the other two witnesses to attend the arbitration, these subpoenas could not be served owing to insufficient information regarding their whereabouts. The employer representative, however, did manage to speak to K over the telephone. However, she refused to divulge her new address or to agree to testify at the hearing. Consequently, the employer found itself in a situation where the only material it had to place before the bargaining council to prove the substantive fairness of the employee's dismissal were the transcripts of the internal disciplinary hearing. It applied, in the interests of justice, to have these transcripts admitted as hearsay in terms of the Law of Evidence Amendment Act 45 of 1988. The commissioner granted the application. However, he then proceeded to find that the weight of the evidence derived from the transcripts was minimal without 'additional testimony or documents substantiating the allegations' (para [7]). Consequently, as the arbitration was a hearing *de novo*, the commissioner found that the employee's dismissal was substantively unfair and ordered the SAPS to reinstate him. The employer approached the Labour Court seeking for the award to be reviewed and set aside.

The transcripts of the internal hearing revealed that the presiding officer had conducted the hearing in a fair and professional manner. Representatives were afforded more than sufficient time to prepare for the case and to cross-examine witnesses. The questions posed to witnesses were relevant and probing. In the result, there were no noticeable, glaring, and possibly exculpatory omissions in the questions asked of witnesses in the transcript of the internal hearing. None of the witnesses were sworn in. However, the Labour Court noted that in labour law not much turns on this. The witnesses were clearly aware that they were expected to narrate their experiences truthfully. The record of the internal hearing had been transcribed by a professional transcription service and accompanied by a signed certificate. The commissioner further noted that there was no evidence extraneous to the transcripts that showed the hearsay evidence to be 'clear and consistent' – differently stated, that it would prejudice the employee if only the hearsay evidence (not taken under oath) were to be relied upon without corroborating evidence.

The Labour Court noted that the reviewing court must have regard to the nature of the competing interests affected by the

decision. With reference to the review test as laid down in *Head of the Department of Education v Mofokeng* [2015] 1 BLLR 50 (LAC), Whitcher J determined that where a commissioner ignores material, relevant facts, issues, and/or considerations, the award will be reviewable if the distorting effect of this misdirection renders the result of the award unreasonable (para [32]).

The Minister of Police argued that the commissioner had committed a reviewable irregularity by failing to apply her mind to the evidence. She had found that there was no corroborating evidence for the hearsay transcripts in the form of additional witness testimony or documents with proof against the employee. She had also found that in not submitting additional testimony, the employee had been prejudiced as he had been deprived of the opportunity to cross-examine these witnesses. This, the Minister of Police submitted, caused the commissioner to reach an unreasonable conclusion, ie, that the SAPS had failed to prove its case on a balance of probabilities. The SAPS arrived at the hearing *de novo* only with transcripts of the internal hearing and an explanation that the SAPS's main original witness, the victim, could not be traced to serve a subpoena. In deciding the ensuing application to have the transcripts admitted as hearsay, the commissioner noted that section 138 of the LRA frees arbitrators from having slavishly to imitate the procedures adopted in a court of law (*Naraindath v CCMA & others* (2000) 21 *ILJ* 1151 (LC), [2000] 6 BLLR 716). As the transcripts were plainly relevant to the issue in dispute, and the employer had a good reason for the absence of its main original witness, the commissioner had correctly admitted the transcripts as hearsay evidence.

However, concerning the weight to be attached to the hearsay evidence, the Labour Court disagreed with the commissioner's ruling that it was of 'minimal' value merely because there was no other evidence before the bargaining council to substantiate the claims made in the transcripts. Should too much, or too little, weight be given to the transcripts, the award may be reviewable. Whitcher J declared that the commissioner had not appeared to realise that the transcripts before her were no ordinary hearsay, but rather of a special type. Considered in full, they comprised a bi-lateral and comprehensive record of earlier proceedings in which the victim's evidence against the employee had indeed been corroborated by other confirming witnesses. The substantiation survived competent testing by way of cross-examination. Moreover, the employee's own defence had been ventilated and

exposed as implausible. The evidence of witnesses in the internal hearing, once admitted, should have been considered holistically to establish what weight it deserved. A reasonable commissioner would, by reading the transcripts, have found K's testimony credible and persuasive. The main argument against affording weight to hearsay is that it cannot be subjected to cross-examination and is prejudicial to the party against whom the hearsay is tendered. Naturally, a witness statement simply handed up in an arbitration leaves an accused employee at a distinct advantage. Absent other hard evidence to back it up, it should have very little weight.

Since this may be a departure from the norm in how hearsay is weighed, the Labour Court set out a few guidelines on when, in arbitration proceedings conducted in terms of the LRA, a single piece of hearsay, such as a transcript, might constitute *prima facie* proof of an allegation. The hearsay should

(1) be contained in a record which is reliably accurate and complete;
(2) be tendered on the same factual dispute;
(3) be bi-lateral in nature. In other words, the hearsay should constitute a record of all evidence directly tendered by all contending parties;
(4) in respect of the allegations, demonstrate internal consistency and some corroboration at the time the hearsay record was created;
(5) show that the various allegations were adequately tested in cross-examination;
(6) have been generated in procedurally proper and fair circumstances (para [45]).

Consequently, the commissioner had erred in unreasonably assigning minimal value to the transcripts. For this reason alone, the award was set aside.

Prescription of claims under the Labour Relations Act

During 2017, the Constitutional Court considered the relationship between prescription as envisaged in terms of the Prescription Act 68 of 1969 and the LRA in two cases, *Van Tonder v Compass Group (Proprietary) Limited & others* (2017) 38 *ILJ* 2329 (LAC), [2017] 10 BLLR 1024 and thereafter *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Ltd t/a Metrobus & others* 2017 (4) BCLR 473 (CC) (*Myathaza*). The judgment in

Van Tonder hinged on the decision in *Myathaza v Johannesburg Metropolitan Bus Service (Soc) Limited t/a Metrobus; Mazibuko v Concor Plant; Cellucity (Pty) Ltd v CWU obo Peters* (2016) 37 *ILJ* 413 (LAC), [2016] 1 BLLR 24 (LAC), 2016 (3) SA 74 (LAC). In *Van Tonder* the employee had been dismissed for dishonesty. While a safe key was in his possession, an amount went missing from the employer's safe. Ultimately, in the arbitration, the dismissal was ruled procedurally fair but substantively unfair. The employer brought an application for review and setting aside of the award. On review, the Labour Court referred to a passage in the appellant's answering affidavit which requested the court to dismiss the review application 'and confirm the arbitration award as an order of court' (para [7]). The key question posed by Steenkamp J was whether this prayer interrupted prescription. In *Myathaza* (LAC) Coppin JA referred to section 15(1) of the Prescription Act, which provides that the running of prescription shall, subject to the provisions of section 15(2), 'be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt' (para [7]). Applying this *dictum* to the present dispute, Steenkamp J found that the filing of an answering affidavit by the successful party in an arbitration award which was not the subject of a review application against the arbitrator's decision did not amount to taking a legal step to recover the 'debt' owing in terms of the award, sufficient to interrupt the running of prescription in terms of section 15(1) of the Prescription Act. The judge observed that the LRA was amended pursuant to section 145(9), which provides that an application to set aside an arbitration award in terms of the section interrupts the running of prescription under the Prescription Act in respect of that award (para [10]; see too J Grogan 'As time goes by: Prescription under the LRA' (2017) 33.3 *EL* 7). However, the commencement date for this amendment was such that it applied to arbitration awards issued after 1 January 2015 and, therefore, could not come to the aid of the appellant in the present dispute.

Subsequently, Coppins JA's decision in the Labour Appeal Court in *Myathaza* (LAC) was overruled by the Constitutional Court. Two judgments were delivered by the Constitutional Court, each supported by four justices of the court, which leaves the *ratio* somewhat uncertain. In the first judgment, Jafta J held that prescription periods determined by section 11 of the Prescription Act are at odds with the LRA in that even the shortest period of three years is way out of line with the periods within which the

LRA requires disputes to be resolved (para [32]); further, that the Prescription Act does not cater for a situation where the dispute has been adjudicated and an outcome binding on the parties has been reached, but that outcome has not yet been made an order of court (s 143 of the LRA provides that a certified arbitration award is deemed to be an order of court and is enforced as if it were an order of the Labour Court, except an arbitration award for payment of money, which is executed as if it were an order of a magistrate's court). Since an award is a final and binding remedy, it is difficult to determine a prescription period applicable to it under the Prescription Act. The three-year period is intended for claims or disputes which are yet to be determined and in respect of which evidence and witnesses may be lost if there is a long delay (para [44]). Jafta J observed that the structure of section 15 of the Prescription Act is predicated on the idea that the judicial interruption envisaged in this section must relate to claims that are yet to be prosecuted to final judgment, or where judgment is abandoned or set aside. Therefore, once prescribed, an award becomes unenforceable and the Labour Court would not be able to exercise its power to make the award an order of court. In this context, the Prescription Act would trump the LRA-designed process that was specifically crafted to enforce the right to fair labour practices (para [56]).

By contrast, Froneman J, supported by three justices, although finding that the appeal had to succeed, held that the relevant provisions of the two pieces of legislation could complement each other in a way that best protected the fundamental right of access to justice, but still preserved the objective of a speedy resolution to labour disputes in terms of the LRA. In Froneman J's view, a claim for the enforcement of legal obligations should qualify 'as a debt' in terms of the Act (para [22]). An unfair dismissal claim under the LRA seeks to enforce three possible legal obligations against an employer: reinstatement; re-employment; and compensation. All three remedies impose legal obligations on an employer that fall within the scope of the concept 'debt' as used in the Prescription Act.

The question arose as to why prescription should run before the finalisation of court proceedings as there is little reason to find that instituting review proceedings does not also have the effect of extending the finalisation of the judgment until the review has been decided (para [83]). There is no plausible reason why a statutory review under section 145 of the LRA is not to be

regarded as a judicial process that interrupts prescription until finality has been reached; so too should prescription apply to the right of appeal. To the argument that the LRA provides that unfair dismissal referrals must be instituted within 30 days of the date of dismissal, Froneman J classified this as a time bar rather than a true prescription period which 'may admit of amelioration through condonation' (para [94]). Accordingly, the 30-day period for the referral, being a time bar, can be interpreted to be congruent with the normal prescription periods provided for under the Prescription Act (para [96]. See too the judgment of the Constitutional Court in *Mogaila v Coca Cola Fortune (Pty) Ltd* [2017] 5 BLLR 439 (CC) (*Mogaila*), in which it was held that on either of these approaches, the appeal must succeed). Regrettably, the court in *Mogaila* (above) did not resolve the difference between the eight justices. On Jafta J's approach, the Prescription Act does not apply. Accordingly, the debt is owed by respondent to the appellant. On the approach adopted by Froneman J, the review has not been finalised and consequently prescription has been interrupted. The appeal was upheld by Davis JA and it was concluded that the arbitration award had not prescribed.

Appropriate relief for unfair dismissal

In *Jonas v Commission for Conciliation, Mediation and Arbitration & others* [2016] 12 BLLR 1222 (LC), (2017) 38 *ILJ* 376, Lagrange J was required to determine if the relief awarded in the arbitration award in terms of which the employee's dismissal was found to be substantively and procedurally unfair, was reviewable and stood to be set aside. The employee party was aggrieved by the fact that in terms of the award he was awarded ten months' remuneration as compensation but was not reinstated. In the alternative, he claimed that the compensation ought to have been higher as his remuneration had been incorrectly calculated. Lagrange J agreed that there was an irregularity in how the choice of remedy had been made.

The Labour Court noted that before deciding against the primary remedy of reinstatement, an arbitrator must have sufficient reason in terms of section 193(2) of the LRA to award compensation instead. Although the arbitrator *in casu* had referred to section 193(2)*(b)* and concluded that it was not reasonably practicable to reinstate or re-employ the employee, it was apparent on the facts that his real finding was that it would be intolerable to reinstate him. Accordingly, the arbitrator's reference

to section 193(2)*(b)* was misplaced and he had applied the incorrect test. However, the relief that was ultimately ordered was justifiable in terms of 193(2)*(a)* and, consequently, not unreasonable in the final analysis.

The intolerability ground as established was founded on *Dunwell Property Service CC v Sibande* (2011) 32 *ILJ* 2652 (LAC), in which the facts corresponded largely to those in the case under discussion, and in which the Labour Appeal Court had found that the trust relationship between the employer and employee had broken down irretrievably.

The employer had based the contention of a breakdown in the employment relationship on facts unrelated to the actual dismissal. Evidence was produced that the employee had instituted civil proceedings against subordinates, and that he was not amenable to discipline. The court noted that it is not necessarily a requirement that the reason for reinstatement being intolerable must emanate from the same events which gave rise to the disciplinary enquiry. However, arbitrators should be careful not to refuse the primary remedy of reinstatement because there might have been other grounds for disciplining the employee which could ultimately have led to his dismissal (*DHL Supply Chain (Pty) Ltd v De Beer NO & others* (2014) 35 *ILJ* 2379 (LAC) para [2]; cf M Bekink '*Minister of Police v M* 2017 38 *IJL* 402 (LC)' (2017) 50/1 *De Jure* 186–94).

Compensation

Pharmaco Distribution (Pty) Ltd v Weideman [2017] ZALCJHB 258 involved an appeal and cross-appeal before Kathree-Setiloane AJA against the judgment of the Labour Court (Lagrange J) where it was found that the dismissal of the respondent by the appellant constituted an automatically unfair dismissal as envisaged in section 187(1)*(f)* of the LRA. The Labour Court concluded that the employee had been unfairly discriminated against on account of her disability when the employer singled her out to undergo psychiatric assessment because she suffered from bipolar disorder. Lagrange J also found the dismissal constituted an act of unfair discrimination in terms of section 6(1) of the EEA. He ordered the employer to pay compensation to the employee for her automatically unfair dismissal, and to pay an additional amount in terms of section 50(2)*(b)* of the EEA, as damages for the unfair discrimination. The compensation awarded to the employee was the subject of the cross-appeal.

The Labour Appeal Court held that section 194(3) of the LRA confers a wide discretion on the Labour Court to award compensation to an employee whose dismissal is found to be automatically unfair. The legislation requires only that the compensation awarded 'must be just and equitable' in all the circumstances, but not more than the equivalent of 24 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal (s 194(3) of the LRA). The power of a court to interfere with compensation awarded by the Labour Court on appeal is circumscribed. This discretion can only be interfered with on the narrow grounds that the judge in the lower court acted capriciously, or applied the wrong principle, or acted with bias, or based on improper reasons, or that the decision-maker adopted an incorrect approach.

The purpose of awarding a dismissed employee compensation in terms of section 187(1)*(f)* of the LRA is for the restitution of his or her dignity which has been violated by being unfairly discriminated against by the employer. In determining what is just and equitable compensation in these circumstances, the court must have regard to, among other things: the nature and seriousness of the *injuria*; the circumstances in which the infringement took place; the behaviour of the employer; the extent of the employee's humiliation or distress; the abuse of the relationship between the parties; and the attitude of the employer after the *injuria* took place. These factors are by no means exhaustive (*Minister of Justice & Constitutional Development & another v Tshishonga* (2009) 30 *ILJ* 1799 (LAC) para [18]).

In determining the *quantum* of compensation to be awarded under the LRA, the Labour Court considered the employee's length of service and the humiliation she had suffered due to the employer's conduct. The court concluded that the employer should have recognised the stigmatising effect of its conduct and realised that the employment contract did not afford it a right to act as it wished. However, the trial court had failed to take account of the fact that the employee had performed at a superior level for the extent of her employment and that she enjoyed her work, was brilliant at it, and interacted well with other members of staff. The employer had used her bipolar condition to intimidate her into submitting to its demands insofar as her grievance relating to her commission was concerned. When considering the appropriate award to make under section 194(3) of the LRA, the court must also take into account that employers should be

deterred from automatically unfairly dismissing their employers *(De Beer v SA Export Connection CC trading as Global Paws* (2008) 29 *ILJ* 347 (LC) para [53]). The employer in the case under scrutiny had used the employee's medical condition as reason to dismiss her. The compensation awarded in terms of the LRA was to address the impairment of the employee's dignity arising from the automatically unfair dismissal. The damages awarded to her in terms of section 50(2)*(b)* of the EEA were also awarded for the impairment of her dignity arising from the self-same act of unfair discrimination against her on the ground of her disability. The respondent's dismissal was, therefore, also an act of discrimination under section 6 of the EEA (*ARB Electrical Wholesalers (Pty) Ltd v Hibbert* (2015) 36 *ILJ* 2989 (LAC) (*ARB*) (para [29]).

Retrospective effect of reinstatement as employee after remittal for rehearing

Sampson v South African Post Office Soc Limited (2017) 38 *ILJ* 2368 (LC) concerned the effect of a successful review by an employee against a pre-dismissal arbitration award in terms of section 188A of the LRA, in circumstances where the review court ordered that the matter be remitted to the arbitration tribunal for a rehearing. The question posed, and answered in the affirmative, was whether this order revives the contract of employment retrospectively, so that the employee continues to be employed as if he or she had never been dismissed. The salient facts of the case were as follows.

The employee was suspended with pay by his employer pending an investigation into allegations of misconduct. On conclusion of the investigation, he was charged with breaching his fiduciary duty. This was followed by a pre-dismissal arbitration where the employee was found guilty and dismissed with immediate effect. The employee applied for the arbitration award to be reviewed and set aside. The employer was not represented at the review hearing, and the Labour Court granted a default order reviewing and setting aside the award. The matter was remitted back for a rehearing before a different arbitrator. The employer submitted that the effect of the court order was that the dismissal stood until the outcome of the reconvened arbitration. But the employee launched an application claiming that the court order had the effect of reviving the contract of employment retrospectively as if he had never been dismissed. Consequently, no reason existed for a disciplinary hearing to be heard anew (para [12]).

The employer contended that when matters are remitted for a rehearing by the review court, employees do not become reinstated based on their interpretation of section 188A. This section provides that an arbitrator in a process bears the status of the chairperson of an internal disciplinary hearing and also of an arbitrator. When a pre-dismissal arbitration award is reviewed and set aside, the dismissal ruling stands as the court generally does not review and set aside outcomes of internal disciplinary hearings. If, in law, the setting aside of the award automatically retrospectively revived the contract of employment and the employee continued in employment as if he had never been dismissed, the court would have expressly ordered the retrospective reinstatement of the employee – albeit on suspension with pay – pending the outcome of the new arbitration (para [12]). In the review application, the court *in casu* did not substitute the award of the arbitrator or reinstate the employee; it simply reviewed and set aside the award and ordered the matter to be arbitrated afresh. This does not equate to retrospective reinstatement. Whitcher J made short shrift of the contention with reference to section 188A(8) of the LRA, which provides that the ruling of the arbitrator in an inquiry has the same status as an arbitration award.

As to the consequence of a court order setting aside a dismissal award and ordering a rehearing of the disciplinary matter, Whitcher J agreed with the employee that ultimately the *status quo ante* is restored. Once the dismissal has been reviewed and set aside it cannot remain in force. The new arbitrator is not asked to confirm or set aside any existing dismissal (para [14]). The act of setting aside a dismissal award is the act of setting the 'conviction' aside (para [14]). It is a rescission in which the situation is restored to the state which previously existed. *In casu*, the court order set aside the original decision to dismiss the employee and that decision effectively 'vanished' (para [15]) and it is as if he had never been dismissed. The order revived the contract of employment which must be implicit in an order setting aside a decision to dismiss retrospectively. The employee, therefore, reverts to his or her status as an employee on precautionary suspension. This conclusion is fortified by a consideration of the powers granted to the court under section 145(4) of the LRA, which expressly gives the court the power to '*determine* the matter in the manner it considers appropriate' or to 'make *any order* it considers appropriate about the procedures to be followed to determine the dispute' (para [16]).

As for the damages claim, the employee mitigated the damages by finding employment elsewhere. However, he did not tender his services to the respondent-employer, but still claimed certain payments, calculated from the date of his dismissal to the date of this application. The employee claimed that, but for his dismissal, he would have been entitled to receive remuneration. The employer opposed this claim by stating that the employee said, on the one hand, that he was its employee and must be paid, but on the other hand, he was not tendering his services and, in fact, was working for a different employer. The review itself revolved around procedural errors which had denied him a fair hearing on the merits and thus impacted on the substantive fairness of his dismissal. This had to be heard *de novo* by a different arbitrator.

Given that a review court's setting aside of an arbitrator's award revives the employment contract, there was nothing irregular in paying the employee back pay [the use of the term damages is incorrect] for the period between his dismissal and the date of the review court's decision. This, the court held, was to be calculated as an amount equivalent to the difference between what he would have earned as an employee of the respondent employer, and what he in fact earned from his new employer (para [23]). Whether he tendered his service at the respondent employer for this period is irrelevant because, although this decision was later overturned, the legal position at the time was that there was no extant contract between him and the respondent employer after he had been dismissed. As to whether the employee should be paid for any period after the review court's decision, Whitcher J declared that it would be artificial to expect the employee to resign from the new employer where he had been able to mitigate his losses after his unfair dismissal from the respondent-employer, so that he could fully press his claims arising from that unfair dismissal (para [25]). The respondent-employer regarded the legal position to be that the employee remained dismissed and consequently would not have accepted a tender of services. Therefore, the employee was also entitled to remuneration and accrued leave calculated as the difference between what he would have earned at the respondent- employer had he not been dismissed, and what he earned at the new employer.

Review on ground of legality

After reiterating that the Labour Court's urgent roll is inundated with applications to interdict disciplinary enquiries from taking

place, Myburgh AJ again had to adjudicate such an application in the matter *of Magoda v Director-General of Rural Development and Land Reform & another* [2017] 12 BLLR 1267 (LC), (2017) 38 *ILJ* 2795. This application had been found on its merits to be urgent in a previous ruling. The applicant, a civil servant, had been subjected to a disciplinary enquiry presided over by the second respondent on charges of serious misconduct. The issue before Myburgh AJ was to determine whether interim relief interdicting continuation of the disciplinary enquiry pending review of procedural rulings made by the second respondent qualifies as *prima facie* right to review.

The applicant relied on section 158(1)*(h)* of the LRA, which provides that the Labour Court has jurisdiction to review depending on the nature of the decision (*Khumalo & another v Member of the Executive Council for Education: KwaZulu-Natal* (2014) 35 *ILJ* 613 (CC) para [28] n12). Referring to the legality review, Myburg AJ held that insofar as the decision constitutes administrative action, a review on the grounds set out in section 6 of the PAJA is possible; and insofar as the decision does not qualify as administrative action, but nonetheless involves the exercise of a public power, a review based on the principle of legality, encompassing legality and rationality, can ensue (*Hendricks v Overstrand Municipality & another* (2015) 36 *ILJ* 163 (LAC) para [29] read with para [21]). However, the court also warned that it does not follow that because a ground for review exists in either of these circumstances, it will always be entertained or found permissible (*Public Servants Association of SA on behalf of De Bruyn v Minister of Safety & Security & another* (2012) 33 *ILJ* 1822 (LAC) (*De Bruyn*)). The applicant's grounds of review *in casu* were that the procedural rulings were allegedly unlawful, irrational, and unreasonable. All of these issues constitute grounds for review of administrative action, while the first two grounds are a basis for legality review, but unreasonableness is not (*Public Servants Association of SA & another v Minister of Labour & another* (2016) 37 *ILJ* 185 (LC) para [58]). It was not explicitly pleaded by the applicant that the procedural rulings constituted administrative action, or that the second respondent exercised a public power in making them.

Addressing the applicant's plea for legality review, Myburgh AJ agreed with the applicant that the procedural rulings did not constitute administrative action. In *Chirwa v Transnet Ltd & others* (2008) 29 *ILJ* 73 (CC) paragraphs [142] and [150], it was found

that neither procedural rulings made during a disciplinary hearing, nor the dismissal of a public servant constitutes administrative action. Notwithstanding, the difficulty with the construct of the applicant's case was that it had been assumed that the procedural rulings constitute the exercise of a public power, which is a prerequisite for legality review. While the dismissal of a public servant involves the exercise of a public power, on the analysis provided by the Constitutional Court in *Association of Mineworkers & Construction Union & others v Chamber of Mines & others* (2017) 38 *ILJ* 831 (CC) (*AMCU*) paragraphs [74]–[83], Myburgh AJ was not persuaded that the procedural rulings constituted a public power. The second respondent was performing the role of management in chairing the disciplinary enquiry, and this is regulated by an internal disciplinary code and procedure under the Code of Good Practice: Dismissal (Sch 8 to the LRA). In the alternative, a review in terms of section 158(1)*(h)* could not be permitted – otherwise a separate legal framework would apply to public and private sector employees (*De Bruyn* paras [29] [34]). Further, Murphy AJA in *Hendricks* (para [30]) held that section 158(1)*(h)* reviews should be confined to legitimate challenges where no other remedy is available under the LRA. It is also trite that where another remedy exists under the LRA, a review as envisaged in section 158(1)*(h)* is impermissible. This was the case in *Booysen v Minister of Safety & Security & others* (2011) 32 *ILJ* 112 (LAC), which involved an application for an interdict/declarator to vindicate the right to procedural fairness. However, in the case under discussion, the applicant submitted that the alleged unlawfulness could only be remedied by bringing a legality review. Myburgh AJ disagreed with the contention that the review could be permitted on this basis. The principle developed in *Hendricks* is that legality review in terms of section 158(1)*(h)* of the LRA is a remedy of last resort. This principle cannot be overridden by simply claiming that review is brought on the basis of lawfulness. The LRA provides for a remedy in fairness and it is the existence of this remedy that renders the review impermissible.

Lastly, even if a legality review is available, despite the existence of an alternative remedy under the LRA, to succeed with an application for interim relief, the applicant had to establish exceptional circumstances for a review *in medias res,* and the commission of a gross irregularity was not a basis for such a review. The applicant must go further and show that the gross

irregularity will lead to a miscarriage of justice during partly-heard or incomplete disciplinary enquiries, before interim relief will be granted (*Zondi & others v President, Industrial Court & others* (1991) 12 *ILJ* 1295 (LAC) 1300, 1303). The court will only intervene in incomplete disciplinary hearings in exceptional circumstances (*Jiba v Minister: Department of Justice & Constitutional Development & others* (2010) 31 *ILJ* 112 (LC) para [17]). The policy underlying this approach was explained in *Trustees for the time being of the Bioinformatics Network Trust v Jacobson & others* (2009) 30 *ILJ* 2513 (LC), [2009] 8 BLLR 833 paragraph [4]. The court held that it will only intervene in ongoing labour matters where to do so would not undermine the informal nature of the system of dispute resolution established by the LRA and frustrate the expeditious resolution of labour disputes. This stringent test (ie, of exceptional circumstances for intervention in a part-heard disciplinary enquiry) had not been met *in casu*.

Unfair Discrimination

Listed and analogous grounds

During 2017, the Labour Court considered how the amended sections 6 and 11 of the EEA should be interpreted. The court clarified that the phrase 'or any other arbitrary terms' in sections 6(1) and 11 did not create a new category of unfair discrimination in addition to the two categories recognised before the amendments to the EEA (ie, listed grounds and analogous or unlisted grounds). Were it otherwise, the legislature would have provided for the burden of proof in respect of three categories of ground.

Coetzee AJ in *Ndudula & others v Metrorail PRASA (Western Cape)* [2017] 7 BLLR 706 (LC), (2017) 38 *ILJ* 2565 (*Ndudula*), confirmed that the burden of proof is determined by establishing whether the matter at hand concerns one of the listed grounds or an analogous ground. If the alleged discrimination is on one of the listed grounds, there is a presumption of unfairness. If the discrimination is based on an unlisted or analogous ground, this presumption does not apply. In the case of an unlisted or analogous ground, the applicant employee bears the evidentiary burden of proving that there was discrimination and that the discrimination had a negative effect on his or her dignity, or that it had some other negative effect.

The facts in *Ndudula* were briefly as follows. The applicants were section managers employed by Metrorail. They were upset

because Metrorail had appointed two new section managers, but on a salary higher than they received. They referred a dispute to the CCMA, whereafter Metrorail informed the two new section managers that they had been appointed on an incorrect scale and that their salaries would be reduced as of the following month. However, the extra amount that had been paid to them in error would not be recovered from them. In effect, they received a higher salary for some twenty months. The aggrieved section managers, who felt done in, proceeded to refer a dispute based on unfair discrimination to the Labour Court seeking to be paid the same as the new section managers retrospectively from the date on which the new section managers were appointed. The applicants did not rely on a listed ground in section 6(1) of the EEA, or on a ground analogous to the listed grounds. Instead they claimed under the new amendment to section 6 on '. . .or on any other arbitrary ground'. They argued that it is unnecessary to specify a specific ground, and that Metrorail's conduct in paying the two new section managers more than they were paid for no particular reason, was inherently arbitrary.

The Labour Court noted that the applicant employees bore the evidentiary burden, in terms of section 11(2) of the EEA, to prove that the conduct constituted discrimination and that the discrimination was unfair. Unfair discrimination on a listed or unlisted ground must affect human dignity or have a similar serious consequence. No differentiation may be 'arbitrary' or irrational; it must be rationally connected to a legitimate purpose. To constitute unfair discrimination, the underlying basis is that the differentiation is arbitrary, that it impacts upon human dignity, and has no legitimate purpose. The court confirmed that the phrase 'arbitrary ground' refers to an unlisted or analogous ground. This is apparent from the purpose of the inclusion of the phrase by means of the amendment. According to the explanatory memorandum for the amendments to the EEA, Parliament intended to align section 187(1)*(f)* of the LRA and section 11 of the EEA by the amendments; the purpose was not to create a third category of unfair discrimination. The legislature did not introduce a new category of grounds of unfair discrimination. The effect of the amendment is that discrimination on any arbitrary ground affecting human dignity constitutes unfair discrimination. In the result, the application was dismissed.

This is the first case in which the court has considered how the amended provisions in sections 6 and 11 of the EEA should be

interpreted. This case clarifies that in an unfair discrimination claim based on equal pay under section 6(4) of the EEA, the employee must plead a case of discrimination, and link the unequal pay to either a listed ground or an analogous ground. The court acknowledged that 'or any other arbitrary ground' is capable of two possible interpretations. A wide interpretation in terms of which the phrase creates an almost blanket extension of the scope of the discrimination protection; or a narrow, more restricted, definition which means that little has changed since the amendment. The narrow construct afforded by the Labour Court makes it clear that the impact of the inclusion of 'or on any arbitrary ground' impacts on the scope of the equal treatment provision in a much more limited sense than the open-ended terminology suggests. Only instances *eiusdem generis* to the listed grounds will be covered.

Pregnancy

In *Impala Platinum Ltd v Jonase & others* (2017) 38 *ILJ* 2754 (LC), Steenkamp J heard an appeal in terms of section 10(8) of the EEA, against an arbitration award made in terms of section 6 of the EEA. The appeal was ultimately upheld, and it was declared that the employer had not discriminated unfairly against the employee.

In this case, two employees referred a dispute to the CCMA in terms of section 10(6)*(a)*(ii), alleging discrimination on the ground of pregnancy. Conciliation having failed, the arbitrator found in their favour and awarded them compensation and required the employer to amend its policy to accommodate pregnant women (para [3]). The policy in question provided that the company would attempt to place pregnant women in suitable alternative employment on the surface 'where reasonably practicable' to prevent any risk to the health and safety of pregnant women working underground or their unborn children (para [4]).

The two employees were amongst those who were moved to the surface, but the employer could not find alternative places for them (and several others). Of 21 pregnant employees, only two had the requisite skills for available administrative posts. The other employees were instructed to take their four months paid maternity leave, with a further choice of unpaid maternity leave of up to six months. Before going on maternity leave, the two complainants were accommodated in the union offices and paid their salaries for about three months – although they were

performing no work for the company – while the company still sought alternative positions.

The two employees approached the CCMA alleging that the employer had discriminated unfairly against them. The arbitrator found that a duty rests on the employer to provide a safe working environment. However, that does not mean that employees should be prejudiced or disadvantaged in the process. An employer cannot direct employees to take unpaid leave where it is unable to secure an alternative position to accommodate them. The employer's failure to find alternative positions was unfair to the two employees and amounted to discrimination as the sole reason for the failure of the employer was the employees' pregnancy. Moreover, the arbitrator found that the two employees had been treated differently from other pregnant employees. In addition, the maternity policy of the employer was found to be unfair as it discriminated against pregnant employees.

In a subsequent appeal, the employer argued that the arbitrator wrongly concluded that discrimination had been proven. In addition, the employer averred that the arbitrator had exceeded the powers granted to him by ordering the employer to amend its policy.

Steenkamp J first considered if there had indeed been discrimination on a listed ground. The test involves determining, first, if there has been differentiation amounting to discrimination. If there has been differentiation based on one or more of the listed grounds, discrimination will have been established. Thereafter it must be determined whether the discrimination was unfair, focussing on its impact on the complainants and other persons who are similarly situated (*Harksen v Lane* 1998 (1) SA 300 (CC) para [54]). *In casu*, the two employees complained that they had been treated differently from other pregnant employees. Yet the commissioner simply found that the employer had discriminated against them because they were pregnant. The complaint, contrary to what the commissioner found, was negated by their comparator being other pregnant women. The treatment of some pregnant women compared to other pregnant women simply cannot constitute discrimination based on pregnancy. They were not treated differently because they were pregnant; they were treated differently from some other pregnant employees who were given alternative employment because they did not have the requisite skills. Therefore, Steenkamp J found that the arbitrator had applied the incorrect test in establishing the existence of discrimination based on pregnancy.

Secondly, Steenkamp J found that the part of the award instructing the employer to strike down its policy must be set aside. The two employees had not complained about the fairness of the policy applied to pregnant employees *per se*. The judge referred to Murphy J's *obiter* statement in *South African Reserve Bank v Public Protector* 2017 (6) SA 198 (GP) paragraphs [39]–[42], where it was held in the context of a review application, that a functionary may not impose a remedy that goes beyond the original complaint before him or her.

Lastly, regarding the duty resting on an employer to find suitable alternative employment, Steenkamp J found that the award was unfounded as the policy itself provides that there is no duty on the employer to provide such an alternative. The policy aims to ensure that pregnant employees are not exposed to a dangerous workplace, ie, to be required to work underground. If the employer cannot find suitable alternative employment, the maternity policy kicks in (para [30]). In this case, there were no suitable alternative positions available for the complainants. No further duty rested on the employer to create non-existent positions for them. The employer, therefore, had acted lawfully, rationally, and in accordance with its own policy.

Employment status

The applicant in *Dlala v OR Tambo District Municipality & another* (2017) 38 *ILJ* 2457 (ECM) was a general assistant who had been in the employ of the employer for a few years on a month-to-month employment contract. The employer advertised a post in which the employee was interested. The advert set as a requirement that the incumbent must hold a certificate, diploma, or degree, or have extensive experience. Being the holder of a diploma and considering himself to have extensive experience, the employee applied for the post. At the interview, the employee was informed that, because he was employed from month-to-month and not permanently, he did not qualify for the appointment. An internal application for reconsideration failed. The employee proceeded to approach the High Court seeking an order setting aside his exclusion from the interview process and directing the employer to reinstate him as a candidate. In addition, he sought an interdict to restrain the employer from employing any other candidate in the advertised post, pending the finalisation of his application.

The employee's case was that his exclusion as candidate in the interview process denied him equal opportunity usually provided

to the employer's employees, creating a reasonable and legitimate expectation that he would not be discriminated against unreasonably in relation to other permanent staff. The employee protested that his exclusion made no sense in light of the principle of legality, and that it was contradictory to his constitutional right to pursue a career, trade, and occupation of his choice.

Mbenenge ADJP found that the matter was urgent as the interview process was still underway and no appointment had been made. The judge continued to consider whether the High Court had the required jurisdiction to entertain the dispute.

Nothing pointed to unfair discrimination as envisaged in the EEA, nor was the court constituted as an Equality Court in terms of the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. The applicant denied reliance on the LRA. Section 157(2) of the LRA, which acknowledges that the High Court enjoys concurrent jurisdiction with the Labour Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution arising from employment and labour relations, was given the following interpretation in *Chirwa v Transnet Ltd & others* 2008 (4) SA 367 (CC) paragraph [123]:

> The application of s 157(2) must be confined to those instances, if any, where a party relies directly on the provisions of the Bill of Rights. This of course is subject to the constitutional principle that we have recently reinstated, namely, that 'where legislation is enacted to give effect to a constitutional right, a litigant may not bypass that legislation and rely directly on the Constitution without challenging that legislation as falling short of the constitutional standard'.

Mbenenge ADJP cautioned against the attempts by practitioners to fashion cases to suit their clients' choice of forum (*Motor Industry Staff Association v Macun NO* [2016] 3 BLCR 284 (SCA)). It is ineffective for litigants to raise a complaint of unfair discrimination, which is an area the legislature has made the subject of specialisation by specific courts, and then to seek to deny the applicability of the provisions of the relevant legislation. In the case under discussion, unfair discrimination was sourced in the LRA. Therefore, the employee's denial of the application of the LRA was irrelevant. Section 23 of the Constitution regulates the employment relationship between employer and employee and guarantees the right to fair labour practices. The Labour Court is the proper forum for disputes emanating from a breach of

the right to fair labour practices (*Solidarity obo Barnard v SAPS* 2014 (2) SA 1 (SCA) and *Solidarity & others v SAPS & others* [2015] 7 BLLR 708 (LC)). Reliance by the applicant on the alleged constitutionally protected right to pursue a career of his choice does not change the character of his cause of action – it is an employment dispute, justiciable in the Labour Court after all other procedures provided for in the LRA have been followed. The High Court therefore lacked jurisdiction.

Unfair Dismissal

Unlawful or unfair dismissal

During 2017, in *Mhlongo v SARS* (2017) 38 *ILJ* 1334 (LAC), [2017] 9 BLLR 859, the Labour Appeal Court held that an employer need not afford an employee a disciplinary hearing after repeated unsuccessful attempts to contact him or her.

After being arrested at her workplace on allegations of corruption, of which Ms Mhlongo (the employee) was later acquitted, a work colleague allegedly confiscated the employee's access card and informed her that she had been suspended with immediate effect. She received no response to a letter addressed to her employer, the South African Revenue Service (the SARS), in which she requested confirmation of her suspension and reasons for her suspension, and she was not paid her salary. Two months later, the SARS wrote a letter to the employee's attorneys indicating that she had been dismissed. The employee brought an application in the Labour Court in terms of section 77 of the BCEA, alleging that the SARS had breached her contract by suspending and dismissing her without adhering to its disciplinary code. She sought, amongst other things, an order of specific performance for her reinstatement. The SARS denied having suspended the employee, claiming that she had simply stayed away from work after her arrest. Furthermore, it was uncontested that the SARS had sent letters by various means requesting the employee to report for duty or explain her absence, and after receiving no response, she had been dismissed. In the Labour Court, the SARS succeeded in its application for the dismissal of the application. The Labour Court agreed that the dispute was an unfair dismissal dispute which had to be referred to arbitration, because the Code relied upon by the employee did not, in the court's view, apply to her.

On appeal, the employee reiterated that the SARS was in

breach of contract for not affording her a disciplinary hearing before her suspension and dismissal. However, the SARS succeeded in its claim arguing that it would serve no purpose to refer the matter back to the Labour Court, because the employee had failed to make out a cased based on a breach of contract. The Labour Appeal Court held that even though the Labour Court had erred in finding that it lacked jurisdiction, it would serve no purpose to remit the matter back to it. Accordingly, the appeal was dismissed.

In a contractual claim, the employee bears the evidentiary burden of proving breach of the contract. The employee's breach of contract claim was unsubstantiated by the evidence. The SARS had taken reasonable steps to deliver/cause delivery of letters to the correct address. The dismissal had been effected in compliance with the workplace policy.

The evidence put forward by the employee was contradictory, and the employer's version was far more plausible. Consequently, the employee had failed to prove that she had been suspended. Even if the employee had proven that her suspension was in breach of the agreement, because she had been dismissed, the issue of her suspension was academic. She could not be reinstated in that she had been dismissed for being absent from work without a good cause.

This case illustrates how important it is to decide properly between referring a matter as a contractual dispute in terms of the BCEA, or in terms of the LRA based on unfair dismissal. Instead of referring the matter based on breach of contract in terms of the BCEA, the employee should have referred an unfair dismissal dispute in terms of the LRA. She could then have claimed reinstatement based on unfair dismissal. The test for unfair dismissal is fairness. The evidentiary burden of proving the fairness rests on the employer. Moreover, her use of motion proceedings, knowing that her principal submission would be disputed, was questionable.

Sanction of dismissal

In *Msunduzi Municipality v Hoskins* [2017] 2 BLLR 124 (LAC), (2017) 38 *ILJ* 582, the salient facts were as follows. In his capacity as HR official, the employee advised and represented other co-employees on employment-related issues in disciplinary matters. The employee continued to do so even after he was no longer a member of a trade union. This became a concern for the

management of the employer as it was viewed as a conflict of interest with the employee's responsibilities as a manager. The newly appointed Municipal Manager instructed the employee to cease representing fellow employees with immediate effect. In direct conflict with this instruction, he continued to represent employees in disciplinary inquiries. The Municipal Manager, after taking legal advice, delivered a reply noting concern at the employee's aggressive, disobedient, and disrespectful approach to the instruction given him, and further drew his attention to some five disciplinary hearings and arbitrations at SALGBC he had handled after the instruction to stop doing so. The employee was instructed to provide the employer with a list of matters in which he would defend other employees. The employee failed to provide the list and continued representing a co-employee at a disciplinary inquiry. Subsequently, the employer charged the employee with gross insubordination, gross insolence, and gross misconduct. He was found guilty on all the charges and dismissed.

Aggrieved by his dismissal, the employee referred an unfair dismissal dispute to the bargaining council. During the arbitration, the Municipal Manager testified, among other things, that by virtue of his position, the employee had access to confidential information and strategies. It was argued further that the employment relationship had been destroyed and that if the employee were to be reinstated, it would undermine the entire spirit of the organisation. His actions were at war with the administration and he showed no remorse (para [14]). His peers felt a level of distrust and dishonesty on his part and were unable to work with him.

The employee testified, among other things, that he had not been grossly insubordinate because the Constitution, the LRA, and the collective agreement guaranteed an employee's right to be represented; that the instruction of the Municipal Manager was unlawful and in blatant violation of the employee's rights; that there was no conflict of interest as he only assisted in cases that were not in his unit; and that his 'forward approach' caused his relationship with the Municipal Manager to be acrimonious (para [16]). The bargaining council arbitrator decided that there was no need for progressive discipline as the employee appeared defensive rather than remorseful. The arbitrator also considered the insolence and insubordination to be wilful and serious, and amounting to gross insubordination. There was a collective

agreement in the workplace which provided for dismissal for a first offence of gross insubordination. The employee was given numerous free get-out-of-jail cards on this count alone. Consequently, the arbitrator found in the employer's favour. Regarding the sanction, the arbitrator agreed that the disruptive and rude demeanour of the employee before and during the disciplinary hearing, showed that the employment relationship had broken down and that the work environment could not be productive if the employee were permitted to remain in this employment.

On review, the Labour Court confirmed the arbitrator's findings and held that the employee was guilty in that he had 'committed a serious offence which highly impinged on his duty to be respectful to his superior, the head of his employer institution' (para [21]). However, the Labour Court concluded that the sanction of dismissal was too harsh. The arbitrator had not had due regard of the fact that the employee was over 50 years old, and that his age militated against future job prospects; there was no evidence of similar misconduct in the past; the employee had been in the employer's employ for over 25 years; there was no evidence that reinstatement was not practical; and that the employee did not work directly under the manager. There was no evidence that he worked closely with the Municipal Manager and received his daily instructions from him.

In a subsequent appeal, the Labour Appeal Court, after applying the test for review, found that the arbitrator's decision was reasonable. The employee had been found guilty on serious charges of insubordination and insolence. He had challenged the authority of the Municipal Manager directly. Therefore, the arbitrator had correctly applied his mind to all of the material facts in determining the appropriate sanction. He had considered progressive discipline but found that, given, among other things, the seriousness of the transgression, the lack of remorse, the complete breakdown in the employment relationship, and the responsibility of the municipality to deliver services, it would not be practicable to reinstate the employee (para [29]). Consequently, the Labour Court's decision was overturned.

Incapacity

During 2017, the Labour Court in *Exarro Coal (Pty) Ltd t/a Grootgeluk Coal Mine v Maduma & others* (2017) 38 *ILJ* 2531 (LC), granted a review application setting aside an award in terms of which the dismissal of the employee on the basis of his

medical incapacity was ruled procedurally and substantively unfair and retrospective reinstatement into a different position was ordered.

The facts were as follows. At the time of his dismissal, the employee suffered from lung disease. The employer maintained that this had prevented him from performing his duties as he was required to work in a dusty area. According to the employer, no suitable alternative post was available. A medical panel board had, after performing medical tests and scrutinising reports received form the employee's doctors, concluded that the employee was permanently medically unfit for work, whereupon the employer dismissed him for incapacity. Before the dismissal, incapacity meetings had been held with the employee and his trade union. During the meetings, the evidence showed that none of the vacant posts which existed at the time were suitable, either because the employee lacked the minimum qualification for the vacancies, or because he would in any event still have to work in dusty areas.

At arbitration, the arbitrator found that the duty to investigate the employee's medical condition lay with the employer. The arbitrator noted that in this case, the employer had failed to conduct its own medical investigation before the dismissal, and instead had based its decision on reports obtained from the employee's own doctors (para [13]). The employee's own specialist had rendered an incomplete diagnosis because further tests were required to determine the cause of the illness and the extent to which it was treatable. This had not been done as the employee's medical aid had run out. Consequently, the arbitrator concluded that at the time of the dismissal, it had not been determined whether the employee's incapacity was of a temporary or permanent nature, and that no conclusion could be reached on the nature and degree of his ill health. His dismissal had, consequently, been based on inconclusive reports. The arbitrator also ruled that the employee ought to have been given the position of a team assistant, which was on the same level as his own position, and in which the fact that he did not have a grade 12 certificate was not material as his own position required the same qualification, but he had nonetheless been employed in that post.

As for procedural fairness, the arbitrator found that, in the absence of obtaining a final medical report, the incapacity meetings convened by the employer were meaningless (para

[16]) and that it was merely going through the motions of conducting a proper procedure.

On review, Lagrange J held that it was not reasonable for the arbitrator to have reached the conclusion that at the time of his dismissal the employee was fit to work in an alternative position. The medical reports, coupled with the dusty conditions, rendered that premise untenable. However, the arbitrator had been correct to find that more ought to have been done by the employer to establish whether the employee's incapacity was permanent or temporary before proceeding with the incapacity meetings (para [37]). The enquiry into incapacity is not concerned solely with an employee's inability to perform his or her current duties, but also with evaluating the prospect of there being feasible alternatives to dismissal which, in turn, may depend on the medical prognosis.

Inconsistency

The decision of Molahlehi J in the trial court was confirmed on appeal by Phatshoane AJA in *Noosi v Exxaro Matla Coal* [2017] ZALAC 3. The Labour Court held, and the Labour Appeal Court confirmed, that on a balance of probabilities the employee had been grossly negligent by failing to comply with the workplace's safety rules, and grossly insubordinate by refusing to obey safety-related instructions. The employer's disciplinary code provided that the sanction for gross insubordination justified summary dismissal. The employee argued that this notwithstanding, he should not have been dismissed as other employees who had committed similar misconduct in the past were treated differently and exonerated. Molahlehi J rejected this argument, holding that a general allegation of inconsistency is not sufficient. A concrete allegation identifying the persons who were treated differently or preferentially, and the basis upon which they ought not to have been so treated, must be set out clearly. Consequently, the appeal was dismissed.

Opperman v CCMA & others (2017) 38 *ILJ* 242 (LC) is one of the rare cases where the sanction in a dismissal is set aside on review. In the Labour Court, Steenkamp J held that the arbitrator had made an error in law which rendered the award reviewable. The facts were briefly that the applicant employee, a nurse who had been employed for ten years without incident, was requested to undergo a breathalyser test at work one morning. The test was positive as she had had some drinks the previous evening. After a

disciplinary hearing, the employee received a severe written warning valid for twelve months. She lodged an internal appeal against the sanction only. The appeal tribunal amended the sanction to dismissal. The employee proceeded to launch an unfair dismissal dispute at the CCMA. The commissioner ruled the dismissal substantively fair, but procedurally unfair and ordered the employer to pay compensation to the employee. The employee approached the Labour Court where she applied for review and setting aside of the finding that her dismissal was substantively fair. She argued that the arbitrator had perpetrated an error in law, and grossly misapplied the law pertaining to consistency in disciplinary measures.

On the issue of consistency in dismissal as sanction, the arbitrator had considered the employer's disciplinary code, which provided for dismissal as a sanction where an employee is found to be under the influence of alcohol. Three other employees who had been under the influence of alcohol had previously not been dismissed. The arbitrator found that the employer had not been consistent in its application of sanctions for the same misconduct. However, he took into account that the general manager had issued a memorandum to the effect that dismissal would be imposed against those who come to work under the influence of alcohol (para [12]). He found that the employee had been aware of the memorandum and that the company could not be said to have been inconsistent in dismissing her.

Even though the award was set aside due to the error in law, Steenkamp J continued to evaluate whether the matter could also be reviewable based on inconsistency. The requirement that an employer must be consistent in the exercise of discipline (the 'parity principle'; para [27]) has its origin in the requirement that an employee is entitled to be aware of the standard of conduct expected by the employer, and is entitled to know, in advance, what the consequences of non-compliance will be. Referring to *NUMSA v Henred Fruehauf Trailers (Pty) Ltd* (1994) 15 *ILJ* 1257 (A); *CEPPWAWU v Metrofile (Pty) Ltd* (2004) 25 *ILJ* 231 (LAC) paras [42] [57]–[59]; and *Cape Town City Council v Mashito* (2000) 21 *ILJ* 1957 (LAC) 1961A–F, Steenkamp J confirmed that inconsistent treatment rendered dismissals arbitrary and substantively unfair. It is for the employer to demonstrate why like cases

of misconduct should not be treated alike, and to distinguish between those cases in a fair manner.

Dismissal for participation in short illegal strike

In 2017, the Labour Appeal Court in *SACCAWU obo Mokebe & others v Pick 'n Pay Retailers* [2017] 12 BLLR 1196 (LAC), (2018) 39 *ILJ* 201, considered whether dismissal is the correct sanction in the context of employees who embarked on a short-duration unprotected strike.

After wage negotiations reached a deadlock, 61 variable-time employees (VTEs) working for Pick 'n Pay, the employer, went on an hour-long unprotected strike at one of the employer's stores. Although a certificate of outcome of the dispute had been issued, and the workers had given notice of the intended strike as required, the strike was supposed to take place at 19h00, but commenced at 15h00 instead. The employer dismissed the VTEs. Their trade union, the South African Commercial Catering and Allied Workers Union (SACCAWU) instituted an unfair dismissal dispute on their behalf.

In the Labour Court, the employer argued successfully that the penalty of dismissal was apt. The Labour Court was convinced that the employees had acted deliberately when going on strike at 15h00 and had done so against clear instructions from the employer's management team. The Labour Court felt that the fact that the strike only lasted for an hour did not mitigate the seriousness of the unprotected strike, and that the aggravating factors outweighed the mitigating factors. The Labour Court considered as aggravating, that the VTEs were already on final warning for the same conduct; that the employees had embarked on the unprotected strike in the last and busiest hour of trading on a public holiday; that they had clearly intended to cause the employer damage; that the VTEs had defied numerous instructions and warnings by management not to strike at that time; that the VTEs had deliberately tried to mislead the Labour Court by claiming that due to a miscommunication they thought they were entitled to strike at 15:00; and that the VTEs showed no remorse. These factors, the Labour Court felt, rendered a continued employment relationship intolerable. In the result, the Labour Court ruled the dismissal of the VTEs substantively and procedurally fair.

On appeal before Waglay JP, the main question was whether dismissal was justified. The Labour Appeal Court held that when

determining whether dismissal is the appropriate sanction, it must be considered whether dismissal is proportionate to the misconduct. Dismissal should be a last resort. Waglay JP noted that the court below had erred in finding that the VTEs had acted in deliberate defiance of the employer's management. On the evidence, the employees believed that they were allowed to strike at 15h00 based on assurances from the union representatives. Moreover, there had been a change in the plans. The strike was originally supposed to commence at 15h00, but the starting time was later changed to 19h00 to meet the 48-hour notice requirement. The union representatives were unable to notify all the stores of the change. That some of the workers were on a final written warning for previously participating in a march, did not warrant dismissal for misconduct for participating in an illegal strike, which differs materially from the previous misconduct for which they had been warned. The misconduct was also not sufficiently serious to warrant dismissal. A written warning would have been more appropriate given that this was a first contravention. The employer also did not apply the penalty of dismissal consistently. Not all the workers who participated in the unprotected strike at that store were dismissed. Those who were not already on a final written warning only received written warnings. Similarly, the employees at other stores, even those who were on written warning, only received further written warnings. This rendered the VTEs' dismissals substantively unfair.

The company's representatives attempted to dissuade the VTEs from striking before 19h00, but an ultimatum should have been issued to give the workers an opportunity to reflect on their conduct and to seek advice before deciding whether or not to heed the ultimatum. The VTEs apparently believed that the strike was a protected one. Had they been furnished with a written ultimatum they probably would not have proceeded. The employer failed to give the individual employees an opportunity to be heard before dismissing them. Although the employer held a collective disciplinary hearing, and an appeal hearing in which the trade union could participate before the dismissal, individual employees were not granted an opportunity to submit written representations. While in strike dismissals a collective hearing may be used, this must be after consideration of the circumstances so as to assess the fairness of the procedure followed by the employer. The trade union had taken steps to legalise the strike.

The court considered whether the employment relationship between the employer and VTEs had broken down irreparably

because of the VTEs' misconduct. It considered that after the illegal strikes the VTEs had not been suspended, and they had continued working until their dismissal. This contradicted the finding that the trust relationship had been destroyed. The employer had not proved the loss that it claimed to have suffered in support of substantive fairness. Also, that the trust relationship with certain employees who participated in the illegal strike had remained intact, but not the relationship with others, was untenable. The Labour Court's order was set aside and replaced with an order declaring the dismissal of the VTEs procedurally and substantively unfair. The employer was ordered to reinstate the dismissed employees retrospectively with back pay, and to pay the legal costs.

Dismissal for misrepresenting qualifications in CV

The issue in the section 145 review application in the matter of *LTE Consulting (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & others* [2017] 12 BLLR 1259 (LC), (2017) 38 *ILJ* 2787 (LC), before Myburgh J, was whether the commissioner's finding that the employee was not guilty of dishonestly misrepresenting his CV was reasonable. The employee was charged and dismissed on the ground of gross dishonesty in that his CV provided false information pertaining to his qualifications. A dispute proceeded to arbitration before the commissioner, which resulted in an award that the employee's dismissal had been substantively unfair. The employer was ordered to pay him compensation. The employer sought to have this award set aside on review.

When the employee was appointed as financial manager, he was turning 82, well beyond the company's ordinary retirement age of 65. Although it was not expressly discussed during the interview, the employee provided a copy of his *Curriculum Vitae* (CV) before the interview. It was taken at face value as there was no reason to doubt the contents. The employee was the preferred candidate and was recommended based on his CV. The CV indicated that the employee had a BCom and an MBA degree, and that he was a qualified chartered accountant. During the arbitration the employee admitted that he was not a chartered accountant and that he did not hold a BCom or MBA degree. However, he sought to deflect his dishonesty either on the basis of recognition of prior learning, or that he had equivalent qualifications. He testified that he had written the examination for BCom

first year accountancy which he argued was equivalent to being admitted as a chartered accountant.

The commissioner's award was based on his finding that the employee's dismissal was a sham designed to secure the employee's retirement which was the reason for the investigation of his CV in the first place. The commissioner's view was also that the representations in question by the employee in his CV were not material in securing the position of financial manager, and, in any event, he was convinced that the employee had equivalent qualifications.

In the Labour Court, Myburgh J disagreed. He stated that even if the qualifications which the employee had misrepresented were not a requirement for the job, it did not negate the employee's dishonesty in misrepresenting himself as a chartered accountant (*Department of Home Affairs & another v Ndlovu & others* (2014) 35 *ILJ* 3340 (LAC) para [23]). The employee had been grossly dishonest in making this misrepresentation. He had also lied about holding degrees which he had not completed and did so without showing any remorse. In the result, his dismissal was patently warranted. Taking into account previous judgments of the Labour Appeal Court (*SA Post Office Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2011) 32 *ILJ* 2442 (LAC); *Department of Home Affairs & another v Ndlovu & others* (2014) 35 *ILJ* 3340 (LAC); and *G4S Secure Solutions (SA) (Pty) Ltd v Ruggiero NO & others* (2017) 38 *ILJ* 881 (LAC)) Myburgh J concluded that the commissioner's award stood to be set aside. The commissioner's finding that the dismissal was a sham was unreasonable in that it could not be reconciled with the explanation as to how the employer came to learn of the problems with the employee's CV. The commissioner's finding that the misrepresentation regarding the chartered accountant qualification was immaterial, was wrong and finding that the employee had equivalent qualifications missed the mark. Ultimately, the Labour Court was convinced that the commissioner's decision not to uphold the employee's dismissal was unreasonable as his dismissal had been substantively fair.

Dismissal for making derogatory statements

The matter before Kathree-Setiloane AJA concerned a dismissal for misconduct for making derogatory comments about an employee to another employee. The commissioner of the CCMA found that employer had failed to discharge the onus of proving that these words were uttered by the employee.

Kathree-Setiloane AJA, presiding over the matter in *South African Breweries (Pty) Ltd v Hansen & others* [2017] ZALAC 33, held that, where derogatory and racist language is used in the workplace, the employer bears the evidentiary burden to prove that the language used by the employee was objectively derogatory. The onus then shifts to the employee who disputes using such derogatory words. Whether the employee will be absolved depends on the credibility of the witnesses, the reliability of the evidence presented, and the probabilities. The Labour Appeal Court held that in this case the commissioner had deferred his assessment of the credibility of witnesses to the internal chairperson's report, which resulted in an unreasonable award (para [8]). The court below had erred in upholding the award during the review proceedings (para [9]). With reference to the Constitutional Court's finding in *Sidumo & another v Rustenburg Platinum Mines Ltd & others* (above), Kathree-Setiloane AJA confirmed that the *Sidumo* test requires the Labour Court on review to enquire whether the commissioner's decision was one that a reasonable decision-maker could not have reached on the available evidence. Defective reasoning notwithstanding, an arbitration award may still pass muster provided that the result is one that a reasonable decision-maker could have reached. In *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration & others (Gold Fields)* [2014] 1 BLLR 20 (LAC), the Labour Appeal Court had refined the *Sidumo* test by introducing a two-stage enquiry. In short, this requires the Labour Court to consider two issues: first, whether the applicant has established an irregularity. This irregularity could be a material error of fact or law, the failure to apply one's mind to relevant evidence, or misconceiving of the enquiry or assessing factual disputes in an arbitrary fashion. Secondly, it must be ascertained whether the applicant has established that the irregularity was material to the outcome by demonstrating on the evidence before the arbitrator, that the outcome would have been different but for the defect. An arbitration award will, therefore, be considered reasonable when there is a material connection between the evidence and the result.

Kathree-Setiloane AJA upheld the appeal and declared the employee's dismissal substantively and procedurally fair in light of the seriousness of the misconduct of using the derogatory words, and the penalties imposed in recent cases featuring

similar employee utterances in the workplace (*South African Revenue Service v Commission for Conciliation, Mediation and Arbitration & others* (2017) 38 *ILJ* 97 (CC) para [4]; *Thembani v Swanepoel* 2017 (3) SA 70 (ECM). See, too, G Devenish 'A great triumph par excellence for non-racism in our jurisprudence: *Solidarity v Department of Correctional Services* 2016 (5) SA 594 (CC)' (2017) 38/1 *Obiter* 222.

In another case involving allegedly racist remarks, the Labour Appeal Court held that not all words that describe race and could potentially offend a person on that basis should be considered racist. Whether the term is objectively derogatory or racist depends on the context in which it is used. This was the concern addressed in *SAEWA obo Bester v Rustenburg Platinum Mine & another* (2017) 38 *ILJ* 1779 (LAC), [2017] 8 BLLR 764.

The facts were briefly that the employee, Bester, was dismissed for making a racist remark by referring to another employee as a 'swartman' when requesting him to move his motor vehicle. After an unsuccessful internal appeal, the employee referred an unfair dismissal dispute to the CCMA where the commissioner ruled his dismissal both substantively and procedurally unfair and ordered the employer to reinstate him with retrospective effect. The employer launched an application to review and set aside the arbitration award. The Labour Court held that there was no reason to justify the use of race as an identifier in this instance, and that the employee had committed an act of serious misconduct which warranted his dismissal. On that basis, the award was reviewed and set aside.

On appeal, the employer bore the evidentiary burden of proving that the language used by Bester was objectively derogatory. The Labour Appeal Court noted that the test is an objective one – the court must examine the entire context in which the misconduct is alleged to have occurred and decide, on a balance of probabilities, whether the employee is guilty of misconduct. Thereafter, the onus shifts to the employee to prove the existence of a ground of justification, and that the derogatory or racist remark was not made with the intention to demean (para [18]).

The impact of a derogatory or racist word on a person to whom it is addressed, and that he or she felt offended, is only one of the relevant factors during this assessment. The word uttered must be proven to have been derogatory and racist in the context. Using a race descriptor does not mean that the language is

necessarily derogatory and racist (para [15]). The evidence showed that the employee had no reason to denigrate his fellow employee. He used the racial descriptor to identify the other employee whose name was unknown to him. This could be considered racist, but that is not the only plausible inference.

The Labour Appeal Court held that the finding in the arbitration that the dismissal was substantively and procedurally unfair was one that a reasonable decision-maker could make. Therefore, the Labour Court had erred by using a subjective test in its assessment and in reviewing and setting aside the commissioner's ruling. The Labour Court's judgment was set aside and replaced with a decision that the review application be dismissed. The appeal was upheld with costs and an *obiter* remark (para [30]) was made that in a racially-charged society, an accusation of racism has far-reaching and serious consequences and one should scrutinise the context in which a race descriptor is used without presuming that the mere use of a race descriptor is axiomatically derogatory and racist (para [30]).

The Labour Appeal Court's decision was overturned in a subsequent appeal to the highest court (*Rustenburg Platinum Mine and SAEWA obo Bester & others* [2018] ZACC 13). The Constitutional Court made it very clear that making racist statements in the workplace will not be tolerated. Even a statement which appears to be a neutral race descriptor can be dubbed racially abusive or insulting in the context.

Transfer of a Business as a Going Concern

Effect of transfer of a business as a going concern

The Labour Appeal Court in *High Rustenburg Estate (Pty) Ltd v NEHAWU obo Cornelius & others* (2017) 38 *ILJ* 1758 (LAC), was faced with the question of whether section 197(5) of the LRA applies to an arbitration award which was reversed and then substituted by the Labour Court only after the transfer of the relevant undertaking had taken place. Employees dismissed by the second respondent, High Rustenburg Hydro (Pty) Ltd t/a High Rustenburg Hydro (HRH), had instituted unsuccessful unfair dismissal proceedings against HRH in the CCMA. They then sought review in the Labour Court. In the Labour Court, Gush AJ ordered HRH to pay compensation to the dismissed employees. While the review proceedings were pending, HRH sold its business as a going concern to iProp (Pty) Ltd (iProp). It

appeared that iProp purchased 100 per cent of the shares in the High Rustenburg Estate (Pty) Ltd (the appellant), and then sold the HRH business as a going concern to the appellant in which it held 100 per cent of the shares. Consequently, by the time Gush AJ delivered judgment, the appellant was the proprietor of HRH.

Following the judgment, the sheriff attached property at HRH in execution of Gush AJ's judgment. The appellant challenged the validity of this attachment in the Labour Court. The Labour Court concluded that in terms of section 197 of the LRA, the employees were entitled to enforce their claim against the appellant. On appeal, the Labour Appeal Court held that the appellant had not been afforded an opportunity to oppose the application which led to the attachment of its property. Therefore, the Labour Appeal Court ordered that the matter should be referred back to the Labour Court as a stated case. The stated case was heard by Rabin-Naicker J, who found that section 197(5) of the LRA applied to this scenario. In a further appeal, Davis JA noted that the purpose of section 197(5) is to ensure that all rights and obligations between the employer selling the business, and each employee at the time of the transfer to the purchaser, continue in force as if they were rights and obligations between the purchaser, the new employer, and each employee. It is the 'new employer' who then bears the duty to fulfil the relevant obligations (para [14]). Davis JA correctly found the contention that the right of an employee against the new employer depends on the stage at which the appeal or review is. The wording of section 197(5) of the LRA provides clearly that an arbitration award that can be binding on the former employer immediately before the date of transfer of the business, binds the new employer. The Labour Court had merely substituted a correct award for an award which in its view was incorrect. This does not change the fact that the award which bound the old employer immediately before the date of transfer had been transferred to the new employer, as the substituted award must be deemed to take effect from the date on which the original award was handed down. The appeal was dismissed.

Establishing whether a transfer as a going concern occurred

In *SVA Security (Pty) Ltd v Makro (Pty) Ltd a Division of Massmart & others* (2017) 38 *ILJ* 2376 (LC), the Labour Court confirmed that, even if the operations of a business of an old service provider appears to continue seamlessly under a new

service provider, it would not necessarily mean that a transfer of a business as a going concern as envisaged in section 197 of the LRA, has taken place.

SVA Security (Pty) Ltd (SVA) was a provider of security services. Makro (Pty) Ltd (Makro), a division of Massmart Group, was the principal provider of a security contract to SVA between 2008 and 1 April 2017. During December 2016, Makro invited security contractors, including SVA, to bid or re-tender for the guarding contracts. In January 2017 the tender was awarded to Fidelity Security Services (Pty) Ltd (Fidelity). This meant that from 1 April 2017, Fidelity would render essentially the same security services previously rendered by SVA at all the Makro retail premises but would use its own equipment. SVA approached the Labour Court seeking a declaratory order that awarding of the contract to Fidelity constituted a transfer of an undertaking as a going concern in terms of section 197 of the LRA. That would mean that the employment contracts of the 89 remaining respondents, additional to some 240 individual respondents that had been employed by Fidelity in the meantime, must be taken up by Fidelity as from the date of the transfer. Fidelity opposed the application.

The Labour Court did not deem the matter urgent and noted that it stood to be struck from the roll on that ground alone. SVA had only approached the court some 52 court days after it had lost the contract. The court held that you cannot create your own emergency. The longer it takes from the date of the event giving rise to the proceedings, the more the urgency diminishes. That Fidelity had refused to take over the employees as part of a going concern also did not make the matter urgent: the matter could be resolved amicably. That the remaining employees would lose their jobs, or that Fidelity had appointed only certain of the employees, also did not make the matter urgent. There were other remedies on which the employees who had not been appointed could rely.

As to whether a transfer as contemplated in section 197 of the LRA had occurred, the court considered the following facts. In the transaction between Makro and Fidelity there was no transfer of equipment, intellectual property, or tangible or intangible assets, only cancellation of the contract of service. Although Fidelity would continue to service the contract with Makro without interruption, section 197 of the LRA applies only if a business has changed hands. Even though 'business' in section 197(1) includes

a service, the business that supplies the service must change hands. Components of the original business must be passed to a third party. Whether a transfer has occurred, depends on the facts of each case. A termination of a service contract, and the awarding of that contract to a third party, does not constitute a transfer: the service provider whose contract has been terminated loses the contract, but retains its business, and can offer the same service to other clients with its workforce intact. That some of the applicant's employees were appointed, did not mean that there had been a transfer. That would mean that every time that a contract of service is taken over by a new service provider, the new service provider would have to take over all the old service provider's employees. This would imply that the old service provider, after losing a contract, can wash its hands of its employees. This is not what section 197 of the LRA aims to achieve. Its purpose is to protect employees' security of employment where a genuine transfer as a going concern has occurred.

Where there has been no transfer, the affected employees can call on section 189 of the LRA, and to the extent that the new service provider has selectively re-employed the old service provider's employees, the workers not appointed have remedies under the EEA. In the result, SVA's application was dismissed with costs.

Unfair dismissal: Reasonable expectation of renewal of a fixed-term contract

Sutherland JA had to decide whether the outcome in *Zungu v Premier, Province of KwaZulu-Natal & another* (2017) 38 *ILJ* 1644 (LAC), [2017] 9 BLLR 949, where the employee alleged that she had a reasonable expectation that her fixed-term contract would be renewed, was correct. The employee sought to compel a renewal of her contract based on a legitimate expectation premised on a recommendation by a selection panel, and that the refusal to heed to the recommendation of the selection panel amounted to an illegality according to the Labour Court jurisdiction.

Sutherland JA found that the dispute fell within the ambit of section 186(1)*(b)* of the LRA, and that disguising the dispute as also exhibiting other characteristics does not negate the validity of the finding that it fell under section 186(1)*(b).* Further, where a clear classification is possible, it is not sensible to force a different characterisation to facilitate forum shopping (para [20]).

A claim that a fixed-term contract be renewed on the grounds of a legitimate expectation is a class of 'dismissal' as defined in section 186 and is further regulated by section 191 of the LRA as falling within the exclusive jurisdiction of the CCMA. The Labour Court's judgment was therefore upheld, and the appeal dismissed.

Replacement of sanction by employer

In *Central University of Technology v Kholoane & others* (2017) 38 *ILJ* 167 (LC), Matyolo AJ was of the view that clauses in disciplinary procedures and/or codes that allow for senior management to change the sanctions decided upon by a chairperson in a disciplinary hearing cannot be understood to give management an unfettered discretion. This type of concession serves as a tool only to address instances where incorrect sanctions that are wholly or shockingly inappropriate are imposed.

The employee was charged with fraudulent or dishonest conduct in relation to misappropriation and/or unlawful possession of the employer's property. The employee was found guilty in a properly constituted disciplinary enquiry and issued with a final written warning by the chairperson.

However, the employer changed the sanction to dismissal. In support of the amendment, the employer referred to management practice, and not an extant code of conduct, dealing with review processes. The employer did not believe that the recommended sanction reflected the nature and seriousness of the misconduct of which the employee had been found guilty.

The employee referred an unfair dismissal dispute to the CCMA where an attempt at conciliation proved fruitless. In the subsequent arbitration, the arbitrator ruled the dismissal substantively and procedurally unfair as the regulatory code of the applicant lists several sanctions available to the employer to address infractions like the one of which the employee was found guilty. The list includes dismissal and alternative sanctions, including a final written warning. The arbitrator also took into consideration the time lapse between the misconduct and the disciplinary hearing and found that this indicated that the trust relationship had not broken done irrevocably. On procedural fairness, the arbitrator noted that the employee had not been afforded an opportunity to make representations on the changes that led to his summary dismissal. Moreover, the chairperson who had heard the evidence had not been involved in the changes to the sanction.

On review, the Labour Court referred to *Kievits Kroon Country Estate (Pty) v Mmoledi & others* [2012] 11 BLLR 1099 (LAC), in which it was held, among other things, that an applicant in a review application must demonstrate that both the commissioner's reasons and the result of the award are unreasonable, and that if the reasons are unassailable that brings an end to the matter.

Matyolo AJ found, *in casu,* first, that it is a narrow interpretation of the commissioner's mandate to argue that the only issue the arbitrator was to deal with was whether the applicant was empowered to change the decision of final written warning to a dismissal, and that in making findings on the unfairness of the dismissal, the commissioner had exceeded his mandate. The proper understanding is that the arbitrator was required to look at whether the employee's dismissal, based on the changes to the sanction, was fair. The arbitrator applied a two-stage approach. He first considered whether the applicant could change the decision and found that it could; secondly, he considered whether dismissal for reasons related to those changes was fair and found that it was unfair.

Regarding the second consideration, the commissioner had to deal with the effect of the changes and how they had been made and decide whether the employer acted fairly. As regards whether the employer had the power to change the decision, the arbitrator had to deal with the fact that the change led to his dismissal. This calls procedural and substantive fairness into play. Referring to Zondo JP in *Fidelity Cash Management Services v CCMA & others* [2008] 3 BLLR 197 (LAC) paragraph [103], the Labour Court found that there was no satisfactory explanation for the changes, and the proper process had not been followed in effecting them. The court further referred to *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA & others* [2014] 1 BLLR 20 (LAC), in which review was described as a process to evaluate whether the commissioner's award was reasonable in light of all the evidence before him or her (paras [17] [18]); cf *Sidumo & another v Rustenburg Platinum Mines Ltd & others* above). In deciding how commissioners should determine whether a dismissal was fair, it is important to bear in mind that security of employment is a core value in the Constitution which has been given effect to by the LRA.

It was ultimately found that clauses in disciplinary procedures and/or codes that allow for employers to change sanctions

cannot be understood to give employers an unfettered discretion, but should rather be seen as tools to correct sanctions that are wholly or shockingly inappropriate (para [32]). Also, it is unlikely that a sanction listed as an alternative could be viewed as such. The arbitrator's award passed the *Sidumo* and *Kloof Gold Mine* tests, and the review application was dismissed.

Sanction of dismissal fair

The Labour Appeal Court in *Malungu & another v Rand Water & others* [2017] ZALAC 28 overturned an order by the Labour Court which had the effect of finding the sanction of dismissal fair, when in the Labour Court's view, the commissioner had erred by not finding the employee guilty on an additional charge warranting dismissal.

The employee, Mahlungu, worked for Rand Water as a mechanical foreman. He was charged and found guilty of committing four acts of misconduct and was dismissed. A commissioner found that Malungu was guilty of only two of the offences, neither of which justified dismissal, and ordered his reinstatement. On review, the Labour Court held that the employee was guilty of a third infraction based on the employer's procurement policy. This, in the court's view, rendered his dismissal fair. The employee lodged an appeal with the Labour Appeal Court.

The Labour Appeal Court disagreed. In terms of the employer's disciplinary code and on the evidence, the employee was not guilty of the third infraction. As for the sanction, the Labour Appeal Court held that if the third charge on which Malungu had been found guilty was indeed found to be an error by the Labour Court, then the employee was only guilty of the other two charges of misconduct which did not justify dismissal. In the result, the commissioner's sanction was a reasonable one. The Labour Court's order was amended to dismiss the application for review of the commissioner's award with no order as to costs.

Double jeopardy

During 2017, the Labour Appeal Court also considered whether a dispute should be remitted back to arbitration if the commissioner had failed to consider a charge against the dismissed employee at an internal disciplinary enquiry, which did not form the foundation of, or the true reason for, the dismissal. The result was a divided judgment in *Jorgensen v I Kat Computing (Pty) Ltd & others* [2018] 3 BLLR 254 (LAC), (2018) 39 *ILJ* 785.

Since 2005, Jorgensen had worked as a product integration specialist at I Kat Computing (Pty) Ltd (the employer). Jorgensen got on well with the employer's Managing Director (Smith). When Jorgensen resigned in 2011 to relocate to Durban, Smith offered him a post at the employer's Durban office, which Jorgensen accepted. However, the business at the Durban branch was not successful. In 2013, Smith requested Jorgensen to send him monthly reports, which Jorgensen failed to do. Smith then informed the staff that they would receive no pay until they turned a profit. Their salaries were halved due to Jorgensen's alleged failure to meet any of his performance targets. Jorgensen instructed an attorney to take the matter up, whereupon he (Jorgensen) was called to a disciplinary hearing in Johannesburg. Worried that he would not be afforded a fair hearing, Jorgensen stayed away from this disciplinary hearing on legal advice. Two disciplinary enquiries in Durban chaired by an independent chairperson followed. The first enquiry related to Jorgensen's alleged gross insubordination in not attending the disciplinary hearing in Johannesburg. The second concerned Jorgensen's alleged poor work performance. The chairperson found Jorgensen guilty of gross insubordination and recommended his dismissal. The disciplinary chair did not recommend Jorgensen's dismissal for poor work performance, as his performance could not be evaluated satisfactorily. Jorgensen referred an unfair dismissal dispute to the CCMA.

The CCMA commissioner noted that the disciplinary chairperson had not made a finding regarding the alleged poor work performance or recommend his dismissal. In the result, the commissioner dealt only with whether Jorgensen was guilty of gross insubordination and, if so, whether dismissal was the appropriate sanction. On the evidence, and with reference to case law, the commissioner found that the employer's failure to fulfil its contractual obligations by not paying Jorgensen in full meant that Jorgensen was not obliged to attend the disciplinary enquiry. He concluded that Jorgensen's dismissal for gross insubordination was substantively unfair. As Jorgensen did not seek to be reinstated, the commissioner awarded him compensation equal to nine months' salary. On review, the Labour Court held that Jorgensen had purportedly been dismissed for gross insubordination and poor work performance, and that the commissioner ought to have arbitrated the dismissal dispute with reference to poor work performance as well.

The Labour Court agreed with the commissioner's finding that Jorgensen had a choice not to attend the disciplinary enquiry, and that his failure to do so did not amount to gross insubordination. Therefore, the Labour Court confirmed the findings of the commissioner relating to the misconduct charge. The dispute was, however, referred back to the CCMA to be heard by a different commissioner to determine whether Jorgensen's dismissal for allegedly 'causing financial loss to the company as a result of (his) inactivity, actions and mismanagement of the Branch' (para [41]) had been procedurally and substantively fair. Jorgensen was granted leave to appeal the judgment.

On appeal, as regards the insubordination charge, the Labour Appeal Court agreed unanimously with the commissioner's ruling and reasons for finding that Jorgensen's failure to attend the disciplinary enquiry did not amount to gross insubordination. Therefore, the commissioner's ruling was found to have been reasonable and his finding was confirmed.

Regarding the remedy, the Labour Appeal Court noted that Jorgensen had not sought reinstatement. However, the Labour Appeal Court held that the compensation amount that had been awarded ignored the fact that Jorgensen was appointed on a fixed-term contract that had only five months remaining at the time of his dismissal. The court held that an employee who succeeds in proving an unfair dismissal should not be awarded relief in the form of more compensation than his or her actual loss of income. Jorgensen sought compensation equivalent to six months' pay, but in accordance with the award made he would receive compensation in an amount equivalent to nine months' remuneration. The award was reduced to an amount equal to what he would have earned in the five months while employed by the employer.

As for whether the dispute concerning poor work performance should be remitted to arbitration, the minority (in the judgment penned down by Landman JA) agreed with the Labour Court's finding that the commissioner ought to have considered the poor work performance charge despite the independent disciplinary enquiry not having made a finding on this issue or on Jorgensen allegedly causing the employer a financial loss. Landman JA proposed an enabling award to allow Jorgensen, within a limited time, to pursue the dispute based on his alleged poor work performance. The majority (in a judgment written by Phatshoane AJA) rejected this reasoning. Tlaletsi DJP held that remitting the

poor work performance dispute back to the CCMA would be incompetent for several reasons: it would subject Jorgensen to double jeopardy as he had not been found guilty of poor work performance at the internal disciplinary hearing; the employer would be provided an opportunity through the back door to appeal the finding of its own chairperson in arbitration proceedings; the order for remittance proposed by the minority is impractical as an employee cannot be compelled to refer an unfair dismissal dispute to the CCMA if he or she does not wish to do so; Jorgensen had long left the employ of the employer and it would not be sensible to subject him to discipline by the employer; in effect the CCMA commissioner would be empowered to reconsider the appellant's alleged poor work performance; the referral that was made to the commission was an unfair dismissal dispute based on misconduct and not incapacity; Jorgensen referred the appeal, not the employer, and he did not wish to have the dispute concerning his alleged poor work performance arbitrated.

Dismissal for dishonesty

The employee in *Bidserv Industrial Products (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & others* (2017) 38 *ILJ* 860 (LAC) was dismissed by the employer subsequent to a disciplinary hearing at which he was found to have been dishonest in that he had submitted a false statement of costs (a quotation) from his child's school for the employer to pay more than it should in terms of its bursary scheme. Aggrieved, the employee referred an unfair dismissal dispute to the CCMA, where it was found that there had been collusion between the employee and his witness regarding the procurement of the quotation, and that *prima facie* the fourth respondent could be said to be guilty of dishonesty; that the employer was inconsistent in the application of discipline; and that the employee's length of service militated against his dismissal (para [23]). The employer was ordered to reinstate the employee with limited back pay. The award was upheld on review by the Labour Court.

On review, the Labour Appeal Court (Phatshoane AJA) found that the commissioner had failed to determine the primary question of whether the employee had been dishonest, which was central to the finding of whether the reason for the dismissal was fair (para [24]; cf *Head of Department of Education v Mofokeng & others* (2015) 36 *ILJ* 2802 (LAC)). The Labour

Appeal Court was satisfied that it had been proven that the employee knowingly submitted a false quotation in the hope of claiming more than he was entitled to. The court held that the commissioner ought not to have posed the question of inconsistency in the application of discipline by the employer without having first determined the underlying reason for the dismissal (paras [29]–[33]; cf *Absa Bank Ltd v Naidu & others* (2015) 36 *ILJ* 602 (LAC) para [36]; *National Union of Mineworkers on behalf of Botsane v Anglo Platinum Mine (Rustenburg Section)* (2014) 35 *ILJ* 2406 (LAC) para [39]). Phatshoane AJA, with reference to case law in point (*Toyota SA Motors (Pty) Ltd v Radebe & others* (2000) 21 *ILJ* 340 (LAC); *Woolworths (Pty) Ltd v Mabija & others* [2016] 5 BLLR 454 (LAC)) concluded that the misconduct committed by the employee was serious, notwithstanding his length of service, and still justified his dismissal. The appeal was upheld.

Poor work performance

The employer in *Damelin (Pty) Ltd v Solidarity obo Parkinson & others* (2017) 38 *ILJ* 872 (LAC), [2017] 7 BLLR 672 (LAC), appealed a judgment by the Labour Court. In the Labour Court, Bleazard AJ had reviewed and set aside an award made by a CCMA commissioner in favour of the employees, by finding that they had been unfairly dismissed based on their poor performance. The result *in casu* was that the appeal was dismissed on the basis that the period for meeting the target issued to the workers after a warning for poor work performance had been too short, or alternatively that the target was unattainable. In summary the facts were as follows.

After being given a target to market and recruit students to its branch and to conduct research, the employee complained to the employer that the target set was unrealistic. The manager replied that the target was the same as in the previous year and suggested that the employee be creative and canvass a greater area where he said there were schools and very little tertiary education. To this suggestion, the employee replied that the students would rather go to the campuses in that area and, therefore, the target set by management remained unrealistic and was setting the employee's team up for failure. Unsurprisingly, the employee's team did not meet the target. The employee was called to attend a disciplinary inquiry based on poor work performance and dismissed.

Against the guidelines in the Code on Good Practice: Dismissal for Poor Work Performance (para [24]), the CCMA commissioner considered that the employee had been afforded more than six months to improve his performance. Moreover, during that time the employee had not communicated that his targets were unattainable. The commissioner also considered that higher standards are expected of senior employees. In the result, the dismissal was ruled to have been the appropriate sanction. Dissatisfied with the outcome the employee applied to the Labour Court seeking to review and set the award aside. The Labour Court did so on the basis that the employer had deviated from its own disciplinary procedure, and the CCMA commissioner had allowed the employer to ask its witnesses leading questions despite objections to this approach (para [25]). The Labour Appeal Court referred to *Palace Engineering (Pty) Ltd v Ngcobo & others* (2014) 35 *ILJ* 1971 (LAC), in which it was held (para [24]) that senior employees are expected to assess whether they are performing on standard. Consequently, they do not need the same degree of regulation or training that lower skilled employees require to perform their functions. Nevertheless, an employer must provide a senior employee with the resources essential to the achievement of the required standard or set targets (para [40]). In this instance, the employee was afforded only 27 days within which, along with his team, to achieve a certain target. The Labour Appeal Court believed, given all that had been done and the assistance afforded to the group of workers by the employer, either the period was too short, or the target was unachievable (para [41]). Therefore, a reasonable commissioner would have found that the employer had not met the *onus* of showing that there was a fair reason to dismiss the employee and that dismissal was a fair sanction.

Dismissals of fixed-term employees for operational requirements

An urgent application on the application of sections 189A(13) and 198B of the LRA was considered by Steenkamp J in *AMCU & others v Piet Wes Civils CC & another* (2017) 38 *ILJ* 1128 (LC), [2017] 5 BLLR 501. The employees sought reinstatement pending a proper consultation process. Piet Wes Civils CC (the CC) contended that the employees had not been dismissed for operational requirements, or at all, but rather that they were employed on fixed-term contracts which had expired because their services had been terminated by Exxaco. The CC and

Exxaco had concluded a service agreement – in terms of which the employees had been working – which was set to expire in 2021, but which expired much sooner and with only one month's notice to the CC, whereafter the CC had terminated the employees' contracts without consultation.

Steenkamp J considered the wording of section 198B of the LRA. The section provides that an employer may employ an employee on a fixed-term contract for longer than three months only if the employer can prove, among other things, that the nature of the work is of a limited or definite duration, and that other justifiable reasons exist to employ the particular worker for a fixed term only. One of the listed reasons in the legislation is when the person is employed to work exclusively on a specific project of a limited or defined duration. The employees' stance was that the CC ought to have consulted them as envisaged in section 189 of the LRA as their employment contracts were not governed by section 198B(4)*(d)*, but rather by section 198B(5). It was argued by the CC that the agreement was not a fixed-term contract as contemplated by section 4*(d)* in the employees' contracts; therefore, it was in contravention of section 198B(3)*(a)* of the LRA. Ultimately, as was argued, it was deemed to be a contract of an indefinite duration. The clause on which the respondents relied was argued to be against public policy and *pro non scripto.*

It was not stated *in casu* that the nature of the work for which the CC employed the employees was 'of a limited or definite duration' as contemplated by section 198B(3)*(a).* Instead, the continued employment of the employees was linked to the CC being supplied with work by 'his clients', Exxaro. Have the respondents demonstrated that that was a 'justifiable reason' for a fixed term contract as contemplated by section 198B(3)*(b)*? If the employers discharge that onus, the contracts would justifiably be a fixed-term contract, and the respondents' defence should succeed. If not, the employment of the employees would be deemed to be of a fixed duration in terms of subsection (5), and the respondents would have to consult over any contemplated dismissals for operational requirements. In *Sindane v Prestige Cleaning Services* [2009] 12 BLLR 1249 (LC) and *Mahlamu v CCMA* [2011] 4 BLLR 381 (LC), the Labour Court expressed the view that 'event' in section 198B(1)*(a)* does not include termination of a contract by a client of the employer. Steenkamp J stated that these contracts were not intended to be for a fixed duration, or to terminate on the occurrence of a specified event, or the

completion of a specified task or project as contemplated by section 198B(1). The termination of the Exxaro contracts may well be a justifiable and fair reason for dismissing the employees for operational requirements, but a proper consultation process in the form of a meaningful joint consensus-seeking process as contemplated by sections 189 and 189A must be undertaken to determine this. In issuing the order, Steenkamp J followed *Steenkamp v Edcon Ltd* (2016) 37 *ILJ* 564 (CC), [2016] 4 BLLR 335, 2016 (3) SA 251 paragraphs [161]–[164], where Zondo J discussed section 189A(13) in similar circumstances, but in the context of large-scale retrenchments, and concluded that the employees who had been dismissed must be reinstated until the employer has complied with a fair procedure.

Dismissal for operational requirements

The employee in *Viljoen v Johannesburg Stock Exchange Ltd* (2017) 38 *ILJ* 671 (LC) claimed that her dismissal was both substantively and procedurally unfair. The employer, on the other hand, contended that it had never sought to dismiss her, and that it was her own conduct which had led to her retrenchment. The employee also claimed that she ought to be paid severance pay, which the employer refused to do.

The salient facts were that during an extensive restructuring process to attract more investors, the employer's board decided to implement a marketing and rebranding strategy which required separate marketing and branding managers. Not only had the position of brand manager expanded to such an extent that two subordinates had to report to it instead of one as originally envisaged, the marketing manager position had an additional three subordinates reporting to it. In the result, two proper and viable positions were created. For the employee, this meant that her existing position as marketing manager became redundant, as it was replaced by the two new positions. Accordingly, she ought to have been consulted concerning the intended restructuring in terms of section 189(3) of the LRA. The employer made it clear that, despite the intended restructuring, the primary objective was not to lose employees, but rather to fill all the new positions with the existing employees. Even in instances where there was no proper fit, a development program would be instituted to train the employee so as to provide him or her with the skills necessary for the new position. So far as the employer was concerned, the applicant was competent to fill either of the new marketing or branch manager positions.

To ensure due process, the employer applied section 189 of the LRA. During the consultation process, the employee was asked several questions, including what positions she would be interested in, in order of preference. She confirmed that she 'fully supported' the new structure and the dividing of her existing marketing manager positions into two new positions of branch manager and marketing manager and took no issue with the rationale for the restructuring (para [28]). However, the employee proposed that the employer forego the interview process and allow her to remain in her current role as marketing manager. She was satisfied that her role could then be amended by way of negotiation if the employer was willing to give her an undertaking that her salary and benefits would not be negatively affected. The employer felt that a fair restructuring process required that the employee apply for appointment in the position/s that she wished to fill, be interviewed, and matched to a position. The employee refused to budge and requested that she be paid an exit package. The employer stated that this was not an option, as there was a reasonable alternative position available for her, and that in any event the employer did not intend retrenching her. The employee was warned that if she failed to take up the opportunity to apply for an available position she would be retrenched without severance pay (para [36]). The employee maintained her view and argued that the new brand manager position would be a demotion for her, and that she was not interested in applying for the marketing manager position because it was allegedly fundamentally different from her existing position. She would agree only to her suggestion that she remain in her existing position and be amenable to amendment of her duties. The employer explained that the brand manager position was not a demotion but a position on the same grade, but that she could apply for either of the two positions, or even both, if she wished. After several unsuccessful attempts to convince the employee to apply for the position/s, she was presented with a letter of termination of her employment.

The Labour Court, in deciding whether on the facts the employee had been unfairly dismissed for operation reasons, noted that whether a dismissal for operational requirements is substantively fair is decided by posing a general question – whether or not there was a fair reason for the dismissal – and a specific question – whether there was a fair reason for the dismissal of the specific employees based on fair selection

criteria (para [52]; cf *Chemical Workers Industrial Union & others v Latex Surgical Products (Pty) Ltd* (2006) 27 *ILJ* 292 (LAC) para [55]). In the case under scrutiny, Snyman AJ accepted that there indeed existed a proper business rationale for the dismissal, and that this rendered the dismissal substantively fair (*Kotze v Rebel Discount Liquor Group (Pty) Ltd* (2000) 21 *ILJ* 129 (LAC) para [36]).

The employer's case, in simple terms, was that the position of marketing manager had become redundant when it ceased to exist. What formerly was a single position had been changed into two distinct and separate new positions that had not previously existed. The employee had consistently refused to either apply for or accept either of these two positions, which would have avoided her retrenchment. In the result, she had identified herself as a candidate for retrenchment (see too *Van Rooyen & others v Blue Financial Services (SA) (Pty) Ltd* (2010) 31 *ILJ* 2735 (LC)). The Labour Court noted that in *Plaaslike Oorgangsraad van Bronkhorstspruit v Senekal* (2001) 22 *ILJ* 602 (SCA) paragraph [27], the court had accepted that redundancy can result from a reorganisation of a business. Snyman AJ stated that the employee could not, as she had during negotiations insisted on, choose to remain in a position that no longer existed and then seek to negotiate changes to it. In *Freshmark (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & others* (2003) 24 *ILJ* 373 (LAC) paragraph [25]), the court expressed the purpose of employing a specific person as addressing the employer's need to employ an employee who is prepared to work, in accordance with its terms and conditions, to meet its operational requirements. When that contract of employment or some of its terms and conditions can no longer serve, or no longer suits, the operational requirements of the business, that is a valid reason for the employer to terminate that contract of employment. However, if the employer requires an employee who can perform her functions entirely or in some respects, as those performed by the terminated employee, or an employee who could potentially face termination, the employer must offer the new contract to the employee whose contract of employment has been terminated or is under threat of termination if he or she is suitable for employment in the new position. If the employee accepts the offer of a new contract of employment, he or she would avoid being dismissed. This does not, however, mean that his or her previous contract of employment remains in place; it does not, it is

cancelled or amended. In either case, the employment of the employee by the employer is subsequently governed by terms and conditions of employment which differ from the terms and conditions which previously governed his or her employment (para [69]). Both parties must compromise during the consultation process if jobs are to be saved during a restructuring process.

The court noted that the employee's total unwillingness to compromise during the consultation process excluded her opportunities to remain employed. She should have applied for the new positions of marketing manager or brand manager, or for both. At the very least, she should have taken up the position of brand manager in which she was ultimately placed as a compromise by the employer. Her failure to do so was fatal to her claim of substantive unfairness of her dismissal. She had left the respondent with no choice but to retrench her when she was in a risk-free position to avoid her own retrenchment.

As for the employee's claim based on procedural unfairness, Snyman AJ reiterated that the employee could have avoided her retrenchment by simply accepting the alternative position(s) that were available to her. They were proper alternative positions which she was fully competent to fill. Moreover, the positions were of equal status to the position she previously filled, with no change in her salary and benefits. Ultimately, the question of procedural unfairness does not even arise in this instance, as the applicant could have avoided her own retrenchment (*Arthur Kaplan Jewellery (Pty) Ltd v Van De Venter*; *SA Transport and Allied Workers Union on behalf of Dube & others v Fidelity Supercare Cleaning Services Group (Pty) Ltd* (2015) 36 *ILJ* 1923 (LC) para [60]). The manner in which the employee had participated in the consultations pointed to *mala fides* as she had closed her mind to any suggestion other than her own. Her method of conducting the consultation by using prepared written scripts and requesting the employer to answer in writing, was not meaningful participation in the consultation indicative of a proper consensus-seeking process.

In terms of section 41(4) of the BCEA, and because the employee had refused to take up alternative employment, she had forfeited her right to severance pay. The Labour Court

concluded that the employee's dismissal was fair, both substantively and procedurally (paras [107] [108]).

Replacement of sanction by employer

In another case heard in 2017, *Moodley v Department of National Treasury & others* [2017] 4 BLLR 337 (LAC), (2017) 38 *ILJ* 1098, Coppin JA considered an appeal against the judgment of the Labour Court in which Tlhotlhalemaje AJ (as he then was) reviewed and set aside an arbitration award in favour of the employee and remitted the matter back to the bargaining council for hearing *de novo*.

At the conclusion of a disciplinary hearing in which the employee was found guilty on charges of misconduct, the chairperson ruled that the appropriate sanction would be for the employee to be dismissed or, in the alternative, demoted. The employee opted for demotion, but the employer informed her that she was discharged from the Public Service in terms of section 16B(1) of the Public Service Act, 1994 (as amended). The employee declared an unfair dismissal dispute seeking reinstatement at the bargaining council. The crux of the complaint was that the employer could not substitute the chairperson's lesser sanction of demotion with a dismissal, and that such a substitution was inherently unfair.

The Labour Court found that the arbitrator's award did not fall within the band of reasonableness. According to Tlhotlhalemaje AJ, arbitrators are required to determine, having regard to a variety of factors (including those in Schedule 8 to the LRA), whether the sanction of dismissal was fair. In addition, the court held that what is required is for the arbitrator to determine what is fair, taking into consideration all relevant circumstances, and not to defer to the employer's decision.

The employee sought leave to appeal Tlhotlhalemaje AJ's judgment on the ground that the court *a quo* had erred in concluding that the arbitrator's award was unreasonable; and in finding, in effect, that an employer may change a sanction imposed by the chairperson of the disciplinary enquiry, even though that sanction is not merely a recommendation; and in deciding the review in terms of section 145 of the LRA after the employer had dropped its reliance on section 158(1)*(h)* of the LRA; and in failing to take into account the employer's 'wholesale' disregard for the rules; and in condoning the employer's failure to comply with the rules

The Labour Appeal Court noted that the lower court had granted leave to appeal, after having had regard to the most recent judgment of this court on the issue of whether an employer could substitute the final sanction of a chairperson of a disciplinary enquiry. (See *South African Revenue Service v CCMA & others* [2016] 3 BLLR 297 (LAC), (2016) 37 *ILJ* 655 (*Kruger*); *Country Fair Foods (Pty) Ltd v CCMA* (2003) 24 *ILJ* 355 (LAC); *South African Revenue Services v Commission for Conciliation, Mediation and Arbitration* (2014) 35 *ILJ* 656 (LAC) (para [35]; *Hendricks v Overstrand Municipality* (2015) 36 *ILJ* 163 (LAC).)

Coppin JA held that the arbitrator ought to have referred to section 193 of the LRA. Like the arbitrator in *Kruger,* the arbitrator had failed to do so or to consider the seriousness of the misconduct and its potential impact in the workplace. Had this been done, ordering reinstatement would not have been seen as appropriate. The arbitrator's failure to do so, in circumstances where she or he was legally obliged to do so, was justifiably criticised as unreasonable. In the result, the appeal was dismissed.

Misconduct

The employee appealed against the judgment of the Labour Court (Van As AJ) in which he upheld the award of the arbitrator that the employee's dismissal for misconduct was procedurally and substantively unfair but substituted his retrospective reinstatement with an order of twelve months' pay as compensation. In *Schwartz v Sasol Polymers & others* (2017) 38 *ILJ* 915 (LAC), the employer cross-appealed against Van As AJ's finding that the dismissal was unfair, and the compensation order made. The employee was charged at a disciplinary hearing with corruption in obtaining personal advantage in the form of monetary sponsorships/gifts/cash, and in the alternative, with a breach of the employer's Code of Ethics in failing to disclose monetary sponsorships, gifts or money received by him from service providers. The Code of Ethics provided further that non-compliance with the policy would result in disciplinary action and could lead to dismissal. After being found guilty at a disciplinary hearing and dismissed, which dismissal was confirmed at an internal appeal, an unfair dismissal dispute was referred to the CCMA.

The arbitrator ruled the appellant's dismissal procedurally unfair in that he had not received sufficient details regarding his alleged misconduct, and that the chairperson should have post-

poned the matter. In addition, the chairperson was found not to have understood either the onus, or the meaning, of an alternative charge, which resulted in the appellant being found guilty on both charges with dismissal as the sanction in both instances. This was declared to be procedural unfairness by the CCMA. Also, on substantive unfairness, the arbitrator found that the corruption charge had not been not proven, but the employee had, nevertheless, been found to have failed to disclose the receipt of gifts and sponsorships from service providers. Somewhat bizarrely, the arbitrator found that the rule requiring disclosure was not well known; had not been communicated and was not understood by the employee; no rule required that gifts to spouses be disclosed; and no employees had made such disclosures in the past two years. The arbitrator found the sanction of dismissal inappropriate and replaced it with a final written warning and reinstatement.

Aggrieved, the employer sought review in the Labour Court, where it was found that there was no reason to disturb the arbitrator's finding on the basis that the appellant had not been furnished with sufficient particulars of the charge so as to allow him properly to prepare for his disciplinary hearing, as corruption is a complex offence with specific legal requirements (para [11]).

On appeal, Savage AJA found that the arbitrator had adopted an overly formalistic and technical approach to the issue of procedural fairness to the extent of committing a reviewable irregularity. Viewed holistically, the employee had received a fair hearing as he had been notified in writing of the allegations against him, albeit in general terms, but with sufficient clarity for him to understand the misconduct of which he was being accused (para [12]). The charges had been explained to him by the chairperson at the outset of the hearing; he clearly understood the misconduct charges as he had secured the attendance of service providers who had been party to the wrongdoing to testify on his behalf at the hearing; and he had made no request for the hearing to be postponed. When he was asked by the chairperson if he had had time to prepare his defence on the two charges, he confirmed that he had had sufficient time, and that his witnesses were present to testify (para [12]). It followed that the Labour Court had erred in finding that the arbitrator's conclusion of procedural unfairness was correct. With reference to *Avril Elizabeth Home for the Mentally Handicapped v CCMA & others* [2006] 9 BLLR 833 (LC), Savage AJA confirmed that the LRA

recognises not only that managers are not experienced judicial officers, but also that workplace efficiencies should not be unduly impeded by onerous procedural requirements. On the issue of substantive fairness, Savage AJA found that the court below had correctly found that the arbitrator had failed to take into account the appellant's conduct as it noted that, whilst the arbitrator had alluded to entrapment when evaluating the taped conversation between the employee and his ex-wife, the arbitrator had correctly allowed the evidence yet had not attached sufficient weight to the various damning statements which the employee had made. Having been allowed, it was only reasonable that the evidence be considered by the arbitrator (para [18]). Therefore, a reviewable irregularity had been committed in that the arbitrator had failed to attach weight to the damning statements made by the appellant, and the nature and impact of the misconduct. However, the Labour Court had misconstrued the proper approach to such a determination.

The employment relationship obliges an employee to act honestly, in good faith, to protect the interests of the employer, and to avoid conflicts of interest that may arise which may breach this duty. The appellant was employed in a senior position as an engineering manager. His calculated silence in the face of a duty to speak amounted to a fraudulent non-disclosure or concealment of the true state of affairs in circumstances in which gifts and benefits earned 'secretly fell to be disgorged by him with little room to avoid that consequence' (para [20]; cf *Volvo (Southern Africa) (Pty) Ltd v Yssel* 2009 (6) SA 531 (SCA) para [14]). His conduct was dishonest in circumstances in which he was obliged to act with honesty, diligence, and good faith towards his employer, and not to allow his own interests to prevail over those of his employer. However, the Labour Court did not properly apply the review test as set out in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA & others (Gold Fields*) (2014) 35 *ILJ* 943 (LAC) with reference to *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC), in replacing the appellant's retrospective reinstatement with an order of compensation equal to twelve months' remuneration. Although the result was unreasonable taking in consideration the material before the arbitrator, the Labour Court's conclusion that the dismissal was substantively unfair was patently incorrect given its own findings as to the serious nature of the employee's dishonesty which subverted the interests of his employer. It follows that the

arbitration award was not justifiable in relation to the reasons given for it and fell outside of the range of decisions which a reasonable decision-maker could have made on the material before him (para [31]). In the circumstances, the award was set aside and replaced with an order that the employee's dismissal was both substantively and procedurally fair.

Inordinate delays in finalisation of a dispute

Ultimately, *NEHAWU obo Leduka v National Research Foundation* (2017) 38 *ILJ* 430 (LC), serves as an example where a condonation application failed due to the grossly excessive and largely unexplained delays.

Even before the referral to the Labour Court, the union representing the employees was tardy: the applicants had referred the dispute to the CCMA some four months late and had to apply for condonation. At the subsequent conciliation in the CCMA, the dispute was declared unresolved, and the union was instructed to refer the dispute to the Labour Court for adjudication. However, this was done only four months later, and the union neglected to attach a condonation application to its statement of claim. Moreover, the union had made no attempt to convene pre-trial proceedings after the employer party had filed its answering statement.

The Practice Manual of the Labour Court (Practice Manual) had appeared with specific provisions on the archiving of statements of claim not timeously and diligently prosecuted. The employer had requested the Registrar to archive the matter, which was done.

Another four months later, the union served a notice on the employer requesting it to attend a pre-trial conference, together with a notice of intention to amend the applicants' statement of claim. There was no application made to condone the material delay – two months short of five years – and no explanation was offered for that delay. The union amended the statement of claim as proposed and proceeded to exert pressure on the employer to attend pre-trial proceedings. The employer was reluctant to do so, given that the matter had been archived. The union successfully approached the Labour Court requesting a directive that the parties must hold a pre-trial conference and file minutes of the meeting.

Upon being served with this directive, the employer approached the court for an order declaring that the matter had been archived

permanently pursuant to its efforts, as the union ought first to have brought a substantive application to remove the matter from from the archives. Lagrange J directed that the directive issued by Baloyi AJ requiring the holding of a pre-trial conference, be substituted with a new directive to read that the union must first bring an application in terms of Rule 7 read with clause 16.2 of the Practice Manual, before any further steps could be taken in the matter. The union approached the court to seek condonation of its lack in prosecuting the matter, and for the non-compliance with the Labour Court Rules and the Practice Manual, and that the matter be removed from archives and reinstated. Unfortunately, the employer lodged its answering affidavit four weeks late, necessitating the respondent, in turn, to apply for condonation, which was opposed by the applicant. Snyman AJ considered the argument on the application for condonation for the late filing of the respondent's answering affidavit and condoned the lateness.

As for the union's application for condonation coupled with the prayer for the removal of the matter from the archives and its reinstatement, Snyman AJ considered *Khumalo & another v Member of the Executive Council for Education: KwaZulu-Natal* (2014) 35 *ILJ* 613 (CC) paragraph [42]; *Aviation Union of SA & another v SA Airways (Pty) Ltd & others* (2011) 32 *ILJ* 2861 (CC) paragraph [76]; and *National Education Health and Allied Workers Union v University of Cape Town & others* (2003) 24 *ILJ* 95 (CC) paragraph [31], and confirmed that the purpose of the LRA is to ensure speedy and expeditious resolution of labour cases.

In total, it had taken in excess of seven years from referral of the matter, and some six years since the litigation was initiated, without the matter even having been ripe for hearing. This kind of delay can, in itself, lead to a matter being disposed of, simply on the basis of the excessive delay. Therefore, in the absence of truly exceptional considerations, the matter must be regarded as closed. The excuse of not following up on the progress of a matter is inadequate.

Snyman AJ considered whether the applicants' application should be dismissed for an unjustified and undue delay in the prosecution thereof to finality, and with reference to the maxim *vigilantibus non dormientibus lex subveniunt,* the *dictum* in *BP Southern Africa (Pty) Ltd v National Bargaining Council for the Chemical Industry & others* (2010) 31 *ILJ* 1337 (LC) paragraph [10], provided the answer. In terms of this maxim a party may, in certain circumstances, be debarred from obtaining the relief to

which it would have been entitled because of an unjustifiable delay in prosecuting its claim. There are two reasons why the court may dismiss these claims: as depicted in *Radebe v Government of the Republic of SA* 1995 (3) SA 787 (N). First, unreasonable delay may cause prejudice to the other parties; and secondly, it is both desirable and important that finality should be reached within a reasonable time in respect of judicial administrative decisions. Ultimately, unwarranted delays in litigating disputes damage the interests of justice and prolong uncertainty.

In addition, the Practice Manual is binding on litigating parties and must be complied with as was explained in *Ralo v Transnet Port Terminals & others* (2015) 36 *ILJ* 2653 (LC) (para [9]). As for the applicants' application for condonation, Snyman AJ had to be convinced to depart from the normal consequence of a final dismissal of the matter. Snyman AJ took note of clause 16.2 of the Practice Manual and Rule 12 of the Labour Court Rules. Should the application be granted the effect would be that the applicants' matter would be resurrected and removed from the archives. Given that archiving has the effect of a dismissal of the matter, the matter is akin to that of rescission rather than condonation. The Practice Manual and Rule 12, however, do render it competent to obtain the relief sought by the applicants by way of a condonation application (*Builders Trade Depot v Commission for Conciliation, Mediation and Arbitration & others* (2012) 33 *ILJ* 1154 (LC) para [22]). However, given that this application for condonation was directed by Lagrange J, Snyman AJ continued to decide on the relief sought based on the principles applicable to condonation. In *Melane v Santam Insurance Co Ltd* (1962) (4) SA 531 (A) 532C–E and *Academic and Professional Staff Association v Pretorius NO & others* (2008) 29 *ILJ* 318 (LC) paragraphs [17]–[18], it was held that, among other things, the following factors must be considered: (a) the degree of lateness or non-compliance with the prescribed timeframe; (b) the explanation for the lateness or the failure to comply with the timeframe (*Independent Municipal and Allied Trade Union on behalf of Zungu v SA Local Government Bargaining Council & others* (2010) 31 *ILJ* 1413 (LC) para [13]); (c) the prospects of success or *bona fide* defence in the main case; (d) the importance of the case; (e) the respondent's interest in the finality of the judgment; (f) the convenience of the court; and (g) avoidance of unnecessary delay in the administration of justice.

The court concluded that the argument that the merits of the case have constitutional value and concern also does not justify approval of condonation, especially considering the degree of the applicants' delay in this matter. If the prescribed legal requirement is not met, condonation cannot be used as a default simply because the merits of the matter urge it. This emerges from *Seatlolo & others v Entertainment Logistics Service* (*a division of Gallo Africa Ltd*) (2011) 32 *ILJ* 2206 (LC) (para [27]). See also *3G Mobile (Pty) Ltd v Raphela NO & others* [2014] JOL 32479 (LC) (above) paragraph [33], where the court held:

> It is trite law that condonation should only be granted where the legal requirements have been met and is not a default option. It remains an indulgence granted by a court exercising its discretion whilst being cognizant of the criticism emanating from the Constitutional Court and the SCA and bearing in mind the primary objective of the expeditious resolution of disputes articulated in the Act.

In another case dealing with absolution also heard in 2017, *SAMWU & others v Ethekwini Municipality & others* [2016] 12 BLLR 1208 (LAC), (2017) 38 *ILJ* 158, employees who served as shop stewards were affiliated to the union. During 2008, they had been charged with misconduct, involving gross insubordination and dismissed after having been found guilty at a disciplinary hearing.

The employees were not satisfied with their dismissal and referred an unfair dismissal dispute to the South African Local Government Bargaining Council (the SALGBC). The conciliation process failed, and the employees referred the dispute for arbitration. In terms of the arbitration award, the arbitrator found that the dismissal of the employees had been procedurally unfair (as the employer had appointed a presiding officer who was not properly qualified, in terms of the disciplinary procedure, to preside over the disciplinary enquiry), but substantively fair. The appeal was instituted by the South African Municipal Workers' Union (the union), in its capacity as the collective bargaining agent of the employees, and on their behalf as the employees primarily sought reinstatement. In the result, they took the matter on review to the Labour Court in terms of section 145 of the LRA. This resulted in a finding that the arbitration award was not reviewable. On appeal before Ndlovu JA, the employees criticised the Labour Court for upholding the arbitrator's finding that they were indeed guilty of gross insubordination. They submitted that the arbitrator's failure to distinguish between insubordination

and gross insubordination was a misdirection and a gross irregularity in the proceedings.

For an arbitration award to be reviewed and set aside under section 145 of the LRA, it must be one falling within the range of decisions which a reasonable decision-maker could not have made, given the evidentiary material presented to the presiding officer (*Herholdt v Nedbank Bank* (*COSATU as amicus curiae*) 2013 (6) SA 224 (SCA) restated the *Sidumo* test).

By referring to applicable sections from a collective agreement governing the working relationship between employer and employees, it was found that the employees laboured under a serious misconception that being in the position of shop stewards, as they were, gave them the power to domineer and bully the management as they pleased and with impunity. Being affiliated to organised labour does not detract from the fact that employees remain subordinate to their employers and are required to obey and comply with lawful and reasonable instructions given by the employers. The decision in *Motor Industry Staff Association & another v Silverton Spraypainters and Panelbeaters & others* (2013) 34 *ILJ* 1440 (LAC), [2014] JOL 31995 paragraph [31], which provides for the distinction between insubordination and gross insubordination, was also restated as follows:

> It is trite that an employee is guilty of insubordination if the employee concerned wilfully refuses to comply with a lawful and reasonable instruction issued by the employer. It is also well settled that where the insubordination was gross, in that it was persistent, deliberate and public, a sanction of dismissal would normally be justified.

In casu it was part of the employer's essential operational requirements that a particular gate be opened, and, therefore, the instruction issued by the employer for the gate to be opened was a lawful instruction. Further, the instruction was a reasonable one as the employer's productive operations had come to a standstill, having been sabotaged by the employees. The actions of the employees therefore justified their dismissal.

Jurisdiction of the Labour Court

During 2017, the Labour Appeal Court confirmed that, in the absence of a successful application for condonation for the late delivery of a review application, the Labour Court does not have the power to grant condonation and review an arbitration award. In *Takalasi v Metal and Engineering Industries Bargaining Council & others* [2017] ZALAC 61, the employee had suffered an

injury that was not work-related. The medical practitioner treating him recommended that he perform only light duties. Having not been accommodated accordingly, the employee resigned and referred an unfair dismissal dispute to the bargaining council. The arbitrator found for the employee and awarded compensation. The employer launched an application to review and set aside the award, and an application to stay the execution of the award. The employee responded by opposing the review application and bringing an application to have the review application dismissed on the basis that it had been launched some six months late and without an application for condonation. In the Labour Court there was no appearance for the employer, but the employee was present. The Labour Court proceeded to adjudicate the review application. Despite acknowledging that the review had been referred out of time, the Labour Court accepted that the delay was 'slight' and *mero motu* condoned the lateness. The Labour Court reviewed and set aside the arbitration award and the employee took the decision on appeal.

The Labour Court lacks jurisdiction to hear a review application which is referred late until the delay has been condoned. Any delay calls for a reasonable explanation, and for proof of good prospects of success on the merits.

The Labour Court should have heard and decided the application to dismiss the review application for lack of prosecution or struck the review application from the roll with an appropriate costs order. Alternatively, the Labour Court could have 'dismissed' the review application with an appropriate costs order, provided it was made clear that the dismissal of the application was not made on the merits. The Labour Court's order was set aside and replaced by an order that the review application be struck from the roll with costs.

Unfair Labour Practices

Unfair promotion

The appeal before Phatshoane AJA in *Health and Others Service Personnel Trade Union of South Africa (HOSPERSA) & others v Member of the Executive Council (MEC) for Health, Eastern Cape & others* (2017) 38 *ILJ* 890 (LAC), was sought against the judgment and order of the Labour Court in which Lallie J granted the application for the review and set aside the arbitration award. The dispute between the parties concerned an

alleged unfair labour practice relating to the promotion of the second and third appellants by the Department of Health, Eastern Cape (the department).

The department advertised a post with one of the requirements being registration with the Health Professional Council of South Africa (HPCSA). Both employees involved in the matter were registered with the HPCSA and applied for the position, but neither was successful. The post was eventually filled. The employees concerned had no problem with the panel scores as allocated to the competing candidates. However, their grievance was that the person appointed did not satisfy the requirements for the position in that she was not registered with the HPCSA but with the South African Nursing Council (SANC). The department explained that the position was newly created on the staff structure and had been identified as critical. The advertisement was circulated to the relevant managers to ensure that the requirements set out therein were correct, and during the short-listing process the panel had regard to the job applicants with appropriate experience and engaged in a specific field. It also agreed to consider other candidates registered with other professional bodies apart of the HPCSA. The appointee scored higher than all the other candidates interviewed. She had qualifications in a health-related field as set out in the advertisement and was registered with the SANC. The arbitrator found that the onus had been discharged by the concerned employees who had proved an unfair labour practice on the basis that the department did not justify why the requirement set in the advertisement was changed during the selection process. As a result, she ordered the department to re-advertise the position. However, on review Lallie J found that the arbitrator had not dealt with the evidence before her and had given no reasons for being satisfied that the onus of proof had been discharged. The grounds of appeal turned on the argument that the court *a quo* had erred in concluding as it had, and in setting aside the award which was not only reasonable, but also correct.

Phatshoane AJA held that not only did this deviation from the advertisement prejudice applicants for the position, it also disqualified other potential candidates who might have applied but did not do so because of the requirements set. Put differently, the department failed to discharge the evidentiary burden that had shifted to it to justify the departure from the requirements set for the position. Following the principles laid down in *Khumalo &*

another v MEC for Education, KwaZulu-Natal 2014 (5) SA 579 (CC), regarding appointment requirements and departing from them when making the appointment, Phatshoane AJA found that the decision reached by the arbitrator that the post be re-advertised was justified on the facts of this case.

Demotion

Nombulelo Mhlekude v South African Airways (Soc) Ltd & others [2016] ZALAC 59, (2017) 38 *ILJ* 577 (LAC) was an appeal before Landman JA in which the appellant employee appealed against a judgment of the Labour Court (Van Niekerk J) reviewing and setting aside an arbitration award in terms of which a CCMA commissioner had ruled that the employer, South African Airways (Soc) Ltd, had demoted the appellant.

In terms of a collective agreement between the recognised union, the South African Transport and Allied Workers Union (SATAWU), the union is entitled to have one full-time shop steward for every 600 members. The collective agreement regulates the termination of a full-time shop steward from the position. In summary, the employer shall, where practicable and possible, offer the same, or equivalent, or higher alternative employment to the full-time shop steward; and the term of office and benefits shall automatically cease when he or she is dismissed, or his or her services are terminated. The employee, while still holding her level 6-9 post, was appointed as a full-time shop steward in terms of the collective agreement. This entailed her fulfilling the duties of this office and not those of a customer service agent for the employer. She was remunerated by the employer in her capacity as full-time shop steward, on remuneration level 13. She also received an allowance of R3 000 per month. The union expelled the employee as a member, which had the immediate effect that she no longer served as the union's full-time shop steward.

The employer then redeployed her to the position which she occupied before becoming a full-time shop steward, namely a customer service agent. It however continued to remunerate her on level 13, ie, the salary she had earned as a full-time shop steward. But, in accordance with the collective agreement, the allowance of R3 000 ceased. Dissatisfied with the situation, the employee referred a dispute to the CCMA on the ground of unfair demotion contrary to collective agreement where there were alternatives equivalent to her level 13 post available. The commissioner relied on *Nxele v Chief Deputy Commissioner, Corporate*

Services, Department of Correctional Services & others (*Nxele)* [2008] 12 BLLR 1179 (LAC), which concerned the transfer of a correctional services official. The court held that the transfer constituted a demotion, even though Nxele's salary and rank remained the same, as greater responsibilities and status were attached to the official's previous position than to his new position. This constituted a demotion.

The arbitrator found that the employee had been unfairly demoted and ordered the employer to offer her the same level 13, or an equivalent or higher, alternative position. Subsequently, the employer launched an application in the Labour Court before Van Niekerk J to review and set aside the award. The Labour Court concluded that the matter turned upon the correct interpretation of the collective agreement, and held that, properly construed, the employer is required to do no more than place the employee in another position at the level, or one equivalent to, or higher than, that which she occupied at the time of her appointment – ie, that of a customer service agent. Therefore, the employee had no right to remain engaged at level 13 after her dismissal from the office of full-time union representative, and her placement did not, therefore, constitute a demotion as it was no more than a reversion to the *status quo*. The flawed reasoning of the commissioner caused the application for review to set aside the arbitration award to succeed.

On appeal, it was reiterated that the commissioner was not required to interpret the collective agreement as is well within the CCMA's jurisdiction, but rather to arbitrate a dispute concerning an alleged unfair labour practice and, in the course of doing so, interpret the agreement. This is an important distinction because the commissioner's jurisdiction to grant the employee relief was dependent on his finding of unfair demotion, as no relief could be granted if she had been wrongly or unfairly refused an equivalent or higher post than that she occupied prior to becoming a full-time union representative. The *Nxele* case is binding concerning what constitutes a demotion; however, *in casu*, the facts did not involve the demotion of an employee *qua* employee. Rather, the situation in which she found herself was caused by her union expelling her and, therefore, removing her from her position as a full-time union representative, which was a union position and not a position within the employer. Therefore, the interpretation by the

Labour Court was the correct interpretation and the appeal was dismissed.

Review in terms of section 145 of the Labour Relations Act

The applicant union on behalf of the employee members lodged an appeal against the outcome of the disciplinary enquiry in terms of which the employees had been dismissed in *South African Municipal Workers' Union obo Cindi & another v South African Local Government Bargaining Council & others* (2017) 38 *ILJ* 472 (LC). According to the arbitrator, his task was, among other things, to determine whether the employer's conduct constituted an unfair labour practice when it took a decision to stop paying salaries, pending the outcome of an internal appeal. The applicant union contested that the appeal stayed the operation of the dismissal imposed following a disciplinary enquiry, by referring to of Rule 49(1) of the Uniform Rules of the High Court which provides that an appeal stays the execution or operation of an order until the appeal has been concluded (para [9]). The arbitrator found this to be an incorrect interpretation of the rules and denied the application. It is against this ruling that the applicant union launched a review based on error. Notwithstanding that the arbitrator's finding was labelled an '*in limine* Ruling', it remained an arbitration award issued pursuant to arbitration proceedings. The nature of the dispute that served before the arbitrator was an unfair labour practice as contemplated by section 186(2) of the Labour Relations Act.

On review, Voyi AJ held that *Nchabeleng v University of Venda & others* (2003) 24 *ILJ* 585 (LC) (*Nchabeleng*), where suspension of an order of court due to appeal applications was clarified, applied: the rules applicable in other courts do not necessarily apply in the industrial relations environment (*Leburu v Voorsitter, Nasionale Vervoerkommissie* 1983 (4) SA 89 (W)). A valid lawful dismissal does not include any right to an appeal. A 'right' to appeal flows solely from the practice, endorsed in the LRA Code of Good Conduct: Dismissals, as a ready means by which a procedurally fair dismissal may be proven. The provision of an appeal is confined to the arena of unfairness (*Nchabeleng* (para [23]).

Also considered by Voyi AJ *in casu,* was *Booysen v National Union of Metalworkers of South Africa* [2014] ZALCJHB, where the Labour Appeal Court held that if an employee is lawfully, albeit unfairly, dismissed, the employment relationship is termi-

nated and '[u]nlike in legal proceedings where an appeal suspends the operation of a judgment, no such doctrine of suspended operation is applicable to a dismissal by an employer' (para [19]). Therefore, there is no right to payment of salaries pending an appeal application in the employment realm. The review application was dismissed.

Collective bargaining

Whitcher J presided over *Popcru & another v Department of Correctional Services & another* (2017) 38 *ILJ* 964 (LC). She was required to determine what the outcome may be where an employer fails to respond to its employee's application for temporary incapacity leave within 30 working days, as prescribed by the employer's Policy and Procedure on Incapacity Leave and Ill-Health Retirement Policy (the PILIR). The Labour Court found that it does not translate into entitlement to such leave and dismissed the application for review for the following reasons.

The employment policy provided that if an employee had exhausted his or her normal sick leave, the employer may, at its discretion, grant temporary incapacity leave (TIL). This policy was also made a ministerial determination as envisaged in section 3(3)*(c)* of the Public Service Act, 1994. The Labour Court referred to the *dictum* of Cele J in *Public Service Association of South Africa & another v PSCBC, Gouvea & others* [2013] ZALCD 3 (para [20]), where he held that where an application for temporary incapacity leave is declined outside the 30 day investigation period, any deduction from an employee's salary for the period (outside the 30-day period) during which he or she was awaiting a decision from the employer, would offend the prohibition against retrospectivity. Cele J stated, 'the consequence of a retrospective effect is that it amounts to an unreasonable and arbitrary exercise of a discretion with unfair consequences to an employee' (para [24]). This has been taken to mean that 'employees cannot be subjected to leave without pay/monthly deductions from their salary (in order to recover salary paid, where an application for TIL/IHR is declined for a period they have been off work sick) or stoppage of salary, unless the application is declined within 30 days or unless they have been given a date to return for work and have failed to do so.' (See *Bezuidenhout / Department of Health: Eastern Cape* (2014) 23 PSCBC 4.2.2, unreported.) An employee applying for TIL has

not yet been granted the leave. A late determination of an employee's application for additional leave, and a subsequent instruction to pay back money to which the employee was not entitled, do not result in a decision that retrospectively deprives the employee of a right to the payment in question. An employee seeking additional sick leave in terms of the PILIR has conditionally been paid a salary while his or her application for additional leave is being considered. This consideration should be finalised within 30 days. However, if the period the employer takes to decide on whether to grant the application exceeds the 30 days as expressed in the PILIR, it is not clear how the conditionality of payments to an employee, subject to a medical assessment, hardens into an entitlement after the 30-day investigation period has lapsed. If the underlying medical condition which prompted an employee to seek additional sick leave is assessed and found not to have warranted such leave, this fact must determine what happens to any payments that the employee received while applying, and not the employer's delay in attending to the application.

LAW OF LEASE

PHILIP STOOP*

LEGISLATION

There was no new legislation affecting this area of the law during the period under review.

RENTAL HOUSING AMENDMENT ACT 35 OF 2014

The commencement date for the Rental Housing Amendment Act 35 of 2014 (GN 876 *GG* 38184 of 5 November 2014) has not yet been proclaimed.

CASE LAW

LEGAL POSITION OF THE LESSEE

Extension of lease

Mokone v Tassos Properties CC & another 2017 (5) SA 456 (CC), 2017 (10) BCLR 1261, dealt in the main with issues related to the law of lease. Mokone, the appellant tenant, had leased premises from the respondent landlord, Tassos Properties CC. The written lease agreement entered into by the parties contained a pre-emption clause which secured for Mokone a right of first refusal if Tassos Properties CC wished to sell the leased property. In terms of the provision, if the right of pre-emption were exercised, the purchase price would be open to negotiation. The initial lease was entered into for one year. After expiry of the term, the parties entered into an oral agreement on the same terms as the written lease. When another year had passed, the parties agreed to a further extension of the lease for eight years. This extension was effected by means of an endorsement on the face of the first page of the original written lease agreement which read: 'Extend till 31/5/2014 monthly rental R5 500'. However, during this extended period, Tassos Properties CC entered into a deed of sale with a third party, the second respondent, and

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transfer took place. After becoming aware of the sale, Mokone notified Tassos in writing that she wished to exercise her right of pre-emption. She tendered the same amount as the purchase price at which Tassos had sold the leased premises to the third party. Tassos Properties CC declined Mokone's offer, indicating that the right of pre-emption was part of the initial lease, but did not form part of the renewed lease. Mokone proceeded to initiate action in the High Court against Tassos Properties CC and the third party, seeking to set aside the sale and transfer of the leased premises, and an order compelling the sale of property to her, or in the alternative, an order for the payment of damages for breach of contract. The question the High Court considered in *Mokone v Tassos Properties CC & another* [2015] ZAGPJHC 322 (unreported case no 12229/2012) (25 November 2015) available at *http://www.saflii.org/*) was whether the right of pre-emption had been extended along with the lease. The High Court, after applying the common-law principles, held that the right of pre-emption was collateral to the relationship between the landlord and the tenant. The court noted that terms that are collateral to, and independent of, the relationship are not renewed when a lease is renewed, unless it is clear that the parties intended otherwise (*Mokone v Tassos Properties* above para [15]).

On appeal, the Constitutional Court considered the effect of the common-law rule regarding collateral terms in contracts. The court reiterated that the common-law rule had the effect that when parties agree to extend a lease, they intend to extend only terms incidental to the lease relationship, and not also those collateral to it. The Constitutional Court disagreed with the High Court that this rule should be applied in the matter under consideration, and concluded that development of the common-law rule was required.

The highest court, with reference to relevant case law, pointed out that the common-law rule, which is followed in South Africa and Zimbabwe, is based on English law (*Levy v Banket Holdings (Pvt) Ltd* 1956 (3) SA 558 (FC) 563B-C). However, the rule coincides with the Roman-Dutch position as laid down by Pothier (paras [20]-[24]). Under both systems, it is clear that an option and a right of pre-emption are deemed not to be part of the terms of an extended lease, unless from the circumstances it is clear that this is the case (para [25]). Therefore, the words in terms of which an extension has been effected must be interpreted (ibid).

The court cautioned against generalisations. One cannot simply assume that the parties did not intend to include collateral

terms in an extended lease agreement. Therefore, a court must consider the intention of the parties based on the experience of lay people and not lawyers in the know (para [26]). The court referred in its *ratio* to *Sherwood v Tucker* [1924] 2 Ch 440, 443-4. In *Sherwood* the trial judge was of the view that the parties in the case, as lay persons who had extended a lease without the assistance of lawyers, must have intended to extend the contents of the entire agreement. The highest court distinguished the *Sherwood* case from the matter under scrutiny, noting that in *Sherwood* the court had held that that words should be taken as they stand, and construed without speculation as to the probable intention of the parties. However, in *Sherwood* (above 443-4), the court was required to decide whether the words had the effect of extending both the lease and the option or right of pre-emption (paras [26] [27]).

In respect of the distinction between collateral and incidental terms, the Constitutional Court agreed with the approach followed in *Sherwood*. If a lease is extended by lay persons by means of a written endorsement stating 'we agree' on the original written lease, in the court's view, the parties intended to extend all of the terms of the written lease. The court, failing to heed the warning against generalisation, made a broad-stroke finding that ordinary lay people would not be able to draw a distinction between terms that are collateral to and independent of the lessor and lessee relationship, and those that are not (para [28]).

The court referred to *Levy v Banket Holdings (Pty) Ltd* (above, 564F), in which the opposite was held. In *Levy*, the court held that if a lease agreement covers aspects that are not incidental to the landlord and tenant relationship, and the parties simply agree to renew the lease, a reasonable person would understand that the lease and nothing more was to be renewed. The Constitutional Court held that this approach is unreasonable, because it imputes the understanding of lawyers to non-lawyers. The Constitutional Court, therefore, held that it is a reasonable deduction that, when non-lawyers write 'extended' across the face of a written agreement, they mean to extend not only the lease, but everything contained in the document. It may, however, because the matter turns on interpretation, be apparent from the nature of certain (once-off) terms in the document that certain terms were not meant to be extended (paras [30]-[32]). An example of a term that would not have been intended to endure beyond the initial period of the lease, mentioned by the court, would be an option to

purchase the leased premises at a specified price. This is because the market-value of the premises may have changed, and it would be prejudicial to seek to hold the landlord to the specified price (paras [33] [34]). The Constitutional Court, however, remarked, and importantly so, that the results of a dispute, as in this case, are achieved through interpretation and not through predetermined rules (para [34]).

As to the proper approach to interpretation, the Constitutional Court held (para [29]) that words must be read in the context of the document as a whole, and in light of all relevant circumstances (*Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para [24]). The court indicated that the use of language by non-lawyers who are not deemed to have knowledge of the distinction between collateral and incidental terms, forms part of the 'relevant circumstances', because lay people make extensions, as in this case, without involving lawyers (paras [29] [30]).

The Constitutional Court noted that as it stands, the common-law rule favours lessors, and that its application is less about interpretation, and more about laying down a categorical substantive legal rule (para [35]).The Constitutional Court proceeded to find that where parties extend a lease without stipulating anything more, generally, the intention is that all the terms in the lease are extended. However, the nature of certain terms may render it apparent that the parties could not have contemplated extending them – either at all, or in the proposed manner. The real issue, therefore, revolves around the meaning and interpretation of the words used to extend a lease. If no readily ascertainable meaning can be attached to the words, the ordinary rules of interpretation must be applied. This ought to be done without denoting knowledge arising from rules rather than from observation (para [36]). The court referred to the dissenting judgment in *Shenker Brothers v Bester* 1952 (3) SA 664 (A), in which Van den Heever JA had held (677B-C):

> In the absence of [an] express stipulation to the contrary in the renewal of a lease, its collateral pacts are also deemed to have been renewed. If this is so in the case of tacit relocation, it must also apply to cases of express renewal (*Dig.* 19.2.13.11) (para [38]).

On that basis, the Constitutional Court held that the party against whom the pre-emptive right operates oppressively should state, expressly or tacitly, at the time of renewal of the lease that the term will not be extended (para [37]). As the findings of

Van den Heever JA in *Shenker Brothers v Bester* (above) had been rejected in *Levy v Banket Holdings (Pty) Ltd* (above 564B), on the basis that this notion was not supported by the authority on which the applicant sought to rely, the Constitutional Court referred to foreign law, and in particular the American case of *Tubbs v Hendrickson* 88 Misc 2d 917 (NY Misc 1976). In *Tubbs* the court was also required to decide whether a pre-emptive right to purchase a leased property endured a renewal (para [38]). The court (919) concluded that the position as reaffirmed by the Court of Appeals was as follows:

> [A] holdover tenancy impliedly continues on the same terms and subject to *the same covenants* as those contained in the original instrument . . . The logic behind this rule is that since the parties have continued in the relationship of [lessor] and tenant it is implied that they intended no change in the conditions of that relationship. Of course, the parties are free to prove a changed condition of affairs . . . (para [38] (emphasis in the original).

The Constitutional Court noted that, in a situation like the one before it where a party merely stated on the first page of the agreement: 'Extend till 31/5/2014 monthly rental R5 500', this indicates the duration of the extension and the increased rental. The common-law rule is contrary to the course the Constitutional Court wished to follow (para [40]). The court noted that the common law must be developed only if it is deficient in promoting the objectives of section 39(2) of the Constitution of the Republic of South Africa, 1996. The court observed that if the deficiency in the common law is not found to be at odds with the Bill of Rights, the common law cannot be developed in terms of section 39(2) of the Constitution. However, in such an event, the High Court, Supreme Court of Appeal, and Constitutional Court all have inherent jurisdiction to develop the common law to meet the needs of a changing society (paras [40] [41]). The court strengthened this finding by stating that it would be absurd if section 39(2) of the Constitution were to be read as having removed the power of the courts to develop the common law in instances where the shortcomings do not involve the Constitution. The court indicated further that for centuries before the advent of constitutional democracy, courts were permitted to develop the law, and that section 173 of the Constitution expressly mandates the Constitutional Court, the Supreme Court of Appeal, and the High Court to develop the common law, taking into account the interests of justice.

For the sake of completeness, the Constitutional Court also considered whether a pre-emptive right must comply with the formalities set out in the Alienation of Land Act 71 of 1969. The majority held this to be unnecessary (paras [44]-[63]). However, Froneman J, in a partially dissenting judgment, disagreed (paras [80]-[88]).

The decision of the Constitutional Court can be criticised on various grounds. The court, in the main, based its decision to develop the common-law rule on two related reasons: that it is unreasonable to apply the common-law rule as it imposes the understanding of lawyers on non-lawyers; and that the rule, as it stands, favours lessors. It appears that the court assumed the need for a general pro-tenant approach. The finding that lay persons lack an understanding of all the legal implications of renewal of a lease was premised on the facts before the court in the case under discussion. However, the court failed to consider or to assess other possible circumstances which may present themselves, and whether the finding regarding lay persons and non-lawyers holds true in respect of all leases. Nevertheless, the Constitutional Court's finding that the outcome rested on interpretation cannot be faulted. The common-law rule clearly provides that collateral terms will not be extended unless the parties intended otherwise. The court concluded that, when non-lawyers write 'extended' across the face of a written agreement, they intend to extend not only the lease, but everything contained in the document. Despite this statement, which could have signalled the end of the matter, and the court's apparent focus on the intention of the parties, it still did not conclude that, based on the written endorsement on the first page of the original lease, the parties intended to extend all the terms of the original lease, including the collateral terms. Instead, it continued to consider the development of the common-law rule, and ultimately held that the common-law rule was deficient. The court did not specifically mention these deficiencies. Instead, it simply stated that it is unreasonable to impose the understanding of lawyers on non-lawyers, and that one should not distinguish between collateral and incidental terms in a contract of lease. The Rental Housing Act 50 of 1999 was promulgated principally to set out the rights and duties of landlords and tenants coherently, to balance the rights of tenants and landlords, to protect both parties against unfair practices and exploitation, and to introduce mechanisms through which conflicts between landlords and tenants could be

resolved expeditiously and at minimum cost. The Rental Housing Act has already removed antiquated aspects of the common-law system from the landlord-tenant relationship and replaced them with a matrix better suited to modern-day residential leases. It is my view that, save in the event of identified instances of constitutional deficiencies, the legislator should address further non-constitutional deficiencies in the common law (see, for example, the discussion in Christopher Wm Sullivan 'Forgotten lessons from the common law, the Uniform Residential Landlord and Tenant Act, and the holdover tenant' (2006) 84 *Washington Law Review* 1287-8). In order to remove uncertainty, the legislator could include, under section 5(2) of the Rental Housing Act, which regulates information that must be included in a lease, a provision that requires the parties to a lease to identify clearly the provisions of the original lease which form part of the extended lease. Alternatively, the legislator could consider including a provision in residential rental legislation stating that options or pre-emptive rights in lease agreements cannot exist in perpetuity, and should therefore be explicitly renewed after the expiry of the original lease agreement, or that parties should agree on a contractual deadline for the exercise of an option or pre-emptive right in a lease. In respect of the Rental Housing Act, it is highly unlikely that non-lawyers will be familiar with even the standard terms which are implicit in all residential lease agreements.

Furthermore, the court's reliance on foreign law – and more specifically on the American case of *Tubbs v Hendrickson* (above) – can be criticised on several grounds. First, the facts in that case differed from the facts before the court. The American case dealt with 'holding over tenancy' where a lease agreement expires, but the tenant remains in possession of the property and the landlord continues accepting rental. Furthermore, in the American case the parties had a long-standing relationship as lessor and lessee spanning some 40 years. In the American case, the court applied section 232-c of the New York State Real Property Law, which regulates the effect of acceptance of rent on holding over by a tenant after expiry of a lease agreement. This provision determines that where a tenant holds over after the expiry of a lease, the fact that he or she is permitted to remain on the leased premises after expiry of the lease does not in itself give the landlord the option of holding the tenant to a new term. In the event of holding over by the tenant, a landlord may evict the tenant, or if the landlord accepts rental for any period after the

expiry of the lease, the tenancy created by the acceptance of rental will be on a month-to-month basis commencing on the first day after the expiry of the lease. The American case can, therefore, hardly be regarded as authority for the court's views regarding extension of a right of pre-emption upon extension of a lease.

Any dispute which may arise concerning the matter of eliminating the distinction between collateral and incidental terms, and the fact that collateral terms would, following this decision, automatically endure beyond the initial period of the lease upon extension, could conceivably be resolved through proper interpretation of the terms by a court. However, the court held that if a pre-emptive right (or option) functions oppressively against a landlord, he or she should state at the time of renewal, expressly or tacitly, that the term will not be extended without considering the prejudice that landlord may suffer.

A related concern is that, although the court held that the common-law rule is not absolute and leaves room for consideration of the real intention of the parties, the court's focus rested on the 'deficiencies' in the common-law rule. The court decided on removal of the rule without considering the consequences.

The first consequence that the court failed to consider is that the *huur gaat voor koop* rule – which provides that lease enjoys preference over sale – functions on the basis of the distinction between collateral and incidental terms in a lease agreement. The removal of the distinction between collateral and incidental terms, therefore, may impact negatively on the application of the *huur gaat voor koop* rule. In terms of the this rule, incidental rights are transferred to the successive owner of a leased property, but collateral rights in the lease agreement which are unconnected to the lease will not be transferred to a successive owner of leased property (*Mignoel Properties (Pty) Ltd v Kneebone* 1989 (4) SA 1042 (A) 1050–1; *Spearhead Property Holdings Ltd v E and D Motors (Pty) Ltd* 2010 (2) SA 1 (SCA), [2009] 4 All SA 417 paras [48]–[52]). Therefore, the new owner becomes a party to the lease agreement in the strict sense (see Graham Glover *Kerr's Law of Sale and Lease* 4ed (2014) 526). If no distinction is to be drawn between incidental and collateral terms in a lease agreement, a third-party purchaser of leased property may be prejudiced. He or she will then be bound to all of the terms of the lease agreement, and not only to the terms in the strict sense (ie, the incidental terms). The Constitutional Court, therefore, unintention-

ally and without realising it, extended the application of the *huur gaat voor koop* rule beyond the scope of the law of lease, to terms which do not relate to the lease at all and which may even be onerous to a third-party purchaser. The *huur gaat voor koop* rule – an equitable doctrine – was adopted to protect the tenure of lessees when the leased property is alienated by transferring rights and obligations that flow from the lease, by operation of law, to the purchaser. The rule is, therefore, not intended to enable the transfer of rights that flow from a pre-emptive right or option to a purchaser. The rights emanating from pre-emptive rights or options are personal rights granted to the grantee of the rights. The *huur gaat voor koop* rule is only intended to protect security of tenure in the context of the lessee's occupation, nothing more (Glover above 529). An extended application of the *huur gaat voor koop* rule may eventually mean that, before the transfer of the leased property, purchasers of leased property may require the termination of an existing lease agreement and/or the eviction of lessees from the leased property, in order to avoid the potential impact of an extended *huur gaat voor koop* rule.

Secondly, in order to avoid the consequences of the Constitutional Court's judgment, landlords would be wise not to extend a lease, or to be extremely cautious when doing so. Instead of renewing a lease, landlords could rather enter into a new lease agreement with their tenants after the period of a lease agreement has lapsed. In residential leases, it is highly likely that the tenant will bear the cost of every new contract entered into after the expiry of the initial contract. Furthermore, parties to a lease will probably, in future, avoid, or be extremely careful when making, verbal representations with regard to options or pre-emptive rights relating to immovable property, as the verbal representations may be construed as the granting of an option or pre-emptive right. In order to avoid being bound by verbal representations, it is advisable for the parties to a lease to reduce any agreement, extension, or variation of the lease, to writing. Moreover, in the interest of certainty and to circumvent the consequences of the judgment of the Constitutional Court, lease agreements should expressly state when a collateral term – such as an option or pre-emptive right – expires, or that collateral terms may not be extended unless the parties expressly agree to the extension in writing. Failing this, landlords could, in future, refuse to include any collateral rights in lease agreements.

As mentioned, it is unclear from the *ratio decidendi* whether the approach adopted by the Constitutional Court would apply to all types of lease, including a commercial lease entered into by a large corporation. The circumstances in respect of the knowledge attributable to lay persons and non-lawyers may well differ from the facts that the court considered. Can the proposed model be applied equally in respect of all leases? Through its generalisations, the court created the impression that parties to a lease agreement are generally lay persons who are ignorant of the law, and who need to be protected. The court did not take into consideration that the law of lease, apart from residential leases, also applies to commercial leases, movable property leases, and other non-residential leases concluded by parties who need not necessarily be regarded as 'lay' persons. It is incorrect simply to assume that all leases are entered into by lay persons, and that as a result the court should intervene on their behalf.

A final remark is that the Constitutional Court appears to have blurred the characterisation of contracts of lease. Terms unrelated to a lease may, as a result of the judgment, continue to exist beyond the termination date of the lease as agreed upon or their intended duration, either through extension of the lease agreement or through the application of the *huur gaat voor koop* rule. This is cemented by Froneman J, in his partially dissenting judgment, where he agreed with the majority decision regarding the aspect of extension of a pre-emptive right. He held that the question of whether collateral rights, such as a pre-emptive right, are extended with a renewal of a lease, should be answered through interpretation 'without baggage' (para [78]). He proceeded to indicate that 'to start by calling it a lease agreement gives it baggage . . . [which] comes with the name, or characterisation. Once one calls it a lease then, surely, all other provisions superfluous to the necessaries of a lease are collateral to the lease, not incidents of it? Yes, put that way it does' (para [78]). This is unfortunately an over-simplification of the differentiation between collateral and incidental terms. The court ought to have applied the clear guidelines the Supreme Court of Appeal laid down in *Masstores (Pty) Ltd v Pick 'n Pay Retailers (Pty) Ltd & another* 2016 (2) SA 586 (SCA), [2016] 2 All SA 351. In *Masstores (Pty) Ltd*, the court indicated how one should go about determining whether or not rights are collateral. The court stated that a right, integral to the right of occupancy, cannot be regarded as a collateral right (para [24]; see too *Spearhead* above para [52];

Shalala & another v Gelb 1950 (1) SA 851 (C) 865). One should, therefore, determine whether a right is integral to the right of occupancy, which is a factual question and not simply one of characterisation. Additionally, to apply the *huur gaat voor koop* rule, which is an equitable rule, properly, one has no choice but to distinguish between collateral and incidental terms in a lease agreement (see PN Stoop 'The Law of Lease' 2009 *ASSAL* 873-5 for a discussion of *Spearhead*; cf *Genna-Wae Properties (Pty) Ltd v Medio-Tronics (Natal) (Pty) Ltd* [1995] 2 All SA 410 (A), 1995 (2) SA 926, 939, in which the court confirmed the *ratio decidendi* of the court in *Mignoel Properties* above).

Termination of a Lease

Cancellation

In *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* 2017 (4) SA 243 (GJ), the agreement between the lessee, Southern Sun, and Leisure Holdings, the lessor, contained a cancellation clause. The cancellation clause provided that if the lessee failed to pay the rental monthly as it became due and payable, the lessor could cancel the agreement, evict it, and repossess the property. After the lessee's bank, due to a technical error, failed for a second time to make a month's rental payment when it became due and payable, the lessor cancelled the lease and applied for the eviction of the lessee (paras [6]-[17]). The question was whether the cancellation clause was enforceable. Van Oosten J refused to enforce the cancellation clause on the basis that its implementation would be contrary to the constitutional value of fairness, implicit in the concept of *ubuntu*. The judge referred to *Juglal NO & another v Shoprite Checkers (Pty) Ltd t/a OK Franchise Division* 2004 (5) SA 248 (SCA) paragraph [12], in which Heher JA held:

> [A] creditor who implements the contract in a manner which is unconscionable, illegal or immoral will find that a court refuses to give effect to his conduct, but the contract itself will stand.

This judgment was overturned in December 2017 by the Supreme Court of Appeal in *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* 2018 (2) SA 314 (SCA). For a further discussion of the High Court decision, see the chapter 'Contract: General Principles'.

In *Monyetla Property Holdings (Pty) Ltd v IMM Graduate School of Marketing (Pty) Ltd & another* 2017 (2) SA 42 (SCA), a

lease agreement was entered into between the appellant (lessor) and the first respondent (lessee). The second respondent bound himself to the lessor as surety and co-principal debtor for the obligations of the lessee. On 6 March 2000, after the lessee had breached the agreement, the lessor cancelled the lease. The lessee, however, disputed the cancellation and remained in possession of the leased premises. On 16 March 2012, the lessor claimed damages resulting from the lessee's breach of the lease and the cancellation of the lease, from the respondents. The respondents raised a special plea arguing that the claim had prescribed. The High Court agreed. On appeal, the Supreme Court of Appeal (Leach JA) held that the claim had arisen on the date of the cancellation of the agreement, and not when the lessee vacated the leased premises. The court explained that the lessor's loss was suffered irrespective of whether the lessee vacated or remained in occupation, and it constituted a debt 'immediately claimable' (paras [17] [18]). Therefore, the summons had been served more than three years after the cancellation of the lease. That meant that any claim for damages flowing from the breach has prescribed as envisaged in section 11 of the Prescription Act 68 of 1969 (paras [19] [22]). (For a detailed discussion of this judgment see the chapter 'Contract: General Principles'.)

Reasonable notice to vacate

In *Airports Company South Africa Limited v Airports Bookshops (Pty) Limited t/a Exclusive Books* 2017 (3) SA 128 (SCA), [2016] 4 All SA 665, the section of the case dealing with the reasonableness of a notice to vacate premises is relevant. (For a further discussion of this case see R Sharrock 'General Principles of Contract' 2016 *ASSAL* 443-5 and cf PN Stoop 'The Law of Lease' 2016 *ASSAL* 815-17.) The crux of the case was penned by Lewis JA on behalf of the majority. The majority held that a lease agreement becomes terminable on reasonable notice. What is 'reasonable' depends on the interpretation of the extension agreement (para [21]). The majority concluded, on the facts, that the parties had intended that the respondent would remain in occupation, on a month-to-month basis, until a new lessee was awarded a tender in terms of a lawful tender process (para [26]). Consequently, the appeal was dismissed. Glover (above 370–1) states that in the case of urban property, where parties to a lease leave the duration of their lease undefined, the law requires

reasonable notice to be given by one party to the other. He also indicates that what constitutes reasonable notice is uncertain. Therefore, determining what is reasonable is left to custom, or to the discretion of the judge, who must decide the matter according to the circumstances of each case (see *Tiopazi v Bulawayo Municipality* 1932 AD 317 326–7).

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MINING LAW

HANRI MOSTERT*

LEGISLATION

There were no amendments to the Mineral and Petroleum Resources Development Act 28 of 2002 (the MPRDA) in 2017. Other relevant developments are discussed below. They provide safety guidelines, including regulations to prevent fires at mines, in respect of the installation and modification of lifts and chairlifts, and for construction work and operating of machinery. Regulations were also introduced to regulate air pollution and waste resulting from mining, and regulations for environmental impact assessment were introduced. Further regulatory developments in 2017 comprise revisions to the provisions dealing with black economic empowerment.

SAFETY ISSUES[1]

Prevention of fires at mines

The Guideline for the Compilation of a Mandatory Code of Practice for Prevention of Fires at Mines DMR 16/3/2/4-B3 (the Guideline) promulgated in Government Notice R1199 in *GG* 40313 30 September 2016), came into effect on 28 February 2017.

The Guideline must be read together with the provisions in the Mine Health and Safety Act 29 of 1996 (the MHSA). The MHSA provides for two codes of practice. First, the employer *may* prepare a code of practice on matters affecting the health and safety of employees and other persons affected by activities at the mine (the MHSA s 9(1)). Secondly, an employer *must* prepare

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[1] This section was co-authored with Godknows Mudimu and Louie van Schalkwyk.

and implement a code of conduct dealing with matters affecting the health and safety of employees and other persons by activities at the mine, if required to do so by the Chief Inspector of Mines (the MHSA s 9 (2)). The MHSA lists the issuing of guidelines as one of the functions of the chief inspector of mines (the MHSA s 49(6)). This is the basis of the Guideline.

The Guideline aims to assist employers in compiling a code of practice for the prevention of fires at mines. The purpose is to remove or to minimise the likelihood of combustion by targeting three causes of fire: (i) a fuel source; (ii) an ignition or heat; and (iii) oxygen. These must be the focus in the identification of hazards. The Guideline must be implemented in conjunction with regulations 5.1; 8.9; 9.1 and 16.1, which deal with prevention of fires (Mine Health and Safety Regulations GN R93 in *GG* 17725 of 15 January 1997). Failure by an employer to prepare and implement this code of practice is an offence under the MHSA.

Lifts and chairlifts

In August 2017, the regulations to the MHSA were amended by the addition of two forms relating to lifts and chairlifts (GN R893 *GG* 41065 of 25 August 2017 *Reg Gaz* 10751). These forms must be read together with regulations 8.11 and 8.12. The forms are prescribed notices to be sent to the principal inspector of mines if a lift or chairlift is to be installed, modified, or recommissioned at a mine.

Construction work

Section 43 of the Occupational Health and Safety Act 85 of 1993 (the OHSA) empowers the Minister of Labour to make regulations after consulting the Advisory Council for Occupational Health and Safety. However, section 1(3) of the OHSA stipulates that the Act, save for the schedules thereto, does not apply to a 'mine' or 'mining area' or 'works' as defined in the Minerals Act 50 of 1991, which was repealed by the MPRDA. The MHSA excludes the OHSA from application within the mining sector to the extent that the MHSA regulates the issue in question (the MHSA s 103). The regulations apply to all persons involved in construction work (regulation 2).

Driven machinery

In June 2015, regulations were promulgated under the OHSA to protect employees against the dangers associated with the

use of driven machinery (GN R540 *GG* 38905 of 24 June 2015, *Reg Gaz* 10454). In March 2017, guidelines were issued to explain the content of the regulations in simple language (GN R288 *GG* 40734 of 31 March 2017, *Reg Gaz* 10703). The guidelines provide guidance, and emphasise the importance of self-regulation. They apply to the design, manufacture, operation, repair, and commissioning of machinery, and aim to ensure that all driven machines are safe for use.

Environmental Matters

Air Polution[2]

The National Environmental Management: Air Quality Act 39 of 2004 empowers the Minister of Environmental Affairs to declare any substances contributing to air pollution a priority air pollutant. In July 2017, various greenhouse gases were declared priority air pollutants (GN 710 *GG* 40996 of 21 July 2017). These greenhouse gases include carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulphur hexafluoride.

In line with the requirement of section 29(4) of the National Environmental Management: Air Quality Act, Chapter 2 of the declaration requires certain persons to submit pollution prevention plans. Any person carrying out production processes listed under Annexure A must monitor, evaluate, and report on the implementation of an approved pollution prevention plan. The processes listed under Annexure A include coal mining; production, refining or processing of crude oil and natural gas; iron and steel production; and cement production.

The Minister of Environmental Affairs also introduced a single national reporting system for the transparent reporting of greenhouse gas emissions (GN 275 *GG* 40762 of 3 April 2017). The regulations were issued in accordance with the provisions of section 53*(a*A*)*, *(o)* and *(p),* read with section 12, of the National Environmental Management: Air Quality Act. The emissions listed in Annexure 1 to the regulations must be reported to the competent authority. The regulations require specifically classified persons to register all facilities where activities exceed the thresholds listed in Annexure A.

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[2] This section co-authored with Godknows Mudimu, assisted by Lindokuhle Ntuli.

Regulation 5 deals with the registration of data service providers on the National Atmospheric Emission Inventory System by means of a prescribed form. The registration of data service providers must be completed either within 30 days of the commencement of these regulations, or within 30 days of undertaking the activity. Regulation 6 requires that the data provider must notify the National Inventory Unit in writing, of any changes in the registration details or ownership.

Regulation 7 deals with the reporting requirements for certain listed categories of data providers. Category A data providers must submit the greenhouse data emissions and activitity data as provided under the Technical Guidelines for Monitoring, Reporting and Verification of Greenhouse Gas Emmissions. This must be done for all relevant greenhouse gases and must be submitted to the Intergovernmental Panel on Climate Change Emission Sources specified in Annexure 1. Similarly, a category B data provider must submit emissions and activity data collected, relating to relevant activity when requested to do so by the National Inventory.

In both categories, the registration must be completed on the National Atmospheric Emission Inventory System (the NAEIS). If the NAEIS is unable to meet the registration requirements, the reporting must be done by submitting information in Annexure 3, in electronic format.

Regulations 10 and 11 deal with the method, verification, and validation of information submitted. A competent authority must review a submission made by a data provider in accordance with Technical Guidelines for Monitoring, Reporting, Verification and Validation of Greenhouse Gas Emissions by Industry for the method, verification, and validation of greenhouse gas emissions by the industry. The regulations further include provisions on the handling of information, keeping of records, and the publication of data and information.

Lastly, the regulations create offences for certain violations. These include: providing false information; failure to comply with regulations relating to the registration as a data provider; failure to notify the competent authority of changes to registration details; and failure to comply with the reporting procedures, including time limits. Any person who is convicted of an offence under regulation 16 can be fined up to R5 million or imprisoment for a period not exceeding five years for first offenders, and R10 million or imprisoned for a period not exceeding ten years for

second and subsequent offenders. In some cases, the offender can be both fined and imprisoned.

Waste[3]

Norms and standards for the sorting, shredding, grinding, crushing, screening, chipping, or baling of general waste (Norms and Standards) were set by the Minister of Environmental Affairs as a schedule to the National Environmental Management Waste Act 59 of 2008 (GN 1093 *GG* 41175 of 11 October 2017). The purpose of the Norms and Standards is to provide a uniform national approach for the management of waste facilities that sort or process general waste. These terms are defined under 'definitions' in the Norms and Standards. The Norms and Standards only apply to waste facilities with a minimum operational area of 1000m^2. A waste facility with an operational area of less than 1000m^2 need only comply with section 4(4) of the Norms and Standards.

Chapter 2 of the Norms and Standards sets out the requirements for facilities that carry out sorting or processing activities. The requirements include registration of facilities and the construction and design of a waste facility. Waste facilities carrying out the applicable activities must be registered within the specified timeframe. Chapter 2 also sets out considerations to be heeded when deermining the location of a waste facility. Waste facilities must be constructed and developed in accordance with regulations and by-laws relating to construction and development of buildings and structures. Chapter 2 further deals with the management and disposal of waste during construction.

Chapter 3 addresses the management of facilities that carry out the applicable activities. The management aspect of the Norms and Standards deals with access control and notices; managing the operational area of a waste facility, emergency preparedness plans, monitoring and inspection, auditing facilities, the competent authorities for auditing and inspections, and the requirements for ceasing operations at a waste facility. Regarding access control, a waste facility must be securely fenced, gated to prevent unauthorised entry, and guarded by security personnel at the entry. A notice board should be placed at the entrance of the facility detailing, among other things, the

[3] This section co-authored with Shamila Mpinga and Louie van Schalkwyk.

type of waste accepted by the facility and emergency contact details. Operational areas must be screened for hazardous waste material. Noise levels and emissions that are likely to cause a nuisance must be kept in check. The facility must adhere to health and safety requirements. Waste facilities regulated by the Norms and Standards must have an emergency preparedness plan that sets out how the facility plans on responding, reacting and preventing negative environmental impacts.

In respect of auditing, Chapter 3 notes that a waste facility must conduct an internal and external audit, followed by written reports. All incidents that occur at the waste facility and that fall within the ambit of section 30 of the National Environmental Management Act 107 of 1998 (the NEMA) must be reported to the competent authority as defined in the Norms and Standards. Chapter 3 also specifies the minimum requirements to be met by an owner who wishes to cease operations at a waste facility.

The Minister of Environmental Affairs also announced several amendments to the list of waste management activities that have, or are likely to have, a detrimental effect on the environment (GN 1094 *GG* 41175 of 11 October 2017). The list of amendments is divided into three categories. Category A deals with waste management activities that require an environmental impact assessment in terms of section 24(5) of the NEMA before commencement. Category B provides that to conduct activities in this category, a person must conduct a scoping and environmental impact assessment reporting process set out in the Environmental Impact Assessment Regulations under section 24(5) of the NEMA. Category C sets out the norms and standards that must be complied with to conduct waste management activities. Each of the three categories focuses on waste storage; recycling waste; waste treatment; disposal of waste; construction, expansion or decommissioning of facilities, associated structures and infrastructure; residue stockpiles; and residue deposits.

Environmental Impact Assessment[4]

The Environmental Impact Assessment Regulations describe the process to be followed when applying for an environmental authorisation. The regulations were first published in 2014 (GN 982 *GG* 3822 of 4 December 2014) and amended in 2017 (GN 326

[4] This section was co-authored with Louie van Schalkwyk and Bernard Kengni.

GG 40772 of 7 April 2017). The amended regulations contain several references to the Minister of Environmental Affairs' authority to gazette protocols or requirements for minimum information in respect of an application (eg, regs 10*(b)*, 16(3)*(a)*, 17*(c)*, 18, 19(3), 19(8), 21(3), 22*(b)*(ii), 23(3) and 23(5); Apps 2, 3 and 6).

To align with practical realities, the amended regulations allow for submission of a combined mine closure plan and financial provision plan for rehabilitation, closure, and post-closure. The amendment deletes provisions relating to the period within which listed activities must commence. While a renewal application is pending, an authorisation will remain valid past its expiry date. In the past, authorisations lapsed on the expiry date.

The amended regulations also contain several transitional arrangements dealing with the implementation of the One Environmental System introduced in 2014. If an environmental authorisation and mining right were obtained before 8 December 2014 and the mining activities commenced after this date, it is assumed that the environmental authorisation and mining right comply with the requirements of the NEMA (reg 54A(1)). Since 8 December 2014, environmental management programmes approved for mining activities are subject to the provisions of the Environmental Impact Assessment Regulations. The first environmental audits for these environmental management programmes must, therefore, be submitted to the competent authority by 7 December 2019, and every five years thereafter.

These regulations should be read with the three Listing Notices, listing activities that impact on the environment and for which environmental authorisation is required. Originally published in 2014, all three notices were amended in 2017 (Amendment of Listing Notice 1: GN 327 *GG* 40772 of 7 April 2017; Amentment of Listing Notice 2: GN 325 *GG* 40772 of 7 April 2017; Amendment of Listing Notice 3: GN 324 *GG* 40772 of 7 April 2017). The amendments have an impact on prospecting, mining, exploration, and production activities. Activities that require a prospecting right, mining permit, or mining right respectively, now include the primary processing of mineral resources. However, they exclude secondary processing activities. Similarly, activities that require an exploration or production right now include the primary processing of petroleum resources, but exclude secondary processing activities (see activities 20–21 in Listing Notice 1, and activities 17–20 in Listing Notice 2).

Empowerment Matters

2017 Mining Charter[5]

On 15 June 2017, then Minister of Mineral Resources, Mosebenzi Zwane, released the Broad-Based Black Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry 2017 (the 2017 Mining Charter) for comment (GN 581 *GG* 40923 of 15 June 2017). The 2017 Mining Charter was a response by the Department of Mineral Resources (the DMR) to the comments received on the 2016 draft Reviewed Broad-Based Black Economic Empowerment Charter for the South African Mining and Mineral Industry (GN 450 *GG* 39933 of 15 April 2016) (the draft 2016 Mining Charter), released by the DMR on 15 April 2016 (see the 2016 *Annual Survey* 1008 ff).

It was expected that, if implemented, the 2017 Mining Charter would replace the 2010 Mining Charter (Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry GN 838 *GG* 33573 of 20 September 2010) (the 2010 Mining Charter). Provisions of the 2017 Mining Charter are compared with the corresponding provisions of the 2010 Mining Charter, to indicate the extent of amendments made.

General comments and changes in definitions

Section 100(2)*(a)* of the MPRDA provides for the creation of a broad-based socio-economic empowerment charter, that has become known as the Mining Charter, to facilitate the empowerment of historically disadvantaged South Africans in the mining industry. One of the reasons for reviewing the Mining Charter is to align the empowerment framework created in terms of section 100(2)*(a)* of the MPRDA with other relevant legislation. The Preamble to the 2017 Mining Charter specifically mentions alignment with the Codes of Good Practice (the DTI codes) in terms of the Broad-Based Black Economic Empowerment Act 53 of 2003 (the B-BBEE Act) and the Employment Equity Act 55 of 1998 (the EEA). The first indication of this change is the name of the Mining Charter. Whereas the title of the 2010 Mining Charter refers to 'broad-based socio-economic empowerment' the 2017 Mining Charter is titled the 'Broad-Based Black Socio-Economic Empowerment Charter'.

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[5] This section was co-authored with Anri Heyns.

New definitions have been introduced in the 2017 Mining Charter to facilitate the alignment with the B-BBEE Act. The only explicit reference to black economic empowerment (BEE) in the 2010 Mining Charter is the definition of 'BEE entity', which is an entity owned by historically disadvantaged South Africans holding at least 25 per cent of the entity's share capital, plus one vote (2010 Mining Charter iii). The 2010 Mining Charter did not make explicit reference to the B-BBEE Act, as is done in the 2017 Mining Charter. The terms 'BEE compliant manufacturing company', 'BEE entrepreneur', 'BEE partner', and 'BEE transaction' are now all defined in the 2017 Mining Charter in the context of broad-based black economic empowerment as defined in the B-BBEE Act. (See Definitions 2017 Mining Charter 1–6.)

A further notable change is the replacement of references to 'historically disadvantaged South African' (HDSA) with 'black person'. The definition of 'black person' corresponds to the definition of black people in the B-BBEE Act, ie, black Africans, coloureds and Indians (2017 Mining Charter 2).

The 2017 Mining Charter has as an explicit purpose to align its provisions with those contained in the Employment Equity Act 55 of 1998 (EEA) (Preamble to the 2017 Mining Charter). Other instruments with which alignment is sought are the social and labour plans to be created by a mining right holder in terms of section 23 of the MPRDA (SLP), the municipal integrated development plan prepared in terms of the Local Government Municipal Systems Act 32 of 2000 (IDP), and the Housing and Living Conditions Standards for the Mining and Minerals Industry developed in terms of section 100(1)*(a)* of the MPRDA.

Special funds or trusts created

The 2010, draft 2016, and 2017 Mining Charters provide for the creation of special funds or trusts. However, each version of the Mining Charter describes a different type of fund.

The 2010 Mining Charter creates a 'social fund' that is defined as 'a trust fund that provides financing for investments targeted at meeting the needs of poor and vulnerable communities as informed by commitments made by companies in terms of their social and labour plans' (2010 Mining Charter v). Interestingly, the 2010 Mining Charter provisions pertaining to mine community development did not refer to this social fund. The 2010 Mining Charter provisions regulating procurement and enterprise development referred to an annual contribution by multinational suppli-

ers of capital goods for the promotion of the socio-economic development of local communities into a 'social development fund' (item 2.2). As 'social development fund' is not defined and the scorecard refers to 'social fund' at procurement and enterprise development, it is assumed that 'social development fund' and 'social fund' are used interchangeably.

Instead of referring to a 'social fund' as was done in the 2010 Mining Charter, the draft 2016 Mining Charter provided for the creation of a 'Ministerial Skills Development Trust Fund' and a 'Social Development Trust' (draft 2016 Mining Charter viii). The Ministerial Skills Development Trust Fund is a trust fund created by the Minister of Mineral Resources with the purpose of developing skills, and is additional to the mandatory skills levy payable by any company. As part of human resource development, a mining company must make investments to the Ministerial Skills Development Trust Fund (ibid).

The 'Social Development Trust' is another fund to be established by the Minister in terms of the draft 2016 Mining Charter, specifically for the socio-economic development of local communities, and for building capacity of black suppliers of goods and services (draft 2016 Mining Charter viii). No mention is made of the social and labour plan, as was the case under the 2010 Mining Charter (see the definition of 'social fund' 2010 Mining Charter v). Contrary to the 2010 Mining Charter, it is explicitly stated that the fund is to be created by the Minister. It appears as if it would have served the same purpose because one per cent of a mining company's annual turnover was to be placed in this fund for socio-economic development of local communities and capacity building of BEE suppliers of goods. This provision, however, is not included as part of the mining community development provisions, but forms part of the provisions pertaining to procurement, supplier, and enterprise development. Therefore, a further contribution towards socio-economic development of mine communities in addition to the one per cent, which is provided for in regard to mine community development, is envisaged. Both of these funds were to be created by the Minister, but the 2016 draft Mining Charter did not include any provisions on how these funds would be regulated or what powers the Minister would have.

As to special funds, the 2017 Mining Charter does not mention the 'social fund/social development fund' as did the 2010 Mining Charter. Neither does it refer to the 'Ministerial Skills Development

Trust Fund' or the 'Social Development Trust' provided for in the draft 2016 Mining Charter (draft 2016 Mining Charter viii). Instead, it appears that, yet again, a new fund is created through the creation of the Mining Transformation and Development Agency (see the definition of 'Mining Transformation and Development Agency' 2017 Mining Charter 5). The definition fails to provide clarity regarding the agency's purpose, or what its mandate will be. It merely states that the agency will be created by the Minister during the transitional period provided for in the Mining Charter.

On the ownership element, from the provisions it can be deduced that the agency will be tasked with creating and managing trusts (2017 Mining Charter 2.1.1.9). These trusts must hold shares in mining companies that must be issued to mine communities as part of compliance with the ownership element. The agency is part of the human resource development element which requires that two per cent of the leviable amount on essential skills development be contributed towards the agency (2017 Mining Charter 2.4*(d)*).

Ownership

In terms of the 2010 Mining Charter, it was required in 2.1 that 26 per cent of the shareholding in all mining companies be held by historically disadvantaged South Africans (HDSAs). The purpose was to ensure the meaningful economic participation of HDSAs in mining companies (ibid). Meaningful economic participation requires that there should be clearly identifiable beneficiaries with full shareholder rights benefitting from empowerment initiatives throughout the term of investment.

The draft 2016 Mining Charter maintained the percentage black or HDSA ownership at 26 per cent, but set out certain requirements for shares to be issued to workers, black entrepreneurs, and communities (2.1). The shareholding was to be held in a trust created in terms of the Trust Property Control Act 57 of 1988 for the benefit of the community and workers, respectively, and traditional authorities and unions had to be represented in these trusts. No indication was given as to who should act as trustees of these trusts or how the powers of the trustees were to be limited in dealing with the trust property that would be the shareholding in the mining company. It was, however, stipulated that the trusts were to report to the South African Revenue Service and the DMR (2.1*(d)*). 'Traditional authorities' were not defined, but read together with 'communities' it can be deduced that

reference is to traditional communities as provided for in the Traditional Leadership Governance Framework Act 41 of 2003.

The 2017 Mining Charter suggests significant changes to empowerment in terms of the ownership of mining companies. For the first time, the Charter distinguishes between new mining right holders, new prospecting right holders, and existing mining rights holders (2017 Mining Charter 2.1.1). For new mining right holders, the required percentage of black ownership is increased to 30 per cent (2017 Mining Charter 2.1.1.2). The holder of a new prospecting right is required to have more than 50 per cent black shareholding (2017 Mining Charter 2.1.1.1). Of the 30 per cent ownership stake in a mining company, eight per cent must be transferred to employee share-owning programmes (ESOPs), another eight per cent to a community trust for the benefit of mine communities. and fourteen per cent to BEE entrepreneurs. BEE entrepreneurs are black-owned companies or black persons who acquire an equity interest in the mining right holder in terms of a BEE transaction (2017 Mining Charter 2.1.1.3).

The definition of 'mine communities' in the 2017 Mining Charter is far broader than its equivalent in the 2010 Mining Charter. The latter referred to a 'mine community' as 'communities where mining takes place, including labour-sending areas' (2010 Mining Charter v). The 2017 Mining Charter includes in the definition 'adjacent communities within a local municipality, metropolitan municipality and/or district municipality' (definition of 'mine community' 2017 Mining Charter 5). Potentially, persons living in a very large area stand to benefit from ownership schemes in terms of the 2017 Mining Charter.

The community trust must be created and managed by the Mining Transformation and Development Agency (2017 Mining Charter 2.1.1.9). Other than stating that the Mining Transformation and Development Agency must report to the Minister on an annual basis, the mandate of the Mining Transformation and Development Agency is not clear from the Charter (2.1.1.10). In addition to an overly broad and vague definition of the mining community, the uncertainty regarding the functions of the Mining Transformation and Development Agency may present challenges in practice when it comes to the distribution of the benefits of the shareholding.

The 2017 Mining Charter includes other peculiar provisions. The dilution of shareholders' shareholding as a result of the issue of further shares should not affect the shares held by a black

person. The shareholding of black persons should vest over a period of ten years, to be paid from the dividends receivable by a black person. Where the dividends are insufficient to pay off the outstanding subscription price for the shares to acquire full vesting, the outstanding amount owed by black shareholders should be written off. Black shareholders, furthermore, must receive at least one per cent of the annual turnover of the mining company before any distribution to the other shareholders is made, and this is over and above any other distributions to be made to shareholders of the holder of a new mining right (2.1.1.7).

As to existing prospecting and mining rights holders, the 2017 Mining Charter acknowledges 'historical BEE transactions' concluded before the commencement date of the 2017 Mining Charter (see the definition in the 2017 Mining Charter 3). This acknowledgment, however, would have expired once the 2017 Mining Charter was published. After publication, a holder would have to 'top up' – defined as 'increasing of shareholding of a Black Person to reach the minimum thresholds required by the Mining Charter' (defined in 2017 Mining Charter 6) – the percentage shareholding issued to black persons to achieve the 30 per cent shareholding level (2.1.2.3) within the twelve-month transitional period (2.11). Therefore, the 2017 Mining Charter effectively rejects what is colloquially known as the 'once empowered, always empowered' principle. This principle entails that, once a mining company has achieved the set ownership target provided for in previous Mining Charters, it need not 'top up' shareholding issued to black persons, should a change in shareholding occur. (*Chamber of Mines v Minister of Mineral Resources & another* 2018 (4) SA 581 (GP) para [206].)

Whereas the beneficiation of minerals constitutes a separate element under the 2010 and draft 2016 Mining Charters, it is included as part of the ownership element in terms of the 2017 Mining Charter. The 2010 Mining Charter confirmed mining companies' obligation to facilitate local beneficiation in terms of section 26 of the MPRDA (2.3). It also allowed a mining right holder to offset eleven per cent of the value of the beneficiation it achieved against the Mining Charter's ownership requirements (see 2010 Mining Charter 2.3). The 2017 Mining Charter applies the eleven per cent limitation to any contribution to beneficiation made in addition to the beneficiation mandated by section 26 of the MPRDA (2017 Mining Charter 2.1.4). The 2017 Mining Charter

adds further criteria for the mining right holder to be able to set off. First, the investment in beneficiation, additional to the investment made in terms of section 26, must have been made since 2004. Secondly, the activities deemed to constitute beneficiation must comply with the definition of 'beneficiation' in the MPDRA. Thirdly, the DMR must approve the activities (2017 Mining Charter 2.1.4; cf 2.1.1.13).

Procurement, supplier, and enterprise development

Empowerment through procurement and enterprise development takes place when mining rights holders procure the goods and services of local businesses owned by black persons. In this regard, the 2010 Mining Charter stipulates that the holders of mining rights had, by 2014, to have procured 40 per cent of their capital goods from BEE entities (2010 Mining Charter 2.2). A BEE entity is an entity owned by HDSAs holding at least 25 per cent of the share capital plus one vote (2010 Mining Charter iii). A multinational mining right holder must contribute 0,5 per cent of its annual income to the social development fund, which has not been created (2010 Mining Charter 2.2). By 2014, mining right holders also had to procure 70 per cent of services and 50 per cent of consumer goods from BEE entities (ibid).

The 2017 Mining Charter places considerable emphasis on 'strengthening the linkages between the mining and minerals industry and the broader economy' (2017 Mining Charter 2.2). It includes a definition of 'South African manufactured goods and services', meaning goods of which at least 60 per cent of the value added during manufacturing or assembly took place in South Africa (2017 Mining Charter 5). Furthermore, the 2017 Mining Charter stipulates that a mining right holder must procure goods and services from the community in which it operates. 'Community' is not defined in the 2017 Mining Charter, with only 'mine community' being defined (2017 Mining Charter 5).

Extensive criteria are set for a mining right holder's procurement policies. At least 80 per cent of a mining right holder's procurement spend must be spent on services sourced from companies incorporated and having offices in South Africa (SA-based companies). At least 65 per cent of the services procured in South Africa must be sourced from companies owned by black persons holding in excess of 50 per cent of the share capital. Ten per cent of expenditure on services must go towards black-owned companies owned and controlled by female

black persons who enjoy at least 50 per cent shareholding and one vote; and five per cent must be spent on black-owned companies owned and controlled by black youth, ie black persons between the ages of eighteen and 35 years (2017 Mining Charter 6 read with 2.2).

All mineral samples must be processed by SA-based companies. The verification of local content must be done by the South African Bureau of Standards. A company controlled and registered outside of South Africa which supplies goods and services to the South African mining industry (a foreign supplier) must contribute one per cent of the annual income generated from local mining companies to the Mining Transformation and Development Agency (2017 Mining Charter 2.2).

Employment representivity

In terms of the 2010 Mining Charter, employment equity should ensure diversity and equitable representation, specifically of HDSAs, on all levels of the mining company (2010 Mining Charter 2.4). The 2010 Mining Charter sets the universal percentage for representation of HDSAs in mining companies at 40 per cent. This target had to be achieved by 2014. The 2010 Mining Charter further identifies the following levels at which representation is assessed: executive management level; senior management level; core and critical skills; middle management level; and junior management level (ibid).

As was done in the draft 2016 Mining Charter, the 2017 Mining Charter makes specific reference to employment equity as provided for in the EEA and provides for consistency with the EEA in the mining industry. It is not clear whether the assessments in terms of the Mining Charter replace the assessments required under the EEA, or whether the Mining Charter assessment constitutes an additional assessment.

The 2017 Mining Charter sets out new representation levels. The board of a mining right holder must consist of at least 50 per cent black persons, a minimum of 25 per cent must be female (notably, the wording of this provision is clumsy and it could be interpreted to mean that a quarter of the black persons should be female). At executive or top management level, 50 per cent of the members must be black persons of whom no fewer than 25 per cent must be female. Sixty per cent of senior management must be constituted by black persons, of whom 30 per cent must be female. At the middle management level, 75 per cent must be

black persons of whom 38 per cent must be female. Junior management must be constituted by 88 per cent black persons, 44 per cent of whom must be female. Three per cent of all employees should be persons with disabilities, to be aligned with the relevant provincial demographics (2017 Mining Charter 2.3).

'Core and critical skills' are defined as skills regarded as 'high-level technical skills' required at all the levels of the mining right holder's operation. Black persons must constitute 60 per cent of persons regarded as having or forming 'core and critical skills' (2.3). Alignment with the SLP in identifying the relevant persons must also be achieved (ibid).

Another new provision in the 2017 Mining Charter envisages the creation of career progression plans in alignment with the SLP (2017 Mining Charter 2.3). It is not clear whether separate sets of career progression plans must be developed in terms of the SLP and the Mining Charter, respectively, or whether one set of plans will suffice.

Human resource development

In terms of the 2010 Mining Charter, expenditure on human resource development had to reach five per cent of the mining right holder's annual payroll (leviable amount in terms of the Skills Development Levies Act 9 of 1999), by 2014 (2010 Mining Charter 1). The 2017 Mining Charter reiterates that the aim of human resource development is to improve the employment prospects of black persons (2017 Mining Charter 2.4). The 2017 Mining Charter retains the requirement that five per cent of the leviable amount must be spent on human resource development (ibid). However, additional requirements are set in this regard. Two per cent of that five per cent must go towards the creation of artisanal skills training, bursaries, and literacy and numeracy skills training for both employees and the community (2.4). One per cent must be contributed to South African historically black academic institutions. These are higher learning institutions that were previously attended only by black persons for research and development initiatives (2.4*(c)*). At least two per cent must be contributed to the Ministerial Mining Transformation and Development Agency (2.4*(d)*).

Mine community development

In response to the identified shortcomings of the 2010 Mining Charter, the draft 2016 and 2017 Mining Charters both addressed

the plight of poor mine communities through broad-based black socio-economic empowerment. Both charters proclaim as an objective the promotion of employment and advancements of the social and economic welfare of mine communities and major labour-sending areas (2016 draft Mining Charter 1*(d)*; 2017 Mining Charter ii).

The 2010 Mining Charter describes 'mine community development' as the meaningful contribution to community development as a means for the holder of a mining right to retain its 'social licence to operate' (2.6). The target set for a mining company in terms of the 2010 Mining Charter is the implementation of approved development projects. Value allocated to the project had to make up at least fifteen per cent of the company's total spend on empowerment in terms of the Mining Charter (ibid).

The 2016 draft Mining Charter also dictates that mine community development should entail the meaningful contribution by a mining company towards community development and reference is also made to the 'social licence to operate' (2016 draft Mining Charter ii). It is stipulated that mine community development requires 'meaningful consultation and co-ordination' between the mining company, the community, and the local municipality (ibid). In contrast to the 2010 Mining Charter, the draft 2016 Mining Charter provides for a specific percentage (1%) of the annual turnover that should be contributed to community development and labour-sending areas. The Charter claims that this is 'consistent with international best practices' (compare 2010 Mining Charter 2.6 and draft 2016 Mining Charter 2.6).

Whereas mine community development must make up fifteen per cent of a mine company's empowerment spend in terms of the 2010 Mining Charter, the draft 2016 Mining Charter increased this percentage to 30 per cent (score card 4).

The 2017 Mining Charter once again refers to the fact that the holder of a mining right must 'meaningfully contribute' to the development of the mining community but specifies that there must be 'a bias towards communities where mining takes place'. Reference is again made to a company's social licence to operate (2.5).

For the first time, the 2017 Mining Charter includes examples of the kind of development project to which a mining company must contribute. These are infrastructure projects, income generating projects, and enterprise development (2.5). None of these three projects/priorities is defined. Of specific interest is the link with

enterprise development. It is not clear, however, if enterprise development (procurement, supplier, and enterprise development) and mine community development should operate alongside each other in this regard.

Whereas the 2010 Mining Charter refers to alignment with projects identified in the Integrated Development Plan (IDP) (2010 Mining Charter 2.6), the 2017 Mining Charter specifically mandates the holder of a mining right to perform mine community development by contributing to projects 'by identifying priority projects as per the approved IDP' (2017 Mining Charter 2.5). The 2017 Mining Charter is not clear on the value of the mining right holder's contribution. It only determines that such a contribution must be 'proportionate to the size of the investment' (2017 Mining Charter 2.5*(a)*). In addition to compelling a mining company to work specifically on the projects identified in the IDP, a holder must also subsidise mine community development as provided for in its approved SLP. Other than the 'social fund/social development fund' provided for in the 2010 Charter which referred to the SLP, this mention in the 2017 Mining Charter is the first instance where a direct link is drawn between mine community development and the implementation of a mining right holder's SLP (2017 Mining Charter 2.5*(b)-(d)*).

Sustainable development and growth of the mining and minerals industry

The 2010 Mining Charter provides for mining right holders to implement the Stakeholders Declaration on Strategy for the Sustainable Growth and Meaningful Transformation of South Africa's Mining Industry of 30 June 2010 (2.8). Implementation entails improving the industry's environmental management, health and safety performance, and capacity and skills enhancement (ibid).

The 2017 Mining Charter once again refers to the 2010 stakeholders' declaration, with specific emphasis on the improvement of environmental management (2017 Mining Charter 2.6). Reference is made to the environmental management plan to be created in terms of the National Environmental Management Act 107 of 1998 (2.6.1). With regard to health and safety performance, the implementation of the 2016 Occupational Health and Safety Summit Milestones is emphasised (2.6.2). The Mining Charter adds further milestones such as the elimination of occupational lung diseases and noise-induced hearing loss; prevention and management of tuberculosis and HIV/AIDS; the

elimination of fatalities and injuries; and the promotion of a cultural transformation framework, within the timelines agreed upon with stakeholders (2.6.2). Regarding research and development spending, the 2017 Mining Charter requires a mining right holder to undertake to direct 70 per cent of its research and development expenditure to projects within the Republic of South Africa. Fifty per cent of the 70 per cent allocation must be spent on South African historically black academic institutions (2.6.3).

Housing and living conditions

In terms of the 2010 Mining Charter, by 2014 mining rights holders had to convert hostels into family units, achieve an occupancy rate of one person per room, and provide home ownership options for mine employees. These initiatives were supposed to take place in consultation with organised labour (2010 Mining Charter 2.7).

The 2017 Mining Charter provides for compliance with the Housing and Living Conditions Standards for the Mining and Minerals Industry, as developed in terms of section 100(1)*(a)* of the MPRDA (see the definition of 'Housing and living conditions standards' 2017 Mining Charter 4). When it comes to housing, it is emphasised that the following principles should be pursued: a decent standard of housing; home ownership by mine employees; the integration of human settlements; and involvement of employees in housing administration and security of tenure (2017 Mining Charter 2.7.1). Separate reference is made to working conditions which include the provision of proper health care services and tending to the nutritional requirements of mineworkers (2.7.2).

A mining right holder must submit a housing and living conditions plan to be approved by the DMR after consultation with the Department of Human Settlements and Housing and organised labour (ibid).

Reporting, monitoring and compliance

In terms of the 2017 Mining Charter, reporting by mining right holders must, as is required in terms of the 2010 Mining Charter, be performed in terms of section 28(2)*(c)* of the MPRDA (2017 Mining Charter 2.9). The new provision introduced by the 2017 Mining Charter is that ownership, mine community development, and human resource development, are ring-fenced elements – these elements must be complied with fully for a mining right

holder to be regarded as compliant in terms of the Mining Charter (ibid). Therefore, if a mining right holder's score for the ring-fenced elements is between five and eight in terms of the scorecard, the mining right holder will be regarded as non-compliant with the Mining Charter in its entirety. As was also confirmed in the 2010 Mining Charter, non-compliance is dealt with in terms of section 93 read together with sections 47, 98 and 99 of the MPRDA (2010 Mining Charter 3, 2017 Mining Charter 2.12).

Additional Provisions

The 2017 Mining Charter explicitly states that compliance with the Charter is required for the entire duration of the mining right. Therefore, the prospecting and exploration phases will also be covered (2.10).

The 2017 Mining Charter provides for transitional arrangements (2.11). The transitional arrangements indicate the periods within which the mining right (and prospecting right) holders must comply with the new targets set out in the 2017 Mining Charter. The general period allowed is twelve months from the date of publication of the Mining Charter. As to the procurement element, the mining right holder must, within three years after the publication of the Mining Charter, submit a three-year plan setting out the progressive implementation of the procurement targets (2.11(c)).

The Minister is expressly authorised to review the Mining Charter by notice in the *Government Gazette* (2.13). This inclusion is arguably in response to legal proceedings currently underway challenging the Minister's powers in this regard. Once the 2017 Mining Charter becomes operational, the 2004 and the 2010 Mining Charters will be repealed (2.14). Guidance regarding the proper interpretation of the Mining Charter is also provided. The 2017 Mining Charter stipulates that the Charter should be read together with the MPRDA and the B-BBEE Act (2.15).

CASE LAW

The discussion of cases litigated in 2017 is categorised as: (i) property-related issues in the mining context; (ii) procedural issues; (iii) environmental issues; (iv) labour matters; (v) administrative issues; and (vi) matters involving taxation and tariffs.

Property-Related Issues

A number of cases decided in 2017 dealt with proprietary aspects. *Ekapa Minerals (Pty) Ltd & others v Seekoei & others*

[2017] ZANCHC 5 (13 January 2017), concerned the enduring questions surrounding legal treatment of tailings in South Africa, and serves to illustrate the plight of artisanal and small-scale miners. In the context of the diamond trade, *South African Diamond Producers Organisation v Minister of Minerals and Energy & others* 2017 (6) SA 331 (CC), emphasises that a mere interference with business interests of the diamond trade does not constitute an infringement of rights, nor does it render state regulation with legitimate purposes unlawful.

Artisanal mining on tailings: Trespassing and illegal mining?[6]

The dispute in *Ekapa Minerals (Pty) Ltd & others v Seekoei & others* (above) arose after the first applicant (Ekapa) purchased a part of the business of De Beers Consolidated Mines (Pty) Ltd (De Beers), entailing the reprocessing of tailings (paras [1]–[6]). The tailings, which were the result of over 130 years of open-cast mining, consist of the debris remaining after excavation for diamonds. The debris, which is left in dumps on so-called tailings disposal sites, or spread on the site surface (the floors), hold diamondiferous material which can be reprocessed using new technology and, consequently, can still hold significant economic value (paras [1]–[6]).

Delivery of the tailings mineral resources (TMRs) from De Beers to Ekapa took place in January 2016 through *traditio longa manu*. Ekapa, along with a group of mining companies participating in the tailings reprocessing business, sought to interdict the respondent artisanal miners from entering or being on certain immovable properties containing tailings, and from illegally conducting mining activities on those properties (paras [1]–[6]). To succeed in the application for a final interdict, the applicants had to prove on a balance of probabilities that they had a clear right that had to be protected, that current or apprehended irreparable harm would ensue, and that there was no alternative remedy. In opposing the application, the respondents raised four defences: the draft order was too vague to be enforced; the applicants had failed to prove that they had a clear right for interdictory relief; the applicant did not approach the court with clean hands; and there was an alternative remedy available (para [10]).

The alleged vagueness of the original order related to attempts to identify the respondents and the description of the sizable

[6] The case discussion of *Ekapa Minerals* was co-authored with Joseph Mayson.

affected properties. Williams J found that the vagueness of the original order could be avoided and the property and related parties clearly identified (paras [11] [12]) once the applicants' representatives had simplified the property descriptions and supplied additional names of artisanal miners.

As to the alleged failure to show a clear right, the court examined whether the applicants had established a *ius possidendi* (right of possession) over the relevant properties. The respondents contended that properties not owned by Ekapa could not be affected by the order. While the properties in question had not yet been transferred at the time of the court proceedings, all were subject to an agreement of sale, which provided that the purchaser 'shall be entitled free of charge, to the use and enjoyment of the Immovable Properties as if it were the owner thereof' from the effective date of the agreement (18 January 2016). This convinced Williams J that, on a balance of probabilities, the applicants had a contractual right of possession, if not actual possession of the properties (paras [13]–[16]).

A further contention for the 'clear right' defence related to the enduring problem of the tailings and their status in South African mineral law. The respondents argued that the diamondiferous material contained in the tailings constitutes 'minerals' as defined in the MPRDA and that consequently the applicants did not have a right to the mine the minerals, as would be required by section 5A of the MPRDA (paras [17] [19]). The applicants, however, rebutted this argument by stating that the MPRDA does not apply to tailings dumps (para [18]). Williams J acknowledged that 'mineral' in section 1 of the MPRDA includes 'any mineral occurring in residue stockpiles or in residue deposits' and that 'residue stockpile' includes material incidental to a mining operation that was subject to 'a mining right, mining permit, production right or an old order right'. Further, 'residue deposit' means 'any residue stockpile remaining at termination, cancellation or expiry of a prospecting right, mining right, mining permit, exploration right, production right or an old order right'. Williams J stated that '[a]n old order right' is defined in item 1 of Schedule II to the MPRDA as 'an old order mining right, old order prospecting right or unused old order right'. Lastly, '[a]n unused old order right' is defined as 'any right, entitlement, permit or licence listed in table 3 to [sch II] for which no prospecting or mining was being conducted immediately before [the MPRDA) took effect'.

The respondents argued that the tailings dumps were created as a result of De Beers' unused old order right, that this qualifies

as an old order right under the MPRDA, and that any incidental residue stockpiles likewise constitute minerals, and require a licence for processing (paras [19] [20]).

The court dismissed the argument that there was an unused old order right as the third applicant had not been processing the tailings dumps between 1991 and 2008. It could also not be said that 'no prospecting or mining was being conducted immediately prior to the MPRDA', which is a precondition for the definition of an unused old order right (para [21]). However, De Beers was the holder of an old order mining right which had been converted to a mining right under the MPRDA in May 2010. In *Holcim SA (Pty) Ltd v Prudent Investors (Pty) Ltd & others* [2011] 1 All SA 364 (SCA) paragraph [37], it was held that an old order right is only created if the old order common-law right has been converted under the transitional provisions of the MPRDA. This position was confirmed in in *XSTRATA SA (Pty) Ltd & others v SFF Association* 2012 (5) SA 60 (SCA) para [10] and *Minister of Mineral Resources & others v Sishen Iron Ore Company (Pty) Ltd & another* 2014 (2) SA 603 (CC) para [60], where it was held that

> [an old order right] is a new right created by statute and which would be converted into a mining right. A failure to convert that old order mining right resulted in the right ceasing to exist.

An old order right, therefore, only came into existence after the enactment of the MPRDA in 2004. The tailings dumps, which were created long before 2004, were not created by the holder of an old order right as envisaged in the definition of 'residue stockpile'. In the result, Williams J found that the dumps did not constitute 'minerals' in terms of the MPRDA (paras [22]–[24]). The court proceeded to acknowledge that the Mineral and Petroleum Resources Development Amendment Bill of 2013 (the Bill), which is currently before Parliament, aims to amend the definition of 'residue stockpile' in the MPRDA to include 'historic mines and dumps created before the implementation of the Act' (s 42A(1) of the Bill). The judge indicated that the existence of the Bill bolstered the contention that the tailings dumps do not constitute residue stockpiles as the contemplated amendments would be unnecessary if the existing definition included dumps created before the implementation of the Act. For a discussion of a similar case and the connection with the relevant proposed MPRDA amendments, see *Candero Mining and Consulting (Pty) Ltd v Smith & others* (GNP) 26 February 2016 (case 7178/16) 2016 *Annual Survey* 1025–27.

The respondents contended that the interdict should not be granted because an alternative remedy – criminal prosecution – was available. Williams J dismissed this argument on the basis that criminal prosecution does not offer similar protection to an interdict. Criminal prosecution would not have been satisfactory due to the 'difficulties inherent in charging and prosecuting such a large number of people together with the inevitable lengthy delays in bringing such prosecutions to finality' (para [25]).

As a final plea, the respondents argued that even if all the requirements of an interdict had been satisfied, the judge had a discretion to refuse the application, or at least to suspend the operation of the interdict in the interests of justice, in light of the prejudice that the respondents who depend on the income they gain from artisanal mining to support themselves and their families, would suffer (para [26]). Without answering the question of whether he had such a discretion, Williams J declined to exercise the discretion in light of the illegality of the activities, which he could not condone (para [27]).

The application succeeded, and the interdict was granted in its entirety.

Free trade and property in the diamond industry[7]

South African Diamond Producers Organisation v Minister of Minerals and Energy & others (above) was the sequel to *South African Diamond Producers Organisation v Minister of Minerals and Energy NO & others* (2016) ZAGPPHC 817. (See the discussion in the 2016 *Survey* 1020–24.) The issue relates to diamond trade practices that were abolished by an amendment of the Diamonds Act 56 of 1986. One of the key purposes of this amendment was to promote the local beneficiation of the country's diamonds (s 4*(b)*). The 2007 amendment, section 20A, seeks to further this aim, as well as to eliminate illegal trading activities. The effect of the amendment, however, has been a prohibition on established business practice in the diamond sector.

The parties to this litigation differed in their opinions as to whether the business practice is lawful, or whether it exploits a loophole in the regulatory framework to give unlicensed persons access to the diamond trade. Members of the South African

[7] Chuma Bubu assisted in the discussion of *SADPO* CC.

Diamond Producers Organisation (the SADPO) used to offer, on their licensed business premises, unpolished diamonds from local producers on a tender basis to other South African dealers. Non-licensed experts, attending on behalf of prospective foreign buyers, and often themselves from abroad, assisted the licensed buyers with purchasing decisions. The sale was ultimately concluded between the producer or licensed dealer and a South African licensed purchaser, but the established business practice allowed these purchasers to associate with foreign prospective buyers to whom the purchased parcels could be sold and exported.

With the coming into force of section 20A of the Diamonds Act, the established business practice was effectively terminated: licensees may no longer be assisted by non-licensed experts during the viewing, purchase, or sale of unpolished diamonds at any place where unpolished diamonds are offered for sale under the Act, save for a Diamond Exchange and Export Centre (DEEC).

The High Court declared section 20A unconstitutional. To confirm the court *a quo*'s order of constitutional invalidity (under s 172(2)*(a)* of the Constitution), the Constitutional Court considered whether section 20A deprives the SADPO's members of property contrary to section 25 of the Constitution. Further, it assessed whether this section violates the right of SADPO members freely to choose their trade, occupation, and profession as provided for in section 22 of the Constitution.

The Constitutional Court held that there had been no deprivation of property; no legally protectable interest had been removed by the introduction of section 20A; and this section has not deprived SADPO's members of any proprietary right they may have had in their licences. The court also found that section 20A is rationally connected to the legitimate government purpose of monitoring the movement of unpolished diamonds. Consequently, it does not unlawfully limit the practice of a trade, occupation or profession.

In support of its finding that section 25 of the Constitution had not been infringed, the Constitutional Court deliberated on the meaning of 'property' in the context of this fundamental right. The SADPO's argument was that there are three property rights at stake: (i) ownership of the diamonds won by the producers and bought and sold by the dealers; (ii) ownership of the diamond dealer licences which is connected to the ownership of their

businesses; and (iii) the rights under diamond exchange certificates that were replaced by trading house licences.

As to diamond ownership, the Constitutional Court accepted that corporeal movable objects have long been recognised as 'property' for the purposes of section 25 of the Constitution (para [41]). A more difficult question, however, is whether section 20A deprives producers and dealers of the ownership of their diamonds (para [42]). Such a deprivation would require a substantial interference which would have a significant impact on the rights of the complainants (paras [42]–[48]). To determine whether there has been such a 'substantial' interference, the court asked: 'Does section 20A interfere with producers' and dealers' right to alienate their diamonds in a legally relevant way?' and answered '[s]urely not' (para [49]).

The Constitutional Court reasoned that it is impossible to quantify the loss suffered by SADPO members as a direct result of section 20A (paras [50] [51]). Even if the 30 per cent loss the SADPO alleged its members had suffered could be proven, the court found that there would still be no deprivation: no legally protectable interest or entitlement has been removed by this section (para [52]). What section 20A does, is to change how diamonds may be alienated, and the market conditions determining the highest price. These changes are not 'sufficiently substantial' to amount to a deprivation of property in the Constitutional Court's view (para [53]).

As regards the ownership of the diamond dealer licences, the Constitutional Court accepted that the licences constituted 'property' (para [57]). Neverthess, it held that, based on the 'substantial interference' test, there had been no deprivation of that property. Acknowledging that what the SADPO was seeking to protect was their members' interest in a preferred strategy for conducting their businesses under their licences, the Constitutional Court held that a government decision to make a particular business strategy unlawful, cannot be said to deprive persons who preferred to conduct their business in that way, of their property. The court held that '[f]avourable business conditions, including favourable regulatory conditions, are transient circumstances, subject to inevitable changes' (para [60]).

The court rejected the SADPO's argument that the holders of diamond exchange certificates had been deprived of property because the amendment abolished diamond exchanges and replaced them with trading house licences, which did not afford

the same level of rights. In the court's view section 20A did not clearly affect these rights.

In the result, the court concluded that there had been no deprivation of property or infringement of section 25(1) of the Constitution.

The SADPO's further challenge was based on section 22 of the Constitution. The Constitutional Court noted that although both the 'choice' of trade and its 'practice' are protected in terms of this provision, different levels of inquiry attach to limitations of each of these aspects (para [65]). The court held that section 20A does not limit the freedom of SADPO's members to choose their trade, profession, or occupation (paras [66]–[70]); it merely regulates the practice of diamond production and dealing by requiring that assistance may only be rendered by a licensed person or at a DEEC.

Applying a rationality test, the Constitutional Court indicated that the provision would pass constitutional muster if it could be rationally related to a legitimate government purpose (para [75]). The court indeed found a rational connection between effectively creating a 'one-stop shop' (para [79]), in the form of state-run DEECs, for all exports of unpolished diamonds, and the legitimate government purpose of properly monitoring and recording the movement of unpolished diamonds. A similar rational connection exists between this government purpose and barring unlicensed persons from being involved as trade experts during the sale process. Therefore, the Constitutional Court found that the right in section 22 had not been limited and declined to confirm the order of invalidity granted by the High Court.

The Constitutional Court's finding is in line with the legislature's aim. The Diamonds Act 56 of 1986 makes it clear that the legislature aims to encourage equitable access to and local beneficiation of diamonds in this country (s 4*(a)* of the Diamond Act; *Krochmal & Cohen Diamond Cutting Works (Pty) Ltd v Minister of Mineral and Energy Affairs & another* 2004 JDR 0141 (W) para [15]). SADPO members' previous business practice prevented this. According to the Supreme Court of Appeal in *Sadiex (Pty) Ltd v Minister of Minerals and Energy* 2011 JDR 0593 (SCA) paragraph [11], to refer to the practice as 'assistance' by unlicensed foreigners, distorts the truth; it was the licensed dealers who assisted the unlicensed foreign participants and earned commission by doing so. This practice effectively prevented fair access to and local beneficiation of diamonds.

The Constitutional Court is correct in finding that the limitation imposed by section 20A does not deprive SADPO's members of their property. The market is an inherently regulated space, and further government regulation will necessarily have an impact, including on market value. Even so, there is no legally protectable interest or entitlement to safeguard against loss of market value. Moreover, where there are different opinions as to whether a business strategy borders on the unlawful, achieving clarity through legislative amendment cannot constitute a deprivation of property; the interest sought to be protected is nebulous to start with.

On the section 22 challenge, the Constitutional Court correctly, and in line with the separation of powers, pointed out that legislation should not be set aside for infringing the right to economic freedom simply because there may be other ways of dealing with the problems. To do so would go against the principle of separation of powers and the different roles of the courts and the legislature in our democratic society. Introducing or reinforcing a licensing process – as section 20A aimed to do – has the important aim of making those involved in a specific process – such as the diamond trade process – known to the state, and so ensures better control and monitoring.

Subdivision of land, zoning, and mining[8]

Exxaro Coal Mpumalanga (Pty) Ltd and Universal Coal Development VIII (Pty) Ltd v Izak Jakobus Gerhardus de Wet in Re: Izak Jakobus Gerhardus De Wet v Exxaro Coal Mpumalanga (Pty) Ltd & others (unreported case no 28637/16 (19/09/2017)) concerned an exception to a main action. The respondent (De Wet), the plaintiff in the main action, sought a declaratory order that he had lawfully exercised an option to repurchase certain immovable property contained in a sale agreement between Exxaro (the first excipient) and De Wet. Alternatively, De Wet sought an order for rectification of the written agreement of sale between himself and Exxaro (para [1]). A further prayer was for an agreement between De Wet and Exxaro to be declared invalid or, alternatively, declaring that the agreement ranks after the option. Further, an interdict was sought against Universal Coal Development (the second excipient/ defendant), declaring that no mining activities

[8] The case discussion of *Exxaro v De Wet* was co-authored with Joseph Mayson.

could be conducted on the properties in question without a permissive zoning certificate (para [2]).

Exxaro and Universal Coal Development took exception against Dd Wet's particulars of claim on several grounds, arguing that it failed to make out a cause of action (para [3]).

The first claim was that it was unclear from De Wet's particulars of claim that ministerial consent had been obtained for the lawful exercise of the option. This point is relevant here because it deals with how an option in respect of alienation of mine land is to be exercised. Exxaro relied on section 3*(e)*(i) of the Subdivision of Agricultural Land Act 70 of 1970 (the SALA). Section 3 of the SALA provides that no portion of agricultural land shall be sold or advertised for sale, except for the purposes of a mine, unless the Minister has consented in writing (para [20]). The court confirmed that the section must be interpreted to include options (para [21]). Ministerial consent is consequently required before an option over a portion of agricultural land can be given (para [22]). De Wet contended that the Minister's consent was unnecessary because the option was being exercised over the whole property in question and not only a portion thereof (para [23]). The court rejected this argument as factually incorrect (para [42]). On this point, the particulars of claim were excipiable (para [44]).

Exxaro's second point that 'the respondent did not allege that at the time the agreement of sale came into existence the *merx* of the option was clearly established in the agreement of sale as is required under section 6(1) of the Alienation of Land Act 68 of 1981 (ALA)' (para [45]) was also upheld (para [52]).

Thirdly, the exception was upheld because De Wet's particulars of claim failed to show the three requirements for an interdict to be granted, or a cause of action (para [53]). Consequently, the exception was upheld in its entirety (para [58]).

Eviction of former mine employee under a contested dismissal[9]

Mathiba v Samancor Chrome Limited [2017] ZAGPPHC 222 (29 May 2017) concerned the process for obtaining an eviction order. It is included in this discussion because it draws attention to the complexity of some of the employer-employee relations in the mining context. When mining companies provide housing for

[9] The case discussion of *Mathiba v Samancor* was written with assistance by Geoffrey Allsop.

their employees, they are placed in the position of both landlord and employer.

After the High Court granted an eviction order in favour of Samancor Chrome Limited (Samancor), a mining company, on whose property Mathiba resided with his wife and young child in leased accommodation while he was in Samancor's employ. When Mathiba was dismissed, Samancor initiated eviction proceedings in an attempt to remove the family from the mine's housing. Mathiba had allegedly fallen into arrears with the rental as a result of his dismissal. When the eviction order was granted, Mathiba was contesting the dismissal in the Labour Court, a fact which had been ignored by the trial court which granted the eviction order.

On appeal, the High Court (Legodi J) noted that this was a relevant consideration in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (the PIE Act). Also of relevance is any prejudice Samancor and Mathiba would suffer if the eviction proceedings were to be stayed pending the outcome of the labour dispute. The court *a quo*'s decision was overturned on appeal.

The appeal court found (paras [10]–[20]) that the court *a quo* had erred in three respects. First, it had adopted a passive as opposed to an active interrogation of whether the eviction would be just and equitable. Moreover, the court had assumed that it was irrelevant to consider the availability of alternative accommodation. Secondly, it was held that the trial court had failed properly to investigate the consequences of the eviction for Mathoba's wife and young child who would possibility be rendered homeless. Thirdly, the court *a quo* had erroneously excluded Mathiba's counter-application as irrelevant to the eviction proceedings. He had instituted separate proceedings challenging his dismissal in the Labour Court, and the court *a quo* should have taken this into account.

The court held that Mathiba would suffer significant harm if the eviction were to take place (para [21]). This potential harm must be weighed up against harm that Samancor would potentially suffer if the eviction proceedings were stayed pending the outcome of the unfair dismissal application. The court *a quo*'s failure to consider these points amounted to a failure of justice.

The High Court noted (para [21]), however, that the employer could institute new eviction proceedings and supplement its pleadings after serving a notice in terms of section 4(2) of the PIE Act.

Procedural Issues

Public interest and other legal firms working to protect community members' interests as against mining houses should take heed of Murphy J's finding in *Langa & others v Ivanplats (Pty) Limited & others* [2017] JOL 37388 (GP). The matter concerned the joinder of opposing community members in a dispute between a mine and a community about the relocation of grave sites. It illustrates possible procedural hindrances in the cases between communities and mining companies. The exhumation of ancestral graves is a sensitive and potentially extremely damaging process, which requires acknowledgment of the applicants' rights to culture, tradition, and access to courts, all of which are affected by this judgment.

Ministerial Power To Impose Peremptory Requirements On Mineral Right Holders[10]

Scholes & another v Minister of Mineral Resources (50642/2015) [2017] ZAGPPHC 303 (30 June 2017) was brought to court in the context of controversial amendments to the 2017 Mining Charter. The law firm, Malan Scholes Inc (Scholes), challenged the powers of the Minister of Mineral Resources to develop a Broad-Based Socio-Economic Charter (the Mining Charter) under section 100*(a)* and *(b)* of the MPRDA. In essence, the argument was that upon proper interpretation of the MPRDA, the Minister is not empowered to impose peremptory requirements with which mineral rights holders are obliged to comply at all times. This supported the push for a so-called 'once empowered always empowered' policy, which was the subject matter in *Chamber of Mines v Minister of Mineral Resources & another* 2018 (4) SA 581 (GP).

Two alternative challenges were also advanced. First, if the Minister does have the power to impose peremptory requirements under the MPRDA, then the constitutionality of those provisions was challengeable in terms of section 172(1)*(a)* of the Constitution. Secondly, the Minister's decision to impose the requirements was challenged as amounting to unlawful administrative action as envisaged in the Promotion of Administrative Justice Act 3 of 2000 (the PAJA) and stood to be set aside.

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[10] The case discussion of *Scholes v Minister of Mineral Resources* was co-authored with Geoffrey Allsop.

The High Court only considered whether the *in limine* plea of material non-joinder by the Minister should be upheld. The court considered the different processes for consolidation of applications and joinder. This issue was pertinent because the points Scholes had raised in this matter had also been raised in another matter initiated by the Chamber of Mines of South Africa (*Chamber of Mines v Minister of Mineral Resources & another* 2018 (4) SA 581 (GP)). Scholes had applied, unsuccessfully, for a consolidation of these applications. The dismissal of the application was then cited as the reason for not joining would-be litigants, including the Chamber of Mines whose rights and interests may have been adversely affected by the outcome of Scholes's application (paras [14]–[16]).

The High Court decided to uphold the *in limine* procedural ground, rejecting the application because parties with a direct and substantial legal interest in the present application had not been joined. Therefore, it did not address the substantive challenges or the Minister's responses. Some comments are nevertheless appropriate in the context of addressing the procedural issue.

(a) First, the process of enacting the Mining Charter is one involving various stakeholders within the mining community, including the Chamber of Mines. These stakeholders must be involved in challenges brought against the Mining Charter.
(b) Further, the Mining Charter is the outcome of negotiations between the Minister and various stakeholders in the mining industry containing their mutual understandings, rights, and obligations. As part of the rights and obligations, the Charter contains a mutual understanding regarding the process of implementing and enforcing its provisions. Scholes's application ultimately aimed to invalidate that Charter, or – at the very least – amend its provisions.

The draft Mining Charter published by the DMR and the Minister on 15 June 2017 indeed attracted a considerable degree of controversy (see *https://www.miningreview.com/news/amended-mining-charter-increase-black-ownership-mining-sector/* and above). In particular, the provisions requiring holders of mineral rights to meet increased targets relating to black procurement, employment equity, and management, have caused considerable consternation in the mining sector.

While the substantive challenges in *Scholes* were not addressed in the judgment, the case highlights that had the draft Mining Charter become operational in its 2017 form, further substantive challenges would have been raised regarding its legality.

Joinder of Opposing Community Members in Disputes Between a Mine And a Community[11]

In *Langa & others v Ivanplats (Pty) Limited & others* [2017] JOL 37388 (GP), the applicants were members of a community with ancestral connections to graves near Mokopane, Limpopo. They sought confirmation of an *ex parte* interim interdict. The interdict prohibited the excavation, removal, and relocation of remains by the mining company Ivanplats (Pty) Limited (Ivanplats), pending the review of decisions by the South African Heritage Resources Authority (the SAHRA). The SAHRA can permit, under section 36 of the National Heritage Resources Act 25 of 1999 (the NHRA), disturbance of graves older than 60 years situated outside a formal cemetery administered by a local authority.

Murphy J held that the application stood to fail on both procedural and substantive grounds. The *rule nisi* was discharged.

Regarding the procedural grounds, Murphy J noted that many members of the community had consented to grave relocations as Ivanplats had agreed to cover the costs of relocation ceremonies, tombstones, refreshments, and other expenses. The court was prepared 'on this ground alone' to discharge the *rule nisi* (para [12]). However, Murphy J also gave judgment on the merits.

The court placed an onerous evidentiary burden on applicants seeking to protect the interests of marginalised communities or individuals. Community members who have consented to the interventions must be joined in proceedings. This may entail a large financial burden on applicants to detail the often high number of prospective respondents that could have an interest in the matter.

Regarding the substantive grounds, the court appeared to accept the respondent's argument that the interdict was final in nature, as a successful interdict would 'finally extinguish the right of Ivanplats to remove the graves in accordance with the permits'

[11] The case discussion of *Langa v Ivanplats* was co-authored with Joseph Mayson.

as the permits were due to expire seven weeks after the hearing date. Alternating between the temporary or final interdict standards of review, the court was 'persuaded that the facts do not establish the existence of any clear or *prima facie* right under substantive law', meaning that the applicants had not even satisfied the lower standard of temporary interdicts.

In evaluating whether there existed a *prima facie* or clear right of review, Murphy J considered the merits of each ground of review as proposed by the applicants.

As to the first ground (para [15]), the court found that the SAHRA was entitled to consider and grant Ivanplats's application for the permits. On this ground, the applicants had not shown a *prima facie* right of review by means of the *functus officio* doctrine in so far as it may have related to the SAHRA.

On the second ground (para [17]), the court found that the consultation processes by the respondents and the agents conformed to section 36(5) of the NHRA and regulation 40 of the NHRA Regulations (para [19]). The applicants had failed to prove that they had a *prima facie* right to review. The court's reasoning appears to disregard the requirement in section 36(5)*(b)* – ie, the existence of an agreement between the company and the community and individuals affected. Although the majority of the community members appeared to have agreed to the relocation of their ancestor's graves, on the evidence a number of people had not consented. Accordingly, the precondition for the granting of a permit in section 36(5)*(b)* had not been met. It is likely that a jurisdictional error of fact occurred. Sufficient evidence of a *prima facie* ground of review existed. The applicants' right to administrative justice in the Constitution (s 33) and the right to access to justice (s 34) would be compromised if the applicants were not allowed to challenge the SAHRA's decision in court.

Environmental Issues

The recently implemented 'One Environmental System' (OES), at least in principle, is designed to resolve the long-running 'turf war' between the Department of Environmental Affairs (the DEA) and the DMR regarding enforcement of environmental legislation in the mining context. Through the OES: most of the environmental provisions in the MPRDA were repealed; 'mining' and 'prospecting' came into effect as listed activities requiring environmental authorisation; the Minister of Mineral Resources was identified as the competent authority for mining and related activities; and the

Minister of Environmental Affairs as the competent appeal authority (TL Humby 'One environmental system: Aligning the laws on the environmental management of mining in South Africa' (2015) 33/2 *Journal of Energy & Natural Resources Law* 110, 115, 123–27).

In *Mineral Sands Resources (Pty) Ltd v Magistrate for the District of Vredendal, Kroutz NO & others* [2017] 2 All SA 599 (WCC) the High Court made various important findings on the amendments to the NEMA and the MPRDA. Mining companies must now obtain environmental authorisation for mining and ancillary activities. Even so, cases such as *RCL Foods Consumer (Pty) Ltd v Makole Resources (Pty) Ltd & others* (GNP) 8626/2016 show that the ineptitudes of the earlier, contested regime are still affecting the intersection between environmental and mining law. The conflict over prospecting activities in an ecologically and geologically important area resulted in litigation. The appeal was reported in 2017 as *Mpumalanga Tourism and Parks Agency & another v Barberton Mines (Pty) Ltd & others* 2017 (5) SA 62 (SCA).

Growing Pains of the One Environmental System: Co-operative Governance in Mining matters[12]

In *Mineral Sands Ltd v Magistrate for the District of Vredendal* (above) amendments to the NEMA and the MPRDA affecting the OES were considered. The issues at stake were: transfer of authority to DMR inspectors for enforcement of environmental legislation in mining areas; the importance of officials fully disclosing all material facts in respect of warrant applications to enforce compliance with environmental legislation; and the constitutional principle of cooperative governance. While the judgment clarifies much uncertainty on these issues which existed following OES's initial implementation, various issues remain unresolved, including the overlapping competency of the DMR and the DEA, which is likely to result in further litigation.

In 2007, Mineral Sands (MS) applied for a mining right in terms of section 22 of the MPRDA. To do so, MS had to submit an environmental management plan (EMP) as envisaged in the MPRDA (para [9]). However, various ancillary activities necessary to commence mining fell within listing notices promulgated by the

[12] The case discussion of *Mineral Sands v Vredendal* was co-authored with Geoffrey Allsop.

Minister of Environmental Affairs in terms of section 24 of the NEMA. Environmental authorisation under the NEMA was required before MS could commence mining activity.

MS applied to the Department of Developmental Planning Western Cape (the DPWC) as the Western Cape NEMA competent authority. Pursuant to section 24N of the NEMA, the DPWC requested MS to submit an additional EMP as a pre-condition to considering MS's application for environmental authorisation.

In November 2008, the DMR granted MS's mining right after approving its EMP in terms of the MPRDA. In July 2012, the DPWC approved the EMP in accordance with the NEMA and granted the MS environmental authorisation. However, some two years later, after an inspection performed by the DMR, MS was notified that it was in violation of its MPRDA EMP and that it had to amend its EMP in terms of the NEMA.

The OES came into effect while MS's application to amend in terms of the NEMA was pending. The OES provided that the Minister of Mineral Resources (not Environmental Affairs) became the competent authority to issue the EMP amendment required by MS, which was approved by the DMR in terms of section 39(6) of the MPRDA.

Following various complaints, an official from the DEA notified MS that the DEA would be conducting a routine inspection to determine compliance with its environmental authorisation under the NEMA. The authority of the DEA to conduct the inspection was disputed by MS on the basis that the DMR, and not the DEA, became the sole authority competent to enforce compliance in terms of the NEMA in mining areas. A dispute arose regarding the DEA's alleged lack of jurisdiction to enforce compliance with environmental legislation in so far as it pertains to mining areas or activities. The DEA successfully applied for a warrant to inspect MS's mining operation in terms of the NEMA and the National Environmental Management: Integrated Coastal Management Act 24 of 2008 (the Coastal Act). In subsequent review proceedings in the High Court, the core issue for determination was whether the amendments to the NEMA and the MPRDA meant that only MPRDA inspectors enjoy jurisdiction to monitor compliance with the NEMA provisions relating to mining activities. A related issue was MS's central challenge regarding the validity of the warrant that had been issued. In addition, MS challenged the DEA's authority to conduct an inspection as in their warrant application the DEA had failed to disclose that the DMR had

become the competent authority to monitor compliance with MS's mining activities under the NEMA.

The court ruled that the DEA lacked jurisdiction to enforce compliance with the NEMA's provisions in so far as they related to mining matters concerning listed activities. Whilst the DEA was within its authority to apply for a warrant for alleged offences in contravention of the Coastal Act, the DEA had failed to discharge the evidentiary burden of proving that reasonable grounds existed for the allegation that an offence had been committed.

Both MS and the DEA conceded that the charge in respect of alleged violations of the Coastal Act ('the dumping charge') was exempt from MS's primary mandate challenge of the DEA. This is because the Minister of Mineral Resources had no jurisdiction to grant dumping permits in terms of the Coastal Act, which in turn means that the DMR inspectors lacked jurisdiction to enforce compliance with the provisions and/or regulations promulgated under the Coastal Act. As section 31D(2A) of the NEMA limits the Minister of Mineral Resources to appointing the inspectors who monitor and enforce compliance with powers conferred on the Minister, who had no powers to enforce compliance with the Coastal Act. The DEA was accordingly within its jurisdiction to enforce compliance with those provisions.

The court acknowledged that it may be possible, at least in principle, for the Ministers of Water and Sanitation and of Environmental Affairs to appoint inspectors to enforce compliance with the provisions of the NEMA in terms of section 31D(1) concurrently. However, the court observed that subjecting persons to overlapping parallel investigations would not only be potentially unfair, but also administratively inefficient. No strict legal finding was made to resolve this conflict, but Rogers J suggested that the solution to overlapping departmental mandates lies in 'sensible official cooperation rather than strained legal distinctions' (para [95]).

Despite extensive findings regarding the validity of the search warrant and respective mandates of the DMR and the DEA, the court expressly refrained from making any findings as to whether national inspectors enjoy concurrent jurisdiction with provincial inspectors to enforce compliance with environmental legislation administered by the provincial authorities. Whilst the court found it unnecessary to decide this issue, an *obiter dictum* strongly suggests that, based on the cooperative governance provisions of the Constitution, provincial inspectors could well enjoy exclu-

sive jurisdiction to implement national legislation within the functional area of the provincial government (para [93]).

The court set aside the warrant in respect of the dumping charge under the Coastal Act because the affidavits and evidence submitted by the DEA in the warrant application were insufficient to establish the two-fold requirements of a reasonable suspicion that an offence has been committed, and that reasonable grounds exist for believing that things connected with the offence are on the premises in question (*Minister of Safety and Security v Van der Merwe* 2011 (2) SACR 301 (CC) para [39]).

This judgment has made some headway in resolving various issues regarding the competencies of the DEA and DMR and the court's reasoning is sound. The judgment clarifies the role of the DMR to enforce the NEMA provisions following the implementation of the OES. Whilst the court expressly refrained from determining the issue of overlapping jurisdiction between the provincial and national spheres of government to enforce environmental legislation, strong *obiter dicta* suggest that the cooperative governance provisions of the Constitution mean that provincial authorities would have exclusive jurisdiction to implement national environmental legislation. The judgment reiterates the stringent duties of good faith incumbent upon officials to make full material disclosure in *ex parte* warrant proceeding applications.

Environmental authorisation for Mining and Ancillary Activities[13]

RCL Foods Consumer Pty Ltd v Makole Resources (Pty) Ltd & others (GNP) 8626/2016 was an application for an interdict against Makole Resources (Pty) Ltd (Makole Resources), the owner of land on which coal mining activities were taking place, by the neighbouring owners of a chicken farm. By obtaining the interdict, RCL Foods sought to prevent Makole Resources from conducting coal mining and related activities on certain portions of their own land. RCL Foods alleged that the mining activities conducted by Makole Resources were unlawful in so far as they were undertaken outside the designated mining areas identified in its mining right, and that Makole Resources did not hold the additional authorisations, as required by the NEMA, the National

[13] The case discussion of *RCL Foods v Makole* was co-authored with Joseph Mayson.

Environmental Management: Waste Amendment Act 26 of 2014, the National Environmental Management Laws Amendment Act 25 of 2014, and the local zoning legislation (paras [1]–[4]).

A factual dispute arose regarding when the offensive activity had started, which would determine whether the laws as per the OES were applicable (paras [11] [14]). If they applied, Makole Resources would have required a waste management licence or integrated environmental authorisation before commencing mining activities. The amendments to the applicable laws in the OES did not operate retrospectively.

Despite the importance of determining the actual commencement date of the mining activities, Rabie J held that the dispute could not be resolved on the affidavits, and that no decision regarding the lawfulness of the mining operations or the relevance of the various pieces of legislation and subordinate legislation could be made (para [17]). If activities commenced prior to the amendments to the OES, they would be compliant and lawful; all that would be required would be a mining right, an EMP, and a water use licence, which Makole Resources held when it alleged that it commenced mining.

A further issue concerned zoning on the second respondent's farm, Black Royalty Minerals (Pty) Ltd. Two portions of the farm were zoned for 'undetermined use' under the Tshwane Town Planning Scheme of 2008. Under the Scheme, mining taking place in such a zoning requires the consent of the municipality. RCL Foods alleged that the required consent had not been obtained and that, therefore, Makole Resources's mining activities on Black Royalty Minerals land were unlawful. Makole Resources alleged that the land was only included in the Scheme after its revision seven months after the date that the mining commenced. As a result, they argued, they were exempted under the Town Planning and Townships Ordinance 15 of 1986, from complying with the Scheme for a period of fifteen years after their inclusion into the Scheme (paras [15] [16]).

RCL Foods also appealed the granting of Makole Resources' water use licence. The court was prepared to accept that Makole Resources may not have had the licence at the time of the hearing. However, the issue remained undecided as the court did not view this ground alone to be a sufficient reason to grant the interdict (paras [18] [19]).

Holding that the requirements for the granting of a final interdict had not been established, the application was dismissed (para [23]).

The *RCL Foods* judgment is of interest, not so much for its factual findings, but rather for Rabie J's legal assumption that the MPRDA covered the field for mining-environmental authorisations until the 2014 amendments. The result is a finding that there was no need for the second respondent to obtain environmental authorisation when it commenced its mining activities. This assumption was not interrogated further in the judgment, despite its having been the subject of many court cases and political consternation for at least a decade. (See TL Humby '*Maccsand* in the Constitutional Court: Dodging the NEMA Issue' (2013) 24/1 *Stellenbosch Law Review* 55 for a more thorough assessment.)

The key issue is that while 'mining' and 'prospecting' were included as listed activities that require additional environmental authorisation pursuant to an environmental impact assessment or basic assessment, respectively, their commencement date was suspended. However, a number of activities ancillary to mining were included as listed activities and came into effect from 1 July 2006 (see Regulations GNR 385, 386 and 387 published in *GG* 28753 of 21 April 2006). While an EMP certainly sufficed for the core activities of mining or prospecting, many mining companies proceeded to apply for environmental authority for their ancillary activities such as road-building and the temporary storage of hazardous waste.

The *RCL Foods* judgment enables an argument that the second respondent was required to obtain environmental authorisation that must have commenced by the time that the application for the interdict was brought. In *Joint Owner of Remainder ERF 5216 Hartenbos v MEC of Local Goverment, Environmental Affairs and Develoment Planning, Western Cape Province & another* 2011 (1) SA 128 (WCC), it was stated that a listed activity is deemed to have commenced when an activity reasonably directly connected to that activity has commenced (para [41] of that judgment).

A weakness in the judgment and, perhaps, a failure by the applicant's lawyers to frame the argument, is that mining is regarded as a single activity. It is not considered whether the ancillary activities require separate environmental authorisation.

The High Court cannot be faulted for this omission in reasoning: the Constitutional Court, in *Maccsand (Pty) Ltd v City of Cape Town & others* 2012 (4) SA 181 (CC), too, did not consider the significance of the need for ancillary authorisation in terms of the NEMA (Humby 2015 above at 117). The court in *Maccsand* dealt

with the issue simply by stating that 'mining' was not a listed activity under the NEMA Regulations and, consequently, there was no authority on which the competent administrator (identified as the Minister of Mineral Resources) could base environmental authorisation for mining. Therefore, a mining company did not have to obtain environmental authorisation in order to commence mining (*Maccsand* para [53]). However, the court did not deal with whether the ancillary activities required environmental authorisation. The question was, therefore, still open to be considered in *RCL Foods*.

Many parties have interpreted the legal regime prior to the 'OES' as requiring double environmental authorisation – both for the core mining or prospecting activities, and for their ancillary activities. Humby (2013 above 66–7) illustrates this in her discussion of the Limpopo Coal example. In that instance, even though the situation was very similar to both *Maccsand* and *RCL Foods* in terms of timelines and the coming into operation of the OES, interdict proceedings were launched by a coalition of non-governmental organisations, almost simultaneously with a compliance notice being issued by the Environmental Management Inspectorate (Green Scorpions). The notice directed Limpopo Coal to desist in activities it had commenced without the requisite the NEMA authorisation. In the end, Limpopo Coal was fined heavily, and interdicted for almost a year from further developing the site. This had a negative impact on its share price.

Because of the indeterminate effect of the *Maccsand* judgment on the issue of obtaining environmental authorisation for ancillary activities, there may be space for an appeal of the *RCL Foods* judgment.

Mining in environmentally sensitive areas[14]

The judgment in *Mpumalanga Tourism and Parks Agency & another v Barberton Mines (Pty) Ltd & others* 2017 (5) SA 62 (SCA) concerned a contested, ecologically important area in Mpumalanga. The Barberton Mountain Land is home to 2 200 species of plants and 300 species of birds, in addition to having numerous unique geological features. Nevertheless, Barberton Mines (Pty) Ltd (Barberton Mines) was granted a right under

[14] The case discussion of *Mpumalanga Tourism* was co-authored with Richard Cramer.

section 17(1) of the MPRDA to prospect for gold and silver in the district of Barberton. The conflict over prospecting activities in this ecologically and geologically important area resulted in litigation, first in the High Court, and subsequently in the Supreme Court of Appeal.

The Member of the Executive Council for Environmental Affairs, Mpumalanga, issued Proclamation 12 (*PG* 132 of 29 March 1996), designating the Barberton Nature Reserve a 'conservation area' under section 1 of the Eastern Transvaal Parks Board Act 6 of 1995. A 2014 Proclamation (GN 185 of 2014 *PG* 2302 of 22 May 2014) amended the boundaries of the reserve.

Baberton Mines' attempts to begin prospecting operations met with resistance from the Mpumalanga Tourism and Parks Association and members of the Mountainlands Owners Association (the appellants). The appellants maintained that the prospecting area formed part of a protected area. The Director-General of Mineral Resources dismissed the internal appeal by the appellants and other interested parties against the granting of the prospecting right.

Baberton Mines lodged an application seeking a declaration: that it was entitled to proceed with prospecting operations; and that the appellants were interdicted from denying it access to the prospecting area for the purpose of conducting prospecting operations. In a counter-application, the appellants sought the setting aside of the decision of the Director-General on the ground that the properties constitute a nature research or protected area (paras [3]–[5]). This would mean that, under section 48(1) of the National Environmental Management: Protected Areas Act 57 of 2003 (the NEMPAA), mining and prospecting activities are prohibited. It was also contended by the MTPA's regional manager that under section 48(1)*(c)* of the MPRDA, the properties 'comprise land being used for public or government purposes or reserved in terms of any other law' (para [5]). This means that a prospecting right could not be granted over the properties unless the conditions stipulated in section 48(2) of the NEMPAA had been met.

In the court *a quo,* Baqwa J found that the prospecting area was not part of a nature reserve or protected area defined in section 1 of the NEMPAA. He rejected the provincial Acts – including the 1996 Proclamation – which were relied on in support of the contention that the prospecting area was subject to the prohibition against prospecting in section 48(1) of the

NEMPAA. In his judgment, he took the view that the 1996 Proclamation was void because the description of the area in question was vague (paras [6]–[10]).

The key question on appeal was whether the properties over which the prospecting right had been granted constituted a 'nature reserve' or 'protected area' as envisaged in the NEMPAA. The answer here depends on whether the 1996 Proclamation was valid. The Supreme Court of Appeal held that the 1996 Proclamation was valid and that the prospecting area fell within a protected area contemplated by the NEMPAA. As a result, the prospecting activities in the area were prohibited. The appeal was upheld (paras [20] [21]) without answering the question of whether section 48(1)*(c)* of the MPRDA applied.

As reasons for its decision the Supreme Court of Appeal considered the definition of 'nature reserve' (s 1 of the NEMPAA read with s 12). A 'nature reserve' is defined as 'an area declared, or regarded as having been declared, in terms of section 23 as a nature reserve' or 'an area which before or after the commencement of this Act was or is declared or designated in terms of provincial legislation for a purpose for which that area could in terms of section 23(2) be declared as a nature reserve'. A protected area is defined as 'any of the protected areas referred to in section 9'. A protected environment is defined as 'an area declared, or regarded as having been declared, in terms of section 28 as a protected environment' or 'an area which before or after the commencement of this Act was or is declared or designated in terms of provincial legislation for a purpose for which that area could in terms of section 28(2) be declared as a protected environment' (paras [10]–[12]).

Ponnan JA, for the Supreme Court of Appeal, emphasised the importance of section 12 of the NEMPAA. This section states that an area which is capable of being declared a protected environment or a nature reserve under the NEMPAA and was reserved or protected under provincial legislation for that purpose prior to the enactment of section 12, is to be regarded a nature reserve or protected environment for the purposes of the NEMPAA. The effect of this section must be that areas protected under provincial legislation enjoy the same protection as a nature reserve under the NEMPAA. Any area falling within the ambit of this section would consequently be protected under section 48(1) of the NEMPAA. This means that an area designated under the 1996 Proclamation as reserved or protected will enjoy the protection of NEMPAA (paras [13]–[15]).

The remaining question was whether the High Court was correct in declaring the 1996 Proclamation void for vagueness. The Supreme Court of Appeal's found that the High Court had erred in doing so. Citing *Van Wyk v Rottcher's Saw Mills (Pty) Ltd* 1948 (1) SA 983 (A) 989, the Supreme Court of Appeal indicated that validity does not require a 'faultless description. . .couched in meticulously accurate terms' (paras [18]–[20]). Simply naming the designated area suffices, as it enables members of the public to understand what area is protected. The Supreme Court of Appeal's view, therefore, was that the 1996 Proclamation provides adequate certainty as to the area designated as reserved or protected and that it is valid. The Proclamation meets the requirements of section 12 of the NEMPAA and qualifies for protection. Prospecting activities in the area are prohibited (paras [18]–[20]).

This case is a cautionary tale for those applying for rights under the MPRDA to ensure that the area for which they are applying does not fall under the protection of the NEMPAA. Section 48(1) of the NEMPAA is clear: the prohibition against mining, prospecting, and related activities ultimately applies regardless of rights granted under other legislation. This protection extends to areas designated as protected or reserved under provincial legislation, including legislation which predates the enactment of the NEMPAA.

Furthermore, areas protected under provincial legislation need not be described with absolute certainty and precise boundaries. Naming the area so that it is reasonably clear is sufficient. Applicants for rights under the MPRDA must proceed with care. Provincial legislation designating areas as reserved or protected cannot be disregarded, even if the boundaries of such an area are not described with absolute certainty. Where the requirements of section 12 of the NEMPAA have been met, these areas are subject to the prohibition against mining, prospecting, and related activities under section 48(1) of the NEMPAA.

Labour Matters in the Mining Context

Cameron J, in *Association of Mineworkers and Construction Union & others v Chamber of Mines of SA & others* (2017) 38 *ILJ* 831 (CC) paragraph [2], refers to the 'grievous struggle for better wages and conditions for the generations of mineworkers who have laid the foundations for this country's wealth'. He also points, eloquently, to the 'increasingly intense contest between

unions about which will represent the workers in that struggle' going forward. A series of 2017 judgments, of which the above Constitutional Court judgment is probably the most prominent, considers the struggle of the Association of Mineworkers and Construction Union (the AMCU) for recognition in various contexts.

In the platinum sector, where the AMCU's membership has grown significantly, the matter of *National Union of Mineworkers & others v Impala Platinum Ltd & another* [2017] 6 BLLR 28 (LC) illustrates the tensions that arise when shifting allegiances lead to violence. This judgment confirms the duties of employers to provide a safe working environment for employees, and how the standard of 'reasonableness' applies in this context. The judgment is also an illustration of the union rivalry between the National Union of Mineworkers (NUM) and the AMCU which has engulfed the platinum belt, and records the growing use of inter-union physical violence and intimidation by unions as a result of rivalry between AMCU and NUM.

Applicability of Collective Agreement to Minority Union Mineworkers[15]

Association of Mineworkers and Construction Union & others v Chamber of Mines of SA & others (2017) 38 *ILJ* 831 (CC) concerned whether mineworkers may exercise the right to strike while an agreement prohibiting strikes, to which they are not party, is in force. The Chamber of Mines (the Chamber) concluded a collective agreement on behalf of various gold mining companies with the majority trade unions in the gold mining sector. The AMCU did not represent the majority of employees in gold mines countrywide and was not party to the agreement. However, it had the majority of employees working at five mines as members.

Dealing with wages and working conditions, the collective agreement extended to all the represented companies' employees, including those that were not members of the majority unions in terms of section 23(1)*(d)*(iii) of the Labour Relations Act 66 of 1995 (the LRA).

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[15] The case discussion of *AMCU v Chamber of Mines* was written with assistance by Shamila Mpinga.

The AMCU did not consider itself bound by the agreement and notified three companies that its members would embark on a strike. The Labour Court granted an interdict against the AMCU. The AMCU's appeal to the Labour Appeal Court failed, and it approached the Constitutional Court for relief.

In the Constitutional Court Cameron J's judgment on the substantive issues identified three matters for consideration:

(1) The first question was whether the definition of 'workplace' in the LRA applies to section 23(1)*(d)*(iii) (para [11]). The court held that it does (para [33]). The follow-up question was whether the definition of 'workplace' should be broadly interpreted to mean an individual mine and not a company's collective operations (para [11]). The court held that 'workplace' means the collective operations and not single mines (para [37]). This means that, as the AMCU does not represent the majority of employees of the companies involved, it remains a minority trade union, bound by the terms of the agreement, which among other things prohibits striking (para [40]).
(2) The following issue was whether the constitutional rights of the AMCU's members are infringed by the provision in the LRA. In particular, the court considered whether the rights to freedom of association, collective bargaining, and strike were contravened (para [41]). The court held that the rights are limited, but in a reasonable and justifiable manner (para [42]).
(3) The final question was whether the rule of law is violated by the provision in the LRA, as it allows private parties to exercise public power arbitrarily by extending a collective agreement to non-parties to the agreement (para [60]). The court rejected this challenge (para [68]), explaining that a two-phase inquiry determines a breach of the rule of law: (i) how the exercise of such power will be regulated and what safeguards exist for its exercise; and (ii) how to ensure a rational relationship between the private actor's exercise of power and achieving legitimate legislative ends (para [70]). The contested provision clearly had a legitimate legislative end by promoting collective bargaining (para [71]).

Union Representativity Issues[16]

Association of Mineworkers & Construction Union & others v Bafokeng Rasimone Management Services (Pty) Ltd & others (2017) 38 *ILJ* 931 (LC) also concerned section 23(1)*(d)* of the LRA. The AMCU approached the Labour Court seeking an order declaring sections of the LRA unconstitutional in that they violated the rule of law, and/or the rights to equality and dignity, just administrative action, and access to court. The issue here again was the binding nature of collective agreements with majority trade unions on non-member employees. In this case, the collective agreement related to the dismissal of employees for operational requirements. The AMCU on behalf of its members argued that section 189(1)*(a)–(c)* of the LRA should either be excised from the LRA, or reinterpreted in a way that ensures consultation with any trade union whose members are affected by a dismissal. Moreover, the AMCU contended that section 23(1)*(d)* must be reinterpreted so that a collective agreement regulating dismissal cannot be extended to bind employees who are not members of the trade union party to the agreement.

As in *AMCU v Chamber of Mines* (above), the AMCU was a minority trade union on the platinum mine of Bafokeng Rasimone Management Services (BRMS) in Rustenburg (the Mine). It held no organisational rights and was not a recognised trade union for bargaining purposes. The NUM held organisational rights and recognition for bargaining purposes, being the majority trade union at the mine, together with the UASA, which held similar rights and recognition historically (paras [8] [9]). The NUM and the UASA concluded a collective agreement with the Mine concerning retrenchment. Subsequently, a number of employees were notified of their retrenchment, effective one day later. Neither the employees, nor the AMCU, was issued with notices as envisaged by section 189(3) of the LRA and they were not consulted during the retrenchment process (paras [11] [12]).

On behalf of its members, the AMCU referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (the CCMA). When it became apparent that the CCMA lacked jurisdiction, the AMCU turned to the Labour Court, challenging the procedural fairness of the dismissal. The Mine

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[16] The case discussion of *AMCU v Bafokeng* was written with assistance by Rebecca Pein.

opposed the claim, raising the collective agreement with the NUM and the UASA as justification. The Mine argued that it had followed the process agreed upon with the recognised unions in the 'consultation agreement' – a collective agreement which bound the AMCU despite its not being party to the agreement (paras [13]–[17]).

The Mine subsequently concluded a retrenchment agreement with the NUM and the UASA, which was extended under section 23(1)*(d)* of the LRA to bind employees who were not members of these trade unions, and which regulated the employees' dismissal. The employees had no recourse to challenge the fairness of their dismissal because they were bound to the agreement, which contained a full and final settlement clause and a waiver of all claims and rights of action (paras [18]–[20]). When it subsequently became clear that the AMCU would not be entitled to the relief sought under section 189(1)*(a)* of the LRA, the application was withdrawn. The constitutionality of the relevant provisions of the LRA was challenged instead (para [19] [20]).

First, the Labour Court held that section 23(1)*(d)* is not unconstitutional (paras [97]–[141]). Secondly, the court considered section 189(1)*(a)–(c)* of the LRA. The Labour Court assessed whether fundamental rights could be offended by the current interpretation of section 189(1)*(a)–(c)* which permits private parties to take away employees' individual rights to be heard prior to dismissal (paras [142]–[157]). The court concluded that the section was not unconstitutional, nor was the way in which it had been applied (paras [158]–[214]).

The Labour Court's carefully reasoned judgment recognises the importance of considering whether minority representation should be a consideration for mines when engaging with trade unions in negotiations about work conditions and retrenchment. From the frequency of litigated matters in this respect it appears as if the issue of minority representation is certainly foremost in the minds of the political constituencies situated at the mines. Concerns about representativity also influence issues of health and safety, as the case of *National Union of Mineworkers & others v Impala Platinum Ltd & another* [2017] 6 BLLR 28 (LC) illustrates.

Employer's Duty to Provide for Safe Working Environment[17]

National Union of Mineworkers & others v Impala Platinum Ltd & another (above) followed in the wake of violent activities in the platinum mining sector from 2012 onwards (para [3] for the context). The NUM, which was previously the majority workers' union in the platinum belt, was replaced by the AMCU at Impala Platinum Ltd or 'Implats' as the majority trade union.

In this matter, the NUM sought to compel Implats to institute disciplinary proceedings against 21 members of the AMCU, all of them former NUM shop stewards who had been dismissed after violent strikes in 2012, but subsequently reinstated when the AMCU replaced the NUM as the majority union. The shop stewards did not return to work, and after a series of meetings culminating in the adoption of an integrated security plan, matters came to a head when the shop stewards' disgruntlement with the lack of disciplinary steps taken against the AMCU members, became apparent. The contention in the ensuing litigation was that these former shop stewards had been intimidated and harassed, and that their rights to freedom of association had been violated. It was argued that Implats, the employer, was in breach of its duty to ensure a safe working environment, thereby violating the NUM members' conditions of employment (paras [4]–[9]).

The Labour Court considered whether Implats had breached its obligation as employer to provide a safe working environment by failing to institute disciplinary action against the AMCU. It also considered whether this failure amounted to a breach of the NUM shop stewards' contracts of employment.

First, considering the standard of reasonableness incumbent on employers to provide a safe working environment, the court ruled that the NUM had failed to discharge the onus of establishing that Implats had committed a breach of contract (para [13]). While the employer's obligation extends to taking action to combat inter-union hostility and labour unrest that could give rise to violence or threats to personal safety, a contract of employment cannot guarantee absolute safety. The standard against which the employer's obligation is assessed is one of 'reasonableness'. To determine whether this standard has been met, a

[17] The case discussion of *NUM v Impala Platinum* was co-authored with Geoffrey Allsop.

balance must be struck between 'the employer's interest in production and the employee's in self-preservation' (para [10] quoting Brassey *Employment and Labour Law* vol 1 E4:33 (Juta 1998)). On the facts, the court held that Implats had responded reasonably and lawfully to all the incidents the NUM cited in seeking relief through the court process (para [11]).

As the NUM had failed to discharge the evidentiary burden, a finding that the conditions of the NUM's employees' contracts of employment had been violated by Implats could not be justified. The application was dismissed.

Administrative Issues

The matter giving rise to the Supreme Court of Appeal's judgment in *Pan African Mineral Development Company (Pty) Ltd & others v Aquila Steel (S Africa) (Pty) Ltd* [2017] ZASCA 165 (29 November 2017) (*Pan African*) was discussed at length in the 2016 *Annual Survey* 1045–50. It involves a series of grave errors on the part of the DMR in the granting of prospecting rights to the same property to two different mining companies.

Although the subject matter is different, *Rustenburg Platinum Mines v Minister of Mineral Resources* (unreported) case 7883/2007 56189/2010 continues the theme of administrative bungling. Although the case dealt with an applicant whose application to convert an unused old order right into a prospecting right was refused, it is relevant to any party wishing to review an administrative decision regarding rights to minerals. This case highlights the importance of seeking interim relief from the court, pending the outcome of internal appeals, if an applicant is seeking to prohibit competing parties from capturing the benefit from resource extraction.

Administrative Bungling in the Queuing System for Applications[18]

Pan African Mineral Development Company (Pty) Ltd & others v Aquila Steel (S Africa) (Pty) Ltd (above) was the next instalment in the continuing saga involving an erroneously duplicative granting of prospecting rights under section 16 of the MPRDA, over

[18] The case discussions of *Pan African v Aquila* and *Shanduka v WC Nickel* were co-authored with Joseph Mayson.

certain properties in Kuruman (Northern Cape) to both ZIZA Limited (ZIZA), which was busy ceding its rights to the appellant, Pan African Mineral Development Company (PAMDC), and also to the respondent company, Aquila Steel (South Africa) (Pty) Ltd (Aquila).

Although ZIZA's application had been received first, a grant was made to Aquila and, despite an internal memorandum noting the conflict between the ZIZA and Aquila applications, the Aquila prospecting right was executed and registered in the Mineral and Petroleum Titles Administration Office on 17 July 2007 (paras [1]–[4]). Subsequently, on 22 December 2010, the regional manager accepted an application by Aquila for a mining right over one of the Kuruman properties. On 19 November 2011, a prospecting right was executed by the DMR in the name of the PAMDC, ZIZA's successor, over all the Kuruman properties.

An internal appeal to the Minister, launched by Aquila, in terms of section 96(1) of the MPRDA, against the decision of the DMR to grant ZIZA a prospecting right, was dismissed. The Minister's reason was that the prospecting right application of Aquila Steel had been unlawfully accepted, processed, and granted during a period in which ZIZA should have been afforded exclusivity. The concomitant mining right application of Aquila Steel could, therefore, also not result in a grant of such right because of the existence of a prospecting right in favour of ZIZA (para [7]).

On review, Tuchten J upheld the review and granted a substitution order upholding Aquila's administrative appeal. The judge found that ZIZA's prospecting right had been unlawfully granted. The High Court granted Aquila the mining right for which it had applied (para [9]).

The Supreme Court of Appeal reversed Tuchten J's decision on appeal. Writing for the majority, Ponnan J indicated that all minerals vested in the state after the MPRDA came into effect. This is contrary to the interpretation in *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC). Ponnan J was correct in stating that a new regime governing the allocation of mineral rights was created (para [12]), but not as regards the vesting of minerals. For purposes of the judgment, however, this error is irrelevant.

Under the MPRDA's transitional provisions in Schedule II to the MPRDA, holders of unused old order rights had the exclusive right to lodge an application for the conversion of those rights under item 8 of Schedule II. The exclusive right to apply for

conversion prevailed for so long as the application remained to be decided, under item 8(3) of the transitional provisions, read with section 16(2)*(b)* of the MPRDA. Once the outcome had been decided, the old order right holder would lose its right to exclusivity (paras [12] [13]).

Section 9(1) of the MPRDA precludes the state from accepting a subsequent application until an existing application has been decided. The amendment to section 16(2) also eradicated any uncertainty that may have existed on this point: the Regional Manager may not accept a later application for the same mineral and the same property while an earlier application is yet to be determined. Section 19(1)*(a)* further supplements the position by providing that a prospecting right holder may exclusively apply for and be granted a renewal of the prospecting right as regards a particular mineral and prospecting area (para [14]).

Ponnan JA's interpretation of these rules was that ZIZA's conversion application (of 19 April 2005, accepted by the RM on 17 August 2005 and granted on 26 February 2008) meant that its old order right over the Kuruman properties prevailed between August 2005 and February 2008. Considering the Aquila application during this time was not appropriate, and granting Aquila's application was unlawful, given the exclusivity of ZIZA's right. Moreover, as ZIZA (and, by extension, PAMDC) held a prospecting right over the relevant properties, it also had an exclusive right to apply for mining rights over these properties (paras [16]–[18]).

What makes this case problematic, is that the court was called upon to unravel a series of administrative bungles on the part of the DMR, to ensure a just outcome for the parties. Aquila averred that ZIZA's applications did not comply with section 16(1)*(b)* of the MPRDA, and for reasons of unlawfulness should, therefore, never have been accepted. The court *a quo* saw the 'return' of an application for amendments and additions, under section 16(3), as tantamount to a rejection of the application. Ponnan JA's view here deviated. Pointing to the fact that the DMR can accept an application and then call for its amendment/supplementation before determining the outcome of the application, the Supreme Court of Appeal asserted that ZIZA's applications were sufficiently compliant for the DMR to accept them, and that unlawfulness was not an issue (paras [19]–[25]).

In a cross-appeal Aquila sought a declarator that ZIZA's prospecting right had lapsed with effect from 9 November 2010.

This was the date the court *a quo* identified as the moment upon which ZIZA's right lapsed: the day on which it was deregistered. The Supreme Court of Appeal held that such a finding would be at odds with *Palala Resources (Pty) Ltd v Minister of Mineral Resources and Energy & others* 2016 (6) SA 121 (SCA). In *Palala* it was held that 'the restoration of a company's registration automatically re-vests the company with its property with retrospective effective and validates all corporate activities undertaken during the period of deregistration' (para [30]). ZIZA's prospecting right must be deemed not to have lapsed on deregistration; and ZIZA was deemed to have held its prospecting right throughout the period of its deregistration until the expiry of the right (para [32]). This means that ZIZA must be deemed to have held a prospecting right over the relevant properties, even while it was deregistered, and that the DMR could not have validly accepted Aquila's application under section 22(2)*(b)* of the MPRDA during this time. The appeal was upheld, and the cross-appeal dismissed (paras [31]–[33]).

In a dissenting judgment, Willis JA took issue with the finding of the substitution of the Minister's decision to refuse the granting of a mining licence to Acquila in the majority's decision, for reasons pertaining to the administration of justice (para [32]). In his view, a structural interdict or rule *nisi* procedure would have addressed some of the potential practical difficulties that may have resulted from the formulation of the order (paras [34]–[36]).

Willis JA, in the minority judgment, agreed with the trial court's reasoning on the decision to review and set aside the regional manager's decision to accept the ZIZA application for prospecting rights, holding that it was a 'nullity' from the outset (para [37]). The interpretation of section 16(3) of the MPRDA is definitive, in the view of Willis JA. He argued for a purposive interpretation of the MPRDA, one that 'requires that the development of a modern and progressive system of minims is the MPRDA's first order priority' (para [41]). The minority judgment set out the considerations that should inform such an interpretation (paras [42]–[47]). With this in mind, the minority judgment then held that section 16(3) of the MPRDA is 'cast in imperative terms' and that it means that 'a defective application is . . . dead' (para [49]). This reasoning stresses that the 'resources of time and intellectual expertise of the Minister' should not be wasted by expecting this office to 'apply [its] mind to something which is incapable of being considered' (para [49]).

Willis JA also pointed to the 'clear bargain' contained in the MPRDA in terms of which 'investors are encouraged to prospect for minerals on the premise that if they are successful, they are first in line for the issue of a licence to mine. Common sense, ordinary, everyday morality and first principles of the interpretation of statutes require that the bargain be respected and affirmed by the courts' (para [64]).

Shanduka Resources (Pty) Ltd v Western Cape Nickel Mining (Pty) Ltd & others 2017 JDR 0285 (WCC) was another judicial attempt to clean up in the wake of bungling on the part of the executive. The central issue was whether Shanduka Resources (Pty) Ltd (Shanduka) or Western Cape Nickel Mining (Pty) Ltd (WC Nickel) qualified as the first-in-time applicant for prospecting rights over a particular property. Section 16(2)*(c)* of the MPRDA states that the regional manager must accept an application for a prospecting right if, among other requirements, 'no prior application for a prospecting right, mining right, mining permit or retention permit has been accepted for the same mineral on the same land and which remains to be granted or refused'. Section 9(1)*(b)* of the MPRDA provides that, where the regional manager receives more than one application on different days, the applications must be deal with in order of receipt.

Both parties had originally been advised by the second respondent, the regional manager, that their respective applications could not be accepted because the fifth respondent, Hondekloof Nickel (Pty) Ltd (Hondekloof), already held the prospecting rights (para [3]). In 2013, however, the regional manager was ordered to accept and process Shanduka's application, and to deal with the application as if it had been lodged on 11 March 2013, after the regional manager failed to oppose an application by Shanduka to that effect (paras [5] [6]). The regional manager, in the same year, applied for that judgment to be rescinded, citing as one of the reasons that Shanduka's application could not be accepted because the rights in question had already been granted to Hondekloof (para [7]). Shanduka opposed this application, claiming that Hondekloof's prospecting right had lapsed by effluxion of time on 14 February 2013, and that the renewal executed later in 2013 in terms of a notarial deed was not legally competent. Shanduka joined the Minister, the Deputy Director-General and Hondekloof as additional respondents in the proceedings (para [8]).

A Hondekloof subsidiary applied for leave to intervene as a respondent in the main application and for substantive relief: that

it be recognised as the first-in-time applicant regarding prospecting rights over the relevant property; an order declaring that the regional manager was obliged to accept and process its application on 22 February or, alternatively, that Hondekloof was the holder of a valid prospecting right over the land; and that the orders in favour of Shanduka be rescinded and its counter-application be dismissed (para [9]). WC Nickel was admitted as a party in the proceedings in the trail court (para [10]).

In 2015, before the hearing in the court *a quo*, the ratio in *Minister of Mineral Resources & others v Mawetse (SA) Mining Corporation (Pty) Ltd* 2016 (1) SA 306 (SCA) (*Mawetse*) made the government parties (second, third and fourth respondents) drop their opposition to Shanduka's claims. The court in *Mawetse* reasoned that if a prospecting right's period of validity were deemed to begin upon the registration or the coming into effect of the right, the effect would be to sterilise the right indefinitely until either event has occurred. This, it argued, would be contrary to the letter and spirit of the MPRDA (para [20] of *Mawetse*). The court found that the commencement date of the prospecting right's period of validity is the date on which an applicant is informed of the granting of the right (para [21] of *Mawetse*).[19] This *ratio* made the second, third and fourth respondents drop their opposition at the hearing in the court *a quo* (paras [11]–[13]) and agree to abide the decision of the court *a quo* (para [14]).

As to which party was first-in-time, between 14 and 22 February 2012, agents of WC Nickel purported to attempt to upload an application for a new prospecting right as Hondekloof's right was about to expire. At the time, this was an essential requirement in terms of section 16(1) of the MPRDA and regulation 2(1) of its Regulations for the lodging of prospecting right applications (para [20]). After a failed attempt on 22 February 2012 to upload the application at the regional manager's office in Cape Town, the information systems manager at the regional manager's office advised WC Nickel to leave a hard copy and an electronic copy on a compact disc at his office and he would upload the application when he returned the following week. Thereafter followed a number of failed attempts by agents of WC Nickel to

[19] This position has subsequently been amended by the latest Amendment Act 49 of 2008, with effect from 7 June 2013, which introduced a definition of 'effective date' to mean 'the date on which the relevant permit is issued or the relevant right is executed'.

ascertain whether such submission had occurred. Further, it was not immediately clear whether the application referred to portion 2 of Nuwefontein 6, the portion of the farm to which the disputed rights refer (paras [21]–[26]). This factual uncertainty ended up being irrelevant, as is shown below.

The acting regional manager intimated to WC Nickel that she could not accept its application as she was of the view that Hondekloof had already been granted the relevant prospecting rights and that they had not prescribed as they had not yet been issued (paras [27]–[32]). WC Nickel faced a dilemma: either it had to challenge the regional manager's decision not to accept its application, or it had to proceed with the department's advice – having Hondekloof (a holding company of WC Nickel) and the department execute and register Hondekloof's prospecting rights for a further three years from the date of registration. Hondekloof proceeded with the latter option and the relevant deed was notarially executed on 2 May 2013. These rights were intended to be ceded and transferred to WC Nickel using procedures provided in terms of section 11 of the MPRDA (paras [32]–[35]).

In the court *a quo*, Shanduka alleged that the court could not find on the papers that the application lodged at the regional manager's office had been in respect of portion 2 of Nuwefontein 6, and, even if it had, the evidence showed that WC Nickel had subsequently abandoned such application when it chose to accept that Hondekloof's prospecting rights should be registered and ceded to it (para [36]).

The court *a quo* declared that Hondekloof's prospecting rights had expired and set aside any decisions made by the government parties in favour of Hondekloof after that date. The court also declared that WC Nickel was entitled to be recognised as the first-in-time applicant for the prospecting rights in terms of sections 9 and 16 of the MPRDA, rescinding the abovementioned orders granted in favour of Shanduka (para [37]). Shanduka's appeal aimed to reverse the effect of this declaration (para [38]).

The court assumed, in the face of this factual uncertainty, that WC Nickel had in fact included portion 2 of Nuwefontein 6 in its application on the basis that the regional manager had dealt with the matter as if the application had included that portion (para [43]). This was essentially irrelevant. However, as the court reasoned that if WC Nickel wanted its application to persist, it had to challenge the regional manager's refusal to accept that application. Otherwise, the refusal of the application would

remove the application from the queue for consideration – it could no longer be first-in-time (paras [44]–[47]).

The court reasoned that the time-lines provided in the MPRDA are aimed at promoting certainty and efficiency (para [49]). Having failed to exercise its right to appeal within 30 days in terms of section 96 of the MPRDA, WC Nickel could not have taken the regional manager's refusal on judicial review, as it had failed to exhaust all internal remedies, a requirement for taking administrative decisions on review in terms of section 7(2) of the PAJA (para [48]). This was not 'waiver', but it did entail a forfeiture of WC Nickel's ability to pursue available remedies.

The court cited *Opposition to Urban Tolling Alliance & others v The South African National Roads Agency Ltd & others* [2013] 4 All SA 639 (SCA) as precedent for the premise that, in the absence of an extension in terms of section 9 of the PAJA, 'a court has no authority to entertain a PAJA-regulated review application brought outside the 180-day outer limit' stipulated in section 7(1) of the PAJA. The court *a quo* accordingly had no authority to entertain WC Nickel's application, which essentially constituted a review application (para [51]). It was still subject to the time limitation in the PAJA and no application in terms of section 9 to extend the period had been lodged (para [52]). The court *a quo* should have had regard *mero motu* to the internal remedy and the time bar issues. These constituted two independent bases in law on which Shanduka's appeal could be upheld (para [54]).

The court held that the decision not to accept WC Nickel's application was not based on any antecedent administrative decision (thus rejecting WC Nickel's reliance on the *dictum* in *Oudekraal Estates (Pty) Ltd v City of Cape Town & others* [2004] 3 All SA 1 (SCA) para [31]). The consideration that the prospecting rights had already been granted did not constitute an antecedent legal decision – it was merely a fact that the regional manager was required to take into account in arriving at her decision (para [58]). By failing to challenge the decision timeously, WC Nickel's application became finally disposed. It could not subsequently have been resuscitated by the determination of the validity or invalidity of a premise leading to the relevant administrative decision. Therefore, the argument by counsel was deemed to have 'no bearing whatsoever in the given circumstances' (para [60]).

Shanduka's appeal was upheld and WC Nickel's intervening

application dismissed (para [63]). Shanduka, therefore, was deemed to be the first-in-time applicant for the prospecting rights.

Inordinate Delay – A Bar to the Granting of Interim Relief[20]

Rustenburg Platinum Mines v Minister of Mineral Resources (unreported) High Court, Gauteng Division case 7883/2007; 56189/2010, dealt with a delayed administrative action review of decisions made by the Deputy Director-General, Department of Mineral Resources (the DDG), on the granting or refusal to grant mineral rights. The main finding of the case is that an inordinate delay on the part of an applicant to bring an application for interim interdictory relief *pendente lite* is fatal to the success of the application due to its detrimental effect on the administration of justice and prejudice to the respondents (paras [43]–[47]).

Under Item 8 read with Item 1 of Schedule II to the MPRDA, the first applicant, Rustenburg Platinum Mines (RPM), became the holder of an unused old order mining right for specified minerals over certain properties when the MPRDA came into effect on 1 May 2004 (para [18]). RPM applied to have this converted to a prospecting right under section 16 of the MPRDA (para [20]). This was refused by the third respondent, the DDG, because granting the right would result in the concentration of mineral resources under the control of the applicant, and would constitute an exclusionary act (para [21]). RPM lodged an internal appeal against this decision in terms of section 96 of the MPRDA, which remains pending after nearly a decade (para [22]).

During this time, the DDG granted prospecting, and then mining, rights over the property to the fifth respondent, Genorah Resources (Pty) Ltd (Genorah), and prospecting rights to the ninth respondent Bauba A Hlabirwa Mining Investments (Pty) Ltd (Bauba). RPM again launched internal appeals against these decisions, which are also still pending (paras [23]–[26]). RPM and the second applicant, RPM's joint venture partner ARM Mining Consortium Limited (ARM), approached the court for an interlocutory application on a semi-urgent basis. However, after discussions with the Minister, the applicants withdrew the application (paras [29] [35]). The application was resurrected three

[20] The case discussion of *Rustenburg Platinum v MMR* was co-authored with Romi-Jean Martin.

years later. This was ten years after their application to convert their old order right had been refused, four years after Genorah had been granted a mining right, and six years after Bauba had been granted a prospecting right (para [30]).

RPM and ARM sought to interdict the DDG from granting Bauba a mining right and to interdict Genorah from exercising their mining rights, pending the outcome of the main review application (paras [31] [32]). The main review application sought to challenge the decisions of the Minister, the Director-General, the DDG, and the regional manager (the state respondents) (para [1]). RPM and ARM also sought an order declaring that, considering the DDG's delay, they had exhausted all internal remedies and could proceed with review applications in terms of the PAJA (para [2]).

On the basis of section 96 of the MPRDA, which states that an appeal does not suspend an administrative decision taken under the Act, the court confirmed that Genorah and Bauba could act on the rights granted them in spite of RPM's appeal. Therefore, there was no impediment to RPM seeking interim relief while appealing the decisions under section 96 (para [40]). The court observed that even though RPM appealed the grant of prospecting rights to Genorah, they did nothing to prevent the DDG from later granting Genorah a mining right. They launched an interlocutory application but withdrew it which 'lulled Genorah into a false sense of security' that RPM would not challenge the decision further (para [42]).

The court's opinion was also that, on the facts, RPM ought to have been aware of the reasonable possibility that Genorah would be granted a mining right and that once this was granted, it would be a 'game changer', as Genorah would be obliged to commence mining under section 19(2)*(b)* and *(c)* of the MPRDA (paras [35]–[37]). However, RPM did nothing to stop Genorah from engaging in mining activities. They merely lodged an appeal against the DDG's decision to grant Genorah a mining right (para [36]). By the time the current application was brought, Genorah had already incurred significant expenses by undertaking numerous studies and prospecting activities, securing international partners, and forming an agreement with Eskom to construct an electrical substation. They had also committed to a social and labour plan creating thousands of jobs in the area (para [41]).

In view of the inordinate delays in this matter, the High Court held that the applications stood to be dismissed (para [46]).

Basson J noted that the interdict *pendente lite* is a special remedy that should be pursued without delay (para [43]; *Juta & Co Ltd v Legal and Financial Publishing Co (Pty) Ltd* 1969 (4) SA 443 (C) 445B–E). Delaying an application for review could be viewed as acquiescence in the situation by the applicant, so that the respondent was lured into a false sense of security, causing 'real inequity' (para [44]; *Botha v White* 2004 (3) SA 184 (T) para [31]). Two reasons were put forward to support the view that challenges to administrative action must be brought timeously and pursued diligently to finality. First, it is important to avoid causing prejudice to respondents. Secondly, it would be contrary to the administration of justice and the public interest to allow decisions to be set aside after an unreasonably long period has elapsed (para [45]; *Gqwetha v Transkei Development Corporation Ltd & others* 2006 (2) SA 603 (SCA) paras [22] [23]).

In addition, the court found that the applicants had not met the requirements for a successful interim interdict (para [47]). It also evaluated whether the applicants had shown a *prima facie* right 'open to some doubt' (para [49]; *Webster v Mitchell* 1948 (1) SA 1186 (W) 1189). Considering whether the applicants had a sufficiently strong prospect of success in their review to set aside the decision to grant Genorah a mining right, the court opined that they had to show a sufficiently strong case with at least some prospects of success in the main application, even if such prospect was weak (para [51]). For the court, two considerations dictated against finding even a weak prospect of success. For one, all that was required to establish Genorah's claim for the granting of a mining right under section 22(1) of the MPRDA, read with regulation 10, was the factual granting of a prospecting right. Validity of the prospecting right is not a necessary precondition to apply for a mining right (paras [51] [52]). Secondly, the review proceedings were most likely outside of the stipulated time limit in section 7(1) of the PAJA (ie, 180 days after becoming aware of the decision sought to be reviewed (para [53])). These considerations induced the court to find that there were no prospects of success in challenging the granting of Genorah's mining right (para [55]).

The applicants may have wanted to argue on the basis of the need for a prospecting right as a factual – rather than legal – prerequisite for the application for a mining right, in terms of section 19(1)*(b)* of the MPRDA. Whether this argument would have convinced is open to speculation.

In considering the right to have the granting of Bauba's prospecting right reviewed, the court was mindful of the fact that Bauba was set up by and in the interests of a previously disadvantaged community. The court acknowledged the MPRDA's aim to facilitate equitable access to and sustainable development of the nation's mineral resources (paras [57] [58]). The state must ensure that mineral resources are distributed equally for the benefit of the disadvantaged and should not be sterilised. The court also noted the imperative in section 104 of the MPRDA, that the Minister *must* grant a prospecting or mining right to a local community if certain requirements are met (paras [59] [60]). These are good reasons for granting a prospecting right to Bauba (para [61]). These considerations had to be weighed up against the exclusive right of RPM, under the MPRDA Schedule II items 6(3) and 7(3), to convert their old order right into either a mining or a prospecting right (*AgriSA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) para [14]; item 8 of Sch II to the MPRDA).

For the same considerations as those relating to the 180-day delay rule (para [56]), the court held that in attempting to interdict Bauba's grant, RPM and ARM had no prospects of success (para [62]). What the court failed to consider, was RPM's exclusive right to apply for the conversion of its old order rights, until the matter had been finalised. Because of the outstanding internal appeal, the matter had not yet been finalised and RPM could have argued that it still had the exclusive right to apply for the rights in question. Were this argument to hold, the court's reasoning regarding Bauba's preferential right would fall away and there would be some prospect of success in reviewing Bauba's prospecting right. This should have been sufficient for the *prima facie* standard outlined above.

The court's finding that the applicants had not established the existence of irreparable harm is questionable. It appears that the court conflated the question of irreparable harm (paras [63]–[67]) with the balance-of-convenience question (paras [68]–[72]). The court weighed up the strengths and weaknesses in RPM/ARM's case – especially their apparently unconvincing argument of irreparable harm (paras [63]–[67]) – against the extensive potential prejudice to the respondents (paras [68]–[70]). This supported the finding that the requirements for an interim interdict had not been met, and the interim interdict applications were refused (para [71]).

Under section 96(3) of the MPRDA, a review cannot be launched before exhausting internal remedies. On this point, the court reasoned that section 6 of the PAJA requires administrative decisions to be taken within a reasonable time. The DDG's ten-year delay in reaching a decision on appeal was sufficient consideration for the court to find exceptional circumstances existed to warrant a conclusion that RPM/ARM had exhausted all internal remedies (paras [102]–[104]). The applicants could, therefore, proceed with their review application under the PAJA.

The salient insight from this case is that, although the applicants had administratively appealed every decision within the prescribed time and in accordance with the correct procedure, the court still expected to be approached concurrently for interdictory relief. Exhaustion of internal remedies consequently does not appear to preclude an aggrieved party from turning to the court process. The court found that the state's action – or rather, lack thereof – unacceptable. Even so, this view had no bearing on the court's decision to dismiss RPM's application for interim interdictory relief. This also implies that an applicant cannot rely solely on the internal appeal processes in the MPRDA to protect its interests in particular minerals in a particular property against competing applicants. Further, it can be argued that the refusal is only finalised once all internal appeals have been finalised and, accordingly, RPM still had an exclusive right to apply for a prospecting right under the transitional arrangements of Schedule II.

However, there are additional considerations. The MPRDA provides that new applications for mineral rights can fail if the granting would result in an exclusionary act or in the concentration of mineral resources under the control of the applicant (section 17(2)*(b)*). Although the provision does not specifically apply to conversions of old order mining or prospecting rights or unused old order rights, the application for conversion of an unused old order right into a prospecting right may be refused for these reasons (see H Mostert *Mineral Law Principles and Policies in Perspective* (Juta 2012) 100). This may be inferred from item 8(3) of Schedule II to the MPRDA, which contemplates the refusal of an application for conversion of an unused old order right into a prospecting or mining right, most likely because of the MPRDA's purpose of promoting equitable access to the nation's mineral resources (Mostert ibid 101).

Ultimately, the purposes and objectives of the MPRDA provided the direction here, both in terms of dismissing the applica-

tion to interdict the state from granting Bauba, a previously disadvantaged community, a licence, and in refusing to interdict Genorah from exercising mining activities after significant expenses had already been incurred and social and labour plans had been finalised to the benefit of the community.

Dealing with Pure Economic Loss pursuant to Erroneous Grant of Rights[21]

Saamwerk Soutwerke (Pty) Ltd v Minister of Mineral Resources & another (1098/2015, 206/2016) [2017] ZASCA 56 (19 May 2017) involved a delictual action for pure economic loss instituted by Saamwerk Soutwerke (Pty) Ltd (the appellant) against the Minister of the DMR and a company called SA Soutwerke (Pty) Ltd (the second respondent).

The matter arose from conflicting claims and activities to mine salt on Vrysoutpan, which was owned by the state. It was complicated by the switch in the legislative regime dealing with minerals and petroleum on 1 May 2004. The right to mine salt was regulated by section 9(1) of the Minerals Act 50 of 1991 until it was repealed and replaced by the MPRDA.

SA Soutwerke had been mining on Vrysoutpan for several years. Its mining authorisation lapsed in October 1992, and it only sought a new permit in November 2000 under section 9(1) of the Minerals Act. Vrysoutpan being state property, ministerial consent was required for a new mining permit (s 9(2) of the Minerals Act). This consent was granted in August 2002. The regional director was authorised to sign the written agreement and consent with SA Soutwerke. The consent agreement was signed on 07 December 2001. The department informed SA Soutwerke in 2003 that a mining permit would be issued for five years, subject to SA Soutwerke complying with various requirements. Two subsequent letters from the department in 2003 reiterated the message. SA Soutwerke met all requirements by December 2003 and expected a five-year mining permit to be issued. Nevertheless, in April 2004, under the new mineral law framework, the regional director of the department refused to accept the recommendation that the mining permit be issued for five years. The director

[21] The case discussion of *Saamwerk v MMR* was co-authored with Geoffrey Allsop.

therefore granted the right for a single year – the permit running until 27 April 2005.

After the expiry of SA Soutwerke's permit, Saamwerk lodged an application under section 22 of the MPRDA for a mining right in respect of Vrysoutpan (on 22 August 2005). The department informed Saamwerk that its application would be granted subject to the condition that a revised Social and Labour Plan (SLP) be submitted. The latter was submitted on 6 December 2006, and the department raised no further objection to the revised SLP. Saamwerk contended that, had the department executed and granted the right within a reasonable time – as required by section 6 of the MPRDA – Saamwerk would have been able to commence mining by 1 January 2007.

However, complications arose in August 2006, when SA Soutwerke objected to the department against any mining right executed in favour of Saamwerk, on the basis that SA Soutwerke was already the holder of a valid mining right over Vrysoutpan. A copy of SA Soutwerke's mining right was produced, the terms of which allegedly afforded SA Soutwerke a right to mine for an indefinite period: the mining permit contained no expiry date.

In a second letter to the department in September 2006, SA Soutwerke claimed to be the lawful owner of a mining right over Vrysoutpan, that such right amounted to an old order right under the transitional provisions of the MPRDA and that Saamwerk's mining right over Vrysoutpan had been erroneously granted. As holder of an old order mineral right, SA Soutwerke argued, its rights would persist for a period of five years. It demanded that the mining right granted to Saamwerk be suspended immediately.

In a meeting on 06 December 2006 between the regional manager and SA Soutwerke it transpired that the regional manager was unable to locate a copy of the mining right application which appeared in SA Soutwerke's letter to the department in 2004 and which supported the claim to an indefinite mining right. Instead, SA Soutwerke's original mining right – which had expired in 2004 – was produced. SA Soutwerke responded by presenting the regional manager with a copy of the mining right application referred to in its 2004 letter. The application, which was undated, is what SA Soutwerke relied on to contend that its mining right was indefinite. The regional manager expressed reservations as to the authenticity of the document presented by SA Soutwerke, based on discrepancies in various time stamps and the fact there was no expiry date.

The matter was referred to the chief director of the DMR for further investigation, and in turn to the head of legal compliance who concluded that the document presented by SA Soutwerke was not authentic as it contained no expiry date. SA Soutwerke maintained that the document was authentic and that its mining right subsisted for an indefinite period. The head of legal compliance submitted his report to the chief director indicating that SA Soutwerke's mining right had expired.

In March 2007 Saamwerk instituted a High Court application in the Northern Cape, Kimberly Division before Lacock J seeking a declaratory order that it was entitled to mine on Vrysoutpan and that the Minister was obliged to execute Saamwerk's mining right. A declaratory order was also sought against SA Soutwerke declaring their alleged mining right invalid and claiming certain interdictory relief against SA Soutwerke. Saamwerk succeeded in its application, but SA Soutwerke sought leave to appeal to the Supreme Court of Appeal which suspended Lacock J's order on 15 December 2009. The Supreme Court of Appeal dismissed the appeal (*SA Soutwerke (Pty) Ltd v Saamwerk Soutwerke (Pty) Ltd* [2011] 4 All SA 168 (SCA)).

In the present case, Saamwerk alleged that SA Soutwerke was party to the creation of a fraudulent mining right, and that it had relied on that fraudulent right to prevent Saamwerk from mining salt on a farm called Vrysoutpan. Saamwerk alleged that it had suffered damages in the form of pure economic loss through the conduct of the Minister (whether the refusal to execute Saamwerk's mining right was negligent or deliberate).

The court dealt with the issues against SA Soutwerke and the Minister in two separate parts, each of which raised different questions of law. The answer to each legal issue and the reasons for it are canvassed below.

In the case against SA Soutwerke, the primary point – which was undisputed – was that SA Soutwerke clearly had no right to continue mining on Vrysoutpan after April 2005. Essentially, the issue was whether Soutwerke was complicit in forging the mining right it relied on to prevent Saamwerk from commencing operations. Related to this issue was whether SA Soutwerke had actually ever received that document. This issue hinged primarily on an evaluation of the evidence before the court *a quo.* There, it had to be determined whether Saamwerk had established that SA Soutwerke was party to the fraudulent mining right document. The court had also to consider whether to grant Saamwerk's

application to present evidence before the Supreme Court of Appeal. The final issue was whether SA Soutwerke's plea of prescription in response to Saamwerk's claim had any merit.

The case against the Minister was whether Saamwerk had established that the conduct was wrongful and therefore actionable in delict. Saamwerk's pleadings in this respect were on the premise that two administrative omissions by the department (both apparently pleaded in the alternative) were delictually wrongful. First, it was argued that the department had wrongfully and with malicious intent refused to execute Saamwerk's mining right by the end of December 2006. Alternatively, it was contended that the department had negligently and wrongfully refused to execute that right and – in so doing – engaged in conduct that permitted SA Soutwerke to continue to mine unlawfully at Vrysoutpan. The court considered these two allegations together as 'two sides of the same coin' that 'could conveniently be taken together' (para [59]).

Both Saamwerk's claims failed in the Supreme Court of Appeal. As for the claim against SA Soutwerke, the Supreme Court of Appeal found that Saamwerk had failed to discharge the onus of establishing that SA Soutwerke had been party to a fraudulent transaction. As for the claim against the Minister, the court refused to recognise the various administrative omissions – by the Department – as sufficiently compelling to recognise a claim for pure economic loss in this instance.

What is important for the mining context, however, is the manner in which the court approached the question of whether the department had acted wrongfully in delict. The court explained (para [60]) that for claims of pure economic loss which are presumed to be lawful, the applicant must establish that the causal conduct resulting in pure economic loss is wrongful and therefore actionable in delict. A judicial value judgment must be made on whether a pure economic loss claim will be recognised as wrongful; and such a judgment depends on various policy considerations, rooted in (and consistent with) the Constitution. Expanding on the various relevant policy factors in this case, the court concluded that a sufficiently compelling case had not been established by Saamwerk to recognise the action of the DMR as wrongful, and therefore the claim against the Minister was dismissed.

The Supreme Court of Appeal indicated that an administrative act or omission causing pure economic loss is not *per se*

actionable; but where it is undertaken in bad faith or dishonestly, the act or omission will generally be wrongful (*Telematrix (Pty) Ltd v Advertising Standards Authority of SA* 2006 (1) SA 461 (SCA); *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC)). Ordinarily, a public law wrong will not necessarily attract private law remedies (*Steenkamp* (above) paras [20]–[22]), because parties aggrieved by public actions are entitled to institute public law remedies to address their grievances. In this respect Saamwerk was entitled to review the refusal of the Minister to execute the mining right as unlawful administrative action in terms of section 6(2)*(g)* of the PAJA. Secondly, Saamwerk had already sought to obtain legal redress through the public law remedy of a declaratory order against the Minister and SA Soutwerke, a cause of action which was ultimately successful. Third, as held above, Saamwerk already had a successful delictual action against SA Soutwerke in respect of any profits it might have lost due to its inability to mine at Vrysoutpan. The court accordingly concluded that there was no good reason to further extend the law of delict to allow for a further claim against the Minister (a public official) when a claim already lay against Soutwerke (a private party).

Additionally, the Supreme Court of Appeal stressed that an incorrect administrative act or omission is not necessarily never actionable in the absence of bad faith or dishonesty. However, if fraud or dishonesty is absent (as in the present matter), that will be a weighty consideration against a finding of wrongfulness (para [63]).

Saamwerk sought to argue that the department intentionally and deliberately decided not to execute Saamwerk's mining right and, therefore, that *dolus* (as opposed to mere negligence) was present. The court rejected this proposition: intention is only present if the defendant directed its will at achieving a particular result, and this could not be established. At best, the department had acted negligently, but the Supreme Court of Appeal declined to make a firm finding on the delictual element of fault in the present matter.

Matters Involving Taxation and Tariffs

Only *United Manganese of Kalahari (Pty) Ltd v Commissioner for the South African Revenue Service* case 74158/2016 GNP (3 October 2017) is of relevance.

'Gross Sales' for the Purpose of Calculating the Royalty[22]

In *United Manganese of Kalahari (Pty) Ltd v Commissioner for the South African Revenue Service* (above) the applicant sought declaratory relief regarding the correct interpretation and application of section 6(3)*(b)* of the Mineral and Petroleum Resources Royalty Act 28 of 2008 (the Royalty Act) relevant to the determination of the applicant's 'gross sales' for the purpose of calculating the royalty payable under section 3(2) of the Royalty Act. The dispute centred around the section 6(3)*(b)* provision for deducting certain transport, insurance, and handling (TIH) costs from the calculation of gross sales. The applicant also sought specific relief in the form of an order from the court that it could omit certain monetary amounts from the total it was required to pay for the 2010 and 2011 years of assessment (para [1]).

The SARS opposed the relief on three grounds. First, it argued that the case should have been brought to the tax court after the SARS had rendered a decision (not yet taken) for the assessments at issue and, in any event, the applicant had failed to exhaust its internal remedies provided for in the Tax Administration Act 28 of 2011. For either of these two reasons, the SARS alleged that the court lacked jurisdiction to hear the matter. Secondly, it argued that the court should exercise its discretion not to consider granting the relief sought. Lastly, it put forward its interpretation of section 6(3)*(b)* of the Royalty Act and argued that its interpretation should be preferred to the applicant's (para [15]).

Regarding the SARS's first argument, Meyer J acknowledged that 'tax cases are generally reserved for the exclusive jurisdiction of the tax court in the first instance', but found that it was settled law that the High Court has jurisdiction to hear and determine tax cases turning on legal issues (*Metcash Trading Ltd v Commissioner for South African Revenue Service & another* 2000 (1) SA 1109 (CC) para [18]). Thus, regarding the declaratory relief, Meyer J found the court to have jurisdiction as the question was legal in nature (para [20]). As the case was not a review under the PAJA, he found that the section 7(2) requirement of exhausting internal remedies was not relevant for the declaratory relief sought (para [27]). However, Meyer J found that the court

[22] The case discussion of *United Manganese v SARS* was co-authored with Joseph Mayson.

was not competent to grant the specific relief sought, as it involved a question of fact, there was insufficient evidence before the court, and the SARS was still seized with the matter at the time of the hearing; to make such a pronouncement would usurp the SARS's function (paras [22]–[26]).

The court rejected the SARS's second argument that the court should exercise its discretion not to consider granting the declaratory relief sought as the Royalty Act was new, complex legislation, and there were many different views on interpretations and applications of the Act. Clarity, in this regard, should be welcomed and the court should exercise its discretion to adjudicate on the declaratory relief sought (para [21]).

Finally, regarding the interpretation of section 6(3)*(b)* of the Royalty Act, Meyer J's point of departure was 'the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document' (para [29]). The SARS argued that the applicant could only deduct the TIH costs that were specifically included in its prices to its customers. If the price was not determined by TIH costs, disregarding TIH costs would have no effect on the price and, therefore, on gross sales. Therefore, only where the price is a function of the TIH costs can the TIH costs be excluded from the calculation of gross sales. The last leap of reasoning was not explained in the judgment, but one would assume that the SARS would argue that the purpose of the section 6(3)*(b)* exclusion is to reduce price pressures from the Royalty Act's taxation measures and, if the price is unaffected by TIH costs, there is no direct price pressure from taxing these costs. The exclusion of such costs would, therefore, not promote the purpose of the section. Meyer J found the SARS's interpretation 'patently flawed,' contradicting the ordinary grammatical and contextual meaning of section 6(2) and 6(3)*(b)* (para [29]). He considered the words clear and unambiguous, and held that the 2009 amendment (Tax Laws Amendment Act 17 of 2009) shows the legislature's intention to exclude all TIH expenditure after the metal has reached the condition specified in Schedule 2 (paras [37] [38]). With the amendments, the section now reads:

> For purposes of subsection (2), gross sales is determined without regard to *any expenditure incurred* in respect of transport, insurance and handling of an unrefined mineral resource after that mineral resource was brought to the condition specified in Schedule 2 for that mineral resource or any expenditure incurred in respect of transport, insurance and handling to effect the disposal of that mineral resource.

The italicised words replaced the words 'any amount received or accrued' in the pre-amendment section. The previous wording appeared to indicate that only TIH expenditure included in sales prices to customers could be deducted from 'gross sales' (paras [31]–[36]). However, with the changes, the plain meaning of the words showed that such expenditure should be excluded from the calculation of gross sales whether or not the TIH expenditure was included by the extractor in the calculation of its sale prices to its customers. The substitution makes it plain that the latter interpretation was the one intended by the legislature (para [38]). It follows that the limitation contended for by the SARS is not expressly provided for in section 6(3)*(b)* (para [39]).

The test for reading words in by implication, was set out in *Rennie NO v Gordon & another* 1988 (1) SA 1 (A) 22E–F: 'Words cannot be read into a statute by implication unless the implication is a necessary one in the sense that without it effect cannot be given to the statute as it stands.' Meyer J could find no reason to imply such limitation as effect could be given to section 6(3)*(b)* and the Act as a whole as it stood without the need to imply the SARS's limitation (para [39]).

Lastly, Meyer J noted that the purpose of the contemplated exclusion of TIH costs, as stated by the SARS in its 2008 Explanatory Memorandum, is to avoid penalising the extraction of minerals 'that are located far from markets, or an export port (para [40]).'

Ultimately the court upheld the applicant's view that it was entitled to deduct any TIH expenditure incurred after the manganese had been brought to the condition specified in Schedule 2 of the Royalty Act, from the calculation of gross sales (para [41]).

CONTRACT: MISCELLANEOUS (AGENCY, CARRIAGE, DEPOSIT, DONATION, LOANS, PARTNERSHIP, SERVICE AND SURETY)

MM Koekemoer*

AGENCY

LEGISLATION AND CASE LAW

There was no legislation or case law affecting this branch of the law during the period under review.

CARRIAGE

LEGISLATION

SUBORDINATE LEGISLATION

Carriage by Sea

The following notices were published in terms of the Merchant Shipping Act 57 of 1951: the Merchant Shipping (Radio Installations) Amendment Regulations, 2016 (GN R44 *GG* 40568 of 23 January 2017); the Maritime Labour Certificate and Declaration of Compliance Regulations, 2017 (GN R534 *GG* 40893 of 6 June 2017); and the Merchant Shipping (Seafarer Recruitment and Placement) Regulations, 2017 (GN R986 *GG* 41108 of 11 September 2017).

The Draft Comprehensive Maritime Transport Policy, 2017, in terms of the Maritime Zones Act 15 of 1994, the Merchant Shipping Act 57 of 1951, and the National Ports Act 12 of 2005, was published for comment (General Notice 183 *GG* 40662 of 2 March 2017). A notice concerning the South African Maritime Safety Authority Act 5 of 1998 was also published, as was the

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Comprehensive Maritime Transport Policy, 2017 (General Notice 457 *GG* 40904 of 12 June 2017).

The proposed fees payable in respect of applications and issuing of rights, permits, and licences in the small-scale fishery sector under the Marine Living Resources Act 18 of 1998 were published (GN 558 *GG* 40906 of 9 June 2017).

Carriage by Air

A notice was published under the Airports Company Act 44 of 1993, regarding airport charges as from 1 April 2017 (General Notice 961 *GG* 40529 of 29 December 2016). Air traffic service charges as from 1 April 2017 were published under the Air Traffic and Navigation Services Company Act 45 of 1993 (General Notice 959 *GG* 40526 of 30 December 2016). Neither notice was mentioned in the 2016 *Annual Survey* as the publication had already gone to print.

There were also multiple amendments or draft amendments to the Civil Aviation Regulations, 2011, under the Civil Aviation Act 13 of 2009. These include: Amendment of the Civil Aviation Regulations, 2011 (GN R68 *GG* 40581 of 27 January 2017); Draft amendment of the Civil Aviation Regulations, 2011 (published in both GN R220 *GG* 40681 of 13 March 2017 and GN R273 *GG* 40720 of 24 March 2017); Amendment of the Civil Aviation Regulations, 2011 (GN R408 *GG* 40831 of 5 May 2017); Fifteenth Amendment of the Civil Aviation Regulations, 2017 (GN R409 *GG* 40831 of 5 May 2017 and, in Afrikaans, in GN R586 *GG* 40929 of 23 June 2017); Sixteenth Amendment of the Civil Aviation Regulations, 2017 (GN R432 *GG* 40846 of 19 May 2017); Seventeenth Amendment of the Civil Aviation Regulations, 2017 (GN R474 *GG* 40870 of 29 May 2017); Amendments to the Civil Aviation Regulations, 2011 *for comment* appeared in GN R697 *GG* 40993 of 21 July 2017; GN R775 *GG* 41023 of 4 August 2017; GN R1089 *GG* 41169 of 6 October 2017; and GN R1348 *GG* 41297 of 4 December 2018); and Amendment of Regulations, 2011 (GN 1423–GN 1425 *GG* 41322 of 15 December 2017).

A draft of the Convention on International Interests in Mobile Equipment Regulations, 2017, was published for comment under the Convention on International Interests in Mobile Equipment Act 4 of 2007 (GN R1422 *GG* 41322 of 15 December 2017).

The levy on the sale of aviation fuel under the Civil Aviation Authority Levies Act 41 of 1998 was published (GN R585 *GG* 40929 23 of June 2017).

A Proposal for the Amendment of the Mortgaging of Aircraft Regulations, 2017, in terms of the Convention on the International Recognition of Rights in Aircraft Act 59 of 1993, was published for comment (GN R587 *GG* 40929 of 23 June 2017).

Air traffic service charges under the Air Traffic and Navigation Services Company Act 45 of 1993 were published (GN 988 *GG* 41362 of 29 December 2017).

Carriage by Rail

The determination of permit fees in terms of the National Railway Safety Regulator Act 16 of 2002, was published (GN 446 *GG* 40847 of 19 May 2017).

Draft regulations on infrastructure or activity affecting safe railway operations, 2017, in terms of the National Railway Safety Regulator Act 16 of 2002 were published for comment (GN 618 *GG* 40945 of 30 June 2017); as were draft security matters regulations, 2017 (GN 617 *GG* 40945 of 30 June 2017).

Carriage by Road

The Amendment of the National Road Traffic Regulations was published under the National Road Traffic Act 93 of 1996 (GN1408 *GG* 40420 of 11 November 2016). This notice was not mentioned in the 2016 *Annual Survey,* as the publication had already gone to print.

The South African National Roads Agency Limited and National Roads Amendment Bill B20 of 2017 was published for comment.

Regulations on colour coding and branding for minibuses and midi-buses used for minibus taxi-type services were published under the National Land Transport Act 5 of 2009 (Proc R26 *GG* 41046 of 18 of August 2017).

Two versions of the Draft Transport Appeal Tribunal Amendment Bill were published for comment (GN 947 *GG* 41082 of 1 September 2017 and GN 1137 *GG* 41202 of 27 October 2017).

CASE LAW

Carriage by Sea

Maritime lien for wages of crew abducted by pirates

In *Asphalt Venture Windrush Intercontinental SA & another v UACC Bergshav Tankers AS* (556/2015) [2016] ZASCA 199, 2017

(3) SA 1 (SCA), an appeal was launched against the decision in *Windrush Intercontinental SA and another v UACC Bergshav Tankers AS: The Asphalt Venture* 2015 (4) SA 381 (KZD). The *Asphalt Venture* was hijacked by Somali pirates and the seven Indian crewmembers taken hostage. Ransom was paid, but initially only the vessel was released. At the time of release of the vessel, the employment period under the employment contracts for the crew had already ended. However, the crew's employer, Concord Worldwide Inc, continued to pay wages to the families of the abducted crew until Concord ran into financial difficulty. The wage claims were ceded to the respondent under a settlement agreement concluded with the families and approved by the Indian High Court. The vessel was arrested by the respondent, which resulted in an application for the release of the vessel and return of the security furnished. The issue to be decided on appeal was whether, at the time of arrest of the vessel, there was a maritime lien for wages allowing the ship to be arrested by way of an *in rem* arrest under section 3(4)*(a)* of the Admiralty Jurisdiction Regulation Act 105 of 1983. This required a two-pronged enquiry: determining, on a *prima facie* basis, the existence of the claims it sought to enforce against Asphalt Venture; and whether, given their nature, those claims were protected by a maritime lien in terms of South African law. A maritime lien for wages is subject to *benefit to the ship* of the crew's services (para [38]). At the time of the release of the vessel, the employment period under the employment contracts with the crew had already ended. Even where the seven sailors were entitled to recover wages, this was not on the basis of an entitlement arising from service rendered to the *Asphalt Venture.* There was consequently no *benefit to the ship,* and no maritime lien existed when the vessel was arrested. The order of the court *a quo* was set aside.

Maritime claim: The arrest of associated ship

The facts in *MV Nyk Isabel Northern Endeavour Shipping Pte Ltd v Owners of MV Nyk Isabel & another* (972/2015) [2016] ZASCA 89, [2016] 3 All SA 418 (SCA), 2017 (1) SA 25 which resulted in the appeal were that the loss of a number of containers aboard the *Northern Endeavour*, owned by the appellant, occurred while the vessel was en route from Durban to Brazil. The appellant blamed the respondent for the loss. The respondent was a slot-charterer which used a number of the slots

on board the *Northern Endeavour* to store its containers. The appellant argued that the respondent had been negligent when they stowed the containers on the vessel. When the vessel arrived in Brazil, cargo underwriters, acting under the right of subrogation, sued the respondent to recover the losses sustained. However, acting on an indemnity it had concluded with the appellant, the respondent joined the appellant to the proceedings. The action then resulted in a Brazilian court granting the claim of the cargo underwriters against the respondent and the respondent's indemnity claim against the appellant. Not satisfied with the outcome in Brazil, the appellant arrested the *Nyk Isabel,* an apparent associated ship in an action *in rem* instituted in the Durban High Court. The appellant argued that it could recoup the damages due under the Brazilian judgment from the respondent. However, in order to arrest the *Nyk Isabel,* the appellant had to prove that the respondent had been a slot-charterer of the *Northern Endeavour* when the incident took place. This would mean that the slot-charterer would be deemed to be the owner, so that the associated-ship arrest could be made under section 3(7)*(c)*. The respondent defended this action and brought a counterclaim under section 5(2)*(b)* and *(c)* of the Act requesting a matching provision of security by the appellant. The High Court granted the relief in favour of the respondent, which led to the current appeal to the Supreme Court of Appeal.

There were three key points of contention. First, whether a slot-charterer qualifies as a 'charterer' for the purposes of section 3(7)*(c)* of the Admiralty Jurisdiction Regulation Act. The court held that as a slot-charterer the respondent did indeed qualify as a charterer (para [27]). It reasoned that the concept of 'slot-charterers' has evolved as result of a commercial need and there is no clear reason not to include or classify them as 'charterers' as intended by the Act (paras [28] [29]). Therefore, the respondent was a 'charterer' of the *Northern Endeavour,* section 3(7)*(c)* applied to it, and the arrest of the *Nyk Isabel* was permitted (para [30]).

The second point was whether a slot-charterer (the respondent) was a party to the action, which the court again answered in the affirmative. As per rules 8(2) and 10 of the Admiralty Court Rules, when the respondent entered an appearance to defend the *in rem* action instituted against the *Nyk Isabel*, it *ipso facto* became a party to the action (paras [31]-[39]).

The last point the court had to consider was whether the respondent was entitled to invoke section 5(2)*(b)* and *(c)* of the

Act to obtain a matching provision of security by the appellant. In affording this type of security, section 5(2)*(b)* and *(c)* gives the courts a broad discretion. This allows a court to balance the scales, so to speak, between the interests of the claimants and the defendants (para [45]). However, in order for a court to exercise its discretion, the party invoking this provision must show that it has an enforceable claim and that there is a 'genuine and reasonable' need for the security sought (paras [46] [51] [58]). In the present matter, the respondent had complied with both these requirements. The Supreme Court of Appeal dismissed the appeal and confirmed the order of the court a *quo*. For a detailed discussion of this decision, see the chapter 'Admiralty'.

Carriage by Air

There was no case law affecting this branch of the law during the period under review.

DEPOSIT

LEGISLATION AND CASE LAW

There was no legislation or case law affecting this branch of the law during the period under review.

DONATION

LEGISLATION AND CASE LAW

There was no legislation or case law affecting this branch of the law during the period under review.

LOANS

LEGISLATION

The 'Guideline for the submission of credit information concerning the National Credit Act 34 of 2005, as amended' was prepared by the National Credit Regulator and published for comment (GN 476 *GG* 40930 of 23 June 2017).

The Amendment of the Regulations relating to Debt Collectors, 2003, was published (GN R1141 *GG* 41205 of 27 October 2017).

The National Credit Amendment Bill, 2018, was published for comment (GN 922 *GG* 41274 of 24 November 2017). The Bill aims to amend the National Credit Act 34 of 2005 (the NCA) by including the following provisions: to provide for debt intervention; to allow the National Credit Regulator to evaluate and refer debt intervention applications and the suspension of agreements considered to be reckless to the National Consumer Tribunal as part of their enforcement function; to include the consideration of a referral as a function of the National Consumer Tribunal; to require a credit provider *and* a debt counsellor to determine whether the credit agreement is reckless; to allow that a court may be able to refer a matter for debt intervention; to provide for an application for debt intervention and its evaluation in general; to provide for orders related to debt intervention and rehabilitation in respect of such an order; to enable the Minister to prescribe a debt intervention method; to make obtaining credit life insurance mandatory for consumers; to provide for offences related to debt intervention, prohibited credit practices, reckless lending, selling, or collecting prescribed debt and the failure to register as a credit provider; to provide for measures when a company commits such an offence; to provide for penalties in relation to the offences created; to provide for the National Consumer Tribunal to change or rescind an order under certain circumstances; and to place an obligation on the Minister to prescribe a financial literacy and budgeting skills programme.

The Draft Home Loan and Mortgage Disclosure Amendment Bill, 2016, was published for comment (General Notice 247 *GG* 40733 of 31 March 2017), as was the Debt Counselling fee structure concerning the National Credit Act 34 of 2005 (General Notice 705 *GG* 41100 of 8 September 2017).

The Amendment of the Regulations relating to Debt Collectors, 2003, under the Debt Collectors Act 114 of 1998, was published (GN R1141 *GG* 41205 of 27 October 2017).

CASE LAW

Credit Agreements

Duty of a bank in respect of the operation of a business by a third party who is not a customer

It is common practice to register a general notarial bond over the movable assets of a retailer as security for the retailer's

indebtedness, accessory to a supply agreement signed with a supplier, such as the Spar Group Ltd (Spar). This was also the case in *Spar Group Ltd v FirstRand Bank Ltd* 2017 (1) SA 449 (GP). The bond is intended to secure an obligation which arises after the supplier has provided goods and/or services on credit to a retailer. A business, referred to as Umtshingo, conducted three businesses (Bella Donna Kwik Spar, Bella Donna Tops, and Sonpark Tops), all of which used the Spar branding. On 8 March 2010, Umtshingo owed Spar R2 539 408,14. This resulted in Spar launching an application to perfect its security held in terms of a registered general notarial bond. The application succeeded and the three businesses were attached and possession given to Spar. Subsequently, Spar started to run the businesses for its own profit and loss. As Umtshingo did not agree that the three businesses should cease to exist, the parties attempted (unsuccessfully) to enter into a short-term agreement to lease the businesses.

The details of the bank account held at FirstRand Bank (FNB) by each business entity were relevant and must be distinguished. Bella Donna Kwik Spar held account 323 in the name of Central Route with a debit balance of R1 343 422,92 on 8 March 2010. Bella Donna Tops held account 655 in the name of Umtshingo (the balance is not provided in the case information). Sonpark Tops held account 309, also in the name of Umtshingo, with a debit balance of R292 140,84 on 9 March 2010. Although Spar requested that the beneficiary accounts be changed to speed-point deposits (Spar accounts), this did not happen, and these proceeds continued to be paid into accounts 309, 323 and 655. FNB applied set-off with credit amounts being paid into accounts 309 and 323 (speed-point credits of R1 300 051,21 paid into these accounts, together with other funds, resulted in the overdraft being discharged). The dispute with account 309 related to amounts which the bank should not have debited against the account. These included R400 000 debited on 25 June 2010, the monthly loan-agreement instalment debited during the period March 2010 to June 2011, and the monthly interest charged by the bank on the debit balance from time to time and then set-off with credit amounts paid into this account after the increased debit balance. The four separate claims instituted by the plaintiff relating to the three accounts were: claim 1 for R1 343 422,92 on account 323; claim 2 for R2 039 948,68 on account 655; and two claims, claim 3 for R158 890,90, and claim 4 for R898 744,92,

relating to account 309. I deal with the court's discussion of each claim separately.

As regards claim 1: Spar averred that the personal rights to funds deposited into this account vested in Spar and that FNB was aware of this. The critical question in claim 1 is whether it was lawful for FNB to use these funds to set-off Central Route's indebtedness. The agreement between Spar and Umtshingo was to use the account to warehouse money which belonged to Spar. Even though FNB was aware of this arrangement, it was not party to the agreement. Fourie J confirmed the general rule that a bank becomes the owner of funds deposited with it (para [44]). Nevertheless, this apparent ownership does not provide the bank with 'an absolute or unqualified right on it to treat the funds as its own or the credit as the property of its customer' (para [44], following the decision in *Standard Bank of South Africa Ltd v Echo Petroleum CC* 2012 (5) SA 283 (SCA) para [28]). After examining previous case law, the court identified the crux as what the situation would be where a bank is aware of the agreement to warehouse the money but is not a party to that an agreement. The answer was clear from previous case law: in the absence of the bank actually *being a party* to the warehousing agreement, it is not bound by the agreement (*Joint Stock Co Varvarinskoye v Absa Bank Ltd* 2008 (4) SA 287 (SCA), where the court held that the bank would only be bound where it has agreed to act as an agent to warehouse the money). Further, in *Absa Bank Ltd v Intensive Air (Pty) Ltd* 2011 (2) SA 275 (SCA) the court also held that the bank would only deal with the funds differently if they were reserved as 'belonging' to another as per an agreement with the bank. In *Standard Bank of South Africa Ltd v Echo Petroleum CC* (above) at para [31] of that case, the court held that even if the bank had been informed of the third-party interest in the funds deposited, it would not have been bound to subordinate its interests.

The court held that this principle was sound in law. Anything less could have the devastating consequence of unilaterally depriving a bank of its ownership of the funds deposited, where it was not even party to an agreement allowing this deprivation (para [50]). From the evidence presented, it was clear that the signatory for Umtshingo was requested to sign a letter changing the beneficiaries of the credit-card payments to Spar. However, this letter was never signed. Subsequently, in the absence of evidence that an agreement had been signed to the effect that

Umtshingo would warehouse the funds deposited on behalf of Spar and to which FNB was also a party, the set-off between the debit and credit entries by FNB was lawful (para [50]).

The foundation for both claims 2 and 3 relied on a breach of a 'duty of care' on the part of FNB. As regards claim 2, Spar alleged that FNB had a 'duty of care' to ensure that Spar did not suffer economic loss caused by allowing Umtshingo to withdraw funds from account 655. Similarly, with claim 3, Spar alleged that FNB had a duty of care to ensure that Spar did not suffer economic loss by allowing Umtshingo to withdraw funds from account 309. These funds were initially transferred not to be used by Umtshingo or Central Route, but to warehouse money belonging to Spar. The answer to the question is found in establishing whether FNB had a duty to a non-client, in circumstances where it knew that a third party was the true owner of money deposited into the account of an FNB client.

This would be a delictual claim for pure economic loss. The court would have to determine whether a legal duty had been breached, by determining whether there had been a breach of a subjective right. The correct question to be asked, therefore, is whether, in terms of the *boni mores* or *reasonableness* criteria, FNB had a legal duty to prevent pure economic loss to Spar by taking decisive action (para [59]). FNB would only have a legal duty if it were reasonably expected of it to take positive steps to prevent Spar's economic loss from taking place. In determining the *reasonableness* of expecting FNB to act, the court considered the following: the duty of confidentiality which FNB owed Umtshingo; the fact that there was no reason to depart from the general rule that a bank becomes the owner of funds deposited with it (this even more so as there was clear evidence that Umtshingo had refused that the speed-point funds be routed to Spar's account – paras [63] [64]); and the fact that the public, in general, would benefit from better safeguarding of their funds in future. The court dismissed the latter argument because it incorrectly assumed that *Spar*, and not the bank, became the owner of the deposited funds, and because of the implication such a finding would have for commercial banks. The court concluded that it was unreasonable to conclude that FNB had a legal duty in the present matter. Claims 2 and 3 therefore also failed (para [66]).

In claim 4, Spar paid a credit amount of R898 744,92, which was intended to be 'used to warehouse money' belonging to

Spar. The court found that this claim had also prescribed and so did not examine the merits (para [42]). For a discussion of this case see CJ Nagel & JT Pretorius 'Ownership and appropriation of funds deposited in a bank account – *Spar Group Ltd v FirstRand Bank Ltd* 2017 (1) SA 449 (GP)' (2018) 80 *THRHR* 308–14.

Debt enforcement procedure in the case of surrender of goods: Preliminary procedures

Two other cases dealt with the preliminary procedures under the NCA which had to be followed where goods were surrendered by a consumer to the credit provider: *Baliso v FirstRand Bank Ltd t/a Wesbank* 2016 (10) BCLR 1253 (CC), 2017 (1) SA 292 and *Edwards v FirstRand Bank Ltd t/a Wesbank* 2017 (1) SA 316 (SCA).

In terms of section 127(2), after the consumer has surrendered the goods to the credit provider, the credit provider has ten days in which to provide the consumer with a written estimated value of the goods. According to section 127(3), after receiving the valuation the consumer needs to decide whether to accept the valuation or 'unconditionally withdraw' the surrender of goods within ten days of receiving the valuation notice. However, this option only applies while the consumer was *not in default* at that time.

In *Baliso v FirstRand Bank Ltd t/a Wesbank* (above), the court had to determine what would constitute 'adequate delivery' of this valuation notice. This was an application for leave to appeal, which was granted by the Constitutional Court. The court had to determine whether the respondent's original particulars of claim contained the necessary averments in order to sustain an application in terms of section 127 of the NCA, and also whether, if the respondent did not comply with the requirements under section 127(2), the court had jurisdiction to hear the matter.

Ordinary mail (not registered) was used to send the valuation notice. The High Court found that sending the notice via ordinary mail complied with the section 127(2) requirements and there was no reason first to postpone the matter regarding section 130(4)(*b)* of the NCA. As regards section 130(3), a court can adjudicate on matters related to sections 127, 129 or 131 'only if' the procedures required under those sections were complied with (para [58]). Further, as to section 130(4), if there is such non-compliance, the court must adjourn the matter and make an

appropriate order setting out the steps the credit provider must now take before the proceedings can resume. The use of the words 'only if' relates to the jurisdiction of a court adjudicating such a matter. The Constitutional Court found that a court's decision that there was compliance with section 127(2) goes to the *jurisdictional* competence of that court. Where the court *a quo* held that there had been compliance with section 127(2), it is not able to go back on its decision (para [68]). The Constitutional Court relied on two earlier judgments to decide whether there were exceptions which could be raised against a decision of the court *a quo* being final and appealable. In *Makhothi v Minister of Police* 1981 (1) SA 69 (A) 72H–73B the court dismissed such an exception as a special plea since 'the suit and its order is not repairable at the final stage'; while in *Maize Board v Tiger Oats Ltd* 2002 (5) SA 365 (SCA), the court held that the dismissal of an exception on the ground that the court does not have jurisdiction 'constituted a final judgment and as such an exception to the general principle that the dismissal of an exception is not final'. The Constitutional Court concluded that a dismissal of an exception to the jurisdiction of a court was final but appealable (para [71]).

As the matter was appealable, the Constitutional Court had to determine whether there had been compliance with the delivery requirement under section 127(2). The starting point was whether there was a reason why the delivery requirements for section 127(2) should differ from those for default notices under section 129 of the NCA (para [72]). Default notices under section 129 must be sent by *registered* mail (para [72]). Section 127(2) notices must, therefore, also be sent by *registered* post and not by ordinary post (para [75]). The court *a quo* made an error in finding that there had been compliance with the delivery requirement under section 127(2) by sending the notice using *ordinary* mail.

In *Edwards v FirstRand Bank Ltd t/a Wesbank* (above) the valuation notice under section 127(2) was also sent by ordinary mail. The Supreme Court of Appeal differed from the conclusion the Constitutional Court reached (above) on the essential nature of sending the valuation notice. The Supreme Court of Appeal held that even though it was advisable to send the valuation notice using *registered* mail, this was not what the law required. Section 127(2) required *adequate* proof of delivery of the valuation notice to the consumer. Shongwe JA (Tshiqi and Seriti JJA

and Makgoka AJA concurring) delivered the majority judgment. Cachalia JA (Tshiqi JA concurring) delivered a concurring minority judgment, as there was a need to provide a fuller treatment of some of the issues at hand.

The facts were that Edwards purchased an Aston Martin Vantage Coupe and financed the purchase under an instalment sale agreement. Edwards defaulted under the agreement, and the bank applied for and was granted summary judgment. Edwards also applied for leave to appeal against the summary judgment to the Supreme Court of Appeal, but this application was refused. The bank repossessed the vehicle after sending a section 127(2) valuation notice to Edwards's *domicilium citandi et executandi* by *ordinary* post. The vehicle was then sold at public auction after the bank had also sent a notice to Edwards in terms of section 127(5). Edwards contended that he never received the two notices under section 127(2) and (5) of the NCA. The issue on appeal was whether the bank had complied with the provisions of section 127(2) and (5) when they sent the notice using *ordinary* post. The Supreme Court of Appeal agreed with the court *a quo* that the conduct of Edwards in designating an address for delivery of notices in which no street delivery occurred, should be regarded as unreasonable (para [9]). The Supreme Court of Appeal referred to the decision in *Baliso v FirstRand Bank Ltd t/a Wesbank* (above), where the majority relied on the interpretation in *Kubyana v Standard Bank of South Africa Ltd* 2014 (3) SA 56 (CC) of *Sebola v Standard Bank of South Africa Ltd* 2012 (5) SA 142 (CC). The interpretation was that in determining what is meant by 'adequate delivery', the decision must be left to the court in which the proceedings were launched – in this case, the Supreme Court of Appeal. That court must be satisfied that the credit provider showed on a balance of probabilities that the notice had reached the consumer. The Supreme Court of Appeal referred to the *obiter* remark by the Constitutional Court in *Baliso v FirstRand Bank Ltd t/a Wesbank* (above) that there was no reason *in merit* why the notice requirements under section 127(2) and section 129(1) should be different. However, it appears that this question was left unanswered by the Constitutional Court. The Supreme Court of Appeal held that even though failure to comply with section 127(2) is detrimental for the bank as non-compliance prevents it from pursuing recovery of damages by way of the shortfall, the ordinary grammatical meaning must be attached to the words 'give the consumer a written notice'

(para [11]). Therefore, even though it is advisable to send a valuation notice by registered mail, this is not what is required by law (para [11]).

The Supreme Court of Appeal also considered the submission that section 127 should not apply as the vehicle was *attached* and not voluntarily surrendered by Edwards. The court held that section 127(2)–(9) of the NCA would have applied had the credit agreement not already been cancelled (para [16]). This was the finding relying on an interpretation of section 131 of the NCA that requires that section 127(2)–(9) be 'read with the changes required by the context'.

In conclusion: the Supreme Court of Appeal held that notice under section 127(2) and (5) had been duly given to the consumer, and that Edwards could blame only himself for not providing a proper address for service of documents. The appeal was dismissed.

Cachalia JA considered whether section 127 of the NCA applied in the present circumstances. The purpose of section 127 is to place a consumer in a position to withdraw the termination notice and resume possession, subject to his or her not being in default at the time. In this instance, Wesbank had already cancelled the agreement and Edwards was in arrears when he received the section 127(2) notice (para [47]). Consequently, no purpose was served by sending the notice, and clearly, section 127(2) did not apply. Even if section 127(2) were to apply, Edwards was still required to rebut the inference of delivery and then prove that his conduct had been reasonable (para [44]), which he had failed to do.

Cachalia JA then turned to consider section 127(5) of the NCA. The purpose of section 127(5), read with section 131, is to ensure that a credit provider accounts appropriately to the consumer after the sale of the goods. Even if Edwards did not receive this second notice by post, the minority judgment remarked that as it was attached to the summons, Edwards had ample time to pursue available avenues like approaching the National Consumer Tribunal to seek relief under section 128 of the NCA. However, it appears that Edwards knew there was no merit in pursuing such a route and used the defence that he had never received the section 127(5) notice as a delaying tactic to avoid

paying the shortfall that arose after the vehicle had been sold and for which he was contractually liable.

Payment by a third party to discharge debt: Payment made through a fraudulent scheme

In *Absa Bank Ltd v Moore* 2017 (1) SA 255 (CC) it was found that payment made by a third party to discharge the debt of a consumer acting in furtherance of a fraudulent scheme will still be effective payment to discharge the debt. The credit provider attempted to appeal this decision before the Constitutional Court, but the appeal was dismissed.

The facts were that two fraudsters (Busson and Kabini) devised a scheme by which they managed to defraud many distressed homeowners, while also causing financial losses for some South African banks. One of the fraudsters, Kabini, signed a deed of sale for the purchase of immovable property from a distressed homeowner, but on the understanding that the homeowner also sign a second deed of sale in terms of which Kabini immediately resold the property to the homeowner. The original owners would then get a cash amount paid to them, the debt with the bank would be settled, and in return, the original homeowner would have to pay a reduced monthly instalment to the fraudsters. However, the resale to the original owner never took place, although the original owners continued to reside on the property which they believed had been sold back to them. There was no evidence regarding the nature of the deeds process involved in the retransfer to the Moores. Kabini, now being the actual new owner of the immovable property, approached a bank, sometimes the same bank with which the original owners had bonded their property, and took out a new mortgage agreement in order to settle the outstanding debt of the original owners under their mortgage agreements. Kabini, however, also requested additional funds and as soon as he received them, disappeared. Kabini had no intention of servicing the debt and eventually the banks had to sell the property in execution and evict the original owner.

The Moores fell victim to this scheme. The High Court set aside the invalid sale agreements between Kabini and the Moores as fraudulent and without force. The title to the immovable property was also restored to the Moores. The Supreme Court agreed with the court a *quo* and also held that as the fraudster had no valid title to the immovable property, the subsequent mortgage bond registered by Kabini was also invalid.

The bank accepted all of the above findings, but their submission related to the cancelled bonds previously registered in favour of Absa. Absa requested that the bonds be reinstated as per the High Court order. It contended, firstly, that the bonds had to be reinstated as the cancellation was linked to a fraudulent scheme and was, therefore, *contra bonos mores*. This depends on whether or not the cancellation was 'vitiated' by the fraudulent scheme. The Constitutional Court held that the fact that Kabini was a 'crook' did not mean that the 'discharge was ineffectual' (para [32]). The court remarked that South African law is 'extraordinarily generous' in prescribing how payment to discharge debt can take place (para [33]). The debtor does not need to know the identity of the person making payment, and even payment into the account of a fraudster will be effective in transferring ownership of money (para [34]).

In summary: '[P]ayment is a bilateral act requiring the cooperation of the payer and the payee – but not the debtor' (the Moores in this case) (para [36]). The practical effect was that payment by Absa under Kabini's mortgage agreement discharged the Moores' debt with Absa. The fraud perpetrated by Busson and Kabini can only invalidate the contracts between the Moores and the fraudsters. However, the fraud cannot undo the cancellation of the Moores' bonds. Because the principal obligation had been validly cancelled, the accessory obligation in the form of the mortgage bond had also been discharged (para [40]).

Absa contended, in the alternative, that the Moores had been enriched at its expense. Consequently, enrichment law must be developed to provide a remedy for Absa, depending on whether the Absa debt had been discharged with the proceeds of the loan which Absa extended to Kabini (para [24]). The two questions to be asked are: were the Moores enriched; and was this at the expense of Absa? (para [25]). The court answered both questions in the negative. The cost to the Moores was the new debt owed to the fraudsters. However, as the contract was tainted by wrongdoing, the fraudsters would be unable to sue the Moores (para [47]). Currently, the legal precedent stands that the trustees/curators of the insolvent estates of Kabini and Busson would be able to reclaim the benefit received from the Moores, irrespective of the defence of *in pari delicto potior est conditio defendentis.* However, Absa would still be unable to prove that it had been impoverished. In effect, what the bank lost when the Moores stopped being its debtors, Absa replaced with the claim against

Kabini. This was strengthened by the fact that Absa decided not to cancel the agreement with Kabini and proceeded to obtain default judgment against him.

In conclusion: the Constitutional Court could find no reason, in the patchwork of evidence Absa provided, for the development of enrichment law (para [56]). It remarked in closing that nothing before it showed an injustice against Absa, which had the institutional resources to protect itself against fraudsters such as Kabini. The application for leave to appeal was dismissed.

Debt rearrangement: Amendment of a contractually agreed interest rate

The question before the court in *Nedbank Ltd v Jones* 2017 (2) SA 473 (WCC) was whether the interest rate in a debt-rearrangement order may be amended. The court issued a declaratory order prohibiting a magistrate's court from amending a contractually agreed interest rate. A provision in a debt rearrangement order allowing for amendment was held to be invalid.

The Joneses (the first and second respondents) engaged the services of a debt counsellor as they were unable to pay their debts. The debt counsellor determined that the Joneses were over-indebted and proceeded to apply for a debt restructuring order in terms of section 86(7)*(c)* of the NCA. Nedbank had concluded various credit agreements with the Joneses, and the debt restructuring would include certain of these agreements. The original details of the home loan agreement to be restructured were: a monthly repayment of R10 491 over 336 months and an initial *variable* interest rate of 10,9 per cent per annum (para [5]). The debt counsellor recommended that the interest rate be *fixed* at 10,4 per cent and the repayment period left open, with the instalment reducing to R4 007,06. The order had the result that the amended instalment was not even sufficient to service the interest on the loan, and that the debt would not be paid off in 336 months. Nevertheless, the magistrate proceeded to grant the order in terms of section 87(1) of the NCA, based on the recommendation of the debt counsellor in terms of section 86(7)*(e)*(ii). This order resulted in Nedbank launching an application for declaratory relief to the High Court.

Magistrates' courts are creatures of statute. This means that they can only exercise jurisdiction conferred on them by legislation. This court can only issue orders if it is expressly authorised to do so. Therefore, where the court exceeds such jurisdiction, the resulting order is null and void (para [16]). In case of an order

for debt rearrangement, the magistrate's court must incorporate the recommendations of the debt counsellor in its order. However, the debt counsellor's recommendation must, in the first instance, meet the requirements of section 86(7)*(c)*(ii) of the NCA. This section requires that the debt be restructured in such a way that it is possible for the consumer to meet its obligations owed to the credit provider (para [15]). The court relied on the decision in *Nedbank Ltd v Norris* 2016 (3) SA 568 (ECP) (paras [42]-[44] of that case). In *Norris,* the court held that even though the interest rate was fixed at 0 per cent, the fixed rate suggested in that order would also 'render the debt incapable of ever being settled' (para [18]). The court remarked that it was unfortunate that orders of this nature were far too common in the lower courts (para [25]).

Further, as the application was brought five years after the magistrate's court order, the High Court had to determine whether review or declaratory relief would be the appropriate remedy in this instance. It is important for legal certainty to grant declaratory relief. Declaratory relief is in the interests of all parties subject to the NCA and of those who must interpret it (para [32]). The court's power to issue a declaratory order is contained in section 21(1)*(c)* of the Superior Courts Act 10 of 2013. Interpreting previous case law, Gamble J held that it is appropriate to grant a declaratory order where there is a 'serial misinterpretation' of a position clearly defined by a statute, as is the case with the misinterpretation of sections 86 and 87 of the NCA by debt counsellors and magistrates (para [30]). The court relied on the decisions in *Ex parte Nell* 1963 (1) SA 754 (A) 760A-C and *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* 2005 (6) SA 205 (SCA) (para [18] of that case). Subsequently, the order held that as a magistrate's court does not have jurisdiction to amend a contractually agreed interest rate, an order which amends the interest rate under a credit agreement is null and void, and a rearrangement order which does not meet the purpose in section 86(7)*(c)* of the NCA would be *ultra vires* the NCA (para [35]).

The question remains how to 'unscramble this egg' in practical terms in cases where this declaratory relief is obtained some time after the debtors have started repaying a lower instalment under

a technically null and void magistrate's court order. This goes to the nature of a declaratory order as opposed to the review of the order.

Retrospective effect of section 126B(1)(b): Prescription of debt

In *Kaknis v Absa Bank Ltd* 2017 (4) SA 17 (SCA), the majority decision by the Supreme Court of Appeal correctly held that section 126B(1)*(b)* does not apply retrospectively to debt already prescribed before this section came into operation on 13 March 2015. Shongwe JA and Willis JA did not agree with the majority decision, and both wrote the separate dissenting judgments, briefly discussed below.

The provision was inserted in the NCA by the National Credit Amendment Act 19 of 2014 (the National Credit Amendment Act), and reads as follows:

> *(b)* No person may continue the collection of, or re-activate a debt under a credit agreement to which this Act applies –
>
> (i) which debt has been extinguished by prescription under the Prescription Act, 1969 (Act 68 of 1969); and
>
> (ii) where the consumer raises the defence of prescription, or would reasonably have raised the defence of prescription had the consumer been aware of such a defence, in response to a demand, whether as part of legal proceedings or otherwise.

In *Kaknis* the two respondents, Absa Bank Ltd (Absa) and MAN Financial Services SA (Pty) Ltd (MFS), entered into instalment sale agreements with Kaknis, the appellant. Due to financial difficulty, the appellant failed to make payments under the instalment agreements. He successfully obtained a debt re-arrangement order and managed to make the adjusted payments to Absa and MFS, but only until 8 July 2011. Then, the claim against the appellant prescribed under the Prescription Act 68 of 1969 on 8 July 2014, as more than three years had elapsed since the last payment to reduce his indebtedness had been made (para [4]). Nevertheless, despite this clear prescription, the appellant signed an acknowledgement of debt with Absa and MFS, which stipulated that he agreed to pay the outstanding amounts and surrender the assets to the respondents. Resulting from the appellant's failure to comply with the terms of the acknowledgement of debt, Absa and MFS brought separate applications for summary judgment against him.

The appellant contended that had he known that the debt had already prescribed, he would not have entered into the acknow-

ledgement of debt at that time. He averred that the provisions of section 126B(1)*(b)* of the Prescription Act precluded Absa and MFS from collecting on a previously prescribed debt which was revived when the parties concluded the acknowledgement of debt. The court a *quo* granted the summary judgments against the appellant. The court held that the legislature would have expressly stated it if the section was intended to apply retrospectively. An appeal against this decision was launched to the Supreme Court of Appeal.

Van der Merwe JA delivered the majority judgment (Mathopo JA and Nicolls AJA concurring). According to this decision, the principle is 'time-honoured but also one of global application' that the provisions of a statute do not apply retrospectively (para [37]). The court referred to judgments where this principle was approved (see *Unitrans Passenger (Pty) Ltd t/a Greyhound Coach Lines v Chairman, National Transport* 1999 (4) SA 1 (SCA) para [12]; *National Director of Public Prosecutions v Carolus* 2000 (1) SA 1127 (SCA) para [32]; *National Director of Public Prosecutions v Basson* 2002 (1) SA 419 (SCA) para [11]; *S v Mhlungu* 1995 (3) SA 867 (CC) para [65]; and *Veldman v Director of Public Prosecutions, Witwatersrand Local Division* 2007 (3) SA 210 (CC) para [26]). There can be no doubt that the legislature must know the law and so be aware that if section 126B(1)*(b)* were allowed to apply retrospectively, this would nullify existing credit agreements, taking away existing rights from consumers and credit providers; indeed causing a predicament (para [39]).

The majority disagreed, where Shongwe JA held that the protection of consumers under this provision includes that the provision should apply retrospectively and that this in itself is sufficient reason for the section to apply retrospectively. The majority held that even though it is the primary objective of the NCA to protect consumers, this protection must also be balanced against the rights of credit providers. (para [38]).

Van der Merwe JA also dismissed the argument that the transitional provisions under Schedule 3 to the NCA, as it currently reads, allows for the retrospective application of section 126B(1)*(b)*. The majority correctly held that the provisions of Schedule 3 apply exclusively to agreements which existed *before* the NCA came into operation, and have no effect on credit agreements entered into under the NCA (para [39]). The appeal was dismissed with costs. What follows is a short discussion of the dissenting judgments.

Shongwe JA acknowledged that there is a presumption that legislation does not apply retrospectively, unless that legislation provides for such application either expressly or by implication (para [13]). Nevertheless, he contended that a presumption only aids in the *interpretation* of legislation, and that the intention of the legislature in drafting that statute must be preferred (para [15]). The presumption will only operate where there is no clear contrary intention. He continued to state that the intention of the legislature in enacting section 126B(1)*(b)* was precisely to protect naive and vulnerable consumers (para [18]). The objective of protecting these types of consumer and balancing the rights of consumers and credit providers is achieved by not allowing a credit provider to benefit under credit agreements where the debt has prescribed (para [18]). Shongwe JA further held that if the provisions of section 126B(1)*(b)* were not applied retrospectively, this 'would be at odds' with the approach of the Constitutional Court, which has emphasised the protection of consumers (para [23]). This trend to protect consumers had already been established in previous case law (see *Sebola v Standard Bank of South Africa Ltd* (above); *Kubyana v Standard Bank of South Africa Ltd* (above); and *Nkata v FirstRand Bank Ltd* 2016 (4) SA 257 (CC)). Disallowing the retrospective effect of the section would also result in a distinction being made between the protection to consumers who entered into credit agreements *before* and *after* the Amendment Act came into operation.

Willis JA decided to prepare additional remarks in support of Shongwe JA's judgment. He contended that the principle against the retrospective operation of law is not absolute (para [29]). He compared the 'burden of debt' to a situation where a higher penalty would not apply in circumstances in which the additional burden did not exist when the crime was committed. He then merely concluded that the court had to decide in favour of the consumer, relying on certain decisions of the Constitutional Court, but provided no detailed discussion of the principles enunciated in these judgments (para [31]).

A subsequent debt compromise agreement also requires compliance with the NCA

In *Man Financial Services SA (Pty) Ltd v Phaphoakane Transport & another* 2017 (5) SA 526 (GJ), the second respondent had previously bound himself as surety and co-principal debtor on behalf of the first respondent debtor (Phaphoakane Transport) to

secure debt due to the applicant (Man Financial Services SA (Pty) Ltd). Man Financial Services and Phaphoakane Transport originally entered into rental agreements in respect of several trucks. These agreements did not fall under the NCA and for that reason, the ancillary surety agreement, too, fell outside of the scope of the NCA. The rental agreements, were excluded from the application of the NCA as Phaphoakane Transport was a juristic person as defined in section 4(1)(*a)*(i) of the NCA, and the transaction was also a large agreement as defined in section 9(4), and was therefore also excluded as allowed in section 4(1)(*b)* of the NCA (para [4]).

Phaphoakane Transport breached certain provisions of the rental agreements, resulting in Man Financial Services cancelling the agreements. Phaphoakane Transport also returned the trucks which formed the subject matter of the agreements to Man Financial Services. Subsequent negotiations resulted in the parties concluding a further agreement to facilitate the full and final settlement of the outstanding debt owed by Phaphoakane Transport. The settlement agreement provided that Phaphoakane Transport and the second respondent were jointly and severally liable for debt amounting to R5 million plus additional fees and interest. The primary subject of disagreement was whether the settlement agreement was subject to the NCA. Although the second respondent was a natural person, because the NCA did not apply to the original main credit agreement, it equally did not apply to the surety agreement. If the NCA now applied to the new agreement, Man Financial Services would first have to deliver a default notice under section 129(1)*(a)* of the NCA, before it could start with debt enforcement against the respondents (para [7]).

The court held that the new settlement agreement ended the prior relationship between the parties. The settlement agreement was, therefore, 'a transaction in the legal sense' in its own right (para [9]). A subsequent settlement agreement terminated the parties' original rights and obligations, unless it was stated to the contrary in the parties' compromise (which was not the case in the present matter). The court correctly followed the decision in *Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd* 1978 (1) SA 914 (A) at 921. As *this* settlement agreement would result in the full and final settlement of the issues between the parties, it constituted a *new* agreement. Consequently, the second respondent, a natural person, was no longer merely a surety, but a co-debtor and the provisions of the NCA *had* to apply to the settlement agreement.

The court distinguished the facts in this case from those in *Ribeiro v Slip Knot Investments 777 (Pty) Ltd* 2011 (1) SA 575 (SCA). In *Ribeiro* the subsequent agreement amounted to an agreement guaranteeing the principal debtor's obligations under the *initial* loan agreements. This was the intention of the parties when they entered into the subsequent agreement. This was clear from the contract relating to the next agreement, which provided that the new agreement 'does not constitute a novation of the initial loan agreements'. The court also held that the agreed and accepted obligations of the sureties originated in the initial loan agreements (para [13]). There was no reservation of the terms of the original agreement in the present matter and for this reason the court held that the facts were distinguishable from the facts in *Ribeiro* (para [13]).

The court concluded that the provisions of the NCA applied to the *new* credit agreement. Man Financial Services had, therefore, to comply with the provisions of section 129 of the NCA and deliver the default notice to the respondents before instituting an action against them (para [15]). The first respondent was already in liquidation when the application was brought. The court ordered that the *second* respondent could oppose the enforcement as the plaintiff had failed to comply with section 129 of the NCA. It is unfortunate that the court was not required to provide a discussion of the dual application of the NCA exemptions where one debtor is a natural person and the other a juristic person under a single credit agreement.

PARTNERSHIP

LEGISLATION AND CASE LAW

There was no legislation or case law affecting this branch of law during the period under review.

SERVICE

LEGISLATION

SUBORDINATE LEGISLATION

Auditors

A number of board notices were published under the Auditing Professions Act 26 of 2005. These include: Amendments to the

Code of Professional Conduct for Registered Auditors Responding to Non-compliance with Laws and Regulations (BN 188 *GG* 40480 of 9 December 2016); the Mandatory Audit Firm Rotation in terms of the Auditing Profession Act 26 of 2005 for comment (BN 170 *GG* 40392 of 1 November 2016 and BN 186 *GG* 40475 of 6 December 2016); the Rule on Mandatory Audit Firm Rotation for Auditors of all Public Interest Entities (BN 100 *GG* 40888 of 5 June 2017); the inspection fees payable to IRBA (BN 101 *GG* 40898 of 9 June 2017); the Amendments to the Code of Professional Conduct for Registered Auditors relating to Custody of a Client's Assets (BN 115 *GG* 40930 of 23 June 2017); the Registration of Registered Auditors and Candidate Auditors: Processes and Documents Required (BN 146 *GG* 41064 of 25 August 2017); and proposed amendments to the Code of Professional Conduct for Registered Auditors: New Guidance for Professional Scepticism and Professional Judgment (BN 107 *GG* 40898 of 9 June 2017).

Attorneys

The Code of Conduct for legal practitioners, candidate legal practitioners, and juristic entities in terms of the Legal Practice Act 28 of 2014 was published (GN 81 *GG* 40610 of 10 February 2017).

Further, the Legal Practice Act 28 of 2014 was promulgated in 2017 (General Notice 480 *GG* 40937 of 23 June 2017). Two Bills to amend this Act were also published: the Legal Practice Amendment Bill B11A of 2017; and the Legal Practice Amendment Bill B11B of 2017.

CASE LAW

Attorneys and Advocates

Removal of an advocate who is not a fit and proper person to practise from the roll

In *General Council of the Bar of South Africa v Jiba and others* [2016] 4 All SA 443 (GP); 2017 (1) SACR 47; 2017 (2) SA 122, one aspect the court had to decide on was whether the grounds in question were sufficient to justify striking three members of the National Prosecuting Authority (NPA) – Jiba, Mrwebi and Mzinyathi – from the roll of advocates using the three-stage inquiry to

determining whether the person is no longer a 'fit and proper person'. This section only deals with the meaning of a 'fit and proper person' with regard to an application to remove an advocate from the roll of practising advocates.

The gist of the complaints brought by the General Council of the Bar of South Africa (GCB) related to the conduct of the members in dealing with three matters involving the then National Director of Public Prosecutions, and a matter relating to former president Jacob Zuma.

Section 7(1)*(d)* of the Admission of Advocates Act 74 of 1964 empowers a court to remove an advocate from the roll when he or she is no longer fit and proper to practise. The test for removal is three-pronged and includes: whether the impugned conduct of the advocate has been established; whether the specific individual is still fit and proper to practise, considering the *nature* of the conduct; and whether, in all the circumstances, the person should be removed from the roll. The primary consideration is to protect the public (para [9]). The removal or suspension of a member of the NPA in terms of section 12 of the National Prosecuting Authority Act 32 of 1998 (the NPA Act) does not also result in automatic removal from the roll of advocates, as the Admission of Advocates Act follows a different process (para [22]). However, an advocate who has been removed from the roll no longer satisfies the requirement under section 9 of the NPA Act that he or she must be able to practise in all courts in the Republic (paras [20]–[23]).

Legodi J included a detailed discussion of the poor conduct of, in particular, Jiba, in handling certain matters (including the prosecution of Richard Mdluli) while employed at the NPA. The court found that both Jiba and Mrwebi were no longer fit and proper persons to remain on the roll of advocates (paras [138] [168] and [176.2.1] as regards Jiba, and para [168] regarding the removal of Mrwebi). The reasons for the Jiba finding included: failure to comply with High Court Rule 53 in respect of timely filing of records regarding the decision to withdraw charges against Mdluli, while the reasons for the delay were also unreasonable and indicative of bad faith (paras [110] [114.2.7]); supplying an incomplete record without providing a proper explanation for its being incomplete (paras [115] [118]); disobeying a directive from Ledwaba DJP (para [119]); failure to heed the advice of counsel briefed to defend her in her capacity as Acting National Director of Public Prosecutions, and continuing to file affidavits contrary to

counsel's advice (para [134.5]); that she, with determination and against legal advice to the contrary, did everything in her power to ensure that charges against Mdluli were permanently withdrawn, regardless of the *prima facie* evidence against him on corruption and fraud charges (see paras [135]–[135.9.5]); and deliberately attempting to mislead the review court by failing to disclose the fact that the prosecutor, Breytenbach, in the Mdluli case had sent her a memo asking her to review her decision to discontinue the Mdluli prosecution, deposing rather that this matter was never brought to her attention by a person she 'considered relevant or was obliged to consider relevant' (para [136]). Legodi J pointed out that Breytenbach should have been considered a relevant person as she was the person best placed to provide Jiba with relevant information concerning the prima facie evidence against Mdluli (para [136.2.2]).

In relation to Mrwebi, the court's reasons for finding him no longer to be a fit and proper person included: lying about a consultative document he prepared regarding the Mdluli prosecution (paras [141]–[141.4]); deliberately failing to disclose a memorandum and consultative note, stipulating the reasons for discontinuing prosecution (paras [142]–[143.4.1]); discontinuing the prosecution of Mdluli, despite a contrary understanding with Mzinyathi, the third respondent (paras [143]–[146]); presentation of unsatisfactory evidence during his disciplinary hearing which rendered him an unreliable and dishonest witness; that he and Jiba had ignored proper legal advice that a decision to discontinue the prosecution of Mdluli would not stand in court, which clearly showed that Mrwebi was 'an untruthful and dishonest person' (para [152.3.1]); the refusal to reinstate the charges against Mdluli, despite *prima facie* evidence, which constituted a contravention not only of section 24(3) of the NPA Act, but also of the rule of law and the Constitution (para [159]); and the contention in an affidavit that he had decided to withdraw the charges against Mdluli after consulting with Mzinyathi, which was 'patently, dishonestly given' (paras [163]–[164.1]). The court concluded that there was insufficient evidence to remove the third respondent from the roll (paras [173]–[174]).

Application for admission and enrolment as an attorney: Applicant with a criminal conviction

In *Ex Parte Mdyogolo* 2017 (1) SA 432 (ECG), the applicant brought an application to be admitted as an attorney. In his

application, he disclosed that he had committed a robbery but with a political aim. The Cape Law Society only issued a general endorsement for the application, but did not take part in the admission proceedings in court.

The first issue the court considered was whether the applicant was a 'fit and proper person' to be admitted as an attorney under section 15(1) of the Attorneys Act 53 of 1979. The second issue related to the approach required from a law society in an application of this nature.

Concerning the first issue, Plasket J (Beshe J concurring) held that the applicant was not a 'fit and proper person'. The applicant was a member of the Azanian People's Liberation Army (APLA), the military wing of the Pan Africanist Congress (PAC) (para [12]). APLA committed robberies in order to raise funds for the PAC. The applicant was involved in an armed robbery at the BP Garage in Fort Beaufort on 19 June 1994, ie after 'liberation' had already taken place. Shortly after the robbery, the applicant was arrested and released on bail. He was rearrested on the same charge in 1997, and after admitting guilt, was sentenced to a ten-year prison term. While incarcerated, the applicant applied to the Truth and Reconciliation Commission (TRC) for amnesty for his crime. However, as the date of his application (19 June 1997) was after the TRC's cut-off date for qualifying actions, he would in any event not have received amnesty (para [27]). No mention is made of whether amnesty was refused.

The court had two versions of the events before it, one based on the applicant's TRC application; and the other put forward in the applicant's affidavit in support of his admission application. The set of facts included in the TRC application implied that he was 'made drunk and taken to Fort Beaufort' and used as part of 'an underground operation' by the South African Police to discredit APLA members (paras [17] [18]). No mention of this operation was made in the affidavit to the admission application. In this affidavit, the applicant mentioned that he had committed the robbery under orders from the 'High Command of APLA' (para [13]). The court concluded that the applicant's claim 'that he committed the robbery in the furtherance of the PAC's struggle' was false, and the application lay to be decided on the lie told by the applicant (para [28]).

A court is required to measure the conduct of an applicant against the conduct expected of an attorney, taking into consideration that an attorney is required to act with 'honesty and

integrity' (para [29]). In assessing the conduct, a holistic assessment is undertaken, meaning that a criminal conviction alone should not determine whether or not an applicant can be admitted (para [31]). However, in most instances conviction of a crime is an indication that the person should not be admitted (para [31]). The pressing question here was whether 22 years after the robbery, the applicant was now a fit and proper person to be admitted to this honourable profession. The court held that the applicant persisted in his lie regarding the occurrence of events and that this showed 'lack of honesty, integrity and trustworthiness' – key qualities required of an attorney (para 34]). Consequently, the court correctly held that the applicant was not a 'fit and proper person', and dismissed the application.

The court also reprimanded the Cape Law Society for not applying due consideration to the application when it should have been clear from the papers alone that the crime committed was after the iconic date of 27 April 1994 (para [38]). From a reading of the facts, it does appear that the Law Society provided only a 'generic' type of response in support of the admission application.

Contingency fee agreements

Two cases in the reporting period dealt with aspects of the Contingency Fees Act 66 of 1997. In *Mfengwana v Road Accident Fund* 2017 (5) SA 445 (ECG) the court had to determine whether a contingency fee agreement resulting in an attorney receiving 25 per cent of a plaintiff's award in a motor vehicle accident claim was in contravention of the Contingency Fees Act. If the agreement was in contravention of the provisions of the Act, it had to be determined whether it was not possible to sever the invalid clauses in the agreement. A further consequence of contravention would be that the attorney would be guilty of misconduct in the form of overreaching. However, the court did not comment on the misconduct and sent a copy of the judgment to the relevant law society for further action.

Mfengwana and the Road Accident Fund (RAF) agreed on a settlement. The court was asked to make the settlement an order of the court. After learning that Mfengwana had signed a contingency fee agreement with his attorney of record, Rubushe, the court requested to see the agreement and also that the affidavits in terms of section 4(1) and (2) of the Contingency Fees Act be filed with the court (para [2]). After perusing the contingency fee

agreement, Plasket J requested an additional affidavit from Rubushe, as the contingency fee agreement was in conflict with critical provisions of the Contingency Fees Act.

The court quoted the *dictum* by Southwood AJA in *Price Waterhouse Coopers Inc & others v National Potato Co-operative Ltd* 2004 (6) SA 66 (SCA) para [41], which sets out the proper context to the Act:

> The Contingency Fees Act 66 of 1997 (which came into operation on 23 April 1999) provides for two forms of contingency fee agreements which attorneys and advocates may enter into with their clients. The first is a no win, no fees agreement (s 2(1)*(a)*) and the second is an agreement regarding which the legal practitioner is entitled to fees higher than the normal fee if the client is successful (s 2(1)*(b)*). The second type of agreement is subject to limitations. Higher fees may not exceed the normal fees of the legal practitioner by more than 100% and in the case of claims sounding in money this fee may not exceed 25% of the total amount awarded or any amount obtained by the client in consequence of the proceedings, excluding costs (s 2(2)). The Act has detailed requirements for the agreement (s 3), the procedure to be followed when a matter is settled (s 4) and gives the client a right of review (s 5). The professional controlling bodies may make rules which they deem necessary to give effect to the Act (s 6), and the Minister of Justice may make regulations for implementing and monitoring the provisions of the Act (s 7). The clear intention is that contingency fees be carefully controlled. The Act was enacted to legitimise contingency fee agreements between legal practitioners and their clients which would otherwise be prohibited by the common law. Any contingency fee agreement between such parties which is not covered by the Act is therefore illegal. What is of significance, however, is that by permitting no win, no fees agreements the Legislature has made speculative litigation possible and by permitting increased fee agreements the Legislature has made it possible for legal practitioners to receive part of the proceeds of the action.

The contingency fee agreement between Mfengwana and Rubushe was supposed to fall under the category intended in section 2(2) mentioned above. Clauses 5 and 6 of the contingency fee agreement dealt with Rubushe's fee, but as clause 6 merely stated that the fee was calculated according to clause 5, only clause 5 is quoted below. Clause 5 reads:

> The Attorneys hereby warrants that the normal fees on an attorney and own client basis perform work in connection with the aforementioned proceedings are calculated on the following basis: 25% of the total of damages awarded, (Set out hourly, daily, and or applicable rates) [sic].

Clause 5 and 6 of the contingency fee agreement conflicted

with section 2(2) of the Act (para [20]). The '25% of the total amount awarded' is a reference to a *maximum* amount, and the fee charged may be higher than the normal fee, subject to two limitations. The first limitation is that the fee may not be more than twice the normal fee of the attorney, which received no mention in this contingency fee agreement. The second limitation is that *after* the first limitation has been applied, the fees may not exceed 25 per cent of damages awarded (para [20]). The court referred to the quality of the attorney work as leaving much to be desired (paras [13]-[15]). With this in mind, the court was of the opinion that a 'fee' of 25 percent (R226 222.30 of the R904 889.17 awarded) was 'grossly disproportionate and amounts to over-reaching on an outrageous scale' (para [19]).

Realising that the contingency fee agreement was contrary to the Act, Rubushe offered to amend the agreement 'unilaterally and retrospectively' by now suggesting an amended calculation method in his accompanying affidavit. The court was not impressed by this 'transparently disingenuous' affidavit (para [23]). It held that clauses 5 and 6, being essential terms of the contingency fee agreement, were in conflict with the Act (para [24]). As the clauses 'go to the principal purpose' of the agreement, they could not be severed, making the entire agreement invalid (para [25]). Thus, the common law applied, and Rubushe could claim a reasonable fee for the work he performed. Put differently: he was only entitled to the fees as taxed or assessed, but on an attorney and own client scale (para [26]). However, it must be emphasised that the common law prohibits contingency fee agreements; consequently, the common law referred to above relates to the law applicable to the taxation of attorneys' fees and is not a reference to contingency fee agreements under the common law.

Even though it has no legal relevance, the special precautions included as part of the order by Plasket J, and aimed at protecting the interests of Mfengwana, are noteworthy; for example, that the Registrar of the court should contact Mfengwana and explain the implications of this judgment to him.

The second reported judgment dealing with contingency fee agreements, *Nash & another v Mostert & others* 2017 (4) SA 80 (GP), dealt whether it is possible to conclude a contingency fee agreement in respect of non-litigious matters on the basis of the common law. The fees in dispute were earned by one Mostert, appointed by the Financial Services Board in terms of section 5 of

the Financial Institutions (Protection of Funds) Act 28 of 2001, to act as curator of the Sable Industries Fund. The High Court gave effect to the appointment of the curator and set out the scope of his appointment. As regards the curator's remuneration, he would be entitled to periodic payment 'in accordance with the norms of the attorneys' profession' [para [28]). This means that Mostert was subject to the law governing contingency fee agreements applicable to attorneys. The discussion under this heading is limited to the validity of the contingency fee agreement (referred to in the judgment as the 'remuneration agreement').

Tuchten J referred to *Price Waterhouse Coopers Inc & others v National Potato Co-operative Ltd* (above), but added *South African Association of Personal Injury Lawyers v Minister of Justice and Constitutional Development (SAAPIL*) 2013 (2) SA 583 (GSJ) and *Ronald Bobroff & Partners Inc v De La Guerre (Bobroff*) 2014 (3) SA 134 (CC). These authorities confirmed that any common-law agreement between a legal practitioner and its client which provides that the practitioner's remuneration will come from the amount recovered on behalf of the client, out of the proceeds of *litigation*, is contrary to 'public policy, unenforceable and unlawful' (para [69]). Tuchten J did not agree that the above cases are authority that contingency fee agreements are allowed under the common law. He went further and stated that the courts are yet to decide on this matter (para [71]). The purpose behind prohibiting contingency fee agreements – particularly when legal practitioners are involved – is to avoid the potential for a conflict of interest between the practitioner's duty towards his or her client and the personal interest of the legal practitioner arising from the speculative action he or she undertakes on behalf of the client (para [76]). Tuchten J is correct that the common theme running through judgments and commentary on contingency fee agreements of this nature is that with such an agreement 'tends to subvert the interests of justice' (para [79]). In determining whether these types of agreement are against public policy, it does not matter whether an agreement *actually* subverts the interests of justice, but rather whether it has the *tendency* to subvert the interests of justice (para [79]). With this in mind, the court correctly held that there was no justification for allowing a legal practitioner to conclude a contingency fee agreement in relation to non-litigious matters under the common law (para [80]). Consequently, *any* contingency fee agreement can only exist where it complies with the provisions of the Contingency Fees

Act. The remuneration agreement concluded between the FSB and Mostert did not comply and was therefore contrary to public policy and the remuneration agreement was invalid (para [93]).

SURETYSHIP

LEGISLATION

There was no legislation affecting this branch of the law during the period under review.

CASE LAW

The release of the surety upon prejudice to the surety

In *Absa Bank Ltd v Expectra 423 (Pty) Ltd* 2017 (1) SA 81 (WCC), the main contention by the defendants was that the delay by the plaintiff in instituting proceedings against the principal debtor resulted in prejudice to the sureties, warranting their release from their respective suretyships.

The three defendants, a limited liability company, Expectra 423 (Pty) Ltd, Mr Pieter le Roux (Le Roux), and Ms Jolene le Roux in their capacity as trustees for the time being of the Le Roux Family Trust, and Ms Le Roux in her personal capacity, bound themselves as sureties and co-principal debtors in favour of West Dunes Properties 176 (Pty) Ltd (West Dunes). The sureties bound themselves as sureties and co-principal debtors in favour of West Dunes for a loan by the plaintiff to West Dunes. The principal amount was R6,5 million. West Dunes failed to make fixed instalments, resulting in the plaintiff being owed R7,2 million by May 2015. The Le Roux Family Trust sold its shares in and claims against West Dunes to Kleinevallei Kinder Trust. The intention was that the purchase price received for the shares would settle the indebtedness to the plaintiff, but as later emerged, this amount was insufficient. Regarding the sale of shares agreement, the Kleinevallei Kinder Trust undertook to take over the liability West Dunes owed to the plaintiff, and also procure cancellation of the mortgage bond held by the plaintiff. This notwithstanding, the Kleinevallei Kinder Trust neither honoured this obligation to the plaintiff, nor attempted to cancel the mortgage bond held by West Dunes. An application to liquidate West Dunes was brought, and the plaintiff, by having been cited in the liquidation application, received notice of West Dunes' financial difficulties. Subse-

quently, it was contended that the plaintiff had actual knowledge of West Dunes' financial difficulties.

The court had to decide whether the plaintiff's delay in taking steps against West Dunes to foreclose on the mortgage bond resulted in prejudice to the sureties. This prejudice would make it possible for the sureties to be released from the surety agreements. The court concluded that even if the defendants had suffered prejudice, that prejudice would only apply to release the sureties where it was 'the result of a breach of some or other legal duty or obligation owed by the creditor' to the defendants (para [42]). The court relied on the principles enunciated in *Absa Bank Ltd v Davidson* 2000 (1) SA 1117 (SCA) and *Estate Liebenberg v Standard Bank of South Africa Ltd* 1927 AD 502 at 507 to determine the nature of the legal duty required. The defendants did not rely on a breach of any terms in the loan agreements. However, they contended that the plaintiff's neglecting to take steps while aware of West Dunes' financial predicament, if proven at trial, would be so unreasonable that it could not be seen to fall within the terms of the loan agreement (para [43]). The court disagreed. This was seen as an attempt by the defendants to create an exception to the general rule that our law does not recognise an *unlimited* 'prejudice principle'; and the defendants neglected to rely on any of the provisions of the loan agreement or suretyship agreements in their attempt to prove that the creditor's conduct was, in fact, unreasonable (para [44]).

The court therefore correctly concluded that the defendants had failed to establish a *bona fide* defence which was good in law, against the summary judgment obtained against them (para [49]).

Liability of a surety where the principal debtor, a company, is deregistered

In *Thomani v Seboka NO & others* 2017 (1) SA 51 (GP), the court had to determine whether a surety could still be sued for payment of a principal debt previously incurred by a deregistered company.

This was an application for the rescission of judgment and an order to set aside the sale in execution of immovable property. The applicants bound themselves as sureties and co-principal debtors in favour of Abrina 1591 (Pty) Ltd (Abrina). Coincidentally, the same creditor also registered a mortgage bond over the applicants' immovable property to secure a *personal* and separate obligation. The creditor now attempted to rely on the wording

of certain sections in the *personal* loan agreement to also use the immovable property as security for obligations under the suretyship agreements involving the Abrina debt. This was largely because it was clear that the obligation against the principal debtor had prescribed. Clause 4 of the personal home loan agreement and clause 11 of the suretyship agreement were relevant. Clause 4 of the personal home loan agreement read:

> **Continuing covering bond**
> *The bond shall remain in force as continuing covering security for the capital amount*, the interest thereon and the additional amount, notwithstanding any intermediate settlement, the bond shall be and remain of full force, virtue and effect as a continuing covering security and covering bond for each and every sum in which the mortgagor *may now or hereafter become indebted to the bank from any cause whatsoever* to the amount of the capital amount, interest thereon and the additional amount (emphasis added).

Clause 11 of the suretyship agreement read:

> **Continuing security**
> This suretyship shall be a continuing covering security notwithstanding any intermediate settlement of the amount owing and notwithstanding my/our death or legal incapacity until the Bank has received notice in writing from me/us or my/our executor, trustee or other legal representative, as the case may be, terminating the same, *and until the amount owing in terms of this suretyship at the date of receipt of such notice plus interest and costs until date of payment, has been paid*; provided that such notice shall have no force or effect and shall not terminate this suretyship unless it is accompanied by a copy of a notice addressed by me/us to the Debtor in terms of which the Debtor is advised of the termination of this suretyship (emphasis added).

The court needed to determine whether clause 4 of the personal home loan agreement could be interpreted to include the indebtedness as agreed to under the suretyship agreements, more specifically, clause 11 thereof. The court referred to earlier decisions on the ancillary nature of a suretyship agreement to the loan agreement (*Barclays National Bank Ltd v Umbogintwini Land and Investment Co (Pty) Ltd (in Liquidation)* 1985 (4) SA 407 (D) 410–11 and *Zietsman v Allied Building Society* 1989 (3) SA 166 (O) 166C, where 'enige bedrag wat ingevolge die gemelde verband betaalbaar mag word' referred to an amount payable under the bond, not merely secured by such bond). If the reference to the exact wording is to be taken, the emphasised part above in clause 4 relates to the obligatory part of the mortgage bond, which is the capital and interest, and thereafter

additional amounts in respect of the mortgage bond. Also, clause 5 of the suretyship agreements specifically limits the obligations of the sureties to those of Abrina. It reads:

> I/We acknowledge and admit that this suretyship is additional to any security which the Bank currently holds or may hereafter hold in respect of the *obligations of the debtor* (Abrina 1591 (Pty) Ltd) and that this suretyship shall not detract in any way from other security already furnished by me/us in favour of the Bank, which security shall remain in force until terminated in writing by the Bank (emphasis added).

The court correctly concluded that it is trite that the surety's liability is accessory to the principal debtor's debt (para [79]). Linked to this confirmation of the accessory nature of the suretyship, the prescription begins to run against the principal debtor *and* the surety simultaneously. Consequently, both claims prescribe at the same time (*Jans v Nedcor Bank Ltd* 2003 (6) SA 646 (SCA) 471C-G and *Kilroe-Daley v Barclays National Bank Ltd* 1984 (4) SA 609 (A) 652E). Therefore, if the claim against the principal debtor has prescribed, so will the claim against the surety. The court concluded that the registered mortgage bond linked to the applicant's personal home loan could not be used as security for the loan to Abrina (para [105]). Further, the default judgment was procedurally defective in that the applicants had been sued prematurely as Abrina had first to be re-registered. The court also ordered that the sale in execution of the applicants' immovable property be set aside.

NEGOTIABLE INSTRUMENTS

C J NAGEL*

LEGISLATION

There was no legislation directly affecting this field of the law during the period under review.

CASE LAW

There were no reported cases on negotiable instruments during the period under review.

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PENSION FUNDS LAW

MUTHUNDINNE SIGWADI*

LEGISLATION

There was no significant legislative development pertaining to the Pension Funds Act 24 of 1956 (the Pension Funds Act) during 2017. However, it is important to point out the following:

- The Tax Administration Laws Amendment Act 16 of 2016 (*GG* 40563 of 19 January 2017) and Taxation Laws Amendment Act 15 of 2016 (*GG* 40562 of 19 January 2017) were promulgated in 2017. These statutes contain certain changes relevant to the pension fund industry. Section 53 of the Tax Administration Laws Amendment Act amended section 69 of the Tax Administration Act 28 of 2011. It replaces paragraph *(b)* in subsection (8). The new paragraph reads as follows: '*(b)* a list of (i) pension funds, pension preservation funds, provident funds, provident preservation funds and retirement annuity funds as defined in section 1(1) of the Income Tax Act'. Section 69 of the Tax Administration Act deals with the 'secrecy of taxpayer information and general disclosure'. Section 69(1) provides that 'a person who is a current or former SARS official must preserve the secrecy of taxpayer information and may not disclose taxpayer information to a person who is not a SARS official'. Section 69(8) contains an exception to this provision which allows the Commissioner to publish certain information, such as the list of funds stated above in the new paragraph 69(8)*(b)*. See the chapter 'Law of Taxation' for a discussion of other developments in tax law.
- The Financial Sector Regulation Act 9 of 2017 (FSR Act) was promulgated in 2017 (*GG* 41060 of 22 August 2017). This Act came into operation on 1 April 2018. It establishes the Financial Sector Conduct Authority to replace the Financial Services Board (FSB). It further replaces the FSB Appeal Board with an independent Financial Services Tribunal in terms of section 219 of the FSR Act. This Tribunal reconsiders decisions as defined in the Act and performs other functions

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as conferred on it by the Act and specific sector laws. A broad overview of the structure of the FSR Act is provided in the chapter 'Financial Institutions' in 2016 *Annual Survey* (379–94).

NOTICES ISSUED BY THE FINANCIAL SERVICES BOARD (FSB) IN 2017

The following notice was issued by the Deputy Registrar of Financial Services Providers in 2017:

- Board Notice 51 of 2017 (*GG* 40785 of 13 April 2017) dealing with the amendment of the determination of recognised qualifications for financial services providers and compliance officers under the Financial Advisory and Intermediary Services Act 37 of 2002.

The following notice was issued by the Financial Services Board in 2017:

- Notice 458 of 2017 (*GG* 40912 of 12 June 2017) dealing with the levies on financial institutions. It imposes the levies set out in the Schedule on financial institutions under section 15A(1A) of the Financial Services Board Act 97 of 1990.

THE NATIONAL TREASURY (REPUBLIC OF SOUTH AFRICA)

The National Treasury released documents and media statements relating to the retirement funds industry for public comment and notification. These include:

- Media Statement: The Minister issued the Final Retirement Funds Default Regulations to Improve Member Outcomes (25 August 2017), in which he stated:

  > The final regulations are meant to improve the outcomes for members of retirement funds by ensuring that they get good value for their savings and retire comfortably. The regulations require retirement funds' trustee boards to offer a default in fund preservation arrangement to members who leave the services of the participating employer before retirement, and also a default investment portfolio to contributing members who do not exercise any choice regarding how their savings should be invested. For retiring members, a fund should have an annuity strategy with annuity options, either in-fund or out-of-fund, and can only 'default' retiring members into a particular annuity product after a member has made a choice.

- Amendments to the Regulations Issued in terms of Section 36 of the Pension Funds Act, 1956 (Act 24 of 1956), *GG* 41064 of 25 August 2017 (the Default Regulation). These amendments came into effect on 1 September 2017.

The documents are available on the National Treasury website at http://www.treasury.gov.za/publications/RetirementReform/ (accessed on 10 July 2018).

CASE LAW

Amendment of pension fund rules and their retrospective implementation

The following two reported judgments by the High Court of the Gauteng Division, Pretoria, both relate to the amendment of pension fund rules and their retrospective implementation: *Magabane v Municipal Employees Pension Fund* (Gauteng Division, Pretoria Case no 81389/15 (10 April 2017) Mabuse J); and *Municipality Employees Pension Fund & another v Mudau & another* (Gauteng Division, Pretoria, Case no 61555/14 (29 March 2017) Raulinga J).

The Municipal Employees Pension Fund (the Fund) was duly registered in terms of the provisions of the Pension Funds Act 24 of 1956 (the Act) (*Magabane* para [1]). The Fund was the applicant in *Mudau* and the respondent in *Magabane*. Magabane and Mudau were members of the Fund by virtue of their employment in their respective municipalities. The underlying reason for Magabane's application was that the Fund had failed to implement a determination by the Pension Funds Adjudicator (the Adjudicator) (para [2]); whereas in *Mudau*, the application was brought by the Fund in terms of section 30P of the Pension Funds Act to review and set aside a decision of the Adjudicator (*Mudau* para [2]). Although *Magabane* and *Mudau* are two distinct judgments decided by two different judges, the facts and the main issues in both cases were almost identical and it is appropriate to discuss them together.

The question before the courts in both cases was whether an amendment to the rules of the Fund was operative from the date on which the Registrar of Pension Funds (the Registrar) approved and registered it or from the date determined by the Fund (the effective date) (*Magabane* paras [3] [6]). Put differently, the question was whether an amendment rule could be applied retrospectively to take away or reduce pension benefits that

accrued to a pension fund member before the amendment had been approved and registered by the Registrar.

The rule *in casu* dealt with the calculation of the withdrawal benefit pursuant to a member's resignation (*Magabane* para [8]). The old rule (pre-amendment) provided that the withdrawal benefits to be paid to an existing member would be calculated at a rate of three times the value of contributions made (*Magabane* para [9]). The new rule (post-amendment) provided that the withdrawal benefit would be calculated at a rate of 1,5 times contributions made (*Magadane* para [9]).

The new rule was implemented following the recommendations of the statutory actuaries (*Magabane* para [1]). The report of the statutory actuaries had pointed out that a huge share of the loss of R300 million to the Fund in the 2008 to 2011 financial years was directly attributable to the old rule (*Magabane* para [9]).. The actuarial report warned that if the Fund continued paying out benefits in accordance with the terms of the old rule, it ran the risk of being unable to meet its future obligations at some stage, considering the future service contribution rates (*Magabane* para [9]). Consequently, the Fund's actuaries recommended an immediate reduction in the withdrawal benefits offered by the Fund (*Mudau* para [6]). The effect of the new rule was to reduce the pension benefits payable to members when exiting the fund (para [1]).

On 22 July 2013 the Fund applied to the Registrar for the registration of the amendment rule (the new rule) (*Magabane* para [8]). The new rule was only approved by the Financial Services Board (FSB) and registered by the Registrar some eight months later, on 1 April 2014 (*Magabane* para [10]; *Mudau* para [9]). The Registrar authorised the effective date of 1 April 2013 for the new rule (*Magabane* para [10]; *Mudau* para [40]).

Magabane (para [11]) and Mudau resigned before the registration of the new rule. In both cases, the parties – the Fund and the affected member or former member of the Fund – were in agreement that the Fund was empowered to amend its rules in terms of section 12 of the Pension Funds Act (*Magabane* para [15]). What the parties could not agree on was whether the amendment rule (the new rule) could be applied retrospectively to the benefits that accrued before the amendments had been approved and registered by the Registrar. Put differently, the question was whether an amendment rule operates from the date determined by the Fund concerned, or from the date on which the

Registrar approves and registers it (para [1]). The Fund contended that, according to section 12(4) of the Act, the amendment rule operates from a date determined by the Fund, or if no such date has been determined, from the date of registration of the amendment rule (*Magabane* para [6]).

In both cases, the Fund applied the new rule retrospectively, and as a result the pension benefits of the fund members (Magabane and Mudau) were significantly reduced (para [1]). Magabane and Mudau were paid their withdrawal benefits calculated in accordance with the provisions of the new rule, ie, the members' contributions plus interest multiplied by 1,5 instead of three (para [1]). Magabane and Mudau were dissatisfied with their withdrawal benefits and lodged a complaint with the Pension Funds Adjudicator (the Adjudicator) on the basis that the calculation of their withdrawal benefits was incorrect (*Magabane* para [12]). Their position was that their withdrawal benefits should have been calculated using the old rule (para [1]).

The Adjudicator issued a determination in favour of Magabane and Mudau against the Fund (para [1]). She ordered the Fund to calculate Magabane's withdrawal benefits in accordance with the old rule (*Magabane* para [13]). The Adjudicator's determinations in both cases were very clear that the amendment rules could not operate with retrospective effect to a pension fund member, because the member's benefit had already accrued by the time the amendment rule was registered (*Magabane* para [13]). The Adjudicator was of the view that section 12 of the Act does not empower the Fund to amend its rules with retrospective effect to an extent that it applies to benefits that have accrued before the registration of the amendment (para [1]). The Adjudicator had also solicited the interpretation of the rule amendment from the Registrar (*Magabane* para [8]). The Registrar is said to be of the view that whilst a rule amendment may be approved with retrospective effect, it cannot be applied before it has been registered. And even if it is registered with retrospective effect, it cannot be applied to benefits that accrued to the member before that amendment has been registered (*Magabane* para [18]). The Adjudicator was of the view that because the withdrawal benefits of both Magabane and Mudau had accrued before the new rule was approved by the Registrar, the rule could not be applied to reduce a member's benefits.

The *Magabane* and *Mudau* cases ended up in the High Court. In both cases, either by way of application (*Mudau* para [2]) or

counterclaim (*Magabane* para [4]), the Fund required the court to set aside the determination (the order) of the Adjudicator made in favour of the pension fund members. The Fund, among other submissions, argued that the Adjudicator's determinations fell outside her jurisdiction (*Magabane* para [4]; *Mudau* para [4]). In *Magabane*, this argument failed because the Fund did not join the Adjudicator as a party in the proceedings (*Magabane* para [1]). The court was of the view that the Adjudicator had a direct and substantial interest in the proceedings as well as the determination that the court could ultimately make, in particular, the counter-application (*Magabane* para [1]). The court held that the Adjudicator was an interested party and should have been joined (para [1]). In *Mudau*, the Fund had also argued that the Adjudicator did not have jurisdiction to make the determination as the complaint did not fall under a 'complaint' as defined in the Pension Funds Act (para [4.1]). The court found that *Mudau*'s matter qualified as a complaint and dismissed the jurisdictional challenge (paras [18] [19]).

It is important to note that even though the High Court was faced with the same question of law, namely, whether the amended rules can apply retrospectively even in instances where they reduce pension benefits that have already accrued to pension fund members, the High Court came to two different conclusions. In *Magabane*, the High Court held that the new rule applied to the pension fund member and the Fund could reduce the benefits in the circumstances (*Magabane* para [22]); whereas in *Mudau* the court held that the new rule did not apply and could not reduce the benefits of the member (para [40]). In *Mudau*, the court could not find any ground on which the Adjudicator's determination could be set aside (*Mudau* para [49]). It dismissed the Fund's application (*Mudau* para [49]).

It is crucial that pension funds, pension fund administrators, pension fund boards, legal practitioners, and pension fund members have clarity with regard to the correct legal position as to whether amended pension rules can apply retrospectively even in instances that take away or reduce pension benefits that have already accrued to a member. A decision delivered by the Supreme Court of Appeal or the Constitutional Court on the matter will be welcomed in order to provide clarity. Alternatively, a legislative intervention is necessary in this regard.

It is clear that the question of whether an amendment to the rules of the Fund is operative from the date on which the Registrar

approved and registered such an amendment rule, or from the date determined by the Fund, is not yet settled. In the case of *Magabane*, this matter was not fully ventilated before the High Court judge. Therein, the applicant had only approached the court to make the determination of the Adjudicator against the pension fund an order of court (para [2]). In other words, the Applicant was not there to argue that the determination of the Adjudicator was correct. See 2011 *Annual Survey* 1157–61 for a brief discussion of the amendment of pension fund rules and their retrospective implementation, albeit in a different context.

Pension funds and the applicability of the Promotion of Administrative Justice Act

Mostert v Registrar of Pension Funds & others (07352/2015) [2016] ZAGPJHC 235 (25 August 2016) was discussed in the 2016 *Annual Survey* 1119–21. The appellant was granted leave to appeal to the Supreme Court of Appeal (see *Mostert v Registrar of Pension Funds & others* (above). The full judgment of the Supreme Court of Appeal was reported as *Mostert NO v Registrar of Pension Funds & others* (986/2016) [2017] ZASCA 108 (15 September 2017). The question facing the Supreme Court of Appeal was whether the court *a quo* erred in dismissing an application for review in terms of the Promotion of Administrative Justice Act 3 of 2000 (the PAJA) on the basis that the proceedings had not been instituted within the 180-day period prescribed in section 7(1)*(b)* of the PAJA (para [1]). The court *a quo* held that it had no power to entertain the review as the application had not been instituted within this period (para [3]) and there was also no application before it to extend the period in terms of section 9. The appellant contended before the Supreme Court of Appeal, on a number of grounds, that the court *a quo* had erred, that the decision should be set aside, and that the application should be referred back to the local division for a decision on the merits (para [4]).

The Supreme Court of Appeal was of the view that the manifest delay between the promulgation of the regulation and the institution of the review proceedings – some twelve years – and the challenge in the respondent's heads of argument to the court's power to entertain the matter, required of the appellant to satisfy the court that the proceedings were instituted within the period of 180 days referred to in section 7. The appellant could not do so, nor had it applied for an extension of the period in terms of

section 9 (para [52]). The Supreme Court of Appeal dismissed the appeal (para [4]). See the chapter 'Constitutional Law' for a detailed discussion of the PAJA.

Restriction on the extent of participation by local authorities in one province in funds established in other provinces

Municipal Employees Pension Fund v Natal Joint Municipal Pension Fund (Superannuation) & others (562/2015) [2016] ZASCA 139, [2016] 4 ALL SA 761 (SCA) (29 September 2016) was discussed in the 2016 *Annual Survey* 1113-16. The appellant applied for leave to appeal the Supreme Court of Appeal's order to the Constitutional Court. The discussion below deals with the judgment of the Constitutional Court, which is reported as *Municipal Employees Pension Fund v Natal Joint Municipality Pension Fund (Superannuation) & others* (CCT260/16) (2017) ZACC 43 (1 December 2017). The facts of this case were thoroughly canvassed in the 2016 *Annual Survey* (above) and covered proceedings in both the High Court and the Supreme Court of Appeal, and it is unnecessary to repeat them here.

The legislation or regulation central to the issue before the Constitutional Court dealt with the compulsory association with and membership in the four KZN Funds (para [35]). It obliged all local authorities to be associated with the Provident Fund within six months from the date of becoming a municipal council (para [35]). The High Court held that all local authorities in KZN were obliged to associate with the respondents only, and that the employees of these local authorities were obliged to become members of the respondents (para [13]). The KZN funds appealed the decision to the Supreme Court of Appeal. The Supreme Court of Appeal held that the local authorities located within the KZN province were, in terms of the relevant legislation, obliged to associate with KZN Funds (para [14]). It noted further that there was nothing in the Fund legislation and regulations that prohibited a local authority in KZN from associating with a pension fund in addition to that local authority's association with the respondents (para [14]). The applicant fund in this matter, the Municipal Employees Pension Fund (the Fund), was not satisfied with the decision of the Supreme Court of Appeal. The Fund approached the Constitutional Court for a further relief (para [15]). It argued, among others things, for the following:

- that leave to appeal should be granted on the basis that the application implicated constitutional issues (para [16]);

- that the regulations were unconstitutional because they exceeded the MEC's authority in relation to local government (para [16]);
- that this case affected not only the parties but all other pension funds that wish to operate in the KZN Municipalities and their employees (para [16]);
- that the obligation on municipal employees to participate in specified pension and retirement funds amounted to an infringement of the right of freedom of association in section 18 of the Constitution;
- that the application raised arguable points of law of general public importance (para [16]); and
- that the legislation was unconstitutional, but the applicant had failed to mount a proper challenge in the High Court (para [45]). The Fund requested the Constitutional Court to uphold the appeal for a limited purpose of allowing the constitutional challenges to be properly ventilated and determined by the High Court (para [19]).

The respondents supported the interpretation of the relevant legislation adopted by the Supreme Court of Appeal (para [19]). They argued that it was not in the interests of justice to hear the matter as the applicant had not complied with the rules relating to the raising of constitutional issues in that they had not been raised in the High Court (para [20]). They contended that the Fund was precluded from doing so for the first time in the Constitutional Court (para [20]).

The majority judgment of the Constitutional Court held that if the applicant felt strongly about the constitutional issues in question, it must institute a substantive application in the High Court, cite all the interested parties, and allow them to respond to the issues raised (para [46]). The constitutional challenge would then be fully ventilated and determined by the High Court (para [46]). The Constitutional Court held that it was not in the interests of justice to grant leave to appeal (para [46]). It dismissed the application for leave to appeal with costs (para [48]). The disserting minority judgment provides a different take on the issues raised in this case.

Setting aside a determination made by the Pension Funds Adjudicator

In *Sentinel Retirement Fund v Hadebe & another*, the High Court Gauteng Division, Pretoria (case no 5647/2017 (12 May

2017) Mngadi AJ), the applicant was Sentinel Retirement Fund, a pension fund (the Fund), duly registered in terms of the Pension Funds Act 24 of 1956 (the Act). The first respondent was Ms Hadebe, an adult female, and the second respondent was the Pension Funds Adjudicator (the Adjudicator). The Fund sought an order setting aside a determination in favour of Hadebe by the Adjudicator (para [2]). Hadebe was a spouse of the deceased member of the Fund (Mr Hadebe) as well as the appointed executor of his deceased estate. Mr Hadebe was employed by Zululand Anthracite Colliery (the company) and was also a member of the Fund. He died on 31 March 2014, and as a result of his death certain benefits became payable to qualifying beneficiaries (para [4]). Ms Hadebe lodged a complaint with the Adjudicator on the basis that the Fund was delaying payment of death benefits, and was also not displaying transparency in its processes for the determination of whom to classify as beneficiaries (para [2). The death benefits were still not paid after a period of two years.

The Adjudicator was of the view that given the inordinate period that had passed since the deceased's death, his beneficiaries had suffered prejudice in that they had been denied access to benefits which became available to them on his death (para [7]). She directed the board of the Fund to complete its investigation and consider the relevant factors for an equitable distribution of the death benefits to the deceased's beneficiaries, without any further delay (para [7]). The Fund was instructed to complete its investigation and proceed with the allocation and distribution of death benefits in terms of section 37C of the Act within eight weeks, and to furnish the Adjudicator and Hadebe (the complainant) with a section 37C report for the allocation and distribution of the death benefits within two weeks of finalising the process.

The Fund was not satisfied with the Adjudicator's order and approached the High Court in terms of section 30P of the Act, seeking to set it aside (para [2]). Hadebe and the Adjudicator did not oppose the Fund's application (para [2]). The Fund argued that the Adjudicator did not have jurisdiction to deal with the complaint because disputes as to the allocation of death benefits in terms of section 37C of the Act fell outside the Adjudicator's jurisdiction (para [9]). The Fund noted that in its research the issue of the jurisdiction of the Adjudicator in respect of the distribution of death benefits in terms of section 37C had not been authoritatively decided (para [14]). The principal challenge

by the Fund was that the distribution of death benefits is not part of the administration of a fund (para [14]). The issue before the court was whether or not a complaint relating to matters envisaged in section 37C of the Act falls within the jurisdiction of the Adjudicator or not (para [15]). The court noted that it was clear that the board decides whether or not a person was a dependant of the member, and on payment of a benefit to a beneficiary (para [18]). The Fund argued that the discretion conferred in terms of section 37C on its board to distribute death benefits was clearly not part of the administration of the fund (para [18]).

The court concluded that the distribution of death benefits is made by the Fund through its board (para [19]). It falls under the overall administration of the Fund (para [19]). The main object of the Adjudicator is to investigate any complaints relating to the administration of the pension fund by its board (para [19]). The court concluded that when the board deals with matters envisaged in section 37C of the Act, it is exercising a function relating to the administration of the pension fund (para [20]). As a result, the Adjudicator is authorised and obliged to investigate complaints relating to how the board is carrying out or has carried out its functions (para [20]). The court held that the Adjudicator had jurisdiction to deal with the complaint (para [20]). The Fund's further argument was that the Adjudicator's order that the fund must complete its investigations within eight weeks was unreasonable in light of the deceased's complicated personal affairs (para [21]). It indicated that it became aware of the deceased's death on 14 April 2014 from his employer (para [21]). In July 2016, the Fund was still investigating (para [21]). The court held eight weeks was a reasonable period in view of the history of the matter (para [21]). It held that the Fund could not raise its inactivity as a ground on which to conclude that the period granted was inadequate, and the Fund could request an extension of the period from the Adjudicator for good reasons shown (para [52]).

The court held that the order relating to the Fund furnishing a report to the Adjudicator and Hadebe was to enable the Adjudicator to ensure compliance with the determination as well as to address the complaint of lack of transparency by the Fund (para [22]). The court dismissed the application (para [23]). It directed the Fund to provide the court and Hadebe with its proposed allocation and distribution of the deceased's death benefit within two weeks of taking a decision relating thereto, and to grant the complainant at least ten days within which to raise objections, if

any, to the proposed allocation and distribution. Having considered the objection, if any, the Fund was to proceed with the allocation and distribution of death benefits (para [23]).

Termination of pension fund membership

Kitshoff v Fedsure Staff Pension Fund & others (597/16) [2017] ZASCA 31 (28 March 2017) was an appeal against a judgment and order of the Gauteng Local Division of the High Court, Johannesburg (Masipa J), in which the court *a quo* dismissed with costs an application brought by the appellant (as applicant) in terms of section 30P of the Pension Funds Act 24 of 1956 (the Act), against a determination of the Acting Pension Funds Adjudication (the Adjudicator) (para [1]).

The first respondent, Fedsure Staff Pension Fund (the Fund), was a pension fund to which the employer was a contributor as defined in section 4 of the Act (para [3]). During March 2002, Investec Employee Benefits (Investec) acquired Fedsure Holdings Limited (Fedsure) (para [3]). Investec notified the employer and other participants that the Fund would no longer be accepting contributions from the employer with effect from 1 July 2002 ((para [3]). The employer accepted this notification and stopped contributing to the Fund as from 1 July 2002 (para [3]). Thereafter, the employer made alternative arrangements to join Wizard Universal Pension Fund (the WUPF-Sanlam) (para [3]). The transfer of the benefits from itself to WUPF (the new pension fund) in terms of section 14(1) of the Act was approved by the Registrar of Pension Funds (the Registrar) effective from 1 July 2002 (para [3]). The transfer was approved two years later on the 9 July 2004, with retrospective effect to 1 July 2002 (para [3]).

Kitshoff was retrenched on 30 June 2003, before the approval, and WUPF paid him a sum of R2 120 153 as his pension benefits (para [3]). This amount was determined as at the date of transfer from the Fund to the WUPF (para [3]). He was dissatisfied as the amount did not include the enhanced pension benefits he maintained he was entitled to be paid on retrenchment, which would have increased the amount payable to him by some R500 000 (para [3]). He then demanded the shortfall of R529 307 from the Fund, alternatively from his employer (para [3]).

The question before the court was whether Kitshoff was entitled to the enhancement benefits to the amount of R529 307 (para [1]). The court held that, in terms of rules of former fund, Kitshoff had no vested right to claim enhanced pension benefits as a

result of retrenchment, and that his right had ceased on termination of membership of former fund. There was no enforceable right effected by retrospective operation of approval. The court held that there was no basis for Kitshoff's assertion that the Fund's conduct was unlawful (para [12]), and dismissed the appeal.

Validity of an investment consulting agreement

The Chemical Industries National Provident Fund v Tristar Investments (960/2016) [2017] ZASCA 184 (6 December 2017) was an appeal from the Gauteng Local Division of the High Court, Johannesburg (Tsoka J sitting as court of first instance). It concerned the validity of an investment consulting agreement (the agreement) concluded between the appellant, Chemical Industries National Provident Fund (the Fund), and the respondent, Tristar Investments (Pty) Ltd (Tristar) (para [1]). The Fund was a large pension fund whose members were employees in the chemical industry in South Africa (para [1]). It was managed by a board of trustees (para [2]). Tristar is an investment consulting company, whose business is to advise trustees on the management of their assets (para [2]). The Fund was governed by a set of rules in terms of which its management was carried out by 24 trustees, half of whom were appointed by the employers of the members, and the other half by employee members (para [2]). The Fund signed the agreement in terms of which Tristar was to provide investment consulting services for a period of three years (para [3]). Pursuant to the agreement, Tristar performed its services for three months, but thereafter the Fund resolved to withdraw the appointment (para [3]). The Fund contended that the agreement was invalid because the signatories on behalf of the Fund had not had the authority to conclude it, and the agreement was *ultra vires* the rules of the Fund (para [4]).

The question before the Supreme Court of Appeal was whether the signatories who signed the agreement on behalf of the appellant (the Fund) had the necessary authority, and whether the agreement was *ultra vires* the rules of the Fund (para [14]). The Supreme Court of Appeal concluded that the Fund's representatives had the authority to sign the agreement on its behalf (para [34]). It dismissed the appeal with costs (para [35]). Although the focus of this case was on contractual matters as well as on the authority of fund representatives (board of trustees) to represent their pension funds, it provides some lessons for boards of trustees as to what they can do and not do when representing their funds.

PERSONS

Trynie Boezaart*

LEGISLATION

Primary Legislation

The Children's Amendment Act 17 of 2016 amended the Children's Act 38 of 2005 (the Children's Act). One of the amendments provides that an adoption order does not automatically terminate all parental responsibilities and rights when it is granted in favour of the spouse or permanent domestic life-partner of that parent (Children's Act s 242(2); 2016 *Annual Survey* 819). The amendments were assented to on 18 January 2017 (GN 42 *GG* 40564 of 19 January 2017) and the commencement date was 26 January 2018. The same applies to the Children's Second Amendment Act 18 of 2016, which provides, among other things, for a child to remain in alternative care beyond the age of eighteen years under certain circumstances (Children's Act s 176; 2016 *Annual Survey* 819). The amendments were assented to on 18 January 2017 (GN 43 *GG* 40565 of 19 January 2017) and the commencement date was 26 January 2018.

The Criminal Procedure Amendment Act 4 of 2017 amended the Criminal Procedure Act 51 of 1977 to, among other things, replace the outdated term 'mental defect' with the more acceptable term 'intellectual disability', and to provide the courts with a wider range of options in respect of orders to be issued when accused persons are by reason of mental illness or intellectual disability, or for any other reason, not criminally responsible for the offences with which they are charged (see ss 77 and 78 of the Act). In addition, the amendments clarify the composition of the panels provided for in section 79 to conduct enquiries into the mental condition of accused persons (GN 619 *GG* 40946 of 29 June 2017).

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Subordinate Legislation

The Regulations Regarding the General Control of Human Bodies, Tissue, Blood Products and Gametes: Amendment were published (GN 392 *GG* 40816 of 26 April 2017).

Draft Legislation

A Notice of Intent to Introduce a Private Member's Bill and Invitation for Comment on the Proposed Content of the Draft Choice on Termination of Pregnancy Amendment Bill has been published (*GG* 40970 10 July 2017) and the first version of the Choice on the Termination of Pregnancy Amendment Bill (B 34-2017) followed on 6 December 2017. The main objective of the draft legislation is apparently to restrict or curtail women's access to abortion.

To achieve this main aim, the Bill proposes an amendment to the definition of 'gestation period' in section 1 by adding confirmation thereof by ultrasound examination (clause 1). The starting point is, therefore, the assumption that ultrasound equipment is available in all the health facilities that comply with the requirements of section 3(1), read with section 3(2) of the Choice on Termination of Pregnancy Act 92 of 1996 (the Act).

Clause 2 of the Bill amends section 2 of the Act by narrowing down the circumstances in which a pregnancy may be terminated. It proposes that where continued pregnancy would significantly affect the social or economic circumstances of the woman, and the termination is conducted from the 13th to the 20th week of gestation, a social worker must also be involved. The underlying assumption in this instance is that the services of social workers will be readily available to low-income families. While the tenability of this particular circumstance in which pregnancy may be terminated is debatable, it is likely that requiring the additional services of a social worker will jeopardise the rights of poor and vulnerable women. Clause 2 furthermore deletes section 2(1)*(c)*(iii) of the Act, which currently allows the termination of pregnancy after the 20th week if a medical practitioner, after consultation with another medical practitioner or a registered midwife, is of the opinion that the continued pregnancy will pose a risk of injury to the foetus. While the wording of section 2(1)*(c)*(iii) may be vague and overly broad, the question remains whether removing it completely solves the problem.

Clause 3 of the Bill inserts new paragraphs *(c*A*)* and *(c*B*)* into

subsection 3(1) (after *(c)*) of the Act to ensure that the facilities where termination of pregnancy are performed provide ultrasound equipment and counselling services. While the first-mentioned addition aligns with the amended definition in clause 1, the second addition aligns with clause 4(1), in which the current non-mandatory counselling is changed to state-provided mandatory counselling. Clause 4 also inserts a new subsection (2) into the Act, stipulating information that must be made available to the pregnant woman. According to the Memorandum on the Objects of the Choice on Termination of Pregnancy Amendment Bill, 2017, published with the Bill, this information is 'to assist her in making an informed choice regarding the termination of her pregnancy and to assist her in giving informed consent prior to the termination of her pregnancy' (para 3.4). Clause 4 also inserts a new subsection (3), mandating that the counselling services be provided to either the 'natural guardian, spouse, legal guardian or *curator personae*, as the case may be', where consent is given on behalf of a woman with severe mental disabilities or an unconscious woman (referring to s 5(4)*(a)* and *(b)* of the Act).

Clause 5 proposes an amendment to section 5 of the Act by deleting section 5(5)*(b)*(iii), which currently allows two medical practitioners, or a medical practitioner and a registered nurse or midwife, to consent to the termination of a pregnancy after the 20th week of the gestation period of a severely mentally disabled woman, or a woman in a continuous unconscious state, if they are of the opinion that the continued pregnancy would pose a risk of injury to the foetus. This amendment is thus aligned to the deletion of section 2(1)*(c)*(iii) of the Act in clause 2.

Clause 6 repeals the Choice on Termination of Pregnancy Amendment Act 38 of 2004, which was declared invalid by the Constitutional Court in *Doctors for Life International v Speaker of the National Assembly & others* 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 paras [182] [189] [193]–[195] [198]–[212], because Parliament failed to comply with the public-involvement requirement in the Constitution of the Republic of South Africa, 1996 (the Constitution) (see ss 72(1)*(a)* and 118(1)*(a)*). However, this judgment has already been accommodated in the Choice on Termination of Pregnancy Amendment Act 1 of 2008, which came into operation on 18 February 2008.

Clause 7 provides for the short title.

CASE LAW

Amendment of a Birth Registration

In *KOS & others v Minister of Home Affairs & others* 2017 (6) SA 588 (WCC), [2017] 4 All SA 468, the Western Cape High Court was confronted with the legal challenges people face when applying to amend their sex description under the Alteration of Sex Description and Sex Status Act 49 of 2003 (the ASDSA) that has been in full effect since 15 March 2004. The judgment (at the very least) reveals ignorance on the part of government officials, and inability on the part of the Department of Home Affairs (the DHA), to provide administrative relief as required by the statute.

The case involved, among others, three applicants – referred to by the court as KOS, GNC and WJV respectively (or collectively, the 'transgendered spouses') – who had all been born male. All of them entered into marriages in terms of the Marriage Act 25 of 1961 with female persons, but during the subsistence of those marriages sought surgical and/or medical intervention to alter their sex/gender to female. They did this because all three applicants, from an early age, experienced 'tormenting gender dysphoria' (a psychiatric concept denoting a state of unease or general dissatisfaction), because their self-awareness was of being female trapped in a male body, and because transitioning to acquire the outward or physical characteristics of the other gender was a means of liberating them from their gender dysphoria and expressing their self-identification (para [2]). The spouses of the three transgendered applicants also entered as applicants, as did an organisation called Gender Dynamix (GDX) which seeks to promote and defend the rights of transgender and 'gender non-conforming' persons (para [26]).

Having successfully undergone the requisite medical procedures, the applicants lodged applications with the Director-General of the DHA to alter their sex/gender descriptions in the national birth register, and requested that they be provided with amended birth certificates (s 27A of the Births and Deaths Registration Act 51 of 1992). This legal measure is provided for in the ASDSA (ss 2(1) and 3(1)). The ASDSA also prescribes that a person whose sex description has been altered is deemed for all purposes to be a person of the sex description so altered as from the date of recording of the alteration (s 3(2)). The ASDSA further provides that rights and obligations that have accrued to or been acquired by such a person before the alteration of his or her sex

description are not adversely affected by the alteration (s 3(3)). The effect is that the recording of a postnuptial sex/gender change in respect of either or both of the spouses has no effect on their mutual marital rights and obligations, which would endure as long as the marriage does. In addition, it has no effect on the transgendered person's rights and obligations in respect of third parties (paras [3] [4]).

As a consequence of an alteration to the birth register, the altered sex descriptor must be recorded in the national population register – in terms of section 5 of the Births and Deaths Registration Act 51 of 1992 – by means of an amendment of the person's sex/gender assignation. This implies that a person who has transitioned is obliged to apply for a new identity document that will reflect a reassigned identity number incorporating an altered gender-related figure code (para [8]). The population register also provides for the inclusion of particulars relating to a person's marriage contained in the relevant marriage register or other documents relating to the contracting of the marriage, and 'such other particulars concerning his or her marital status as may be furnished to the Director-General' (as provided for in section 8*(e)* of the Identification Act 68 of 1997, which contains the founding provisions of the population register).

The DHA refused the applications for alterations to the birth register by both KOS and GNC. In the case of WJV, the department gave effect to the application, but then, of its own accord, went on to remove the particulars relating to WJV's marriage from the population register, and altered the surname of WJV's spouse to her maiden name. As a point of interest it may be mentioned that the applicants' spouses supported their applications, were content in their respective marital relationships, and had no intention of ending their marriages (para [11]).

In the department's view, the applications by the transgender spouses (as far as KOS and GNC were concerned) could not be granted while their marriages remained registered as solemnised in terms of the Marriage Act. This led to the applicants seeking an order in the High Court declaring (i) that the department was by law required to alter a person's sex/gender description in terms of the ASDSA irrespective of that person's marital status; and (ii) that the department's refusal to process the applications by KOS and GNC because they were married in terms of the Marriage Act, and its deregistration of the marriage between WJV and her spouse, were unlawful and unconstitutional. By way of secondary

relief, the applicants sought, in the alternative, a declaration that the ASDSA, and/or the Marriage Act, and/or the Civil Union Act 17 of 2006 is/are inconsistent with the Constitution and invalid to the extent that any or all of them fail to allow the alteration of a person's sex description and sex status while that person is in a marriage solemnised under the Marriage Act (para [58]).

Essentially, the DHA's argument lay in the fact that what was previously considered to be a heterosexual relationship, solemnised as a marriage under the Marriage Act, had been converted to a same-sex relationship – which can legally be solemnised as a marriage or civil union in terms of the Civil Union Act 17 of 2006. The department's stance was, therefore, that the marriage entered into under the Marriage Act must first be dissolved before the respective applications could be considered. Dissolution of a marriage can only be effected by death or divorce. *In casu*, none of the applicants (including their spouses, who were also cited as applicants), wished to dissolve their marriages by divorce and, in any event, were precluded from doing so because the circumstances that would legally allow divorce – irretrievable breakdown, mental illness, or continuous unconsciousness – were not applicable.

The parties in this case were in agreement that only marriages in which the prospective parties are of opposite sexes can be solemnised under the Marriage Act. The Civil Union Act is the vehicle for establishing a marriage or union where the prospective parties are of the same sex, although the mechanism contained in the Act is also available to opposite sex parties. The parties entering into a formalised union under the Civil Union Act must elect whether it is to be called a 'marriage' or a 'civil partnership'. Regardless of the designation chosen, the character of a union entered into in terms of the Civil Union Act is indistinguishable in its legal effect and consequences from one solemnised under the Marriage Act. The implication is that opposite-sex couples have a choice as to which statute to use in solemnising a marriage or union, whereas same-sex couples do not (para [23]).

Evidence was presented to the court relating to practical challenges facing applicants who wished to make use of the provisions of the ASDSA. These range from ignorance on the part of DHA officials of the existence and content of the Act, the absence of prescribed procedures and forms for the administration of the Act, a complete lack of response from the department

when applications were lodged, failure to acknowledge receipt of important documents, and hostility on the part of DHA officials towards applicants, to the department's computer system that automatically rejects changes to a person's gender assignation if that person's marriage has been solemnised under the Marriage Act – hence the department's stance that such a marriage must first be dissolved (para [27]ff). The latter challenge induced Binns-Ward J and concur with one of the applicants, GNC, who stated that she saw 'no need to get a divorce to satisfy a computer system' (para [46]).

The DHA contended that a parallel regime of law governing the solemnisation of marriages had been introduced following the adoption of the Civil Union Act, which gave rise to some confusion in the department. Initially, the possibility of amending the Marriage Act to include the solemnisation of same-sex marriages had been considered, but after objections from, eg, the religious sector, it was decided to keep the Marriage Act intact and applicable only to heterosexual marriages, and to introduce a parallel system which would allow for the solemnisation of same-sex marriages or unions (para [63]). In the department's view, the legislative framework

> does not simultaneously allow for a person married under the Marriage Act who has undergone a sex alteration to have their sex alteration registered on the system while simultaneously allowing such a person to remain married under the Marriage Act; this is because the result of the sex alteration would be that that person would be in a same sex relationship, which is not permitted under the Marriage Act (para [67]).

Binns-Ward J pointed out, as also conceded by the respondents, that there is nothing in the ASDSA that expressly or by implication indicates that a transitioned applicant's marital status has any bearing on his or her ability or entitlement to obtain administrative relief under the provisions of the Act. The aim of the ASDSA, as articulated in its long title, is to provide for the alteration of the sex description of certain individuals in certain circumstances, and the amendment of the Births and Deaths Registration Act accordingly. The sole criterion for obtaining an amended birth certificate under the Act is proof, to the reasonable satisfaction of the Director-General, that an applicant has altered his or her sex/gender (para [73]). In addition, the Marriage Act does not contain anything prohibiting a party to a marriage

duly solemnised in terms of the formula prescribed by section 30(1) from undergoing a sex-change or obtaining an amended birth certificate in terms of the ASDSA. Binns-Ward J pointed out that any provision to that effect would, for a number of reasons, be of very doubtful constitutional validity. In his view, it would go against the grain of constitutional principles to interpret or apply express provisions of the Marriage Act in a manner that would undermine, rather than promote, the spirit, purport and objects of the Bill of Rights contained in the Constitution (para [82]).

In response to the respondent's argument that the current prescribed forms and certificates used in the application of the Marriage Act refer only to 'husband' and 'wife', Binns-Ward J stated that nothing would prevent the Minister from amending the relevant regulations to provide for an appropriate form to cater for any required amendments to the official records or registers. In his view (which I whole-heartedly endorse) the Minister cannot rely on shortcomings in the regulatory record-keeping mechanisms of the Marriage Act to deny transgendered persons their substantive rights under the ASDSA (para [84]). Moreover, since the legal consequences of marriages or unions concluded under either the Marriage Act or the Civil Union Act are identical, there is no parallel system of law governing marriage; there is only a parallel system for the solemnisation of marriages. There is also no need for a conversion from one type of duly solemnised marriage to another in order to meet practical difficulties (para [85]).

Binns-Ward J concluded that the applicants were entitled to the primary relief for which they had applied. The failure of the Director-General of the DHO to decide the applications of KOS and GNC, or his refusal of their applications, amounted to administrative action within the meaning of the Promotion of Administrative Justice Act 3 of 2000, and needed to be challenged in terms of that Act. This, as well as the late application for extension of time under that Act, was condoned as the application raised important issues that bear materially on the lives of a sector of South African society and on matters of public administration (para [87]). As far as the applicant WJV was concerned, the judge was not persuaded that the department's deletion of the record of the marriage between her and her spouse, and the subsequent unilateral change of her spouse's surname back to her maiden name, amounted to 'administrative action', as the actions were not taken in terms of any law, and therefore fell to be set aside for being in breach of the doctrine of legality (para [88]).

In summary, the court granted the following relief:

(i) A declaration that the manner in which the DHA dealt with the applications of the transgendered spouses was inconsistent with the Constitution and unlawful in that it infringed the applicants' rights to administrative justice, infringed all applicants' rights to equality and human dignity, and was inconsistent with the state's obligations in terms of section 7(2) of the Constitution to respect, protect, promote and fulfil rights under the Bill of Rights.

(ii) A declaration that the Director-General of the DHA is authorised and obliged to determine applications submitted in terms of the ASDSA by any person whose sexual characteristics have been altered by medical treatment, or by evolution through natural development resulting in gender reassignment, or any person who is intersexed, for the alteration of the sex description on such person's birth certificate, irrespective of the person's marital status and, in particular, irrespective of whether that person's marriage or civil partnership was solemnised under either the Marriage Act or the Civil Union Act.

(iii) An order that the transgendered spouses were exempted from exhausting the internal remedies provided for under the ASDSA (s 2(4)–(10)).

(iv) A direction to the Director-General to reconsider and, within 30 days of the court order, determine the applications under the ASDSA construed in the light of the judgment.

(v) A declaration that the deletion, by the department, of the particulars in the population register in respect of the marriage between WJV and her spouse was unlawful, and a direction to the department to reinstate, within 30 days of the court order, in the record of the particulars of the solemnisation of their marriage in terms of the Marriage Act.

(vi) A direction to the first respondent to pay the applicants' costs, including the costs of two counsel.

This case is an example of citizens who are compelled to revert to the judiciary to assert their fundamental rights (paras [70] [75]) in the face of ignorance, maladministration and confusion, apparently 'coloured by religious and social prejudice' (para [69]) in a government department. In the case of KOS, the DHA in George refused to accept the application despite KOS having a copy of the ASDSA available (para [34]). A follow-up email to the Minister

was not even acknowledged by the addressee's office (para [35]). When the application was eventually channelled to the head office in Pretoria, KOS was informed that the application could not be processed because she was married and the computer system would not allow a change to the gender code in this instance (para [40]). Inappropriate and incorrect suggestions regarding divorce were made to her (para [41]). This application was thus effectively refused, or alternatively the Director-General failed to take a decision as required by the ASDSA (para [42]).

GNS's application went one step further than that of KOS, because she managed to obtain a new identity document reflecting her new christian names and her appearance as a female, but without changing the sex/gender description to female. GNS was also advised to obtain a divorce and remarry in terms of the Civil Union Act, which also meant that her application was effectively refused (para [46]).

In comparison with the above applications, WJV's application progressed much further, although in the process the Roodepoort office of the DHA deleted its record of the marriage as if it had never been concluded, and changed WJV's spouse's surname back to her maiden name (para [55]). The hardship that all the individuals involved in the three applications suffered is detailed in no uncertain terms in this judgment (paras [36] [47] [55]). Let us hope that this judgment has paved the way for the proper implementation of the ASDSA – unfortunately fourteen years after its enactment.

Surrogate Motherhood Agreement

The law governing surrogate motherhood and the status of the child concerned is extensively dealt with in Chapter 19 of the Children's Act 38 of 2005 (Trynie Boezaart *Law of Persons* 6 ed (2016) 100ff; Jacqueline Heaton *The South African Law of Persons* 5 ed (2017) 48ff; see also Lawrence Schäfer *Child Law in South Africa: Domestic and International Perspectives* (2011) 265ff; Anne Louw 'Surrogate motherhood' in Davel & Skelton (eds) *Commentary on the Children's Act* (revision service 4, 2012) ch 19). All the requirements for a valid surrogate motherhood agreement are contained in sections 292ff and are often scrutinised in our courts (*AB & another v Minister of Social Development* [2016] ZACC 43, now reported as 2017 (3) SA 570 (CC), 2017 (3) BCLR 267 and discussed in 2016 *Annual Survey*

820ff) on the constitutionality of the 'genetic-link requirement' (s 294)). One of the very first requirements in section 292 is that the surrogacy agreement must be confirmed by the High Court within whose area of jurisdiction the commissioning parent or parents are domiciled or habitually resident (s 292(1)*(e)* read with s 295 of the Children's Act).

In *Ex parte HP & others* 2017 (4) SA 528 (GP), also reported as *Ex Parte HPP & others; Ex Parte DME & others* [2017] 2 All SA 171 (GP), the Gauteng Division of the High Court was tasked with considering the confirmation of two surrogate motherhood agreements. Both applications for confirmation involved services rendered by a surrogacy coordinator (or facilitator, the same person in both applications) who provided surrogacy facilitation services at a fee, in this case R5 000. Her task as a surrogacy coordinator was to assist with (i) guiding and advising the surrogate mother; (ii) referral of the surrogate mother to a clinical psychologist; (iii) mediation with the surrogate mother during the gestation period; (iv) if required, managing any dispute resolution; and (v) in general, overseeing the entire surrogacy process or 'journey' (para [7]). At the first hearing of these applications it was decided that a ruling on these matters may have an impact on the rights of the surrogacy coordinator and she subsequently filed an affidavit and was joined as a respondent (para [11]).

In both these applications the following issues arose:

(i) whether the surrogacy facilitation agreements constituted a transgression of section 301 of the Children's Act, which aims to prohibit payment in respect of surrogacy in no uncertain terms; and
(ii) whether the court could confirm the surrogate motherhood agreements if it is found that the agreements between the surrogacy coordinator (the coordinator) and the applicants were unlawful.

In both applications for confirmation it was pertinently stated that in the current cases the fee charged by the coordinator did not include any introduction fee to the surrogate mother (see para [8] regarding the first application, and para [22] for the second. However, in both applications the coordinator did in fact introduce HP and JP to the potential surrogate mothers (paras [7] [22]).) The coordinator argued that she was entitled to choose her occupation in terms of section 22 of the Constitution, and that section 301 of the Children's Act should not deprive her of that

right. In terms of section 22 of the Constitution every citizen has the right to choose his or her trade or occupation freely, but the section also provides that the practice of that occupation or profession may be regulated by law. In support of her claim as to the value of her services, the coordinator attached both a medico-psychological expert opinion and an ethics expert opinion, seeking to persuade the court that the facilitation agreement entered into by the parties concerned was morally and ethically sound and should not be declared unlawful. The medico-psychological opinion stated that (i) without the coordinator's assistance, commissioning parents would have to find a surrogate mother themselves; (ii) she briefed the commissioning parents about medical and legal aspects; (iii) she made sure that the surrogate mother was medically assessed; (iv) she determined whether the surrogate mother's living conditions were amenable to carrying a pregnancy; and (v) she reminded the surrogate mother to keep to her medication regime related to the artificial fertilisation and the pregnancy. In addition, the coordinator stated that she explained complicated medical reports, debriefed the surrogate mother after invasive medical procedures, and prepared her emotionally for these procedures (paras [14]–[18]).

Tolmay J expressed concern that these services rendered by the coordinator encroached upon the professional fields of recognised service providers, and that the coordinator's personal experience as a surrogate mother did not qualify her to render such services (para [19]).

Noting that the justification for the prohibition of commercial surrogacy had been the subject of some debate, and that there had been calls for the legalisation of commercial surrogacy, Tolmay J stated that the view commonly held appears to be that the potential for abuse far outweighs any possible advantage. She referred to the fact that the prohibition was recognised in most countries, which implied that legal commercial surrogacy was the exception rather than the norm. In South African law, section 301 of the Children's Act expressly prohibits payment in respect of surrogate motherhood agreements subject to limited exceptions only (paras [24]–[27]). These exceptions are (s 301(2))

> *(a)* compensation for expenses that relate directly to the artificial fertilisation and pregnancy of the surrogate mother, the birth of the child and the confirmation of the surrogate motherhood agreement;
> *(b)* loss of earnings suffered by the surrogate mother as a result of the surrogate motherhood agreement; or

(c) insurance to cover the surrogate mother for anything that may lead to death or disability brought about by the pregnancy.

Section 301(3) excludes services rendered by legal and medical professionals with a view to the confirmation of a surrogate motherhood agreement. As far as the involvement of agencies is concerned, Tolmay J referred to the following passage in the case of *Ex parte WH & others* 2011 (6) SA 514 (GNP) para [66]:

> If any agency is involved, full particulars regarding that agency should be revealed. An affidavit by the agency should also be filed containing the following –
> *(a)* the business of the agency;
> *(b)* whether any form of payment is paid to or by the agency in regard of any aspect of the surrogacy;
> *(c)* what exactly the agency's involvement was regarding the (i) introduction of the surrogate mother; (ii) how the information regarding the surrogate mother was obtained by the agency; and
> *(d)* whether the surrogate mother received any compensation at all from the agency or the commissioning parents.

It was argued on behalf of the coordinator, that the services she provided were beneficial to all persons involved, and were not of the kind prohibited by section 301. The premise was that the purpose of this section could not be aimlessly to criminalise the provision of paid-for services that relate to surrogate motherhood agreements, but rather to avoid payments in money or in kind to the surrogate mother. In the view of Tolmay J, however, such an argument loses sight of the fact that surrogacy entails much more than mere direct payments to surrogate mothers in that third parties could also be involved and could benefit from the process in contravention of the law (para [38]). The judge acknowledged that commissioning parents could find themselves in a difficult position when looking for a potential surrogate and unable to find such a person within their immediate circle. In her view the solution could well be the establishment of a regulatory framework which could include a possible database of potential surrogate mothers. The possibility of abuse could be eliminated if such a database were properly regulated. In the meanwhile, however, the only solution was to require that anyone, including agencies, individuals, or entities, file an affidavit to inform the court about the payments. The court should then determine, on a case-by-case basis, whether there has been compliance with the Children's Act while bearing in mind that commercial surrogacy is unlawful, and that only certain expenses are allowed (para [39]).

With regard to the coordinator's assertion that section 301 of the Children's Act limits her right under section 22 of the Constitution to choose an occupation, Tolmay J found that it was not her right to exercise a profession that was limited, but her right to require payment. The limitations contained in section 301 are acceptable in an open and democratic society and are accordingly justifiable in terms of section 36 of the Constitution (para [51]). Notwithstanding the possibility that the coordinator may well have rendered an invaluable service, and despite appreciation for her assistance to persons going through the surrogacy process because of her own experience, the judge found that the expenses she claimed fell foul of the provisions of section 301, and declared the agreements between her and the commissioning parents unlawful and unenforceable (para [53]).

The declaration of unlawfulness gave rise to the second question, namely, whether the surrogate motherhood agreement (which complied with all the other requirements of the Children's Act and guidelines) could be confirmed (para [54]). The applicants relied on the decision in *Ex parte MS* 2014 (3) SA 415 (GP) where the court confirmed a surrogate motherhood agreement after fertilisation, despite the fact that section 296(1)*(a)* prohibits fertilisation of a surrogate mother before the surrogacy agreement has been confirmed by a court (para [58]; note, however, that it is s 296 and not s 298 as stated in that paragraph). The applicants argued that, as was held in *Ex parte MS*, contravention of a provision of the Children's Act does not preclude a court from confirming an agreement – not even if the contravention carries a penal sanction. The court, however, distinguished the *MS* case from the applications under discussion as the right of the child to be conceived in this way was in no way threatened in the present matter (para [61]).

After considering the principles that have evolved in the law of contract, Tolmay J concluded that it should be established whether the unlawful contract had tainted the lawful contract to such an extent that the lawful contract could not be endorsed. The judge then referred to case law on the law of contract indicating that a range of factors must be considered on a case-by-case basis, including the nature and degree of the unlawful act, and the way in which it is linked to the lawful agreement (*Gibson v Van der Walt* 1952 (1) SA 262 (A) 269G–H and *Richards v Guardian Assurance Co Ltd* 1907 TH 24 29). She decided that the appropriate approach regarding surrogacy

agreements would be to allow the court a discretion, which should be exercised keeping in mind the legislative framework and the ban on commercial surrogacy (para [67]). The judge thereupon considered the notion that the surrogate mothers in both applications before the court did not appear to be vulnerable women who may have been exploited. They were willing to engage in the surrogacy process on a purely altruistic basis. The judge also considered the difficulty of finding suitable surrogates, which may well have been exacerbated by the absence of a proper regulatory framework for potential surrogate mothers. In addition, she took into consideration that the coordinator might have been under the *bona fide* impression that she was allowed to enter into agreements with the applicants (para [69]). Moreover, the parties to the applications did not act in a morally reprehensible manner that could impact on the validity of the surrogate motherhood agreements (para [70]). Tolmay J noted that she also considered the very human desire of the applicants to have children who, through no fault of their own, were unable to conceive a child themselves. Finally, in exercising her discretion she confirmed the surrogacy agreements despite the declaration of unlawfulness of the facilitation agreements (para [71]).

Consequently the court order included a declaration that the surrogacy facilitation agreements were unlawful and unenforceable, but that the surrogate motherhood agreements were confirmed. The medical practitioners were authorised to proceed with the artificial fertilisation procedures (para [72]). In so doing, this case followed the trend that a surrogate motherhood agreement may be confirmed despite one of the statutory requirements not having been met (*Ex parte MS* above). This inevitably raises many questions and concerns, the first of which has already been pointed out by Louw in the context of *Ex parte MS,* namely that it effectively sanctions a departure from statutory provisions (*Ex parte MS* 2014 JDR 0102' (2014) 1 *De Jure* 116ff). *Ex parte HP* (above) also highlights, and by implication at least also acknowledges, the role of agencies or surrogacy facilitators in the process. Tolmay J opined that a regulatory framework should be established which may include a possible database of potential surrogate mothers (para [69]). Henceforth, either the Children's Act or the regulations should spell out what the qualifications and the involvement of the facilitators may or may not entail. In both the applications under discussion, the surrogacy coordinator stated very explicitly that she did not charge an

introduction fee, but from the facts it is evident that she introduced the commissioning parents to the surrogate mother. (Note the criticism by, eg, M Carnelly '*Ex parte WH* 2011 6 SA 514 (GNP)' (2012) 45 *De Jure* 184–85 and A Louw 'Surrogacy in South Africa: Should we reconsider the current approach?' (2013) 76 *THRHR* 576, regarding the courts' apparent reluctance to deal with the role of an agency – in this instance in *Ex parte WH* – decisively.) Finally, if certain payments in respect of surrogacy are not prohibited, should the ban on commercial surrogacy not be reconsidered?

Legal Relationship Between a Child and His or Her Unmarried Parents

Exercise of parental responsibilities and rights

In *VN v MD & another* 2017 (2) SA 328 (ECG) the Eastern Cape High Court considered an appeal based on a revised parenting plan confirmed by the Children's Court in terms of section 33 of the Children's Act 38 of 2005. The parties in this case, who were unmarried parents sharing parental responsibilities and rights, had drawn up an initial parenting plan which was made an order of the Children's Court. This was followed by revisions to the plan, ostensibly granting extended access of the father to the child. The latest parenting plan, as confirmed by the Children's Court, became the subject of an appeal by the child's mother who opposed the extended access. The child was represented by an employee of the Legal Aid Board duly appointed in terms of section 55 of the Children's Act.

Eksteen J criticised the presiding officer in the Children's Court for the inadequate record of proceedings in that court placed before the High Court. It consisted of only two pages and gave no indication whether the evidence was oral or not, or whether it had been given under oath or not. Moreover, it did not reveal the source of the evidence, or refer to any documentation that might have been handed in for consideration, or to any reports which the presiding officer might have considered (para [6]). Most concerning was the fact that no foundation for the order made was reflected in the record (paras [7] [8]).

The presiding officer in the Children's Court was given the opportunity to advance reasons for the decision and the order made. Again, Eksteen J found the reasons inadequate (para [9]). For instance, the magistrate stated that in extending access she

had relied on the father's good relationship with the child. However, no basis for coming to such a conclusion was advanced, and it did not appear that she had access to any documentary evidence to support her assertion (para [13]). In addition, the magistrate stated that she had considered the observations of a social worker concerning the child's emotional connection and comfort with the father, as well as the reasonableness of the father's expectations regarding sleep-over contact. To the extent that the magistrate relied on the reasonableness of the father's expectations, Eksteen J considered that to be a misdirection in circumstances where the observations of the social worker were made some fourteen months prior to the order made by the Children's Court. The court made it clear that the presiding officer was required to consider the best interests of the child, and not the expectations of any particular parent, and was prepared to grant the appeal on that basis (para [15]). The *ratio decidendi* is entirely in line with the Children's Act, which makes it very clear that a parenting plan must comply with the best-interests-of-the-child standard (s 33(4)).

The court continued to consider some of the additional grounds of appeal relating to the interpretation of the Children's Act and parenting plans. Parenting plans provide a mechanism for co-holders of parental responsibilities and rights to reach agreement on the exercise of their respective responsibilities and rights in respect of the child (s 33(1)). If co-holders experience difficulties in exercising their parental responsibilities and rights, court intervention is not their first option. They must first engage with one another and 'seek to agree on a parenting plan' (s 33(2)). The Act requires the parties to a parenting plan to seek the assistance of a family advocate, social worker, or psychologist, or mediation through a social worker or other suitably qualified person, in preparing such plan (s 33(5)).

Section 34 contains the formal requirements that a parenting plan must meet, including the formalities for its amendment. In this case it appears that the amended parenting plan had been confirmed by the Children's Court upon application by the father alone, whereas section 34(5) requires such an application to be made by 'the parties'. Eksteen J noted that on face value this appears to suggest that an application by one party in the face of opposition from the other, is impermissible, but pointed to the judgment in *PD v MD* 2013 (1) SA 366 (ECP), where that interpretation was rejected. The judge thus accepted, without

making any finding in this regard, that the father was entitled to bring the application for amendment of the parenting plan, and that the magistrate was empowered to grant an order on the application of only one parent (para [18]). However, Eksteen J alluded to another misdirection in the order of the Children's Court, where it was concluded that consultation with professionals is not a requirement for amendment of parenting plans. While section 33(5) does not pertinently require that a variation of the parenting plan must be prepared with the assistance of a family advocate, social worker, or psychologist, Eksteen J held that on considering the structure of Part 3 of Chapter 3 of the Children's Act, it becomes clear that in pursuing *any* agreement, including the amendment of an existing agreement, in respect of the exercise of parental responsibilities and rights, the parties are required to consult a family advocate, social worker, or psychologist who is qualified to provide guidance as to the best interests of the child, before approaching a court – especially in circumstances where a significant period has elapsed since the endorsement of the previous parenting plan, and where the parties have failed to agree (para [19]).

In granting the appeal by the child's mother and setting aside the order of the Children's Court, the court must be applauded. I am as convinced as the court that the presiding officer's order did not consider the best interests of the child at all, or to the extent that it should have. I also agree with the interpretation of section 34(5) in this case and in *PD v MD* 2013 (1) SA 366 (ECP) paras [28] [29], and am firmly convinced that the consultation and/or mediation required by section 33(5) when preparing a parenting plan should also be followed when amending an existing plan. The only criticism that may be levelled at the judgment is that Eksteen J at times referred to parental rights and responsibilities (eg, in paras [1] [19]), instead of parental responsibilities and rights, while it is widely accepted that the priority given to responsibilities rather than to rights in that phrase is not a matter of semantics. It is meaningful and indicative of the shift from parental rights to children's rights in South African law.

PROPERTY LAW (INCLUDING REAL SECURITY): CASE LAW

CG van der Merwe*
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Real or Personal Right?

In *Bondev Midrand (Pty) Limited v Puling & another and a related matter* [2017] JOL 38971 (SCA) the appellant, Bondev, a property developer, unsuccessfully sought an order obliging the respondent to re-transfer to it a piece of land it had earlier purchased from the appellant. The basis for the claim was that the respondent had failed to comply with a condition registered against the title deed obliging the respondent to erect a building on the property within a prescribed period. The Gauteng High Court, Pretoria, dismissed the developer's claim on the basis that Bondey was seeking to enforce a debt as envisaged in section 11*(d)* of the Prescription Act 68 of 1969 which had prescribed and become unenforceable as more than three years had elapsed since had become due. The Supreme Court of Appeal granted leave to appeal. The respondents contended that the claim for re-transfer constituted a 'debt' for the purposes of the Prescription Act, but not one envisaged in section 11*(a)*, *(b)* or *(c)* of the Act. They therefore submitted that, in terms of section 11*(d)* of the Act, the prescriptive period was three years. In contrast, the developer (appellant) argued that the registered condition gave rise to a real right (and not merely a personal right), which did not prescribe within three years.

Leach JA referred in passing to the recently reported case of *Bondev Midrand (Pty) Ltd v Madzhie & others* 2017 (4) SA 166 (GP), which the parties' legal representatives correctly brought to the attention of the court. In that case the court concluded that a similar repurchase clause was grossly unfair to a purchaser intending to build a residential home, that it infringed the constitutional right to adequate housing, and that enforcing it would be against public policy. The acting judge dealt with various consti-

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tutional issues and stated, amongst others, that the clause was grossly unreasonable towards a purchaser who wished to pursue the suburban dream incrementally, and that a repurchase clause is 'not central to the business of a developer or the operations of a homeowners association,' before concluding that enforcement of the present type of repurchase clause should be refused (paras [7] [8]). Leach JA correctly pointed out that the applicant in that case wished to abandon an application for default judgment and all that was required was the court's consent. Leach JA found that this was not an instance that required a formal judgment, let alone one in respect of constitutional issues that had not been raised or canvassed in the papers and in respect of which interested parties had neither been forewarned nor heard. Consequently, it was inappropriate for the court in *Madzhie* to have reached the conclusion that it did in regard to the constitutionality and lack of enforceability of the repurchase clause. Leach also found that it was extremely unfortunate that the Registrar of Deeds now viewed the judgment in *Madzhie* as binding and, consequently, refused to register deeds containing such clauses which are relatively common and are regularly registered at the instance of developers and local authorities (paras [7]–[11]).

Returning to the question of whether the claim for re-transfer constituted a debt capable of prescribing or a real right, Leach JA explained that the condition in question consisted of two clauses. The first obliged the transferee or its successors in title to erect a dwelling on the property within a period of eighteen months. The second provided that in the event of a dwelling not being erected within that period, the appellant was entitled, but not obliged, to have the property re-transferred to it against a return of the purchase price (para [12]). As the first clause reflected an intention to bind not only the transferee but also its successors in title, it resulted in an encumbrance upon the exercise of the owner's rights of ownership of its land and, therefore, gave rise to a real right – *Willow Waters Homeowners Association (Pty) Ltd v Koka NO & others* 2015 (5) SA 304 (SCA) (paras [16] [22]) and the authorities there cited (para [13]). On the other hand, the right of the appellant to claim re-transfer of the property against repayment of the original purchase price, as set out in the second clause, did not amount to such an encumbrance. This is a right which can only be enforced by a particular person, the appellant, against a determined individual, and does not bind third parties, which is the hallmark of a personal right

which the appellant could exercise at its sole discretion. Standing alone, that clause would not have carved out a portion of the respondents' *dominium* and would, therefore, be regarded as creating a personal right (para [14]).

On the authority of, amongst others, *British South Africa Company v Bulawayo Municipality* 1919 AD 84 93 and *Lorentz v Melle & others* 1978 (3) SA 1044 (T) 1049, Leach JA then pointed out that although only real rights and not personal rights should be registered against a title deed, the fact that a personal right is registered does not, in itself, convert that right into a real right.

Leach JA then dealt with the appellant's contention, with reliance on *Cape Explosive Works Ltd & another v Denel (Pty) Ltd & others* 2001 (3) SA 569 (SCA), that although the second clause appeared to create a personal right, it was so inextricably linked to the first clause – which clearly created a real right – that the two clauses should be read together as creating a real right capable of registration (para [15]–[17]). Leach JA explained that Denel's right under condition 2 to give notice to the transferor, Capex, that the property was no longer being used for the specified purpose provided, in *Cape Explosive Works,* a mechanism by which terminate the restriction upon the rights of ownership. Consequently, either Capex would repurchase the property, or, if Capex was not inclined to do so, Denel would retain its ownership free of the restriction. The encumbrance on the land created by condition 1 could only continue until Denel gave Capex a notice under condition 2. Therefore, the restriction on ownership in condition 1 was inseparably bound up with condition 2 (para [18]).

By contrast, Leach JA found that the burden created by the first clause in the present case – ie, the obligation to build a dwelling on the property – was binding on the transferee (the respondent) and its successors in title. The respondent had no right under the second clause to bring that restriction to an end. Clause two provided only that in the event of a failure to build a dwelling in the time provided, the developer (appellant), as the transferor, could recover the land against the payment of the purchase price if it so wished. This was akin to providing the appellant with an option to purchase which, on the authority of *Barnhoorn NO v Duvenhage & others* 1964 (2) SA 486 (A) 494F–H, essentially constituted a personal right. However, as the developer (appellant) was not obliged to demand or claim re-transfer of the land, and the obligation to build would remain extant so long as the respondents retained their ownership, the restriction on ownership

created by clause 1 remained binding and would not be terminated should the appellant elect not to seek re-transfer. The two clauses read together, therefore, did not constitute 'a composite whole' restricting the respondents' use of the property. Therefore, the second clause, under which the developer (appellant) could choose to claim re-transfer of the property, created no more than a personal right akin to an option to purchase which was not inseparably bound up with the first clause (paras [19] [20]).

In conclusion, Leach JA dealt with whether the debt which was the subject of the claim in terms of the second clause had prescribed. He found that it appeared to be settled that even on a narrow meaning, a 'debt' includes the right to claim the return of property. The court therefore concluded that, in the light of its finding that the second clause of the condition did indeed create no more than a personal right, the appellant's claim in each case had been correctly dismissed by the court *a quo* on the basis of prescription (paras [21] [22]).

In *Mokone v Tassos Properties CC & another* 2017 (5) SA 456 (CC) it was held that for a right of pre-emption in a renewable lease agreement to be extended, it was unnecessary for a written extension of the lease to comply with the formalities prescribed in section 2(1) of the Alienation of Land Act 68 of 1981. The court reasoned that the formalities laid down by the Alienation of Land Act applied only to alienations of land as defined in the Act. In the case of a right of pre-emption, an alienation, as defined, occurs only when that right is exercised and a sale comes into being. Merely affording someone that right was simply not an alienation in the form of a sale, exchange, or donation (paras [47] [48]).

With regard to the fundamental nature of a right of pre-emption, the Constitutional Court remarked (para [61]):

> The holder may simply make a signed written offer to purchase. If the grantor accepts the offer in writing under signature, a sale that meets the formalities will come into being. If she or he does not, the holder of the right may seek a declarator by a court that she or he is entitled to the exercise of the right and a mandamus requiring the grantor to accept the offer in writing. If the relief is warranted, it must be granted (para [54]).

See also the conclusion reached by the Constitutional Court after considering the view expressed in *Hirschowitz v Moolman* 1985 (3) SA 739 (A) as to the effect of the *Oryx* mechanism adopted in *Associated South African Bakeries (Pty) Ltd v Oryx &*

Vereinigte Bäckereien (Pty) Ltd 1982 (3) SA 893 (A) and Lubbe's reaction in 1985 *Annual Survey* 140–1:

> We must not give on a silver platter and on formalistic, technical grounds an easy way out to a grantor of a right of pre-emption who wants to resile from a bargain concluded with her or his eyes wide open. This is not making light of what the Alienation of Land Act seeks to achieve. It is about averting abuse and injustice. After all, our interpretation needs to be restrictive on the reach of the formalities required by the Act. Of course, where an alienation of land must fail for non-compliance with the formalities, so be it. The Act exists for a reason.

Possession

Mandament of van spolie

In *Residents of Setjwetla Informal Settlement v Johannesburg City* 2017 (2) SA 516 (GJ) the applicants had built shacks on land belonging to Johannesburg City (respondent – the City). The City claimed that an illegal land invasion had taken place and demolished the shacks without a court order. The applicants claimed that they had been living in the shacks when they were demolished, and were entitled to protection under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (the PIE Act). The City contended that the shacks were half-built and unoccupied when demolished. Given the dispute over the facts, the court enquired whether even on the City's version, a court order was nonetheless required. The court issued a rule *nisi* calling upon the City to show cause why an interdict should not be confirmed.

On the return day it was held that while the applicants had, by starting with construction, unlawfully acquired possession of the City's land sufficient to constitute spoliation, the subsequent demolition constituted unlawful self-help by the City; the PIE Act was not applicable because the shacks had not yet been completed or occupied (paras [13] [14]). In confirming the rule *nisi*, the court stated that local authorities should not be permitted, without court sanction, to move in with heavy equipment whenever people moved onto their land (para [19]).

Crucial passages in the judgment are the following (paras [13]–[18]):

> In my view the conduct concerned was unlawful as being self-help. What had occurred, in effect, is that the applicants had unlawfully acquired possession of the shack sites. In doing so, they had

> unlawfully dispossessed the respondent of possession of those sites. Their conduct thus amounted to spoliation, and they were obliged, before all else, to restore possession of the sites to the respondent.
>
> At that stage, that is before the shacks had been completed and had been occupied, the provisions of PIE were not yet applicable. The respondent was therefore not yet obliged to follow the prerequisites laid down. But that does not mean that the applicants had not yet acquired sufficient possession so as to constitute unlawful spoliation.
>
> On the respondent's version, they had commenced constructing shacks on the respondent's land, implying that they had driven poles into the ground; perhaps wrapped corrugated-iron sheets around some of those; perhaps fixed roofing material on top of those. That implies further that they actually moved around on the land, at least in the areas of those sites, while they were busy with their construction endeavours. It also implies that their own movable assets were affixed with a measure of permanence, at least to such measure that it could afford effective protection against the elements.
>
> In a sense, the respondent found itself between the proverbial rock and a hard place in this regard. If there were not sufficient presence on behalf of the applicants to constitute possession, there was probably not enough to demolish; if the shacks had reached such a state of completion that they could be (and therefore likely were) occupied, PIE applied. Therefore, since the respondent did in fact demolish, then, unless the respondent would concede that PIE applied (which it did not), there was enough of possession on the part of the applicants to constitute spoliation for purposes of the mandament van spolie.
>
> Some reflection on the underlying rationale for the mandament underscores the point. It is to prevent self-help; to foster respect for the rule of law; and to encourage the establishment and maintenance of a regulated society.
>
> If local authorities were permitted to move in with heavy engineering equipment, without first obtaining court sanction, whenever people moved onto their land, that encourages conduct which in our society with its history is reminiscent of a time best forgotten.

In *Jigger Properties CC v Maynard NO & others* 2017 (4) SA 569 (KZP), the deed of sale in terms of which the appellant (J Prop) purchased an exclusive-use area in a sectional title scheme, acknowledged an agreement between the seller and a third party (a trust represented by the first three respondents) entitling the trust to access to the property for the purpose of servicing underground storage tanks. The fourth respondent was a close corporation (the CC) which took over the trust's business during 2010, the same year in which J Prop acquired the

property. The CC's right of access to the tanks was governed by a lease agreement with the trust.

During February 2012, J Prop suggested (for the first time) that the trust and/or the CC pay a market-related rental of R3 000 per month for access to the tanks, and by April 2013 threatened to deny any of the respondents access in the absence of payment. The respondents countered that unless J Prop withdrew this threat and confirmed that it would not interfere with their right of access to the tanks, they would approach the High Court for appropriate relief. Not having received the response demanded, the respondents brought an urgent application for spoliatory relief. They contended that their right of access amounted to a quasi-possession in the form of a right of servitude, demonstrated by the actual use of that servitude; and that J Prop's threats amounted to dispossession thereof. J Prop, in a separate case, brought an application for a declaratory order that no servitude or other right of access existed in favour of the respondents in respect of the exclusive-use area, and for an order prohibiting the respondents from accessing it without its permission. This attracted a counter-application by the respondents in which they, in turn, sought an order declaring that they had rights of access in terms of an unregistered servitude.

The High Court granted a *mandament van spolie* in favour of the respondents and dismissed J Prop's application for a declaratory order. In this case, consisting of appeals against both decisions heard together by the full bench, the main issues were: (a) whether the respondents' access to the exclusive use area amounted to a quasi-possession which was deserving of protection by means of a *mandament van spolie*; and (b) whether a threat of spoliation amounted to an act of spoliation entitling a party to relief by way of a *mandament van spolie.*

With regard to (a), the court found that the respondents' right to access the tanks flowed from a contractual arrangement between the parties spanning a number of years. This right which the trust and the CC were exercising, and which J Prop threatened to stop, in fact merely amounted to a right of access. The trust and the CC neither occupied the premises, nor did they exercise any physical control over it. The respondents' access to the premises was for a specific purpose: to service and maintain their tanks from time to time. None of this could be achieved without the cooperation of the appellant, which owned unit 16 and the exclusive area attached to it.

The court explained that *ATM Solutions (Pty) Ltd v Olkru Handelaars CC & another* 2009 (4) SA 337 (SCA) emphasised that instances where quasi-possession has been protected by a spoliation order have almost invariably dealt with the rights to use property, for example, servitudes or the purported exercise of servitudes. The court then found that a claim to a servitutal right would only apply in a sectional scheme such as this, in terms of either the rules (s 27A) or their registration in the deeds office (s 29). The court pointed out that neither of these considerations applied in the present case as no such rights of access to the tanks on the exclusive-use area had been conferred on any of the respondents in terms of the rules, and neither were such rights registered in the deeds office. The absence of a clearly recognised and registered servitutal right in favour of the trust strengthened the view that its claim to a right of access flowed from an agreement concluded between the trust and the CC. At no stage had the CC granted, nor had it ever been requested to grant, a servitude in favour of the trust over the exclusive-use area.

The court stated that it is well-established that mere personal rights are not protected by the *mandament* and that protection by a spoliation order only warrants protection of rights to use or occupy property, or incidents of occupation. As their right of access was the consequence of an agreement and not an incident of actual possession, their claim amounted to nothing more than a claim for specific performance of their contractual rights. Consequently, the court held that the enforcement of such a claim was not permissible by way of a *mandament van spolie* (paras [18] [21]–[23]).

At this point it must be noted that if a servitude of access were to have been established in terms of the rules of the scheme, it would likewise not result in a real right in favour of the trust or the CC. It had been established that the rules of a sectional titles scheme rest on a contractual relationship between the owners of the scheme. It is also difficult to identify the type of servitude that would otherwise be registered. It would not be a praedial servitude as it would not be created in favour of a neighbouring plot of land. It would have amounted to a type of irregular servitude in favour of the trust and later the CC.

With regard to (b), the court pointed out that there were fundamental differences between the *mandament van spolie*, which was aimed at the recovery of lost possession, and a final

interdict to prohibit a threatened spoliation or dispossession. In the unreported judgment by Boruchowitz J in *Outdoor Network Ltd v Passenger Rail Agency of South Africa* GJ 26064/2013 (30 May 2013) (para [25]), it was pointed out that the *mandament van spolie* could not be invoked to prohibit a threatened spoliation – it was only available to a *de facto possessor* who had been despoiled. While possessory remedies to prevent a threatened spoliation were available in Roman-Dutch law, namely the *mandament van complainte* and the *mandament van maintenue*, these had not been imported into South African law. Thus an essential requirement to qualify for spoliatory relief is that there must have been a spoliation, consisting of a 'wrongful deprivation of another's right of possession'. Without an actual and wrongful deprivation of their purported right of possession, the spoliatory relief sought was not warranted from the outset. Consequently, the relief sought through a *mandament van spolie* was not available in the instance of a mere threat of dispossession (paras [14] [24] [25]).

Ownership

Obligation of landowner in respect of fire burning on his or her land

In *MTO Forestry (Pty) Ltd v Swart NO* 2017 (5) SA 76 (SCA) the court held that a landowner's duty to control or extinguish a fire burning on its land is not absolute. Rather, all that is required is that the landowner take steps to avoid the fire spreading that are reasonable in the circumstances. A reasonable landowner is, therefore, not obliged to ensure that in all circumstances a fire on his or her property will not spread beyond its boundaries. If he or she takes reasonable steps and the fire nevertheless spreads, he or she cannot be held liable for negligence simply because additional steps could have been taken.

Obligation of landowner in respect of structures erected on land

In *City of Johannesburg v Friedshelf 1120 (Pty) Ltd* (2016/44430) [2017] ZAGPJHC 1 (3 January 2017) the court held that where an activity or structure located on property causes a nuisance or danger to others, it is, in terms of South African common law, the responsibility of the owner to stop the nuisance or remove the danger, irrespective of who on the property might have been responsible.

Effect of statutory power to lay pipeline across private land

In *Rand Water Board v Big Cedar 22 (Pty) Ltd* [2017] 1 All SA 698 (SCA), the Rand Water Board had laid underground pipe-

lines over certain property before the respondent became owner of that property. The respondent was unaware of the existence of the pipelines when it acquired the property. During the course of the following year, the Rand Water Board informed the respondent of the pipelines and suggested that a servitude be registered over the property in accordance with its standard terms and conditions. However, as the parties could not agree on the amount of compensation payable by the Rand Water Board to the respondent, attempts to register a servitude failed.

The respondent subsequently launched an action against the Rand Water Board advancing two claims. The first claim was characterised as a vindicatory claim on the ground that the pipelines had been constructed, installed, and were being used by the appellant without the consent or permission of the respondent, and without any servitude or other limited real right having been registered. The respondent alleged further that the Rand Water Board refused to remove the pipelines and thereby prevented the respondent from having the unhindered enjoyment of its property. On that basis the respondent sought an order that the appellant remove the pipelines, alternatively that it register a servitude in respect of that portion of the property, or take transfer of that land against payment of the amount of R6,6 million.

The respondent's second claim was that the presence of the pipelines constituted an infringement of its fundamental right to property. The respondent contended that the Rand Water Board was entitled either to expropriate the relevant portion of the property or to burden the land with a servitude, against the payment of compensation, but had failed to do so. The respondent accordingly alleged that its rights had been infringed, as a result of which the Rand Water Board had been unjustifiably enriched and had benefited at its expense. The respondent sought an order for payment of a reasonable rental, alternatively compensation in an amount of R38 500 per month. Failing this, it sought payment of that amount by way of constitutional damages.

The court indicated that shortly after the second pipeline had been laid on the property, the Water Services Act 108 of 1997 had repealed the previous Act with effect from 19 December 1997. The 1997 Act contained provisions directed at the transition of various water boards, including the Rand Water Board. The key provisions were contained in section 84(4) and (6). The effect of section 84(6) was that, if laying the two pipelines was lawful when

it was done, it remained lawful after the Water Services Act came into operation, provided that it was something that was permitted in terms of the 1997 Act (paras [8]–[11]).

The court found that there was no dispute that the section empowered the Rand Water Board to lay both pipelines – the laying of the pipelines was lawful in terms of section 24*(j)* of the Act. Section 24*(j)*(i) provided that before entering upon property to lay a pipeline, the Board was obliged to give the owner of the property at least seven clear days' notice of its intentions. The respondent submitted that the evidence showed that no such notice had been given and, therefore, that the appellant's actions had been unlawful from the outset. The court did not agree that the assumed failure to comply with the said requirement rendered appellant's actions in laying the pipelines unlawful and unauthorised by section 24*(j)*, on two grounds. Firstly, that case was not pleaded, as the respondent pleaded that the Board had placed the pipelines on the property and used them for its own purposes without the consent or permission of the respondent, and without any servitude or other limited real right being registered over the property (para [14]).

In the second claim it was averred that that conduct infringed respondent's rights to the exclusive use of its property. The Board pleaded that it was entitled to keep, repair, and maintain the pipelines and to enter upon respondent's property for such purposes, and that no servitude was required to enable it to exercise its rights and obligations in that regard (para [15]). There was no replication to that plea as required of the respondent. In terms of Uniform Rule 25(2), the respondent had to contend that the Board in truth purported to act in terms of that power in constructing the pipelines, or challenge the validity of the exercise. It needed that power on the ground of a failure to comply with the statutory requirements for its exercise; it needed to replicate and identify the point as an issue in the litigation. By not raising this point, the respondent had failed to alert the appellant to the issue, and prevented it from responding properly to it. Therefore, it was not open to the respondent to rely upon the relevant point on appeal (para [20]).

The substantive reason for rejecting the respondent's argument was that on a proper interpretation of section 24*(j)*(i), a failure to comply with the notice provision did not render the laying of the pipelines unlawful (para [22]). Consequently, the Board had acted lawfully in installing the two pipelines. The conclusion that the

appellant had acted lawfully disposed of both the claim for removal of the pipelines and the cross-appeal. The appeal was upheld and order of the High Court replaced with one dismissing the respondent's claim.

In the course of his judgment Wallis JA explained (para [23]):

> The clear purpose of the requirement that notice be given to the owner of a property before entering upon the property and undertaking work, is to enable the owner to engage with Rand Water over the impact that the work of laying the pipeline will have upon the owner's activities. It also affords the owner an opportunity to make arrangements to ensure that its own activities are disturbed as little as possible by the proposed work upon its property. But the period of notice is short, so that planning for any extensive work, such as the laying of the two pipelines in this case, and the decision to undertake that work, would have occurred and been finalised long before the notification to the owner. That means that the notice's purpose was not to enable the owner to dissuade Rand Water from laying the pipeline, or in any significant degree to cause it to alter its plans. It was rather to ensure that when workmen come on site to undertake the laying of the pipeline inconvenience to the owner would be minimised and the owner would be given an opportunity to, for example, move stock or goods away from the working area and take other steps to protect its own property. There is nothing in this to suggest that a failure to give notice to the owner invalidates the act of laying the pipeline.

With regard to the alternative order – to register a servitude over the property in respect of the two pipelines, and that Rand Water pay it R6,6 million as compensation – the court pointed out that the exercise of powers in terms of section 24*(j)* was a very different matter from exercising rights in terms of a registered servitude in that an element of indeterminacy arises from the exercise of a power to enter property and lay a pipeline. This is largely absent from a registered servitude. In the former case there is scope for dispute as to the extent to which the property owner may undertake works in the immediate vicinity of the pipeline. How close to the pipeline may the owner erect a building or install other services, such as electricity cables or sewage pipes? May the owner allow vehicles to cross the pipeline or mine under the pipeline? May the surface be used for agricultural purposes and, if so, what constraints are to apply? Once a servitude has been registered its terms will ordinarily dispose of these questions. All of these issues were dealt with in a draft deed of servitude that was part of the record explaining Rand Water's willingness to offer some compensation to the respondent in return for its consent to the registration of a

servitude in this case. The compensation was payable in return for securing certainty in regard to the respective rights of the parties (para [29]). Consequently, accepting that Rand Water was entitled to exercise a power of expropriation in order to secure servitutal rights in relation to the pipelines, there was nothing in the Act that required it to do so before constructing the pipelines. Its statutory right differed from any right it would acquire from a registered servitude (para [31]).

With regard to the claim for constitutional damages, the court found that such a claim would need to rest on the provisions of section 25 of the Constitution guaranteeing the right to property. Its operation is triggered either by an expropriation or by a deprivation of property. These could only have occurred when the pipelines were constructed; in the present case they took place before the pipelines were constructed (para [34]).

Rights of property owner when faced with large and historic municipal utility bills

Argent Industrial Investment (Pty) Ltd v Ekurhuleni Metropolitan Municipality 2017 (3) SA 146 (GJ) is an important acknowledgment of rights of the owner of immovable property when faced with large and historic municipal utility bills. In this instance, the owner received and paid water bills based on an estimated reading over a period of some 51,5 years. When the municipality subsequently took an actual reading, it emerged that the actual and estimated consumption differed, and the owner was billed for an additional R1,1 million. The court held that the charges older than three years had prescribed, and that the municipality had erred in arguing that prescription only commenced running once the owner was billed.

Unauthorised use of single residential property as guesthouse

The dispute in *Du Toit NO & others v Coenoe 90 CC & others* (1584/2017) [2017] ZAFSHC 126 (2 August 2017) relates to the running of a guesthouse in a suburb in Bethlehem in the Free State. The action was brought by neighbours in the street, after incidents of noise and disruption originating from conduct of guests of the Pandora's Guest House. The neighbours argued that the use of the property as a guest house or place of accommodation was in contravention of both the title conditions and the Bethlehem Town Planning Scheme. They therefore sought an order interdicting the property owner from continuing with the illegal use of the property.

The court held that the neighbours were owners and/or residents in the same street as the Pandora's Guest House where the contravention of the municipal zoning provisions occurred. The owners therefore had the necessary *locus standi* to approach the court. The court further found that the fact that the incidents complained of were disputed was not in itself sufficient for a court to grant an interim interdict without further evidence being led. In this context, the court also found it relevant that the guesthouse had been in operation for quite some time and the neighbours had shown no urgency in bringing the application to stop it operating. However, the court found that no proof had been offered to the court of the apparent permission granted to Pandora's Guest House, and that the informal authority alleged could not replace the formal authority envisaged by the relevant ordinances and regulations for a departure from the rights of use applicable to the property. Consent or special use as a guesthouse can be granted only after the correct procedure has been followed. This entails, in particular, that proper notices be given to the property owners in the vicinity of the guesthouse, and published in the local newspaper. Until the circumstances have been considered and permission granted, the guesthouse on the property is being run illegally. Consequently, the court held that the requirements for an interdict had been met and granted an order in favour of the neighbours.

Transfer of Immovable Property

Abstract theory of transfer

In *Jacobs NO & others v Salut La Vie Estate (Pty) Ltd; In re: Salut La Vie Estate (Pty) Ltd v Jacobs NO & others* (1146/2016) [2017] ZANCHC 11 (10 February 2017), Salut La Vie (SLV) entered into an agreement of sale in respect of certain portions of agricultural land still to be subdivided. When the Vryburg deeds registry refused to pass transfer as the consent of the Minister of Agriculture was required for the subdivision and sale of the land in terms of the Subdivision of Agricultural Land Act 70 of 1970, the trust entered into an addendum agreement signed by only two of the three trustees. In terms of the addendum, SVL and the trust agreed to transfer the entire property into the name of the trust for the purchase price set out in the main agreement, subject to the trust re-transferring the portion which did not initially form part of the object of the earlier agreement of sale to SLV on demand and

at no consideration. It was presumably foreseen by the parties that such re-transfer would take place once ministerial consent to the registration and transfer had been obtained. The property was transferred to the trust in May 2010.

When the trust failed to re-transfer the designated remainder to SLV, SLV approached the court for a declaratory order contending, amongst other things, that the addendum was null and void as it was not signed by all three trustees. The trust noted an exception to SLV's claim on the basis that the allegations did not support a cause of action for the re-transfer of the property. In essence, the trust argued that it could not be said that the transfer was void, despite the invalidity of the addendum. The trust contended that South African law requires ownership of immovably property to pass in terms of the abstract theory: (a) delivery which is effected by registration of transfer in a deeds registry; coupled with (b) a 'real agreement' showing consensus between the parties for the transfer of ownership in the property from one to the other. If these two requirements have been met, a defect in the underlying agreement – such as non-compliance with the provisions of section 2(1) of the Subdivision of Agricultural Land Act – does not affect the validity of the transfer of ownership to a *bona fide* purchaser and the property cannot be vindicated.

The court held that to succeed with an exception to a claim, an excipient must show that on every reasonable interpretation of the claimant's particulars of claim, no cause of action is disclosed. In other words, the trust had to show that the case as pleaded by SLV could not succeed on a reasonable interpretation of the facts.

The court found that as one of the trustees had not signed the addendum, the trust had not been properly represented and this constituted a formal defect in the underlying agreement and non-compliance with section 2(1) of the Subdivision of Agricultural Land Act, which resulted in the land not having been alienated. The court further found that as the trust, as purchaser, had not performed in full under the addendum, section 28(2) of the Subdivision of Agricultural Land Act did not apply and, in terms of this addendum, the underlying agreement could not be deemed valid. As, on the other hand, SLV had performed its obligations, section 28(1) could apply to it and entitle it to recover from the trust that which it had performed in terms of the underlying agreement (including the addendum). The court consequently concluded that if the exception is considered, it

cannot not be said that on every interpretation which the particulars of claim could reasonably bear, no cause of action had been disclosed.

With regard to the application of the abstract theory, the court reasoned that the absence of the third trustee's signature was not merely a case of the underlying agreement being void *ab initio* and the real agreement remaining in existence. The court found that it could be, as argued by SLV, that the absence of the signature was not a mere formality but struck at the heart of the transaction by impacting on the ability of the trust to be bound by the addendum. In the absence of a joint decision by all the trustees, there could never have been an expression of intent by the trust to enter into an agreement and to accept transfer in the circumstances. There could, therefore, be no real agreement as consensus was lacking. The court concluded that on every interpretation of the particulars of claim, it could not be said that a cause of action had not been disclosed and dismissed the exception.

Transfer of property in double sale: Doctrine of notice

In *Anthony & another v Japies & others* (17614/2016) [2017] ZAWCHC 92 Mr and Mrs Japies sold their immovable property to Mr and Mrs Anthony in June 2016 subject to the purchase price being paid within ten working days of signature. The purchasers paid the purchase price into the trust account of the conveyancing firm (BN Attorneys) within this period. Shortly thereafter, in July 2016, the Japies entered into a second agreement of sale in respect of the same property with a Mr and Mrs Lodewyk, without the knowledge of the Anthonys. In August 2016, the conveyancing attorney appointed for the second sale (VT Attorneys) advised the estate agent of its appointment to attend to the transfer. This appeared to have been communicated to the attorney of the first purchasers and, on the same day, BN Attorneys requested an undertaking from VT Attorneys that the latter would not proceed with transfer pending a claim for specific performance in terms of the first agreement.

Nonetheless, in September 2016, VT Attorneys advised BN Attorneys that they were proceeding with transfer on specific instructions to do so by the sellers, the Japies. VT Attorneys indicated that in their opinion the first sale agreement had lapsed as the purchase price had not been not paid as required by the contract. The (second) purchasers were apprised of the risks.

There was no allegation by the sellers that the first purchasers had breached the agreement, and neither had they issued a letter of demand to the first purchasers. Transfer was effected in the name of the second purchasers on 30 September 2016.

On 4 October 2016, unaware that the property had already been transferred, the first purchasers issued the present application seeking to interdict the transfer of the property to the second purchasers, and to compel the seller to transfer the property to them. The sellers did not file an answering affidavit, and an (interim) order was granted interdicting the transfer of the property, and a return date set by which the sellers had to show why they should not be ordered to comply with the provisions of the first agreement.

The sellers then filed an affidavit stating that the interim interdict should not be made final as the property had already been transferred and registered to a third party. The main issue faced by the court was whether the Anthonys, the first purchasers, were entitled to an order for transfer of the property to them.

The court explained that the matter concerned a 'double sale' and the maxim *qui prior est tempore potior est jure* (he who is earlier in time, is stronger in law) had to be considered in relation to the competing rights of the two sets of purchasers. In accordance with the maxim, transfer of the property to the Lodewyks was no bar to the claim of the first purchasers for transfer of the property. In *Bowring NO v Vrededorp Properties CC* 2007 (5) SA 391 SCA (paras [15]–[18]) it was held that there is no reason in principle why a first purchaser should not be allowed to claim transfer of the property directly from a second purchaser who acquired the property while aware of the first sale. However, it is well-established in South African case law that in order to do this, the first purchaser would have to show that the second purchaser foresaw the possibility of the first purchaser's prior right, but persisted with the sale. In this scenario, the court found on the authority of *Meridian Bay Restaurant (Pty) Ltd & others v Mitchell NO* 2011 (4) SA 1 (SCA) (paras [18] [19]), that it was not necessary for the first purchaser to prove fraud or *mala fides* on the part of the second purchaser; it sufficed to establish that the second purchaser subjectively foresaw the possibility of the existence of the first purchaser's personal right, but proceeded with the acquisition regardless (paras [22]–[24]).

The first purchasers contended that when, during 2017, the existence of the present court application was made known to the second purchasers, the latter did not indicate that they would

oppose the matter in any way, which indicated, so the first purchasers argued, that they had known about the first agreement (para [25]).

The court held that it was open to the second purchasers to file an affidavit in this matter to the effect that they had had no knowledge of the first agreement, but that they would not oppose the application and would abide by the court's decision (this would have shielded them from costs). If they in fact had not known of the first agreement, they would have had an unassailable claim. By not responding at all, they allowed the (unfortunate) inference to be drawn that they had in fact known of the first agreement. In these circumstances, it appeared that they indeed had knowledge of the first agreement and could therefore not escape the consequences flowing from proceeding with the transfer (para [26]).

Rates clearance certificate under section 118(3) of the Local Government: Municipal Systems Act 33 of 2000

In two recent cases the constitutionality of section 118(3) of the Local Government: Municipal Systems Act 32 of 2000 was scrutinised. In *Jordaan & another v Tshwane City & another, and four similar cases* 2017 (2) SA 295 (GP), the North Gauteng High Court, Pretoria, declared the statutory charge on property in terms of section 118(3) of the Act unconstitutional to the extent that the charge survived the transfer of ownership to an owner who was not a debtor of the municipality with regard to debts incurred prior to transfer.

In terms of section 118(1) of the Act, the municipality must certify that all amounts, such as rates and municipal service charges, have been paid before the Registrar of Deeds may pass transfer. In this case, five applications were heard together, in which all the applicants had taken transfer of property in respect of which so-called 'historical debts' – ie, debts incurred before the two-year period envisaged by section 118(1) – were owing. The municipalities concerned argued that they were entitled to demand that all historical debts be paid before entering into service agreements with new owners on the ground that historical debts, being 'a charge upon the property' as contemplated in section 118(3) of the Act, survived transfer of ownership and so were enforceable against new owners and their successors in title (para [8]).The main issue was the constitutionality of section 118(3), more particularly whether section 118(3) permitted arbi-

trary deprivation of property contrary to section 25(1) of the Constitution.

With regard to whether section 118(3) constituted a *deprivation*, the court pointed out that the section is a security provision without a time limit, and therefore operates irrespective of who the present owner was. Consequently, reliance on section 118(3) would entitle a municipality to perfect its security (subject to compliance with its own bylaws) by obtaining a court order, selling the property in execution, and applying the proceeds to pay off the historical debt. This meant that section 118(3) could result in a loss of ownership for new or subsequent owners and, consequently, a loss of the ability to use, enjoy, or exploit the property. Even in the absence of actual loss, the mere existence of such a drastic remedy constituted a severe limitation of a new owner's property rights in terms of section 25(1) and so a deprivation for the purposes of section 25(1) of the Constitution (paras [9] [10] [23] [24]).

With regard to whether the deprivation was *arbitrary*, the court explained that a deprivation of property is arbitrary when the law concerned does not provide sufficient reason for the deprivation in question. Sufficient reason would, inter alia, depend on the extent and purpose of the deprivation. As the perfection of section 118(3) security could result in the complete and permanent removal or loss of ownership, the court held that the deprivation was substantial. The legislative purpose of section 118(3) was to provide security for the payment of outstanding municipal charges, not to authorise expropriation. This purpose could be achieved whilst the property was still registered in the name of the current owner without extending it to new or subsequent owners who had no connection with any of the historical debts. However, the present wording of section 118(3) indiscriminately extends the purpose of deprivation far beyond what is necessary. No matter how important the legislative objective, it could not be justified to force property owners to pay the municipal debts of their predecessors in title, or to forfeit their ownership if they refused to do so. The new or subsequent owner was neither a debtor of the municipality with regard to historical debts, nor was he or she in a position to prevent the accumulation of historical debts before transfer was effected. In the absence of any such relevant relationship between the purpose of the deprivation and the person whose property was affected, namely the new or subsequent owner, the court found that no sufficient

reason existed for section 118(3) to deprive new or subsequent owners (other than the current owner before transfer takes place) of their title in the property concerned. The deprivation with regard to new or subsequent owners was therefore arbitrary for purposes of section 25(1) of the Constitution (paras [20] [25]–[26], [32] [36] [38]–[39]).

The court then considered whether the deprivation or limitation was *reasonable and justifiable in an open and democratic society* as contemplated in section 36 of the Constitution. The court found that the findings that section 118(3) constituted a deprivation, that no sufficient reason existed for such deprivation, and that it was arbitrary with regard to new or subsequent owners of the property concerned, were sufficient also to conclude that this deprivation or limitation was not reasonable and justifiable in an open and democratic society (para [44]).

Finally, the court held that the appropriate order would be to declare section 118(3) constitutionally invalid *to the extent only* that the security provision – the 'charge upon the property' – survived transfer of ownership *into the name of a new or subsequent owner who was not a debtor of the municipality with regard to debts incurred prior to transfer* (para [103]). The court dealt separately with the applications against the City of Tshwane and the Ekurhuleni Municipality (paras [46]–[99]).

In *Chantelle Jordaan & others v City of Tshwane Metropolitan Municipality & others* 2017 (6) SA 287 (CC), [2017] ZACC 31 the metropolitan municipalities of Tshwane and Ekurhuleni brought an application in the Constitutional Court to appeal the North Gauteng High Court, Pretoria, decision in *Jordaan v City of Tshwane Metropolitan Municipality; New Ventures Consulting & Services (Pty) Ltd v City of Tshwane Metropolitan Municipality*; *Livanos v Ekurhuleni Metropolitan Municipality*; *Oak Plant Rentals (Pty) Ltd v Ekurhuleni Metropolitan Municipality* 2017 (2) SA 295 (GP). The Constitutional Court held that municipalities cannot hold a new property owner liable for a previous owner's historical municipal debt. This ruling gives relief to home and business owners who have been saddled with years of historical municipal debt – some dating back twenty years – and have been denied municipal services until the debt has been paid. The outstanding debt includes water, electricity, and rates and taxes charges associated with a property unit. In the majority judgment, Justice Cameron found that upon transfer of property, a new owner was not liable for old municipal debt. The Constitutional Court upheld

the ruling by the High Court that liability for the old municipal debt rests with the previous owner.

The matter came before the High Court after the City of Tshwane and Ekurhuleni municipalities suspended, or refused to contract for the supply of, municipal services to the applicants' properties. This was on the basis that the applicants, who were relatively recent transferees of municipal properties, owed the municipalities for municipal services rendered to these properties before transfer. In other words, the municipalities required these new owners to pay historical municipal debts. The applicants complained that they faced darkness, having no electricity, and many other inhumane conditions because they had bought property in respect of which the previous owners had failed to meet their obligations to the municipality – and against whom the municipality had failed to enforce its rights in fulfilment of its constitutional obligations.

We have seen in the discussion of the previous case, that the High Court found section 118(3) constitutionally invalid, but only to the extent that it has the effect of transferring municipal debts incurred before transfer to new or subsequent owners. The High Court held this to be an arbitrary deprivation of property in terms of section 25 of the Constitution. It found that new owners of property are not liable for municipal debts incurred by previous owners. Therefore, municipalities may not sell the property in execution to recover the debt or refuse to supply municipal services on the basis of outstanding historical debts.

In considering whether to confirm the High Court's declaration of constitutional invalidity, the Constitutional Court had to determine whether the provision, properly interpreted, in fact meant that when a new owner takes transfer of a property, the property remains burdened by the debts a previous owner incurred. If the provision is capable of an interpretation that does not impose constitutionally invalid consequences, the High Court's declaration of constitutional invalidity would be unnecessary.

Before the Constitutional Court, Tshwane, Ekurhuleni and now eThekwini municipality, which was admitted as *amicus curiae*, contended that a proper construction of section 118(3) was that the charges survive transfer. They argued that for municipalities properly to fulfil their constitutional duties of service delivery in the greater good, they needed extraordinary debt collecting measures. This meant burdening new owners with the responsibility for historical debts. Both in the High Court and in the

Constitutional Court, the Minister of Cooperative Governance and Traditional Affairs also presented argument in support of the municipalities' stand.

The municipalities, however, conceded that nothing prevented them from enforcing their claims for historical debts against those who had incurred them, namely the previous owners. The municipalities conceded further that their powers included interdicting any impending transfer to a new owner by obtaining an interdict against the old, indebted owner, until the debts were paid.

Also admitted as *amici curiae* were the social housing organisation, TUHF Ltd (the TUHF), the Banking Association of South Africa (the BASA), an association of 32 member banks, and the Johannesburg Attorneys Association (the JAA). The TUHF and the BASA associated themselves with the applicants in challenging the meaning the municipalities ascribed to section 118(3). They advanced further arguments including that section 118(3) permitted arbitrary deprivation of not only the new owner's property rights, but of real security rights the new owner conferred on any mortgage creditor who extended a fresh loan on the security of the property post-transfer. The JAA focused on a conveyancer's duties and ethical position should the court hold that the section 118(3) right survives transfer (paras [13] [14]).

In a unanimous judgment, written by Cameron J, the Constitutional Court weighed the historical (paras [16]–[27]), linguistic, and common-law (paras [28]–[43]) factors bearing on how the provision should be understood. Justice Cameron concluded (paras [29] [30]):

> The case law indicates that, without an express enactment conferring preference above other holders of real rights in the property, the embargo over property transfers until arrear rates are paid gives the municipality no preference above registered rights holders in the property. The cases also show that, enacted on its own, a legislatively created 'charge upon the property' means no more than that a debt may be recovered by execution upon the property. There is thus no magic in the word 'charge', and no abstruse technical meaning associated with it. The Supreme Court of Appeal [*City of Johannesburg v Kaplan NO* [2006] ZASCA 39, 2006 (5) SA 10 (SCA)] has explained, illuminatingly, that the word 'charge' in section 118(3) means no more than that any amount due for municipal debts that have not prescribed is secured by the property and that, after an order of court has been obtained, the property may be sold in execution and the proceeds applied to pay those debts [*Kaplan* para 29].

This points to the conclusion that a mere enactment, without more, that a claim for a specified debt is a 'charge' upon

immovable property does not make the charge transmissible. It therefore does not endure beyond transfer and the creditor's claim is not enforceable against successors in title. This does not mean the charge is ineffective or illusory. There is reason enough for its enactment even without transmissibility. It is this: the 'charge' helps municipalities elude the constrictions of the Rules of Court that would otherwise need to be complied with in order to render the property executable. In other words, the charge allows municipalities to by-pass at least some debt collection enforcement procedures. It renders the property immediately and expeditiously executable, subject to an order of court. In this way, it gives the preference teeth.

Having considered the common-law background which culminated in the promulgation of section 118(3), Cameron J explained (para [39]):

> Against this background, what is notable about section 118(3) is that the legislature did not require that the charge be either registered or noted on the register of deeds. Textually, there is no indication that the right given to municipalities has third-party effect: no provision is made to fulfil the publicity requirement central to the functioning of limited real rights. It stands alone, isolated and unsupported, without foundation or undergirding and with no express words carrying any suggestion that it is transmissible.

Cameron J concluded (paras [42] [43]):

> Were there no Constitution, one would thus conclude, on the wording of section 118(3) alone, that the unregistered charge it creates is enforceable against the property only so long as the original owner holds title. The absence of any requirement that the charge be publicly formalised is a strong interpretative indicator that the limited real right section 118(3) creates is defeasible on transfer of ownership.
>
> In the case of the charge contemplated in section 118(3), the statute is evidence only of the *existence* of potential debt on the property. There is no indication as to the value of that debt. Registration of the charge would provide that detail. Even where a covering mortgage bond is registered, the amount of which may fluctuate over time, the bond to be effective must include a fixed amount beyond which future debts shall not be secured. So the legislated fact of the charge, alone, does not render the requirement of registration or formalisation redundant. That remains necessary to fulfil the publicity purpose by providing details of the charge.

Turning to the Constitution, Cameron J summarised the three municipalities' contention that the constitutional setting points to the conclusion that the charge indeed survives transfer and thus burdens new owners (paras [45]–[50]) and held (para [51]):

> These arguments are not without force. The notion that owning property comes with burdens for the public good is not outlandish. This Court has increasingly emphasised the constitutional limitations on private property as well as the constitutional vision that property utilisation must conduce to the public good. So the notion that a new owner may be burdened by historical debt relating to the property should not be treated as landing from planet Pluto.

He then elucidated the richer picture by the full constitutional context as follows (paras [53] [54] [56]):

> Start with this: as the Minister rightly noted, historical debts exist only because municipalities have not recovered them. This while the statute expressly obliges every municipality to collect 'all money that is due and payable to it' . . . and to implement a credit control and debt collection policy . . .
>
> [A] municipality has a duty to send out regular accounts, develop a culture of payment, disconnect the supply of electricity and water in appropriate circumstances, and take appropriate steps to collect amounts due. In addition, for the sake of service delivery, it is imperative that municipalities do everything reasonable to reduce amounts owing.
>
> And the statute does indeed provide a full-plated panoply of mechanisms enabling efficient debt recovery in the cause of collecting publicly vital revenue. Here the parts of section 118(3) that are uncontested are integral. These are the charge on the property against the existing owner, and the municipality's preference over registered mortgagees. During argument the municipalities conceded, correctly, that the provision enables them to enforce the charge against the existing owner up to the moment of transfer – and to do so above and before any registered mortgagees. And they were constrained to concede, also correctly, where there are unpaid municipal debts, that the charge enables them to slam the legal brake on any impending transfer by obtaining an interdict against transfer.
>
> In this way, all outstanding debt can be recovered, as a charge against the property, *before* transfer. Neat. This power does not improve with age. It is no jot or tittle better *after* transfer than before. So why wait? If transfer nowise strengthens a municipality's position, why not act pre-transfer? The municipalities and the Minister had no answer. Indeed, during oral argument, Tshwane conceded perforce and rightly that, should the Court find municipalities have ample power to recover outstanding debt from current owners, there would be little justification for making the charge survive.

Cameron J then explained that the imposition of historical debts on a new owner constitutes an arbitrary deprivation of property on the part of the new owner as well as on the interests of bondholders (paras [60] [61]):

> Does this happen if the charge takes effect in the hands of a new owner to satisfy debts incurred during a preceding owner's title? As the applicants compellingly contended, the new owner's property could be sold in execution to satisfy the charge. And, if the historical debts are big enough, the new owner could be left with very little – or even, where the debt exceeds the value of the property, with nothing. The municipalities were constrained to concede that the historical debt could be so big as to extinguish the new owner's entire interest in the property.
>
> The same applies to the bond-holder, who advances money to the new owner to finance the transfer, but finds that its security, carefully calculated on the value of the property before transfer, becomes useless afterwards. The effect of allowing the charge to take effect post-transfer is thus to substantially interfere with or limit the transferee's ownership as well as the mortgagee's real right of security.

He therefore concluded that if a charge under section 118(3) survives transfer, there could be a significant deprivation of property (para [68]).

In finding that the deprivation of property was arbitrary, Cameron J explained that it was intrinsically arbitrary to impose responsibility for payment of a debt on a property owner who has no connection with it, and who had no control at all over the property or those occupying the property when the debt was incurred (para [73]). The imposition of unprescribed debts without historical limit on a new owner of municipal property would constitute an arbitrary deprivation of property, irrespective of whether the new owner acquired title at a sale in execution, by regular deed of sale, or by other means (paras [74] [75]).

To follow the instruction in section 39(2) of the Constitution to promote the spirit, purport, and object of the Bill of Rights when interpreting legislation, Cameron J concluded (para [77]):

> To avoid unjustified arbitrariness in violation of section 25(1) of the Bill of Rights, we must thus interpret section 118(3) of the Act so that the charge it imposes does not survive transfer. Far from the provision being merely capable of this interpretation, it is from historical, linguistic and common law perspectives the overwhelmingly persuasive interpretation.

The court held that because section 118(3) can properly and reasonably be interpreted without constitutional objection, it was unnecessary to confirm the High Court's declaration of invalidity. For clarity, however, the court granted the applicants a declaration that the charge does not survive transfer (para [78]). At paragraph [81.3] the order reads as follows:

> It is declared that, upon transfer of a property, a new owner is not liable for debts arising before transfer from the charge upon the property under section 118(3) of the Local Government: Municipal Systems Act 32 of 2000.

As this represents a victory in substance for the applicants, the court held that the municipalities and the Minister should pay the applicants' costs, including the costs of two counsel.

Rates payable on sale and transfer of immovable property

In *Nelson Mandela Bay Municipality v Amber Mountain Investments 3 (Pty) Ltd* 2017 (4) SA 272 (SCA), the court was called upon to determine whether, following upon the sale of immovable property, the property owner was liable to pay the total rates on the property determined for the financial year, or only the rates calculated until the property was transferred. The outcome of the appeal turned on the interpretation of various provisions of the Local Government: Municipal Property Rates Act 6 of 2004 (the Rates Act), the Local Government: Municipal Systems Act 32 of 2000 (the Systems Act) and the Local Government: Municipal Finance Management Act 56 of 2003 (the Finance Act).

Amber Mountain Investments (AMI) was the previous owner of immovable property, having sold the property to a third party. In terms of section 118 of the Systems Act, before transfer of the property could take place, AMI required a rates clearance certificate from the Nelson Mandela Bay Municipality. The municipality's financial year commenced on 1 July in a year and ended on 30 June the following year. The municipality required payment of rates until the end of its financial year, being 30 June 2010, as a condition for furnishing the certificate, and presented the respondent with an account for the sum of R2 281 014,68. AMI paid the amount, under protest, in order to obtain the certificate. At the time of payment, AMI's actual indebtedness to the municipality was R1 214 482,68. Regarding the payment made under protest as an over-payment, AMI sought to be reimbursed in court proceedings against the municipality.

The court *a quo* found that AMI was only obliged to pay rates on the property until the date of its transfer – 25 February 2010 – as it would be unjust for the municipality to claim rates from the respondent when it was no longer the owner of the property. The court ordered that the municipality repay the amount of R1 066 532, including interest, to the respondent.

In the present appeal the court found that the original power to levy rates is regulated by national legislation in the form of the

Rates Act. The municipality contended that sections 12 and 13(1) of the Act made it plain that an owner's obligation was to pay one annual property rate, and that this liability arose and was fixed on the first day of the municipality's financial year. Accordingly, it argued that once its financial year commenced, AMI became liable to pay the rates fixed for that financial year, and therefore the municipality was entitled to withhold the rates clearance certificate until it had received payment of rates for the full financial year. The court found that it was clear from the relevant provisions of the Rates Act and the Finance Act that the levying of rates is an integral part of a municipality's annual budgetary process. The approval of the budget goes hand in hand with the determination of rates, as the revenue from rates is essential to fund budgeted expenditure. It is for this reason that the property rate is determined for each financial year. It is only once the rate has been determined that a municipality can estimate its income for the financial year and prepare its budget in accordance with that projected income (paras [9] [10] [12]).

The main issue in this case was *at what point* property rates are payable. The court held that the Rates Act distinguished between what is 'due' and what is 'due and payable'. In terms of section 13, the rates became payable (in the sense of the obligation to pay arising at that stage) 'as from the start of a financial year'. Sections 26, 27 and 28 deal with the method and time of payment of rates, the furnishing of accounts, and the recovery of arrear rates from tenants and occupiers. The import of these sections is that the rate may be recovered either on a monthly basis or annually, subject to an election by the owner. In respect of both payment options, it is the municipality that determines the date by which payment must be made. It is the responsibility of the municipality to produce a statement reflecting the amount due in respect of rates and the date on which the amount is payable. Section 28(1) is of particular significance. Once the municipality has determined the amount due and the date on which such amount is payable and the owner fails to make payment on the due date, the municipality may recover the amount due from the tenant or occupier of the property.

Section 28(1) does not entitle a municipality to recover the rate levied for the financial year from the tenant or occupier. In terms of section 27 of the Rates Act, payment of the rates are subject to the happening of an event, namely, the municipality's determination of the amount to be paid and the date by which payment

must be made. A property owner's obligation in respect of property rates arises at the start of the financial year when the municipality determines the rates. The words 'payable as from' in section 13(1)*(a)* had to be interpreted to mean that the rates are payable within the period of the financial year, and not on 1 July as contended by the municipality, and 'payable' must be interpreted narrowly to mean that the rates were fixed for the financial year, but not that they were also payable at the same time. Put differently, a portion of the debt in respect of rates becomes due from time to time. Consequently, the court held that the municipality's argument, that the determination of an annual property rate was indicative of an intention that a single sum for the entire year was payable at the start of each financial year, could not be sustained (paras [13] [16] [17] [19] [20]).

As to whether the municipality was entitled to withhold the rates clearance certificate until it had received payment of rates for that financial year, the court held that section 118(1) only applies to payment of debts preceding the date of application by two years and does not include future municipal debts. Therefore, the municipality's policy to include debts incurred after application has been made was inconsistent with section 118(1) and therefore *ultra vires* and void. The legislator intended to limit the period in section 118(1) to the two years preceding the date of application for the certificate. Section 3 of the Rates Act empowers a municipality to adopt a rates policy that is 'consistent' with the Act. Insofar as the municipality's rates policy included the settlement of debts incurred after the date of application for a clearance certificate, it was inconsistent with section 118(1) and therefore *ultra vires* and void. The relevant provisions of the Rates Act, the Finance Act, and the Systems Act read together, confirmed AMI's contention that the municipality was not entitled to withhold the property rates clearance certificate until it had received payment of the property rates for the entire financial year. Such property rates became payable (but not due) from the start of the financial year. The appeal was therefore dismissed (paras [22]–[28]).

Protection of Immovable Property and Eviction

Extension of Security of Tenure Act 62 of 1997

Rights of occupiers

Various crucial judgments were handed down by the Constitutional Court under the Extension of Security of Tenure Act 62 of

1997 (the ESTA). The first judgment, *Daniels v Scribante* 2017 (4) SA 341 (CC), is in many respects noteworthy. Unlike previous judgments where the link between tenure security, security of home and hearth, and human dignity were only hinted at, this judgment highlighted unequivocally the link between redress – based on historical imbalances, access to housing and tenure security, and human dignity (see para [2] specifically). The judgment is further particularly accessible in that it includes a judgment by one of the judges in both Afrikaans and English. This also highlights the potential impact of the decision on landowners and land occupiers alike. The decision handed down effectively consists of five separate judgments. The majority judgment was handed down by Madlanga J (with Cameron, Froneman, and Khampepe JJ, and Mbha and Musi AJJ concurring). Judge Froneman provided a further judgment in both Afrikaans (paras [72]–[108]) and English (paras [109]–[144]), with Cameron J concurring. That judgment was followed by a further separate judgment by Cameron J, a still further judgment by Jafta J (with Nkabinde ACJ concurring), and a final, separate judgment by Zondo J. The judgment is also characterised by large sections dealing specifically with contextualisation. While the judgment is rather lengthy, it is exceptionally detailed and offers an excellent backdrop for current land-related issues with which the country continues to grapple.

The facts were briefly the following (paras [4]–[10]). The applicant, Ms Daniels, had been in occupation of the land in question for sixteen years as an occupier for purposes of the ESTA. That entailed that she had consent to occupy, that she was not a labour tenant, and that her monthly income did not exceed the required amount (at the time of the judgment, R5 000). She therefore fitted the profile of the category of dweller the Act aimed to protect, namely, a vulnerable member of society, usually of low income, previously exploited, and who may still be at risk of exploitation. The first respondent was the person in charge of the property as manager of the farm for the second respondent, the landowner. In 2014 the applicant's electricity supply was cut and the door to her home was tampered with. She lodged various applications, all successfully, with the local magistrate's court. Although the required maintenance work was performed by the first respondent, Daniels wanted to effect further improvements to the property, including levelling the floors, paving part of the outside area, and the installation of various items and amenities.

The latter entailed an indoor water supply, a wash basin, a second window, and a ceiling. The respondents conceded that, as these were basic human amenities, as opposed to luxurious improvements, the dwelling failed to meet the standards required for human dignity (para [7]). In her communication to the respondents, Daniels indicated specifically that she would carry the costs of the improvements. She received no response and went ahead with the improvements. She was thereafter informed by letter to stop all activities as (a) the respondents had not consented to the improvements; and (b) no building plans had been submitted, resulting in the improvements being unlawful. Her reply that she relied on sections 5 (providing for fundamental rights for owners and occupiers) and 6 (dealing with the rights and duties of occupiers) of the Act was unsuccessful in local court proceedings on the basis that an occupier does not have the right to effect improvements. A subsequent application to the Land Claims Court also failed. Both the Land Claims Court and the Supreme Court of Appeal refused leave to appeal, resulting in the present application in the Constitutional Court.

The Constitutional Court had to decide (a) whether the ESTA affords an occupier the right to make improvements to his or her dwelling; (b) if so, whether the consent of the owner is required for such improvements; and (c) if consent is not required, whether an occupier can effect improvements in total disregard of an owner's wishes (para [11]).

In dealing with the right to make improvements, the point of departure was that the ESTA was drafted in light of section 25(6) of the Constitution so as to ensure tenure that was legally secure (or comparable redress). The Act was necessary in light of the background of racially-based land control and access in South Africa, in particular where vulnerable sectors of society are concerned (see paras [14]–[22] of the judgment for a general historical background and Pienaar JM *Land Reform* (Juta 2014) 133–6 where the links between control of labour, control of natural resources, the exploitation of franchise, and the links with land control are specifically highlighted). Sections 5 and 6 of the ESTA must be approached and interpreted in this context. Given that occupiers enjoyed certain fundamental rights, including the right to human dignity (para [26]), section 6 specifically provides that an occupier has the right to reside on and use the land in issue. Arguably, living in deplorable conditions would not qualify as 'residing' on the relevant property. Instead, the right to reside had

to be consonant with the fundamental rights contained in section 5 (which the respondents wholly ignored), especially the right to human dignity. This was not limited to a roof over one's head: 'But it is about more than just that. It is about occupation that conduces to human dignity and the other fundamental rights itemised in section 5' (para [31]). Accordingly, the court held that effecting improvements meant bringing the dwelling up to a standard suitable for human habitation. In that regard context is critical, including the purpose for which the ESTA was enacted, as well as section 39(2) of the Constitution. Denial of the right asserted by Daniels could, therefore, inadvertently result in what would effectively amount to eviction of the occupiers (para [32]). In the context of 'reside' and 'tenure security' it thus means that the dwelling must be habitable (para [33]):

> If you deny an occupier the right to make improvements to the dwelling, you take away its habitability. And if you take away the habitability, that may lead to her or his departure. That in turn may take away the very essence of an occupier's way of life. Most aspects of people's lives are often ordered around where they live.

The respondents averred that if the court concluded that an occupier had a right to effect improvements, it would place a positive duty on the landowner to ensure an occupier's enjoyment of the section 25(6) right (para [37]). Because section 13 of the Act provides for the payment of compensation regarding improvements, the respondents argued that the landowner would be required to finance the improvements on the basis of a positive duty resting on him or her to ensure that the occupier lived under conditions conducive to human dignity. However, being private parties, no such positive duty ought to be placed on landowners. The court underlined that whether private persons would be bound by positive duties depended on a number of factors, including the nature of the right, the history behind the right, the objective of the particular right, the best manner in which that objective could be achieved, the potential of invasion of that right by persons other than the state or organs of state, and whether letting private parties 'off the hook' would not lead to negating the particular rights in question (para [39]). However, as a point of departure, it would be unreasonable to require the exact same obligations under the Bill of Rights from private parties as those placed on the state (para [40]). If a positive duty was indeed placed on the landowner, it was an important factor to consider, but still only *one* factor (para [41]). On the other hand, in light of

Mazibuko v City of Johannesburg 2010 (4) SA 1 (CC), this does not mean that under no circumstances would the Bill of Rights impose a positive obligation on private persons: 'In sum, this court has not held that under *no* circumstances may private persons bear positive obligations under the Bill of Rights' (emphasis added – para [48]).

And further (para [49]):

> By its very nature, the duty imposed by the right to security of tenure, in both the negative and positive form, does rest on private persons. People requiring protection under ESTA more often than not live on land owned by private persons.

Accordingly, the real question was: what was the extent of an occupier's constitutional entitlement as expounded in the ESTA? Did it go so far as to create an entitlement to improvements with the effect of imposing a positive obligation on land owners? In this context, the positive obligation related to the possibility of an order for compensation upon the eviction of the occupier (para [50]). Whether an owner will be ordered to pay compensation depends on a variety of considerations, including the need of the occupier to improve his or her living conditions and elevate them to the level that accords with human dignity (para [51]). In other words: when set agains the right to dignity, the possibility of payment of compensation paled in comparison. The crux of the matter was the following: the mere fact that there was a possibility that the landowner might have to pay compensation could not automatically mean that the occupier ought to be satisfied with the state of her living conditions. Clearly this could not be the case (para [52]). Furthermore, the payment of compensation to a departing tenant was also possible at common law (para [55]). The possibility of payment of compensation could thus not be the deciding factor in circumstances like these. The conclusion was reached that Daniels was indeed entitled to effect the proposed amendments. In fact, this flowed 'naturally' from a proper interpretation of 'what Parliament itself has said' (para [67]).

Having dispensed with the first point, the second issue was whether the owner had to consent to the improvements. It was highlighted that an owner has various options at his or her disposal. For example, an owner could accept that a dwelling was not fit for human habitation but could still not be open to effecting improvements. In these instances a simple refusal by the landowner would render the occupier's right to secure tenure (linked to human dignity) nugatory. This right of the occupier was

'primarily sourced from the Constitution itself' (para [59]). Clearly, the landowner's consent could not be a prerequisite for effecting improvements that would bring a dwelling in line with a standard that conformed to human dignity (para [60]).

Could an occupier effect improvements in total disregard of the owner? This issue, the third dealt with by the court, highlighted that the landowner also has certain rights, as underlined in section 5 of the ESTA (para [61]). Although consent of the landowner was not necessary (not a prerequisite), as explained above, *meaningful engagement* with an owner or person in charge remained necessary (para [62]). The court set out the possible methodology to be followed (para [64]): It started with the occupier first approaching the landowner and raising the issue of improvements. Various options would then arguably arise: (a) the landowner could consent; (b) the landowner could withhold consent; (c) the extent of the improvements could be contested; (d) the improvements could compromise the structure to the detriment of the owner; or (e) the parties could agree that, when evicted, compensation would be paid for improvements. Accordingly, although various forms of engagement could take place with varying results, the point of departure remains that the existence of the occupier's right is not dependent on the owner's consent (para [64]). If the engagement resulted in a stalemate, the court had to address the matter. At no point could the occupier resort to self-help (para [65]).

Having regard to the reasoning above and the conclusions reached, the final part of the majority judgment dealt with the appropriate relief. Of critical importance was relief in a form that recognised the existence of Daniels's right. Apart from stating this right, how it was to be dealt with and acknowledged in practice was critical. To that end the order was handed down that the applicant was entitled to make specific improvements, which were listed as follow: levelling floors, paving part of the outside area, installing water supply inside the dwelling, a wash basin, a second window, and a ceiling. A meaningful engagement order was also handed down in relation to specific items, including the arrival and departure times of the builders; their movement on the farm; and the need for and approval of building plans in respect of the improvements set out above. If no agreement could be reached within a month, either party could approach the magistrate's court for appropriate relief.

The majority judgment was followed by the Froneman judgment in Afrikaans and English. The Afrikaans version is a poignant,

beautifully written judgment that underscores and acknowledges the injustice of the past, in general, but also specifically with regard to farmland, rural areas, and the class and racial distinctions that evolved in these arenas. It was in this context that human dignity was crucial. This judgment further highlighted the place and role of the property concept in South Africa, and the necessity to re-think and re-conceptualise ownership in light of prevailing needs and demands. In sum, the judgment argued that human dignity had to be restored in much the same format as that in which the poor-white problem had been addressed (and alleviated) by the previous apartheid government. In this endeavour the concept of ownership was instrumental (para [70]). The Froneman judgment is, therefore, a further embodiment of the need for redress and human dignity and does not adjust the legal findings formulated in the majority judgment set out above.

The Cameron judgment likewise concurred with the legal findings of the majority judgment, but with some reservation regarding the historical reflection and its comprehensiveness. That was the case because both the former two judgments were only partial reflections of what had occurred: 'they are neither impartial nor complete' (para [148]). While Cameron J warned against judges writing history, he also concurred in the findings (para [153]).

The judgment of Jafta J also agreed with the main thrust of the majority judgment, save for the finding that a positive duty was placed on the landowner, as explained above. Instead, he found that section 8(2) of the Constitution ensures that some of the rights entrenched in the Bill of Rights are enforceable against the state (vertical), and others against private persons (horizontal application) (para [157]). Whether the right was indeed horizontally or vertically enforced stood to be determined by two factors: (a) the nature of the right; and (b) the duty it imposed (para [158]). However, there was no provision that expressly imposed a positive obligation on a private person in the Bill of Rights (para [162]). In this regard the Jafta judgment differed from the main judgment's stance that section 25(6) of the Constitution imposes a positive duty on private parties (para [163]). He underlined that persons or communities who do not have secure tenure are entitled thereto, and if that is not possible, then to comparable redress. However, there is no duty on private parties, as such, to ensure that this happens. Apart from the specific wording in section 25(6), he also highlighted that it was part of the property

clause that began by safeguarding property rights (para [167]). The positive obligation to address injustices in relation to loss of tenure or possession rests on the state alone. Enforcing a positive obligation against a private person would raise a spectrum of practical difficulties, including how the private person was to be identified and what exactly he or she was required to do to fulfil the obligation, as well as what the implications would be if the obligation were not discharged (para [171]). Accordingly, this judgment was directly in conflict with the finding in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* (2012 (2) SA 104 (CC)), which imposed a direct and positive obligation on a private person (para [177]). The fact that the owners had to accommodate the unlawful occupiers for a few months was not based on any positive duties imposed by a constitutional right. Instead, it amounted to a prohibition restraining the landowner from removing the occupiers from property before a date determined by the court (which was just and equitable in the circumstances – para [183]). The scenario applicable to the *Blue Moonlight* case was thus not the same as the present instance where an occupier wished to effect improvements to her home. This line of argument was proceeded with further in relation to socio-economic rights generally, which, likewise, do not impose positive duties on private parties (para [186]ff).

Having concluded that here was no positive duty on the landowner, Jafta J turned to the ESTA and found that instead of a positive duty, there was in fact a negative obligation on the landowner to refrain from interfering in the exercise of her rights by Daniels (para [193]). Phrased differently: the respondents were under an obligation to refrain from conduct that interfered with the exercise by Daniels of her right to reside on the farm in question. That meant that the right, properly construed under the ESTA, included effecting improvements that were necessary to make the dwelling suitable for human habitation. By preventing her from effecting the necessary improvements, the landowner effectively interfered with her right to reside on the property. This had nothing to do with gaining access to land, providing which was the duty of the state alone under section 25(6) of the Constitution (para [195]). The ESTA only arises after access to land has already been gained. Accordingly, the Act safeguards her residence by prescribing the conditions under which her rights may be terminated: 'But where a private person has voluntarily permitted an individual to reside on his or her property,

everyone including the state has a negative obligation not to interfere with the exercise of that right of residence, unless the interference is justified by law which passes constitutional muster' (para [197]). Central to security of tenure which the Act sought to promote, was the consent of the landowner to reside on and use the land (para [201]). As there had indeed been interference with Daniels's right to reside on the property, this judgment ultimately also supported the order handed down.

Judge Zondo drafted the final judgment in which the legal question was formulated as follows: did the landowner have the right to prevent an occupier defined under the ESTA from effecting improvements to his or her dwelling which would enable him or her to live in the dwelling under conditions that did not violate his or her right to human dignity? (para [209]). He confirmed that an occupier has a right to effect such improvements – tied to human dignity – without the landowner's consent. The basis of that finding was in section 5 of the ESTA, which sets out the various rights of occupiers, including the right to human dignity (para [212]). The rights of landowners were, however, listed in section 6. Accordingly, when considerations of justice and equity were taken into account and a balance was struck between the rights of the applicant and those of the respondents, there could only be one answer to the question: the improvements were basic, they would not prejudice the landowner, and would – on the other hand – mean a great deal to the applicant and her family. Thus, on balance the answer had to be that the applicant had the right to effect the improvements. However, having the right did not mean that she could do whatever she wanted – she would have to engage with the landowner regarding the logistical implications. The order handed down in the main judgment was thus also supported.

Despite five different judgments, a single order was handed down. All of the individual judgments confirmed the right of the applicant to effect these specific improvements. The main judgment reached the conclusion that the applicant, as occupier and on the basis of human dignity, had the right to effect the improvements – also because there was a positive duty on the landowner to ensure access to land and ultimately secure tenure. The Froneman and Cameron judgments did not alter these findings, save to the extent that the Froneman judgment emphasised the necessity of changing the role, function, and concept of ownership in South African law in general, and specifically

in light of the need for redress and acknowledgement of the wrongs of the past. This dimension is crucial and was, notably, neither highlighted in the main judgment, nor commented on in the subsequent judgments. The Cameron judgment warned against the incompleteness and built-in bias in the reporting and writing of history and pointed out that, until what had occurred in South Africa was reckoned with in full, history would linger – also in judicial fora and courts. While supporting the order handed down as there was specific interference with Daniels in exercising her right to reside, that judgment denied any positive duty placed on private landowners to broaden access to land or secure tenure. Instead, from the point of departure that human dignity was tied to tenure, a negative duty was placed on the landowner not to interfere with the exercise of the right set out and framed in legislation. The final judgment by Zondo J called for the balancing of rights and duties of landowners and occupiers, and finding the balance in that process. Given the specific improvements, as well as the surrounding circumstances, the court concluded that Daniels must have the right to effect improvements.

The decision means that Daniels may improve the state of her dwelling considerably and, once she has done so, she will be living in conditions suitable for human habitation. She will indeed have redeemed her human dignity. That is the case because tenure security is inextricably bound to human dignity. While the result cannot be faulted, the implications of the decision for landowners appears somewhat vague and unclear. Is there a positive duty on landowners to secure access to land and guarantee tenure security? Is that the case because of the Constitution – generally, and section 25(5) and (6) specifically – or is it tied to the changed role and function of ownership in modern South African law? Or is that duty possibly the result of a balancing act? Perhaps the reasoning lies at another level: is there not perhaps a negative obligation on all landowners not to interfere with rights, and specifically those set out in legislation? The facts here are important: the improvements were not luxurious and Daniels opted to pay for them herself. The logistics with respect to the actual work being conducted on the farm and to the dwelling and the coming and going of workers would be worked out by the relevant parties. What would be the case if the improvements were not so basic and if Daniels refused to stand

in for the expenses – would that have made any difference to the duties of the parties respectively?

Suitable alternative accommodation

The second critically important judgment handed down by the Constitutional Court in relation to occupiers under the ESTA was *Baron & others v Claytile (Pty) Ltd* 2017 (5) SA 329 (CC). The facts were briefly the following. The magistrate's court granted an eviction order against the appellants from privately-owned land under the ESTA. The order was confirmed on automatic review by the Land Claims Court under section 19(3) of the ESTA. In the present application to the Constitutional Court for leave to appeal, there were two issues: (a) whether the eviction was just and equitable; and (b) what it meant when occupiers were granted 'suitable alternative accommodation' under certain circumstances (para [2]). Underlying these issues was the further question of whether section 10 of the ESTA, read with sections 25 and 26 of the Constitution, had been complied with (para [4]). Of the seven applicants, four were section 10 occupiers, meaning they were already in occupation when the Act was published for comment in 1997; one became an occupier at a later stage (thereby falling under s 11 of ESTA) but had since died and his family had voluntarily moved away. The owners operated a brick manufacturing business and were the applicants' former employers. The applicants were entitled to reside in housing units on the farm for the duration of their employment (paras [8]–[12]). During the period 2006–2011, pursuant to disciplinary enquiries premised on misconduct, their employment was terminated. Despite their employment and housing rights being linked, and following their dismissal, the first, second, third, fourth, and fifth applicants remained on in the housing units. In 2013 eviction proceedings were instituted, at which time the City indicated that no suitable alternative accommodation was available due to long waiting lists. In 2014 an eviction order was indeed granted, on the basis that it was just and equitable, allowing eight months for the occupiers to vacate the premises.

Pretorius AJ approached the matter by first setting out the constitutional and legislative frameworks, starting with sections 25 and 26 of the Constitution (para [10]). The point of departure was that section 25(1) – which protects against arbitrary deprivation – ought also to apply to the rights of occupiers, not only to those of landowners (para [10]:

> For ESTA occupiers to enjoy a strong form of secure tenure, as envisaged by the Constitution, we must recognise that ESTA occupiers enjoy rights and entitlements over the land they occupy, and that these rights and entitlement are every bit as worthy of protection as those of private landowners.

However, on the subsidiarity principle, legislation crafted to deal with the rights of occupiers, and not the Constitution itself, had to be relied on – hence the ESTA (para [11]). The ESTA sets out the relevant rights and duties of the parties, dealt with in detail in the *Daniels* case (above), as well as the procedural requirements regarding termination of rights and subsequent eviction. At the magistrate's court level the possible disruption an eviction order could cause, especially in relation to the school-going children, was specifically raised (para [13]). In response, the City indicated that temporary accommodation consisting of corrugated iron structures might be available in the Delft Temporary Area (Blikkiesdorp). The occupiers objected in that they found the move from a brick house to a corrugated iron house problematic. At that stage the two reports submitted by the City indicated that no alternative accommodation was available. Having regard to all the factors, including that the occupiers had been in occupation for many years without rendering service, that the business required the housing for its employees, as well as the comments in the probation officer's report, the court concluded that the granting of the eviction order was just and equitable (para [14]).

In the automatic review process under section 19(3) of the ESTA, the eviction order was confirmed by the Land Claims Court (para [15]). The Land Claims Court also considered the fact that since being dismissed the occupiers had paid neither rent nor electricity during their occupation, and the need for the owner to house his own employees, coupled with the corresponding hardship it caused the owner and employees. With regard to the issue of suitable alternative accommodation, the Land Claims Court highlighted that, while important, it remained but *one* factor only. It further found that the duty to supply housing rested on the state and not on private citizens (para [17]). As the employer had been shouldering the responsibility of providing housing for many years, and as it had been detrimental to the business and its employees, the appeal could not succeed (para [20]).

The Constitutional Court pointed out that the above conclusion was reached with reference to, among other things, the PIE Act,

whereas the relevant legislation was the ESTA (para [20]). Different pieces of legislation existed, with different purposes, meaning that the particular balance to be struck in the various legislative measures may also be different. (See, for example, the *Fischer* case discussed below in the context of the PIE Act.)

While various issues were identified by the Constitutional Court in paragraph [28], at the hearing the parties agreed that the only issue to be dealt was the question of suitable alternative accommodation. In this regard the court focussed firstly on the City's constitutional obligations (para [30]ff). In February 2017 the City indicated that five housing units could be made available in Wolverivier, and that the applicants had to indicate whether this offer was acceptable. The offer was turned down by the applicants due to the distance to and from the children's school, and because the buildings were constructed of corrugated cladding (para [31]). The court was called on to make a value judgement as to what would be just and equitable, including the distance to and from amenities. However, the issue of hardship was not raised. Although the housing units were emergency units only, they had fitted toilets and basins, and were of better quality than the housing previously offered in Delft (para [33]). At the hearing the respondents (landowners) offered to provide school transport for the children.

The duties of the landowner are dealt with specifically in paragraphs [35]–[49]. In this context the earlier judgment in *Daniels* (above) formed the point of departure, namely that the ESTA can, under certain circumstances, place a positive obligation on a private landowner. However, that in itself does not mean that private landowners carried all or the same duties as the state. Of critical importance was the recognition that landownership entailed certain duties and obligations, which differed from duties and obligations which rested on private landowners in the pre-constitutional context. It was accordingly highlighted by the applicants that the landowners, as commercially able private landowners, were obliged to assist the applicants to obtain suitable accommodation.

Whether the landowner had a duty to provide accommodation also relates to the horizontal application of the Constitution. The real question, however, was (para [36])

> . . . whether, within the relevant constitutional and statutory context, a greater 'give' is required from certain parties. Any 'give' must be in line with the Constitution. This Court has long recognised that complex constitutional matters cannot be approached in a binary, all-or-nothing

fashion, but the result is often found on a continuum that reflects the variations in the respective weight of the relevant consideration.

The ESTA is silent on who or what must supply suitable alternative accommodation. In this particular case the state was a party to the proceedings, it participated and engaged meaningfully, but was still unable to provide suitable alternative accommodation. Within the context of section 10(2) of the ESTA, where an occupier has been evicted without a breakdown in relationship, it could be expected of the landowner to assist in providing suitable alternative accommodation. This, however, had to be a contextual enquiry, having regard to all the relevant circumstances (para [37]).

As all the requirements of the ESTA had been complied with, the only outstanding matter was the suitable alternative accommodation and the obligations of the City and landowners, respectively. The obligation of the landowner was pointed out in the very limited scope that section 10(2) of the ESTA set out. The duties of the City, on the other hand, were located in section 26(2) of the Constitution, and were also linked to its available resources. The two offers made by the City – the Delft and the Wolwerivier developments – had both been rejected. The question was, therefore, whether the City had an obligation to continue offering accommodation until the applicants were satisfied (para [40]). In addressing this issue the court referred to case law dealing with the PIE Act, and stated the role of the PIE Act to be that 'it cannot be expected of the first respondent to accommodate the applicants indefinitely when an offer of alternative accommodation has been made by the City' (para [43]). The reference to the PIE Act is interesting, given the earlier statement by the court alerting the parties that different legislative measures were in play and that the balancing of rights may differ accordingly. With further reference to *Molusi v Voges* 2016 (3) SA 370 (CC), where the Constitution was identified as the starting point in the enquiry, the court reached the conclusion that a constitutional duty clearly rested on the City to provide suitable alternative accommodation where occupiers were legally evicted and rendered homeless (para [46]). That duty could not be avoided by the submission of reports indicating that housing was unavailable.

As in the *Daniels* case, it was also highlighted that both occupiers and landowners have rights and duties. Here the court emphasised that the occupiers had enjoyed free accommodation since 2012, that the landowner had consequently enjoyed only

restricted property rights for the relevant period and could not, in fairness, be expected to continue granting free accommodation while its own employees were being disadvantaged in the process. In light of all the relevant circumstances, the court was satisfied that the occupiers had to be evicted so as to provide accommodation for the current employees (para [49]).

On the basis that the City's duty to provide housing was one of progressive realisation, the court accepted that the housing units at Wolwerivier qualified as suitable alternative accommodation which the City could provide within its available resources (para [50]). Eviction could thus not be avoided indefinitely by refusing the accommodation on offer. The remaining concerns regarding the children's schooling had been addressed by the respondents' offer to provide transport. The eviction order was therefore granted and a just and equitable date for the eviction was set at three months from the date of the judgment. Although leave to appeal was granted, the appeal failed.

Judge Zondo provided a qualified concurring judgment in which he declined to express a view on the duties of the landowner as that was not necessary in order to reach the conclusion. It is unclear, however, on what alternate basis he would have founded the judgment.

The *Daniels* judgment (above) has provided a valuable context for occupiers and their housing needs. This judgment again highlighted that a contextual approach is imperative in deciding these complex matters. In this regard the judgment is welcomed. However, given that the approach is contextual, one would have expected more guidelines, especially concerning when precisely what duties would be expected of the private landowner. Whereas duties other than those attaching to landowners in the pre-constitution context are expected, what specific factors need to be considered? Are these general considerations, or do they arise only where section 10(2) of the ESTA is involved? In this instance, the financial and business dimensions of the enterprise were specifically underscored. What would be the case if the landowners operated a small-scale family-owned farm, for example?

Eviction and probation reports

In *Magubane v Twin City Developers (Pty) Ltd* [2017] ZASCA 65 (30 May 2017), the issue was whether the failure of the Land Claims Court to consider a probation report, as provided for in

section 9(3) of the ESTA, was fatal to the granting of the eviction order. The appellants and their families had been in occupation of the farm belonging to the respondents since 1975 and 1980 respectively. At the time of the eviction proceedings the appellants had not been in the employ of the landowners and their right of residence had been terminated by the respondents on 2 July 2013 under section 10 of the ESTA (paras [1]–[4]). As the relationship between the parties had also broken down irretrievably, the court ordered the eviction of the appellants within a specified timeframe, the removal of their livestock, and the payment of certain amounts to the occupier families to assist in their relocation. The only relevant issue on appeal was the probation report provided for in section 9(3) of the Act, which was not considered when the above order was handed down. The probation report was necessary as it reflected the rights and interests of the parties in light of a possible eviction. The report was requested on 27 February 2015 and the hearing took place from 20 November 2015. As these reports are notoriously difficult to secure, it is not uncommon for courts to request the report but to proceed without it. An unreasonably long delay in the hearing and finalisation of the matter on the basis that the report was outstanding would be detrimental to the parties involved. Accordingly, in the absence of a probation report – once it has been requested – the proceedings could continue (see JM Pienaar *Land Reform* (Juta 2014) 735–49 for an exposition of the case law developments in this arena). However, in the present instance the report was in fact available, but the judge was unaware of this and the proceedings were concluded in its absence. Did the failure of the Land Claims Court to consider the probation report in its deliberations constitute a material irregularity which justified the setting aside of the eviction order and the remittal of the matter to the court? (para [7]).

The Supreme Court of Appeal found that the failure of the court to consider the probation report before making its finding constituted a material misdirection which necessitated interference. The purpose of the report was important and ought, therefore, to have been considered before judgment was handed down (para 9]).

Following the conclusion above, the question was whether the matter should be remitted to the Land Claims Court, or whether the Supreme Court of Appeal could rather consider the report before it (para [10]). The court per Fourie AJA (with Ponnan,

Mbha, Dambuza and Van der Merwe JJA concurring) considered the Supreme Court of Appeal to be in as good a position as the Land Claims Court to consider the contents of the probation report in light of the relevant facts and circumstances (para [11]). That would also prevent any further delay. In the present instance the report was detailed and provided ample information regarding the possible impact the eviction could have on the relevant rights of the parties and their extended families, including the rights of school-going children (para [13]). Counsel for the appellants agreed that, had the report been available at the hearing and had it been considered by the Land Claims Court, nothing in addition to the present content could have been submitted that would have shed more light on the facts and circumstances. Furthermore, counsel for the appellants was unable to advance any reason as to why the content of the report justified the Supreme Court of Appeal's interference with the order already handed down. In other words: had the report been taken into account by the Land Claims Court the same result would have been reached. The content of the report therefore did not warrant interference concerning the *actual order handed down*. The appeal was thus dismissed (para [15]). However, the date for eviction and evacuation was extended and the money payments were increased to R100 000 per family to assist in the relocation. The eviction order was thus confirmed.

The judgment highlights the distinction between (a) requesting a probation report and proceeding when the delay is unreasonable and the report is not available to the court; and (b) requesting and receiving the probation report but not considering it in the adjudication process. Whereas the former is possible, given the delays and the interests of the relevant parties, the latter cannot happen: the purpose of the probation report is too important to ignore when it is indeed available.

Appeal against confirmation of eviction order following automatic review

Goosen v The Mont Chevaux Trust (148/2015) [2017] ZASCA 89 (6 June 2017) provided further guidelines regarding appeals against the Land Claims Court confirming the magistrate court's eviction order, and the duties of the local authority with regard to emergency housing. Whereas the initial concern was to which court the appeal lay where the Land Claims Court confirmed an eviction order on automatic review under section 19(3) of the ESTA, alluded to above, the route to follow had in the meantime

been addressed by the Constitutional Court in *Snyders v De Jager* 2017 (5) BCLR 614 (CC), 2017 (3) SA 545 (see 2016 *Annual Survey* 51–9). The Wellington magistrate's court granted an eviction order against the seventeen appellants under the ESTA on 31 March 2014. The eviction order was confirmed by the Land Claims Court on automatic review. The issue on appeal was whether the Land Claims Court had been correct in confirming the eviction order (para [6]).

The background facts were set out in detail in the judgment (paras [7]–[13]). The property was initially purchased for use as a high-care thoroughbred stud facility. However, a number of cottages on the property were occupied by various persons, none of whom was employed on the farm. After taking occupation of the farm, an urgent eviction application was applied for and granted. For some unknown reason, the eviction order was never executed and was thereafter neither confirmed nor set aside (para [8]). New purchasers were interested in the property. During purchase negotiations while visiting the farm and on noticing the occupants residing on the land, the prospective purchasers were assured that an agreement had been reached between the former owners, the occupants, and the local authority in terms of which the occupiers would be relocated. The agreement entailed that the former owner would purchase Wendy Houses, and the municipality would make land available where the Wendy Houses would be erected. The trust – the respondent in the present appeal – therefore went ahead and purchased the property.

However, the municipality failed to honour the agreement, stating that no land was available for relocation and that building plans had not been submitted for the Wendy Houses (para [10]). Immediately after taking possession of the farm, the new owners' occupation was challenged by the conduct of the occupants, all detailed in the judgment (paras [11]–[12]). In short: the occupants made it impossible for the new owners to utilise their property, to put it to the use they intended, and made their living conditions unbearable. Conduct included threatening the occupiers, damaging property, excessive littering, continuous theft of electricity cabling, etcetera. In effect, the farm had a living, thriving informal settlement on its doorstep, which had a detrimental impact on all activities on the farm – even to the extent that the new owners were held prisoner in their own home, unable to venture out.

As mentioned, the eviction application was successful and was later confirmed by the Land Claims Court. It was against that confirmation that the appeal was lodged. In the *Snyders* judgment it was confirmed that the Land Claims Court has wide powers to assess the appropriateness or otherwise of an eviction order (para [16]). The section 19(3) automatic review under the ESTA was not the same as an appeal. In any appeal, including in the Supreme Court of Appeal, the court dealing with the appeal is subject to all limitations applicable to appeals (para [17]). For example, an appeal is limited solely to the grounds of appeal and can only be decided on the trial record. That meant that the appeal would only succeed if the Supreme Court of Appeal was convinced that the Land Claims Court was wrong in its deliberations, taking into account the nature of an automatic review which was conducted in that court (para [17]).

Interestingly, a probation report was again at issue. In the present matter, despite various notices and requests, no probation report had been received when the court ruled on the eviction application. However, as the report had not been raised in the application for leave to appeal, it was impermissible to raise it at the appeal stage. (In any event, requesting the report and waiting an unreasonable time would not prevent the court from proceeding with the matter in the absence of the report, as explained above in the *Magubane* case.)

Questioning the confirmation was linked to the ground of appeal that the trust had provided insufficient evidence of the termination of the appellants' rights of residence in accordance with section 8 of the ESTA (para [20]). The rights of residence had in fact been terminated by the predecessor in title. The notices were furthermore in order, save for the seventeenth appellant who moved on to the farm at a later stage (para [22]). Overall, the question to be decided was whether section 9(2)*(d)* of the ESTA had been complied with. The issue was that the trust itself had not given notice to the appellants as required. On the basis that the Land Claims Court had found that the appellants were fully aware of their rights even before the trust became the owner (as an eviction process against them had already taken place), the Land Claims Court – as High Court – had the inherent power to waive strict compliance with the notice provision and to condone the non-compliance with the ESTA in this regard (para [25]). As a creature of statute the Land Claims Court was, however, not free to waive any and all statutory provisions at will. Instead, the test

was whether the object of the peremptory statutory provisions had been achieved even though, strictly speaking, the formalities had not been complied with (para [26]). In light of the time that had passed, the Supreme Court of Appeal was satisfied that the purpose of the provisions of section 9(2)*(d)* had indeed been achieved (para [28]).

Section 10 of the ESTA was also relevant as it was the specific mechanism used to effect the eviction. In this respect the Supreme Court of Appeal confirmed that the relevant provisions had to be complied with in relation to each appellant individually (para [29]). The Supreme Court of Appeal was satisfied that the conduct of the appellants was intimidating and hostile, and that the incidents alluded to above were unprovoked. In these circumstances the granting of an eviction order was warranted. The Land Claims Court could thus not be faulted for concluding that the conduct of the appellants justified an eviction order (para [30]).

The enquiry did not stop there. The execution of the eviction order would render the occupants homeless. As they were in any event living in deplorable conditions, the municipality had a constitutional duty to provide them with emergency accommodation (para [31]). At issue was not permanent housing which could result in the occupants jumping the queue, but temporary emergency housing only (para [34]).

The appeal was partially successful. The eviction order in the Wellington magistrate's court was confirmed for the first to sixteenth appellants, but not for the seventeenth appellant. The execution of the order was suspended for a period of 90 days. The Drakenstein Municipality was ordered to provide the first to sixteenth appellants with temporary emergency accommodation within 75 days of the date of the appeal order.

Apart from providing guidelines regarding appeals and reviews respectively, as set out above, the judgment highlighted the desperate need for housing in the Drakenstein area. The conduct of the occupants indicated the lengths to which persons will go to ensure or 'protect' their access to housing, even if the housing is sub-standard and sub-human. In this judgment it is notable that the local authority was ordered to provide emergency housing within a set time. The local authority was thus not called on to

indicate what steps it would take to provide accommodation. It was ordered actually to provide the accommodation itself.

Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998

Occupiers of Erven 87 & 88 Berea v CF de Wet CCT 108/16) [2017] ZACC 18 (8 June 2017) deals with the implications of an ostensible eviction by consent (agreement) and the duties of the court in these instances. The crux of the matter was whether, where there is purportedly an eviction by consent, the court is absolved from the obligation to consider all relevant circumstances. A closely allied question is whether an eviction order can be rescinded at the instance of the occupiers who have purportedly consented to it.

In this case a number of occupants (47 women, 114 men and 23 children) lived in a building which was purchased for developmental purposes. Pursuant to the sale, the respondents' attorneys served letters on the applicants – by affixing them to the main doors of the building – notifying them of the termination of their rights of residence (para [6]). A few months later the initial notices under the PIE Act were served. This led to certain members of the community approaching a ward committee member – Ngubane – for assistance. At the eviction application, four applicants (the appearer applicants), Ngubane, and the respondents' legal representatives were present. The applicants were not legally represented. At an earlier meeting, the four appearer applicants had been mandated to have the application postponed. However, at the hearing a draft order was presented which Ngubane confirmed. The draft order was thereafter made an order of court. After realising that no postponement had been granted, but rather that an eviction had been effected 'by agreement', the applicants sought legal representation. After successive failures in both the High Court and the Supreme Court of Appeal regarding rescinding the eviction order, the Constitutional Court was approached.

The applicants contended that, firstly, there had been no actual consent between the parties when the draft order was made an order of court. Secondly, even if consent could be established, it was not legally valid. Thirdly, the applicants submitted that, even if the consent was legally valid, the court was under constitutional and statutory duties to satisfy itself that the eviction would, nevertheless, be just and equitable after considering all the

relevant factors. Lastly, the applicants submitted that the eviction order fell to be rescinded in terms of rule 42 of the Uniform Rules of Court or the common law (para [13]). The respondents averred the following: there was no clear evidence that the applicants would be rendered homeless following the eviction order; a prolonged legal battle would have a detrimental impact on the owner and plans for development; and there was furthermore no real defence before the court which could prevent the granting of an eviction order (paras [14] [15]). Regarding the merits of the matter, the issues to be dealt with were listed as follows: the duties of a court when faced with a purported eviction by consent; how the High Court had approached its duties; the joinder of the local authority; a valid defence under the PIE Act; rescission, remedy and, finally, costs (para [18]).

An order of court may be rescinded either under rule 42 of the Uniform Rules of Court or in terms of the common law. Accordingly, in this regard the issues were whether there had been real consent, constituting a waiver, and whether there had been a mandate to consent. The fact that the applicants were not legally represented was important. The four appearer applicants only had one mandate when they attended the application proceedings, namely to secure a postponement in order to secure legal representation (para [28]). At the initial stage of the proceedings, it was thus quite possible that the following factors could have influenced the initial High Court's findings: there was a delegation of the applicants in the court (the four appearer applicants); proper service had been effected as authorised by the court; the appearer applicants engaged with the legal representatives of the respondents; the identities of the other applicants were unknown; and it appeared that the applicants had no valid defence on the merits of the case (para [29]).

As they were not legally represented, and as they had not fully understood their rights, they could have, factually, consented to the order. Was factual consent by the appearer applicants also legally effective? For consent to be legally effective it must have been given freely and voluntarily, with full awareness of the rights being waived and thus constitute informed consent (para [32]). A waiver would include considering the following specific rights: (a) an eviction only after a court has considered all relevant factors; (b) the joinder of the local authority and the production by it of a report regarding the need and availability of alternative accommodation; (c) a just and equitable date under the PIE Act;

and (d) temporary alternative accommodation in the event that the eviction would render them homeless (para [33]). It was not disputed that the applicants had not been informed of any of these rights. However, the factual consent was not informed consent and, therefore, their consent was not legally valid (para [33]). In this light it was therefore unnecessary also to consider whether these rights were in fact capable of waiver. That conclusion was not only linked to the four applicants who were present in court, but to all of the applicants, as they could not (without mandate), and in fact did not (were not informed), consent on behalf of all of the applicants (para [35]). Accordingly, no valid, legally enforceable consent had been given when the eviction order was granted against them (para [38]).

In these instances the duties of the court flow from the protection of the rights of the residents, which are also inextricably linked to the issue of whether informed consent and waiver occurred (para [39]). The starting point was section 26(3) of the Constitution, which confirmed that eviction orders could only be granted by a court and only after all relevant circumstances had been considered (para [40]ff). The PIE Act was drafted in light of section 26(3), which enjoins courts to 'probe and investigate the surrounding circumstances' further (para [43]). The PIE Act could, therefore, not be applied passively. Integral in the process and the inquiry that the court had to undertake was to be informed of all relevant circumstances in each case in order to ensure that the eviction was indeed just and equitable. If the eviction were indeed to be granted, then the date and relevant conditions had also to be determined (para [46]). The PIE Act urges courts to go beyond the consideration of the lawfulness or otherwise of the occupiers' actions only. It requires the court to take an active role (para [47]). Ultimately, courts can only grant eviction orders once they are satisfied that it would be just and equitable to do so, and this can only occur when all the relevant information has been before the court so that the relevant circumstances could be considered (para [48]). Two issues were thus intertwined: relevant information; and justice and equity.

The High Court, when considering the draft order, mistakenly considered that issuing the order would be the end of its involvement. In other words: the court took a passive approach to the eviction and the proceedings, and incorrectly regarded its duty as having ended once the parties 'consented' (para [53]). Although the court was faced with a purported agreement, this

alone did not absolve it from its duties. Whether an eviction ought to be granted was not the prerogative of the parties; it was the court that had to decide this. Therefore, a court is not absolved from actively engaging with relevant circumstances where the parties purport to consent (para [54]). The court accepted the consent without conducting an enquiry into its validity and/or legal effectiveness. It furthermore failed to acknowledge that it had to play an active part in the proceedings, and had to probe the matters as it was statutorily enjoined to do (para [55]).

The following application to rescind the eviction order and how that was dealt with was likewise problematic. In that application the court relied on the fact that the parties were legally represented when the eviction order was granted. As was clear in the Constitutional Court proceedings, the applicants were in fact not represented. The court misdirected itself as to the facts, and again failed to appreciate its proactive role (para [56]). The issue of homelessness was also before the court but was entirely ignored (para [57]).

The question of joinder of the local authority was dealt with in detail by the court (paras [58]ff). With reference to the judgment in *Blue Moonlight*, coupled with section 4(7) of the PIE Act, the court highlighted that a local authority had the duty to provide temporary emergency accommodation to all persons facing eviction if the result rendered them homeless. In other words: where no suitable alternative accommodation is available, temporary emergency housing must be provided. In this light suitable alternative accommodation could be a relevant circumstance that had to be considered by the court. A court would not be able to consider such a factor in isolation and without the necessary information. To that end, where there was a risk of homelessness, the local authority had to be joined (para [61]). On the basis of a purported consent, that had not occurred.

Whether a valid defence could be raised was dealt with next (see especially para [65]). Here the court accorded 'valid defence' the broadest scope possible. That was the case because the court found that where it was unjust or inequitable to evict, the unlawful occupiers would therefore have a defence and the eviction order could thus not be granted. In this light the absence of justice and equity automatically constituted a valid defence. The enquiry was clearly not limited to the lawfulness or not of the occupation (para [65]).

Given the arguments above and the conclusions reached, the question was further probed of whether a court was precluded

from making a settlement agreement an order of court where that order would result in eviction (para [66]). The fact that a settlement had been reached, could, however, be one of the factors to be considered by the court in its overall enquiry. This would then furthermore mean that the court would have to establish that the parties freely, voluntarily, and with full knowledge of their rights, agreed to the eviction. That in itself does not mean the end of the enquiry – the court would also have to consider the risk of homelessness and the possibility of joining the local authority. Clearly, merely entering into an agreement does not automatically guarantee that an eviction order will be granted. An agreement is, therefore, only one of the factors to be considered, albeit an important one, which also initiates a further enquiry as to the result of the eviction and whether homelessness would ensue. The tasks of courts confronted with eviction applications are therefore multi-dimensional and complex.

The remaining issue to be dealt with was whether, having regard to what had transpired, the eviction order ought to be rescinded. In this context both rule 42 and the common law were taken into account. Essentially an order can be rescinded when it has been granted in error (para [68]). As mentioned, the High Court failed to discharge its duty to inquire into the relevant circumstances. This resulted in the court being unaware of essential issues of fact when it granted the order – for example, that some 180 occupiers were not present, and that there had been no mandate to enter into an agreement (para [69]). As the eviction order was thus granted in error, rule 42 provided a basis for its rescission (para [70]). As for the appearer applicants who were present during the proceedings, *iustus error* was a ground at common law for the rescission and allowed the court a fairly wide discretion (para [71]). The basis on which the eviction order was granted against those who were present at the proceedings was that they had validly consented thereto. As that was not the case, the eviction order had been granted against them in error. Once an error has been established, a judgment reached by way of consent can be set aside (para [74]).

The application for rescission was also *bona fide*. If uncontested, the eviction order would render them homeless. In these circumstances it was not unreasonable for them to bring the rescission application (para [76]). All the applicants also had valid defences to the eviction, namely (a) the non-joinder of the local authority; and (b) the violation of their rights under section

26(3) and the PIE Act. Therefore, the applicants presented a coherent case which satisfied the requirements of good and sufficient cause for *iustus error,* constituting a good case for the rescission (paras [76]–[78]).

In considering a suitable remedy, the court took the circumstances of both the landowner and the occupiers into account. The landowner had invested considerable funds in the project, had been in court for various proceedings, and had to rely on *pro bono* work for the most recent proceedings (para [80]). The effect of the PIE Act was highlighted as suspending, for an interim period only, some entitlements of owners and not expropriating them. Although expediency was the ideal, issues of suitable alternative accommodation and homelessness still had to be dealt with. As the local authority was not joined in the proceedings, all information was as yet still not before the court. To that end, the court decided to remit the matter to the High Court with an express provision that the matter be dealt with on an expedited basis. The local authority was joined *mero motu* (para [82]).

When exactly ought local authorities be joined? The local authority has to be joined as it is in the perfect position to report on the availability of suitable alternative accommodation. However, it may only be necessary to consider that issue once all the necessary information is before the court. It would probably be better to join local authorities right from the outset, on the basis that they are able to provide the necessary information that the court would need in order to determine whether the granting of the application would be just and equitable, on the one hand, and whether suitable alternative accommodation is required, on the other. Nevertheless, the judgment is welcomed as it clarifies the specific duties of courts when faced with eviction applications – in general, but also in instances where the parties enter into an agreement or settlement that is then made an order of court. The important feature is that, irrespective of the fact that an agreement had been entered into, courts remain integral in the process. Ultimately, the agreements must be solid; there cannot be any risks relating to homelessness or other considerations that would render the result unjust and inequitable.

Respective rights and duties of relevant parties in eviction matters

Fischer v Persons Listed on Annexure X (case no 9443/14); *Stock v The Persons Unlawfully Occupying Erven 145, 152, 156, 418, 3107, Phillipi & Portion 0 Farm 597, Cape RD* (case no

11705/15); and *Copper Moon Trading 203 (Pty) Ltd v Persons whose identities are to the applicant unknown and who unlawfully occupy remainder Erf 149, Phillipi, Cape Town* (case no 14422/14) is an important High Court judgment that brought some form of closure to unlawful occupation of land and housing issues that had been dragging on for many years. Essentially, three cases were dealt with in this all-encompassing judgment. While the cases may be distinguished on the particular facts, the common thread was the plight of the landless and homeless and the dire need to access housing on the one hand, and the frustration of landowners who are caught in the middle, on the other.

The crux of the matter was identified succinctly in the first paragraph of the judgment, namely: what does one do with 60 000 people when neither the owner of the land on which they reside, nor the local authority in whose jurisdiction they live, can or want to accommodate them? (para [1]). In attempting to answer the question, Fortuin J first provided a historical background (paras [3]–[5]), starting with the commencement of the Black Land Act 27 of 1913. Despite a new constitutional dispensation and a magnitude of legislative measures and a body of case law, the pertinent question remained as to whether the situation has improved. Phrased differently: how was it possible that access to land and a corresponding access to housing have remained a dilemma? (See JM Pienaar '"Unlawful occupier" in perspective: History, legislation and case law' in H Mostert & MJ de Waal (eds) *Essays in Honour of CG van der Merwe* (LexisNexis 2011) 317–38 for an analysis of some of the considerations as to why unlawful land occupation has remained prevalent in the constitutional dispensation.)

Following on the historical background was an exposition of applicable legal aspects in which the statutory and constitutional framework was set out (paras [8]–[18]). This included relevant sections of the Constitution (ss 7(2), 25, 26 and 38), the Housing Act 107 of 1997, Chapter 13 of the National Housing Code, and the National Housing Programmes. Of critical importance was the contention that the rights of owners – section 25 rights – and the rights of unlawful occupiers – section 26 rights – were continually being violated by the state (para [9]).

The statutory and constitutional frameworks were succeeded by an overview of case law and the most important developments in that regard (paras [19]ff). The point of departure here was the *ratio* of *Fose v Minister of Safety and Security* (1997 (3) SA 768

(CC)) that required that appropriate relief had to be forged so as to be effective relief. (See, for a detailed study of what constitutes effective relief where unlawful occupation and eviction are concerned, T Kotzé *Effective relief regarding residential property following a failure to execute an eviction order* (2016) LLM thesis Stellenbosch University.) Included in the spectrum of appropriate relief were constitutional damages and expropriation (paras [26]–[53]), with special reference to the well-known case law of *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC) and *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC).

In light of the constitutional and case law contextualisation, the factual background for each of the three cases was set out in detail in template format (see paras [78]–[80]). It was underlined that the *Fischer* property belonged to an elderly female who had inherited the immovable property from her husband. The property was her sole investment. While she immediately alerted the authorities to the unlawful occupation as soon as it happened, and despite eviction proceedings, over years the unlawful occupation continued and also increased. The relief sought was fourfold: a declaration that the City of Cape Town, the National Minister of Housing, and the Provincial Minister of Housing, had violated Mrs Fischer's constitutional right to property; an order that the City purchase the relevant property at a price to be determined; and an order that the National and Provincial authorities provide the necessary funds to purchase or alternatively to evict the occupiers.

The *Stock* factual background was as follows: over a period of some 40 years, various parcels of land were acquired for different purposes by the Stock family (paras [81]–[85]). From 2013 on large-scale occupation of Stock properties took place. With the assistance of the South African Police further attempted occupations were fended off. The relief sought was similar to that in the *Fischer* application, except that additional relief was also sought against the Provincial Minister of Community Safety on the basis that the right to property had been violated as the authorities had failed to protect the property.

In the third application, *Coppermoon* acquired the relevant property in 2007, after which it was mortgaged to Nedbank and rezoned for industrial purposes and a business park (paras [85] [86]). Unlawful occupation of land started occurring in August

2014, and eviction proceedings were initiated shortly thereafter, but were postponed repeatedly. Again, the relief sought was similar to that sought in the two applications above. In addition, it was stipulated that the relevant purchase price was to be determined by an arbitrator, and that it was to be based on market value at the time of the arbitration. Various other forms of relief were also sought in the alternative.

Essentially, in all of the cases the issue to be decided was whether the constitutional rights of the landowners had in fact been violated, and what was to be done in that regard. In other words: how could that violation, if it had occurred, be redressed? In all three applications the purchase price of the relevant property was sought, as well as the necessary funding for such purchase.

The respondents' case in relation to each of the three applications was set out in paragraphs [87]ff. As a point of departure in the *Fischer* case, the first respondents, the unlawful occupiers, highlighted that the burden of providing housing should rest on the state and not on private individuals (para [87]). In this context, historical, social, and economic factors should also be taken into account. The unlawful occupiers had been evicted previously, and they had been moving from one area to another with no help offered by the City (para [88]). In light of all of these considerations, it was clear, as argued on behalf of the occupiers, that an eviction of this scale could not be carried out humanely, and was, therefore, not a feasible option (para [90]). It was also pointed out that there had been no noteworthy, meaningful engagement, thereby contributing to the increase in unlawful occupation. In the *Coppermoon* case the unlawful occupiers underlined that their occupation was a matter of necessity, and that if evicted they would be rendered homeless (para [102]). Neither rental housing nor emergency housing was possible as there was a huge backlog, and the City had already indicated that no emergency housing was available (para [103]). Executing an eviction order in these circumstances would be practically impossible. In response to the state's argument that the invasion had been both planned and violent, the occupiers contended that there was no ongoing violence and again highlighted that the invasion had been an act of desperation (para [106]).

The second respondent, the City of Cape Town (the City), contended, with regard to all three applications (paras [113]ff), that as regards the buyout (purchase) option, the City argued

against it on two grounds: (a) it was legally unsustainable on the facts; and (b) it was an impermissible infringement of the separation of powers doctrine (para [114]). It was argued that the City could not be forced to enter into a purchase contract. Even though the City was empowered to purchase, it could not be placed under a duty to do so. Furthermore, the buyout option was not 'just and equitable relief' under section 4 of the PIE Act, inter alia, because the occupiers were already on a waiting list, the relevant parcels of land were earmarked to be used for transport corridors, the land was not suitable for human settlement, and necessary services could not be installed there (para [116]). Regarding the *Stock* and *Coppermoon* applications, the relief was opposed on three grounds: (a) it did not flow from the causes of action pleaded; (b) it was not legally sustainable; and (c) it was not appropriate (para [117]). Furthermore, the power to expropriate was not tied to the duty to exercise it. The same reasons for not buying the land also applied in relation to not wanting to expropriate it. As there was no duty to expropriate, there was no actionable cause (para [190]).

The response of the Ministers of Police – National and Provincial – in relation to the *Stock* application regarding the averment that they had violated their constitutional duty to protect the applicants' property, was as follows (para [125]): the land was vulnerable to occupation due to its location; and it was vacant, unimproved and readily accessible as there was no perimeter fencing or clear markings (paras [129] [133]). Despite these factors, coupled with the fact that the applicants could have secured their properties in a number of ways, the South African Police were doing their best to patrol the area and be vigilant (para [139]).

With regard to the relief sought against the relevant Ministers of Housing and Development, it was submitted that they would abide the outcome of the eviction order, but raised some questions regarding alternative accommodation (para [144]). It was underlined that no accurate information or data was available, resulting in requesting the court to order the unlawful occupiers to make such information available to the City. With regard to alternative accommodation, it was highlighted that the circumstances under which the unlawful occupation occurred were relevant and had to be taken into account (para [147]). These included that unlawful occupation was accompanied by extreme lawlessness, and that the landowners had not acted with the

required degree of urgency in protecting their property. In these circumstances, it was argued, the state could not be directed to provide immediate alternative accommodation. This consideration was also relevant in relation to the buyout, expropriation, and damages claim (para [147]). Regarding the purchase option, it was argued that such an order would not be competent as it would breach the principle of separation of powers. The land was also not suitable for human habitation (para [152]). As to expropriation, it was underlined that that issue had specifically been left open in the *Modderklip* case. In any event, it was argued that such an order would also violate the separation of powers doctrine (para [153]). Essentially, the main argument was that the premise that the state has an immediate and unqualified obligation to provide alternative housing once it is clear that the occupiers would be rendered homeless is simply incorrect (para [155]). Dealing with the issue of alternative accommodation, the following factors had also to be taken into account (para [155]): the obligations of private owners to protect their property; the condition of the property; the fact that the properties were unfenced; that interdicts were either not obtained at all, or only after a considerable period; that private security was only employed at high risk periods or not at all; and the circumstances under which the properties were occupied, in some instances with extreme violence.

Given the detailed background and exposition of relevant legislation, the Constitution, case law, and factual frameworks, the discussion continued in paragraphs [160]–[195]. Expanding on the *ratio* in *Fose*, alluded to above, Fortuin J highlighted that, if necessary, courts were obliged to forge *new* and *creative* remedies. Forming part of the necessary background were the historical, social and economic circumstances, as well as the desperate conditions in which these communities were forced to live. The court was satisfied that the state had breached its duty in terms of sections 7(2), 25 and 26 of the Constitution (para [162]). All three applications dealt with destitute people and with the slow reaction by local authorities (para [163]). Furthermore, large numbers of occupiers were involved and the City had indicated very clearly that it could not provide alternative accommodation. Despite the lengthy appeals and background information, the court had not been given a satisfactory reason why, rather than moving so large a number of people, the occupied land could not simply be acquired (para [167]).

The court was convinced that the only reasonable course of action was for the occupiers to stay where they were, thereby enforcing their section 26 rights. However, the real question was how that could be achieved without contravening the section 25 rights of the applicants; also, how this solution could be achieved without overstepping the boundaries of the separation of powers doctrine (para [167]).

Overall, the court had a problem with the reasonableness of the City's responses and its interpretation of relevant plans and policies. This included that the placing of the occupiers on the waiting list was unreasonable as it was unclear what this meant on a practical level (para [168]). The response that accommodating the unlawful occupiers would disrupt existing efforts to provide housing was also deemed unreasonable, as a reasonable response necessitated flexibility (para [169]). The current temporary relocation area used by the City was furthermore close to the relevant areas. The responsibility to provide temporary or emergency housing would thus always remain. In addition, the portion of land earmarked for transport purposes did not belong to the City and would, in principle, have first to be acquired and then rezoned. While a distinction could be drawn between the *Fischer* application on the one hand (para [180]) and the other two applications on the other, the relief in respect of all the occupiers should be the same (para [175]).

Ms Fischer had to be assisted as speedily as possible so as to enable her to enjoy her constitutional right to property during the last years of her life (para [180]). It was highlighted specifically that (a) the duty to respect section 26 rights rests on all three spheres of government and that they must cooperate (para [185]); (b) the City had a duty to plan pro-actively (para [186]); (c) there was no suitable alternative land available; and (d) the peculiar circumstances constituted an emergency housing situation (para [187]). In these circumstances the purchase of property was allowed where no alternative land was available. Under the relevant policies, this includes the acquisition of privately owned land. The policies also provided guidelines as to how the purchase price had to be determined (para [187]). In contrast to the *Grootboom* scenario (*Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC)), it was not an unconstitutional policy that was at stake, but rather a municipality which had failed to give effect to the constitutional rights of both the applicant and the occupiers by not invoking the remedies in the policies at their disposal (para [191]).

In light of the above, the following orders were handed down. As regards the *Fischer* application, it was found that both the City and the National and Provincial Ministers had infringed Fischer's constitutional right to property in terms of section 25 of the Constitution (para [196]). The City was ordered to enter into good faith negotiations to purchase Fischer's property within one month of the order. The third and fourth respondents were ordered to provide the City with the necessary funds to purchase the property should such funds fall outside of the City's budget. Failing this, the City was ordered to report back to the court within a set timeframe. The eviction application was dismissed (para [200]).

The *Stock* and *Coppermoon* orders were very similar; both found that the landowners' constitutional right to property had been infringed, as had the section 26 rights of the occupiers. In both cases the City was ordered to enter into good faith negotiations to purchase the relevant property within two months of the order (paras [205] and [213] respectively). Likewise, failure to reach agreements would result in a report back to court within two months of the order, explaining whether expropriation had been considered, and if not, why not (paras [206] [214]). The necessary funds had to be made available by the relevant authorities to effect the purchases, where relevant (paras [207] [215]). In both instances the eviction order was also dismissed.

This is a crucial judgment even though much of the judgment is not new, despite the judgment being extremely lengthy and detailed. It is not new because the existing relevant constitutional and statutory frameworks are well-known, and had been referred to in relevant case law many times before. Similarly, the exposition of case law in the context of housing rights and responsibilities is not really new and the challenges are well-known and often commented on in decisions. However, what is unique about this judgment – and what makes it a very valuable and useful one – is its particular presentation consisting of the relevant backgrounds, its case-law dimensions, and the very detailed factual exposition in template format. When the specific sequence of events is set out in detail, the frustration of the parties involved and their sheer desperation come to the fore in a very striking manner. When one is faced with a multitude of failings on such a large scale, the plight of the parties is paramount and the need for redress critical. The decision does not shy away from laying down duties and responsibilities and identifying underlying issues.

However, while the finding seems to be the only real solution to the three scenarios set out here, providing emergency housing remains only that: emergency housing. What about permanency? To what extent will the plight of these communities be alleviated and dealt with in an all-encompassing fashion? Is the provision of emergency housing, at an interim level, really appropriate and effective relief?

Temporary accommodation and the exercise of basic human rights

Dladla v City of Johannesburg (case no CCT 124/16 [2017] ZACC 42 (1 December 2017) entailed an application for leave to appeal against an order of the Supreme Court of Appeal handed down in *City of Johannesburg v Dladla* 2016 (6) SA 377 (SCA). (See 2016 *Annual Survey* 63–65.)

The matter has a very long and complicated litigation history, not all of which will be relayed here (see paras [15]–[23] for background). Two specific house rules of the relevant 'managed-care-facility', which emanated from a previous alternative accommodation order, were at stake here: the so-called lockout and family separation rules. The former entailed that occupants of the shelter had to vacate the premises from 8h00 until 17h30 and were thus locked out of the facility for the duration of the day. The latter, the separation rule, meant that heterosexual couples were not allowed to stay in the same dormitory as their partners and were thus separated from their families. This also meant that the bulk of childcare and responsibility was genderised in that women and children up to a certain age resided together. Not only did the separation rule split families and disrupt family life, it also perpetuated gender stereotypes. While the Supreme Court of Appeal found that the specific rules infringed the applicants' constitutional rights to dignity, freedom, security of person, as well as their right to privacy, it held that these infringements were reasonable (para [23]) in that the shelter was not a permanent home, but constituted temporary accommodation and the applicants could not claim to have the same rights as they would have in their homes. Such an approach also ensured the safety and protection of the occupiers and discouraged an attitude of dependence.

In the present appeal the applicants submitted that the City had not complied with the foundational *Moonlight* order as the measures adopted were inconsistent with the right of access to adequate housing provided for in section 26 of the Constitution.

They further submitted that their rights to dignity, freedom, security of the person, and privacy were infringed by the lockout and family separation rules. It was submitted that such a limitation was not, as had been concluded by the Supreme Court, justified, as the house rules were not introduced pursuant to a law of general application as required by section 36 of the Constitution (para [26]). In response, the City emphasised that the alternative accommodation provided constituted 'temporary' housing which had to be reasonable under section 26 (para [27]).

The majority judgment was handed down by Mhlantla J (Mogoeng CJ, Nkabinda ADCJ, Mojapelo AJ, Pretorius AJ and Zondo J concurring), with Cameron, Jafta and Madlanga JJ all writing separate concurring judgments, but with different emphases on the interpretation of sections 26 and 36 respectively. In order to consider whether the City had indeed complied with the *Blue Moonlight* order, the court revisited the original order in paragraph [37] and further. The order was not detailed and merely stated that 'the City was to provide the occupiers with temporary accommodation in a location as near as possible to the area where the property is situated on or before 1 April 2012' (para [37]). Judge Mhlantla found this to mean that the City had to provide temporary accommodation in accordance with the general legal standards applicable to the provision of temporary accommodation (para [39]). In this context the order did not limit any rights in question, including rights to dignity, privacy, freedom, and security. Any person, anywhere, had these rights, which the Constitution bestowed. The mere fact that the shelter did not constitute a home in the everyday sense of the word did not mean that applicants were not entitled to the protection of these rights (paras [43] [44]). The right to dignity furthermore entailed the right to family life. The Constitutional Court was thus satisfied that the house rules were in breach of the Constitution (para [51]).

A rather technical approach was followed with regard to whether the limitation of the applicants' rights by the impugned rules was justified (see paras [52]ff). In this context the 'law of general application' was a threshold requirement. The rules were not authorised by a law of general application. As the City had failed to prove that the limitations flowing from the application of the rules were reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom, as required in section 36, the appeal had to succeed.

While the Cameron judgment concurred with the finding (supported by Froneman, Khampepe, and Madlanga JJ save as regards paras [93]–[100]) that the rules were not constitutionally valid, it differed in the way in which the conclusion was reached. Whereas in the first judgment, the majority, set out above, concluded that the rules did not concern a measure the City took under section 26 of the Constitution to realise the rights of access to housing progressively, the Cameron judgment argued that the rules could not be separated from the provision of housing. This meant that temporary accommodation entailed the provision of housing and everything connected thereto, including the rules. Section 26(2) therefore had an impact on both the provision of housing and the house rules (para [57]). This was important, as the original order did not set out how the temporary housing had to be provided or what it had to comply with, as it was very general and rather vague (para [58]). In light of section 26(2), the question was therefore whether the measures, including the rules set out by the shelter, were reasonable. This meant that it necessarily had to go further than a mere technicality as to whether the limitations flowed from a law of general application (para [60]). If that was the focus, it would deflect attention from the real issue that arose when measures taken in progressive realisation of social and economic rights were assessed for reasonableness (para [63]). The test was thus *not* whether the limitations flowed from a law of general application, but whether the limitations were *reasonable*.

Whether the temporary housing constituted a section 26 measure was explored in paragraphs [64]ff and answered in the affirmative (para [68]). Accordingly, where the government provided temporary housing in fulfilment of a court order, section 26(2) and its reasonableness criterion governed the way in which it did so. In agreement with the reasons put forward in the majority judgment, the Cameron judgment concluded that the house rules were not reasonable (para [79]).

While the third judgment handed down by Jafta J (with Mojapelo J concurring and Mogoeng CJ concurring in part) confirmed the unconstitutionality finding of the house rules, it disagreed with the second judgment to the extent that house rules amounted to a measure contemplated in section 26(2).

The approach that dignity entailed a right to family life, and that the house rules as interpreted and applied in these shelters conflicted with the fundamental rights identified above, cannot be

faulted. Pertinent to the present matter is the fact that the shelter was the *only manner* in which the individual or family's right to access to adequate housing could be realised. Phrased differently: for the person involved the shelter is the only home he or she knows – *that is his or her home*. In this context, no difference, as regards substance, is made between temporary and permanent housing and accommodation. What does this mean for local authorities or NGO's providing and operating accommodation and 'managed-care-facilities'? Arguably, realising the full spectrum of rights is challenging, given extant capacity, facilities, and budgeting.

Sectional titles

In *Body Corporate of Empire Gardens v Sithole & another* 2017 (4) SA 161 (SCA) the body corporate obtained two default judgments against the Sithole sisters who co-owned a section in the sectional title scheme for non-payment of their proportionate share of their levies. In order to satisfy the judgments, their movable assets were attached and sold at auction, but they realised too little to satisfy the judgments (para [4]). The body corporate then obtained a warrant of execution against their immovable property, and the unit was attached and sold at auction. The sale had, however, to be abandoned as the second respondent (Nedbank), which held a mortgage bond registered in its favour over the unit, did not accept the sale price. The body corporate then launched an application for the Sithole sisters' compulsory sequestration. The court *a quo* dismissed the application by the body corporate on the basis that such an order would only benefit the body corporate and not the general body of creditors as required by section 10(1)*(c*) of the Insolvency Act 34 of 1936.

On appeal to the Supreme Court of Appeal, the body corporate argued that bodies corporate do not merely act to protect their own financial interests but have a statutory obligation to protect the interests of all the members who are prejudiced when a single member fails to pay his or her arrear levies. On this ground a deviation from the trite principle of *concursus creditorum* was justified so that it would not be necessary for bodies corporate to prove actual or prospective pecuniary benefit to the general body of creditors. The Supreme Court of Appeal accepted that the purpose and effect of the sequestration process are to bring about a convergence of the claims in an insolvent estate to

ensure that it is wound up in an orderly fashion, that the creditors are treated equally, and that once a sequestration order is made, a *concursus creditorum* comes into being with the effect that the rights of the creditors as a group are preferred to the rights of an individual creditor (para [9]). The Supreme Court of Appeal consequently held that there was no basis for distinguishing between bodies corporate and other creditors. Consequently, a body corporate applying for the compulsory sequestration of its members is required to prove that the order of sequestration sought will be to the advantage of the general body of creditors, as contemplated in section 10*(c)* of the Insolvency Act 24 of 1936 (para [13]).

The crux of the decision is contained in the following passages:

> The fundamental problem with the proposition is that the difficulty experienced by bodies corporate in collecting arrear levies is not a novel one. It is part of a 'socio-economic problem'. (See *Body Corporate of Geovy Villa v Sheriff, Pretoria Central Magistrate's Court, and Another* 2003 (1) SA 69 (T) at 73 paras 6 – 7; *Barnard NO v Regspersoon van Aminie en 'n Ander* 2001 (3) SA 973 (SCA) at 981D – F. Since 1986 the legislature has effected several amendments to the Sectional Titles Act but has not deemed it fit to accord bodies corporate any other preferential treatment beyond that provided through the provisions of s 15B(3)*(a)*(i)*(aa)* of the Sectional Titles Act and s 89(1) of the Insolvency Act. Section 15B(3)*(a)*(i)*(aa)* provides that a sectional title unit cannot be transferred to the name of a new owner unless a clearance certificate is obtained from the body corporate and provision is made for the payment of all arrear contributions. In terms of s 89(1) of the Insolvency Act, outstanding levies due to the body corporate are treated as being part of the cost of realisation. (See *Nel NO v Body Corporate of the Seaways Building and Another* 1996 (1) SA 131 (A) at 140A – D; *First Rand Bank Ltd v Body Corporate of Geovy Villa* 2004 (3) SA 362 (SCA) para [27].)
>
> This court cannot usurp the functions of the legislature and grant the immunity from the Insolvency Act now being sought. There is thus no basis to make the distinction between bodies corporate and other creditors (paras [12]–[13]).

Demolition of part of sectional title building

The issue in the appeal in *Serengeti Rise Industries (Pty) Ltd & another v Aboobaker NO & others* 2017 (6) SA 581 (SCA) was whether a demolition order granted by the KwaZulu-Natal Division of the High Court, Durban, was valid. The first appellant, Serengeti, acquired the property in 2009. In August 2010 the municipality approved the first building plans in terms of which Serengeti was to build a four-storey residential apartment devel-

opment on the property. At that time the property was zoned general residential 1 (GR1) in terms of the Durban Town Planning Scheme Regulations. On 12 December 2011, whilst construction under the 2010 building plans was under way, the municipality approved an application by Serengeti for rezoning of the property from GR1 to a general residential 5 (GR5) zone. The rezoning was approved despite written objections from the third, fifth, and sixth respondents (para [4]). The respondents contended that the approval of the rezoning application and deviation plans was in conflict with the municipality's policy, which provided that only buildings that conformed to GR1 and GR2 zoning would be allowed in the Berea-Musgrave area of the municipality. They asserted that the process which preceded the approvals had been unfair as they had not been given proper notification thereof (para [6]).

Although the order was based on the finding that the eThekwini Municipality's rezoning and subsequent deviation plan approvals in respect of the appellants' building were invalid, the High Court made no order to that effect but ordered only that the development on the property that exceeded GR1 zoning be demolished. The High Court's approach was that it was bound by the legality doctrine to order that the part of the structure that was illegal be demolished (paras [9] [10]). (2004 *Annual Survey* 992–3.)

The Supreme Court of Appeal held that the demolition order was unsustainable for the following reasons. First, the court had granted a remedy of a consequential nature without granting the primary relief sought. The primary relief sought was the setting-aside of the approvals of the municipality's rezoning and deviation plan, which formed the basis for the consequential relief sought. Until these approvals were set aside they remained valid (para [12]). Second, the order lacked clarity. The order read that only the portion of the building that 'exceeds GR1 zoning' must be demolished. Apart from there being no description of such portion, no evidence was led as to whether the structural integrity of the building could survive the partial demolition. Apparently, the order could only be executed by the demolition of the entire building, which meant that the court had not duly considered the constitutional proportionality of the remedy in question (para [13]). Third, the High Court mistakenly found that it was compelled by the legality doctrine to issue the demolition order that it had; in considering the appropriate order, it failed to exercise its discretion to grant a just and equitable remedy in accordance with the circumstances of the case (paras [15] [19]).

During the course of the judgment the court distinguished the decision in *Lester v Ndlambe Municipality & another* 2015 (6) SA 283 (SCA), [2014] 1 All SA 402. In *Lester* the building in respect of which the High Court had issued a demolition order had been constructed without any approved building plans. The demolition order was sought by the municipality in terms of section 21 of the National Building Regulations and Building Standards Act 103 of 1977, which empowers a magistrate, on application by a local authority or the Minister, to authorise such local authority or Minister to demolish a building if the magistrate is satisfied that its construction does not comply with the provisions of that Act. The court concluded that *Lester* must in future be read in the light of the subsequent judgment of Supreme Court of Appeal in *BSB International (Pty) Ltd v Readam South Africa (Pty) Ltd* 2016 (4) SA 83 (SCA).

The crux of the decision is contained in the following passage:

> Remedies provided for under s 8 of PAJA and under common law must be construed as giving effect to and promoting constitutional rights. Sections 38 and 172 of the Constitution enjoin courts to grant case-appropriate remedies. The principle is that
>
> > 'invalidity under the Constitution, as was the case with voidness under the common law, is a relative concept. It is, firstly, subject (in the administrative-law context) to a determination by the court whether a ground of review is present. Secondly (in the event that a ground of review is present) a court has to determine what the consequences of such determination are. A finding that the action in question is invalid (because a ground of review is present) will not necessarily mean that the action is to be set aside or declared invalid with retrospective effect or even at all. Especially in the case of delegated legislation which authorises administrative action, a retrospective declaratory order of invalidity could have extremely disruptive effects (especially where a number of actions had already been taken in terms of such legislation).

This passage summarises the views expressed by JR de Ville *Judicial Review of Administrative Action in South Africa* (2003) 331.

Property Estates: Homeowners' Associations

Road rules and limitation on movement of domestic employees in estate managed by a homeowners' association

Singh & another v Mount Edgecombe Country Club Estate Management Association Two (RF) (NPC) & others (AR575/2016)

[2017] ZAKZPHC 48 (17 November 2017) deals with an attack on the validity of certain rules of a homeowners' association (the HOA). The rules became binding on owners when they bought properties in the estate. The sale agreements, in each instance, provide that on purchasing a property in the estate, the purchaser acknowledges that there is an HOA in existence of which he or she will become a member, and that there are 'estate rules' with which he or she must comply.

The rules in question are the rules of the Mount Edgecombe Country Club Estate, a gated complex consisting of in excess of 890 ownership and sectional title residential units, together with extensive common property consisting of open areas, dams, ponds, rivulets, water features, community facilities, roads, and other infrastructure. The common facilities on the estate include a golf course, clubhouse, and a function venue. The estate also provides facilities for various sporting activities, including squash, tennis, fishing, and bowls. The estate has gated access points controlled by guards and is serviced by a network of roads situated on erven registered in the name of the HOA (paras [6]–[8]).

Singh's daughter was fined for contravening the rules relating to speeding on the roads in the estate, and the management withdrew Singh's (and his family's) biometric access facility to the estate as the fine remained unpaid. Further altercations arose between Singh and the HOA regarding prescribed times that domestic personnel were allowed to enter and leave the estate. In this regard, the rules provided that domestic personnel had to make use of dedicated minibus transport, provided by the HOA, and could not generally use the roads in the estate; their access was restricted to between 6am and 6pm, and they could only 'walk on the estate between the residence where they were working that day and their gate of exit'.

The matter was first heard in the Pietermaritzburg High Court (the court *a quo*). That court held, amongst other things, that the contractual nature of the relationship between the HOA and Singh (and other owners) was determinative of the dispute – basically, that having purchased a property in the estate and agreed to be bound by the rules of the association, Singh must consider himself bound thereby and act accordingly; and that, on the face of it, the rules were not invalid. Concerning the limitations on the movement of domestic employees in the estate, the court held that these rules were not unreasonable, taking into account the

security aims of the estate management (paras [11] [12]; 2016 *Annual Survey* 77-81). Singh appealed the matter and argued that the estate should not be allowed to issue speeding fines to motorists driving in the estate as it did not have the authority to do so under the Road Traffic Act 93 of 1996. He also contended that the rules relating to the movement of domestic personnel were inappropriate.

The full court reasoned that the issues raised in this judgment invoke the demarcation of public and private law and its impact, if any, on the regime of certain conduct rules that exist in the HOA estate. The roads, although owned by the HOA, were according to the court 'public roads' as defined in the National Road Traffic Act 93 of 1996 (the NRTA). This meant that certain public law consequences followed which gainsaid the argument that the application of the rules were confined to the contractual relationship between the parties only. The court explained that inherent in the concept of a public road was that the public had access to it and that the regulatory regime was a statutory one, as prescribed by the NRTA.

Chapter IX of the NRTA contains various provisions bearing on the road rules as formulated and implemented by the HOA. In fact, only the Minister of Transport, or someone authorised by him or her, has the power to regulate any aspect of public roads. The court emphasised that in the context of this matter it was significant that section 57(6) of the NRTA obliged private bodies (such as the HOA) to seek permission for regulating traffic on and access to public roads from the MEC and/or the municipality concerned. As it was common cause that in the present matter, the HOA had at no stage applied for such permission, the court held that this failure rendered both the rules and the contractual arrangement with its members illegal (paras [27] [30]). Consequently, the court concluded that the rules relating to traffic control within the estate were against public policy because they were in direct conflict with the relevant provisions of the NRTA; that the HOA and its members could not contract out of the obligations imposed by legislation and the NRTA in this instance; and that a contractual arrangement could not remedy such an illegality (paras [35] [36]).

The court held that the rules limiting or restricting the domestic employees' access to the public roads also had to be rejected as invalid insofar as it appeared that domestic employees were not free to traverse the public roads in the estate save in the limited

manner provided by the HOA's rules. From a constitutional point of view, their rights in this regard were severely restricted. The restrictions placed on domestic employees with regard to their movements on the roads in the estate, flowed from a misconceived notion on the part of the HOA that it was entitled to exercise usurped control over the public roads in the estate through its conduct rules. To the extent that these rules restricted the rights of domestic employees freely to be on and traverse public roads in the estate, they were unreasonable and unlawful (para [43]).

Review of refusal to grant a licence to construct homes

In *Long Beach Home Owners Association v Department of Agriculture, Forestry and Fisheries (South Africa)* 2017 JDR 1613 (SCA), the owners of seven properties located within a forest, represented by the appellant, Long Beach Home Owners Association, wished to construct homes on their properties. Before doing so, they had to to obtain a licence in terms of section 7(4) of the National Forests Act 84 of 1998 from the first respondent, the Department of Agriculture, Forestry and Fisheries, the executive head of which is the second respondent, the Minister of Agriculture, Forestry and Fisheries. The licence would permit the applicants to carry out prohibited activities in a natural forest despite the fact that natural forests may not be destroyed save in exceptional circumstances.

When the application for the requisite licence was refused by the Department, the appellant launched an application before the Gauteng Division of the High Court, Pretoria (Kollapen J), seeking the review and setting aside of the first decision by the Department and replacing it with the grant of the requisite licence to the appellant. The court found that the rigid adherence to policy in reaching the decision amounted to an improper exercise of the discretion. It set aside the order of the court *a quo* and replaced it with an order that the refusal be reviewed and set aside.

Share Blocks

In *Off-beat Holiday Club & another v Sanbonani Holiday Spa Shareblock Ltd & others* 2017 (5) SA 9 (CC), the applicants, both timeshare clubs, were minority shareholders in the first respondent (Shareblock), a company operating holiday resorts. In 2008 the applicants commenced a High Court application for declaratory relief under section 252 of the previous Companies Act 61 of

1973. They claimed that the third respondent (Harri), the controlling mind and principal shareholder of Shareblock, had, during 1998 and 1999, improperly amended Shareblock's articles to allow the allocation of shares in a timeshare development, and then allocated such shares in an unfair manner. They sought an order declaring the amended articles invalid, that the shares had been improperly issued, and that the holders of those shares were barred from voting on them. The issue was whether the applicants' section 252 claim had prescribed.

The High Court held that the claim had prescribed as it was a 'debt' as intended in sections 11 and 12 of the Prescription Act, and the applicants had been aware of their cause of action for many years. The court rejected the argument that the causes of action amounted to continuing wrongs. In an appeal the Supreme Court of Appeal attached a wide meaning to the term 'debt' and endorsed the High Court's view that the section 252 debts had prescribed. In the present application, also for leave to appeal, the applicants argued that the Constitutional Court's decision in *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) (2016 (6) BCLR 709, [2016] ZACC 13, required that a narrow meaning be ascribed to 'debt': it could be either a claim for the payment of money, or a claim for the delivery of something. Since their claim under section 252 was neither, it had not prescribed. In the alternative, the applicants argued that their claim constituted a continuing wrong that could not prescribe. The respondents argued that the applicants' claim was a debt because it sought the alteration of Shareblock's articles, that is, the performance of an obligation as ordinarily understood.

On appeal to the Constitutional Court, Mhlantla J upheld the appeal for the majority on the ground that the plain text of section 252 gave the court a broad discretion to grant equitable relief (para [28]). Until the court made a determination under section 252, neither party could discharge its obligations to the other because neither would be aware of their existence or extent (para [30]). A claim had to be correctly characterised before a decision on the applicability of the Prescription Act could be made (para [34]). As the applicants' claim, being one for declaratory relief, was not a debt as defined in *Makate,* it was incapable of prescription (paras [31]–[34] [48]). The judge ordered that the order of the Supreme Court of Appeal be replaced with an order declaring that a section 252 claim was not a debt under the Prescription Act, and remitted the matter to the High Court (paras

[36] [56]). Froneman and Madlanga JJ concurred in part, for different reasons.

Group Housing: Extension of Dwelling Causing Loss of View and Reduction in Value

See *Gerstle & others v Cape Town City & others* 2017 (1) SA 11 (WCC), discussed in 2016 *Annual Survey* 81–3.

Obstruction of Public Road

In *Escherich & another v De Waal & others* 2017 (6) SA 257 (WCC) the first and second applicants and the first respondent owned neighbouring plots in the George/Sedgefield area. A road, Seaview Drive East, passed through the area, giving access to the first applicant's property before proceeding through the first respondent's property, and continuing through other land to the second applicant's property. The present matter arose when the first respondent, without building plan approval, erected two structures on the road within his property, which completely obstructed the road. He also erected a gate across the road where it entered his property with the result that no one could use Seaview Drive East from the point where it entered his property without his consent, and, even if they were to do so, they would be unable to proceed any further than the structures. Persons wishing to access the second applicant's property had to make use of a detour that the first respondent had built through his property.

Apart from the loss of physical access to the second applicant's property via Seaview Drive East, the applicants complained that the location of the detour meant that their rights to privacy were impaired, and that a plantation belonging to the first applicant was placed at risk of fire. The applicants consequently brought an application in the High Court to restore access to Seaview Drive East, seeking an order directing the first respondent to demolish the structures erected, clear the road of other obstructions, and remove the gate.

The first respondent countered that Seaview Drive East was not, as the applicants insisted, a public road, and that nothing prevented him from acting in the manner he had. Consequently, the court had to decide on the legal status of the road and, depending on this, whether the first respondent was entitled to obstruct it by erecting a gate and structures. The first respondent

also challenged the applicants' *locus standi*. He argued that by virtue of section 21 of the National Building Regulations and Building Standards Act 103 of 1977 and section 127(1) of the Divisional Councils Ordinance 18 of 1976, respectively, only a local authority (with jurisdiction) had *locus standi* to approach a court to seek the demolition of unauthorised structures or the removal of an encroachment on a public road.

Having found that that Seaview Drive East was a public road which in terms of section 121 of the Divisional Councils Ordinance 18 of 1976 vested in the relevant local authority, the court held that the first respondent had no right unilaterally to close or obstruct the road simply to suit his own convenience, since to do so was to abrogate entirely the public character of the road. The fact that he had established a detour and offered to register servitudes of way did not advance his case as these arrangements were temporary and could be disavowed by subsequent owners of the first respondent's property. Moreover, the first respondent had not followed the established procedure for changing the location of a public street (paras [23] [24], [27]–[31]). The court further held that the applicants had *locus standi* to pursue the relief they sought under common law on the basis of (a) their general interest in maintaining the system of public streets on the estate and avoiding unilateral changes (except by lawful procedures); and (b) their direct interest in the encroachment due to its impact on their rights (paras [36]–[42]). As the first respondent had unlawfully obstructed Seaview Drive East, the court finally ordered him to restore access by demolishing the structures in question and clearing the street so that it might again be used as a road (paras [43]–[46]).

Land Reform-Related Matters

Land Reform (Labour Tenants) Act 3 of 1996

Expropriation and labour tenancy claims

Uys v Msiza ((1222/2016) [2017] ZASCA 130) is an appeal from the Land Claims Court against the amount of compensation determined following the expropriation of a portion of land pursuant to a successful labour tenant land claim under section 23(1) of the Land Reform (Labour Tenants) Act 3 of 1996. On the basis that the respondent's father initially, and subsequently Msiza himself, complied with all the requirements of labour

tenancy legislation, a labour tenant claim, as provided for under Chapter 3 of the Act, was lodged in 1996 (see paras [3]–[8] for background). Following due process, the owners were notified, there were various negotiations, and the property was sold to the trust, the current owner, in 2000. The trust was aware of the presence of the Msiza family and that a labour tenancy claim had been lodged when it purchased the land. In 2004 an award of land was made to Msiza by the Land Claims Court, after which the parties attempted to reach an agreement regarding the amount of compensation to be paid to the trust. Unable to resolve the matter, Msiza lodged an application to refer the matter to the Land Claims Court. The Land Claims Court determined an amount of R1,5 million. That was the order on appeal in the present matter.

Navsa ADP set out the relevant statutory background (para [9]), referred to previous Constitutional Court judgments (eg, *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC)), but ultimately highlighted that the amount of compensation agreed on or decided upon had to adhere to the standards of justice and equity (para [109]). In this regard it had also to reflect an equitable balance between the interests of the public and of those affected by expropriation. Ultimately, the standards are set out in section 25(3) of the Constitution and included, amongst other factors, the market value of property. The current Expropriation Act 63 of 1975, however, does not specifically require that the amount of compensation must meet the peremptory standards of the Constitution.

Because market value is usually the one factor capable of objective determination, it is generally the convenient starting-point in the assessment of what constituted just and equitable compensation (para [12]). Once that has been determined, other factors are taken into account, adjusting market value either upwards or downwards – the so-called 'two-stage approach' (para [12]). The court underlined that the approach had to be applied with care and in line with all the factors set out in section 25(3) of the Constitution (para [13]).

At issue in the present case was whether the relevant property also had residential development potential, which would affect the valuation. If it had developmental potential, the value would be R4,36 million. However, if it was considered in its present state as agricultural land, the value would be R1,8 million (para [14]). Accordingly, the latter estimation already took into account the

land claim lodged by the Msiza-family (para [15]). Worded differently: there was a known impediment to the property's development potential when it was purchased which had a direct bearing on the price that a willing buyer in the trust's position would have been prepared to pay for the property (para [19]). The *Pointe Gourde*-principle entails that compensation for the compulsory acquisition of land cannot include an increase in value which is entirely due to the scheme of the underlying acquisition (para [18]). This principle does not apply where the owner who buys the land knows of the impediment and the land is subsequently expropriated (para [20]). The *Pointe Gourde*-principle, therefore, did not apply to the present case as the trust bought the land knowing of the Msiza-claim. On that basis the market value was not R4,36 million, but R1,8 million (para [21]).

Although the Land Claims Court was hesitant to apply the two-stage approach, it did so, and after estimating the market value, adjusted it downwards to R1,5 million citing various reasons, including the disproportionate chasm between the amount paid by the trust and the market value it sought to claim; that the trust had made no significant investment in the land; that the use of the land had not changed since it was bought; that there was a land claim against the property when it was purchased; and that in 2004 the land had been awarded, but not yet transferred, to the Msiza family (para [23]). In considering the reasons listed above, Navsa ADP found that the value of land had increased since the trust bought the property (para [24]), so rejecting the disproportionate chasm alluded to by the Land Claims Court. Essentially, the Supreme Court of Appeal found that all of the reasons listed above for the downward adjustment of the value by the Land Claims Court, had already been taken into account when the valuers estimated the market value to be R1,8 million (para [25]). In this light the court was satisfied that there was no justification for stigmatising the trust's claim as 'extravagant' (para [26]). Furthermore, the state was willing to pay R1,8 million. Overall, the Supreme Court of Appeal found there was no justification for the deduction of R300 000 by the Land Claims Court (para [27]). Accordingly, R1,8 million was deemed to be just and equitable to compensate the landowner for the land lost in concluding the labour tenant claim.

The judgment is unsatisfactory as it in essence confirms that just and equitable compensation continues to be based principally on market value. That is the case because the initial market

value estimated by the valuers, taking into account all relevant factors, was R1,8 million and that was the *exact same amount* the Supreme Court of Appeal considered just and equitable. The judgment does not unpack all the factors listed in section 25(3) of the Constitution. Where, how, and to what extent did the above amount reflect an equitable balance between the interests of the public and of those affected by the expropriation? The fact that the state was willing to pay the R1,8 million should not be a factor at all. Instead, *how* the R1,8 million was arrived at, should be the main focus. The analysis was not sufficiently deep to consider, overall, whether the market value of R1,8 million was, in the final analysis, the correct amount to be awarded. If market value is to be the constant standard against which compensation for all expropriations related to land reform are to be measured, the process will be very expensive and ultimately unsustainable. Below market value is acceptable, guided by and calculated in terms of a consideration of all the factors listed in section 25(3) of the Constitution.

Labour tenants and a special master

Despite the dawning of the new constitutional dispensation, rural dwellers remain vulnerable and exposed to exploitation. Various legislative measures within the context of land reform have been developed to deal with aspects of vulnerability. Within the context of farmworkers generally, the ESTA was promulgated, of which certain elements of eviction and the procedural and substantive requirements embodied therein are referred to and discussed above. As regards labour tenancy, the Land Reform (Labour Tenants) Act 3 of 1996 was promulgated specifically to redress tenure insecurity and broaden access to land in certain rural areas. A labour tenant – a specific category of rural dweller for whom particular requirements are set out in the Act – has general protection against eviction, but, more importantly, can also lodge a labour tenant claim. Under Chapter III of the Act, labour tenants who meet the requirements can claim a parcel of land (s 16), as well as corresponding rights to enable the effective utilisation of the land (s 17). When the process is completed successfully, both redistribution and tenure reform objectives will have been achieved. There will have been redistribution, as the land belonging to the (white) landowner will have been subdivided and a portion transferred to the former labour tenant. Likewise, tenure reform will have been achieved, as the former labour tenant is now a landowner in his or her own right.

Unfortunately, the lodging of claims and their corresponding processing have not gone according to plan and massive backlogs have developed, with extremely negative consequences for landowners and labour tenants alike. It is in this context that *Mwelase & others v Director-General for the Department of Rural Development and Land Reform & others* 2017 (4) SA 422 (LCC) was handed down. The background is as follows. The applicants had, to no avail, previously approached the respondent and the relevant Department numerous times to secure statistics regarding the number of labour tenant claims finalised since the promulgation of the Act (para [5]). The Department acknowledged, in a report, a massive backlog and indicated an estimated period of 24 months for the collation of outstanding information regarding Chapter 3 applications. This state of affairs prompted the applicants to lodge the present application in 2013 for the appointment of a Special Master to process labour tenancy claims (para [6]). The application was not supported by the respondents. While a general understanding was reached on some supervisory role for the Land Claims Court in processing the claims, the appointment of a Special Master was resisted.

Part A of the notice of motion sought relief in respect of the first to fourth applicants' claims for awards of land owned by the third respondent, the Hiltonian Society. Part B sought systemic relief for the processing of all outstanding labour tenant applications that had been lodged. The respondents agreed to Part A of the application, which was referred to the Land Claims Court for determination. Systemic relief sought under Part B of the application has come before the Land Claims Court numerous times before and its content has changed over time. Initially, court supervision was requested, followed by a preference for the appointment of a Special Master. As mentioned, the latter was opposed by the respondent.

The application was based on various grounds, including that the Department was failing in the process; that it had been approached to refer section 16 applications to the Land Claims Court, which had never occurred; that the process was in shambles, as information had been lost; and that in certain instances, the applications would have to be re-submitted from scratch (para [9]). The application was supported by various affidavits, including petitions from hundreds of labour tenants. The latest figures, released by the Department in August 2016,

indicated that 10 914 claims under section 16 remained unsettled. It was argued that the Department was guilty of a persistent failure properly to process applications, and in this light a structural interdict was initially sought against the Department. That interdict would have required the Department to provide statistics of the current status of all labour tenants' claims and to report regularly on its progress.

The Department filed a response in March 2014 indicating that (a) it was not required to process all claims as some labour tenants would be better served if their claims were dealt with in the restitution programme; and (b) full details regarding outstanding claims would be published by mid-2104 (para [10]). The latter information was never published, leading to further litigation, resulting in the so-called Collation Order of 31 March 2015 (paras [11] [12]). In these documents the Department acknowledged that the processing of labour tenants' claims had not gone according to plan and stated that, despite the undertaking that statistics would be available in 2014, the collation process could in fact take between one and two years to complete. In KwaZulu-Natal, for example, the whole process would have to be revisited. This development led to the applicants simultaneously seeking court supervision for the completion of the process, as well as for the appointment of a Special Master (para [13]). The latter was also needed due to the scale and nature of the problem. Returning to court in June 2015, the Department agreed to a detailed court supervision order along the lines the applicants had initially sought, culminating in a court order that the respondent intended to comply with the Act and that progress reports would be filed every three months (para [14]).

Again reports were not filed on time or regularly as agreed, with the result that during the March 2016 hearing all parties were in agreement that court supervision would be necessary (para [16]). At this time it was clear that the Department was unable to file reports on time, to comply with their own timelines generally, or to provide accurate information. Overall the supervision order had not been complied with and subsequent reports had not included updated plans. Apart from these shortcomings, it was still unclear at what stage complete, reliable information would be available to all parties. In their documents the applicants alluded to incompetence, intransigence, and lack of attention, calling for the appointment of a specific person to manage and monitor the process – a Special Master (para [17]).

In order to consider the possible appointment of a Special Master, the court, per Ncube AJ, first set out the nature and functions of such a person (paras [19]–[24]). Such an appointment would have to be an independent person with the main function of assisting the court in processing and adjudicating on labour tenant claims in the manner prescribed by the court. The powers would be limited and carried out under supervision of the court. Such a person would thus be providing additional resources to the court. Special skills and qualifications would be required, similar to those required of a court-appointed *amicus curiae.* Such appointments are quite widespread in the United States and India, and comparative research could, therefore, also be of value here (para [22]). Important characteristics would include independence, diligence, managerial experience, an ability to mediate disputes, to work with both parties, and experience in land-related matters (para [23]). In practice such a person could be a senior advocate, a retired judge, or a retired civil servant with experience in land-related matters.

Time was also of the essence. Estimating that it would take one day to solve and settle a labour claim, this meant that it would take 24 years to complete the whole process and finalise all claims – without any obstacles or delays. As delays were sure to occur, it could mean that labour tenants would wait decades and might well die before their claims could be settled – having regard to the fact that the majority of labour tenants had already been waiting for two decades for their claims to be dealt with. While the magnitude of the task was understood, the respondents still contested the appointment of a Special Master. It was argued that it would not expedite the process and would not accelerate or improve the finalisation of these claims (para [26]). The claims would still have to be dealt with judicially, which meant more judicial resources, not a Special Master.

For the process to work effectively the first respondent also had to function at full capacity. The Director-General's role in managing and processing claims was likewise crucial. Simply referring thousands of claims to the court would overwhelm the court. It was thus imperative that a strategy be put in place as to how thousands of claims would be processed and finalised. In this process the Land Claims Court would also play a critical role. Currently, only one permanent judge was appointed, with a number of acting judges. Under these conditions, a Special Master would contribute greatly to much-needed continuity (para

[28]). Linked to the above difficulties were further issues of lost applications (and no protocol to deal with lost applications), poor record-keeping in certain provinces, and the inability to stick to timelines and meet deadlines (para [29]). The appointment of a Special Master would assist in all of these shortcomings and difficulties.

A further objection noted against the appointment of a Special Master was that it would introduce external persons into the Department's command line functions and would cause delays (para [31]).

In light of the dismal performance of the Department and the problems experienced, as set out in the judgment and discussed above, the court was not swayed by any of the objections raised against the appointment of a Special Master. Experience has also shown that a structural interdict or a supervisory role for the court would be inadequate. The supervisory role of the court would inevitably embody a long, extended process, would take many years to complete, and would drain the court's time and the resources of the Department (para [33]).

In light of all of these considerations, the appointment of a Special Master was not only desirable, but urgent. The appointment would also contribute to effective relief for a special category of persons, namely labour tenants, and would be aligned with the Constitution as it would contribute to realising labour tenants' rights (paras [34]–[36]). To that end an order was handed down in terms of which a 'Special Master of Labour Tenants' was provided for. The process of appointing such a person would start on 30 January 2017. A detailed exposition of the process together with the requirements and timelines were set out in the court order (para [38]).

The decision to start the process of appointing a Special Master to regulate and monitor the processing of 'labour tenants' claims is welcomed. The appointment itself will add gravity to the process, underline the importance of dealing with claims expeditiously, and highlight the government's commitment to land reform objectives. As is clear from the judgment, the mere appointment of such a person is not a silver bullet that will solve all problems; the backlog remains massive and merely collating the information and determining the *status quo* of labour tenancy claims will be both challenging and time-consuming. But the process must start and must be as coordinated and streamlined as possible. This is where this Special Master, with sufficient capacity and resources, comes into the picture.

LAND USE PLANNING

Restrictive conditions

Ex Parte Whitfield & similar matters 2017 (5) SA 161 (ECP) dealt with the removal of restrictive conditions within the new paradigm of the Spatial Planning and Land Use Management Act 16 of 2013 (the SPLUMA) and the role and function of the court in this regard. The judgment dealt with seven similar issues where applicants sought the removal or amendment of certain restrictive conditions of title incorporated in the title deeds of their respective properties. These conditions placed a restriction on the current and successive title holders. This meant that the restrictions also conferred rights upon holders of title to other properties, in that relationships were defined, including the enforcement of such conditions (para [4]). In the light of this restrictive conditions may not be removed, suspended or altered except with consent of all the parties whose rights and interests they regulate. The court therefore did not have inherent power to amend, suspend, or repeal the conditions (paras [4] [7]). Instead, the court did no more than enquire into and establish that the rights of the relevant title holders to amend, waive, or abandon had been properly exercised. Once it had been satisfied in this regard, the court issued a declaratory which authorised the Registrar of Deeds to effect an appropriate endorsement of the title deeds in accordance with the provisions of the Deeds Registries Act (para [10]). The question the court had to deal with was whether the provisions of the SPLUMA had in any way limited the court's authority to give effect to the exercise by interested parties of their rights to waive, amend, or vary their rights (para [11]).

The background to the SPLUMA and the reasons for its enactment were set out in the judgment in paragraphs [12]–[18]. Not only did the SPLUMA rationalise planning and land use measures, it also introduced important innovations in this context, specifically at municipal planning level (para [15]). This was done by providing for the establishment of municipal planning tribunals and the alignment of administrative decision-making in relation to the removal or variation of restrictive conditions in relation to spatial planning and land use management (para [17]). The Act thus located the decision-making process in relation to restrictive conditions in the municipal sphere. A municipal planning tribunal was now empowered to decide one or more applications in

relation to land, including applications for the removal, amendment, or suspension of restrictive conditions of title (para [19]). Section 42 sets out the relevant factors in relation to such applications. However, there is no specific requirement in the SPLUMA that parties whose rights are affected by the removal or variation of a restrictive condition of title must consent to such removal or variation. Goosen J confirmed that this meant that the basis for the removal or amendment of a condition of title was essentially the same as that applied in any other land development application (para [22]). However, conditions of title are dealt with further in sections 45(6) and 47. While no prior consent of relevant property title holders is required, these sections provide that the municipality could consent in certain instances and that the removal, amendment or suspension had to be effected in accordance with section 25 of the Constitution, with due regard to the respective rights of all those affected. Applications had, furthermore, to have been lodged in the prescribed manner (see paras [23] [24]). The procedure and format of applications were dealt with in detail in the Regulations, specifically in regulations 14 and 15. Under these regulations municipalities were free to set out relevant procedures and timelines and to appoint relevant officials specifically to deal with these duties. In the absence of such appointment, applications for the removal or amendment of restrictive conditions would be dealt with by the municipal planning tribunal.

The SPLUMA does not deal with the removal, variation, or suspension of a restrictive condition pursuant to a court order (para [26]). Accordingly, there is no provision establishing the circumstances in which such a court order may be made. Instead, the SPLUMA establishes a new administrative procedure for the removal of restrictive conditions by placing the authority in the hands of the municipal planning tribunal or designated municipal official (para [28]). In light of the fact that SPLUMA does not specifically address the ambit of the court's authority, Goosen J opined that this mitigated against a finding that the court's authority had in any way been altered (para [29]). Restrictive conditions, in light of sections 42 and 47 of SPLUMA, could, in accordance with section 25 of the Constitution, be removed or amended with the consent of the municipal planning tribunal. What was the effect of these provisions on the court? Various questions emerged: Did these sections preclude a court from authorising the removal of a restrictive condition without the

consent of the municipal planning tribunal? Phrased differently: does the court have a discretion to remove such a condition, or is the court obliged to do so once the tribunal has consented thereto? Must the consent of the tribunal be obtained before a court can grant a declaratory order authorising such removal? Given the point of departure that courts do not have inherent power to amend or suspend restrictive conditions, the court confirmed the following at paragraph [40]: a court's power to grant an order authorising the removal or amendment of a restrictive condition of title, upon proof that all interest parties have consented thereto, is not affected by the provisions of the SPLUMA. In each instance it is still necessary to establish that all interested parties have indeed consented thereto.

The court emphasised that, contrary to many applications that deemed restrictive conditions to be 'quaint, somewhat old-fashioned devices which preclude ''modern'' approaches to land development and that they serve little or no purpose' (para [46]), restrictive conditions had substance, that they operated to the benefit of the public, and were integral in preserving the essential character of a township. These kinds of restriction could, therefore, not simply be deleted. In this light, as well as against the background set out above regarding the role of the court, the court proceeded to deal with each of the seven applications before it. In short, in the first application (paras [42]–[60]) the correct authority that had to grant consent had not been approached; while in the second (paras [61]–[66]), the incorrect legislative measure was relied on, namely the Removal of Restrictions Act 84 of 1967, which had been repealed by the SPLUMA. The first two applications were consequently refused. The third application (paras [67]–[71]) was likewise refused as it in essence embodied a rezoning application. The fourth application (paras [72]–[77]) had been incorrectly lodged by the legal representative in her personal capacity – a fatal flaw which also resulted in a dismissal. In the fifth application (paras [78]–[82]) a rule *nisi* was confirmed; and in the sixth (paras [83]–[84]), the application was granted. The final application (paras [85]–[89]) was successful in relation to three restrictive conditions, of which notice had been given to relevant property owners who had consented to the removal.

The judgment is very useful as it confirms the value of restrictive conditions as planning tools, as well as the necessity of following specific procedures to amend or remove such condi-

tions. The SPLUMA has made the process of considering planning developments that may be connected to the removal or amendment of restrictive conditions more streamlined in that the application can be approached holistically. This still means that conditions cannot be removed or amended without the necessary consent. Although the courts do not have inherent power to remove or amend such conditions, they still have a role to play in that they must ensure that the correct procedures have indeed been followed and that the necessary consent – including the consent of the municipality – has been granted. The seven applications dealt with here indicate clearly that there is still uncertainty regarding the procedure to follow on the one hand, and the relevant legislative measures, on the other. Lodging an application in terms of the now repealed Removal of Restrictive Conditions Act is indicative of the fact that many practitioners are not abreast of new developments.

Special Notarial Bond: Extinction by Prescription

Factaprops 1052 CC & another v Land and Agricultural Development Bank of South Africa 2017 (4) SA 495 (SCA) deals with the period required for the extinction of a special notarial bond by prescription. In confirming the decision of the High Court in *Land and Agricultural Development Bank of South Africa t/a The Land Bank v Factaprops 1052 CC & another* 2016 (2) SA 477 (GP) (2016 *Annual Survey* 89–90), the Supreme Court of Appeal found that the phrase 'mortgage bond' in section 11*(a)*(i) of the Prescription Act 68 of 1969, given the language of the section, the context in which it appears, its purpose, and the history of the Prescription Act, has a wide meaning and includes a 'special notarial bond' in terms of the Security by Means of Movable Property Act 57 of 1993. Therefore, the period of prescription applicable to a debt secured by a special notarial bond is 30 years (paras [17]–[22]).

An interesting argument in favour of a wider interpretation is the following (para [21]):

> Thirdly, ch 3 of the Prescription Act, in which s 11*(a)*(i) is located, concerns prescription of debts, and one of the philosophical justifications for prescription is that it relieves a debtor from having to defend a claim long after the event. Differently stated, prescription is about proof of debts and the purpose of the Act is to protect a debtor against claims that he may be unable to defend due to lack of evidence

caused by the passage of time. Therefore, longer periods of prescription are justified where transactions are matters of public record as is the case with special notarial bonds. The purpose of the Prescription Act thus provides a strong indication that the wider meaning of 'mortgage bond' was intended.

It should be noted that the wider meaning of 'mortgage' is also espoused by Loubser *Extinctive Prescription* (1996) 37–8.

Interpretation of Legislation

Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988

Maimela v Maimela & others (case no 13282/16 High Court Gauteng Division (24 August 2017)) confirmed that the process of conversion under the Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988 is not an automatic process, but that it presupposes an investigation into the relevant facts in order to establish whether, in what format, and to which beneficiary such a conversion should take place. The applicant's and the first respondent's mother (deceased) were residential permit holders under regulation 7 of Chapter 2 of the Regulations Governing the Control and Supervision of an Urban Black Residential Area and Relevant Matters, GN 1036 of 14 June 1968. In 1995 the deceased was invited to apply for ownership of the relevant property, but she died before the application had been finalised. In 1995 the first and second respondents were issued with a lodger's permit under regulation 20 of the above Regulations and they continued to reside on the property with their children. In 2014 the applicant became aware that the first and second respondents held a title deed to the property of the deceased. The applicant sought a declaratory order to cancel the names registered in the title deed of the property on the basis that it was a family home and that the required process had not been complied with.

The aim of the Conversion Act was to formalise and confer leasehold or full ownership upon beneficiaries (para [8]). Under section 8, an inquiry had to be conducted prior to the rights of leasehold or ownership being granted. The Conversion Act furthermore had to be read with section 24A and 24B of the Gauteng Housing Act 6 of 1998, in terms of which a duty was placed on the MEC to conduct an inquiry in disputed cases to determine the lawful beneficiaries (para [10]). With reference to *Shai v Makena Family* 2013 JDR 0608 (GNP) and *Nzimande v*

Nzimande 2005 (1) SA 83 (W) concerning section 2 of the Upgrading of Land Tenure Rights Act 112 of 1991, the court was satisfied that 'it was not intended to automatically convert rights held under R1036 regulations to more effective common-law rights of leasehold or ownership without considering the availability, or lack thereof of new houses in the area, *the need for family members' occupation rights to be recognised and protected* and the need not to increase homelessness but to decrease it in the defined area' (para [12]). Accordingly, before properties could be transferred, the MEC had to determine who the lawful beneficiaries were by using appropriate mechanisms in making the determination (para [13]). In this light the title deed was cancelled and the relevant authorities were ordered to ensure that an enquiry was conducted in respect of the relevant erf.

Conservation of Agricultural Resources Act 43 of 1983

Persons entering into lease agreements for grazing do not fall under the Extension of Security of Tenure Act 62 of 1997 as they do not meet the requirements for 'occupier' under the Act. In *Adendorffs Boerderye (Pty) Ltd v Shabalala* (case no 997/15 SCA (29 March 2017)), the Supreme Court of Appeal confirmed that the landowner and the land user were both responsible for the preservation of land for pasture and its rehabilitation and not only the landowner. The case dealt with an appeal against an order handed down by the Land Claims Court in terms of which the landowner had to relocate the cattle belonging to the respondents, and to provide alternative pasture. Not only was the ESTA not applicable, the Land Claims Court also granted orders which had not been sought and in terms of which the parties were not accorded the opportunity to file further affidavits or present arguments before the orders were granted. 'Pure' grazing agreements were dealt with under the Conservation of Agricultural Resources Act 43 of 1983 and not the ESTA. The appeal was successful and the removal order was confirmed.

National Building Regulations of 1990

In *Mobile Telephone Networks (Pty) Ltd v Beekmans NO & others* 2017 (4) SA 623 (SCA) the Supreme Court of Appeal had to pronounce on the meaning of certain terms in the National Building Regulations of 1990 promulgated in terms of section 17(1) of the National Building Regulations and Building Stan-

dards Act 103 of 1977. The appellant had obtained authorisation from the City of Cape Town to erect, as a temporary building, a cellular communications base station. In an application for a review and setting aside of the City Council's authorisation, a trust contended that given the nature of the base station, it ought not to have been approved as a temporary building.

On appeal to the Supreme Court of Appeal, the court had to pronounce on the meaning of 'provisional authorisation' as used in regulation A23(1) and (6) of the National Building Regulations. The court held that it meant temporary authorisation (paras [10] [13]). The court then had to decide on the requirements for a building to be classified as a 'temporary building'. The court held that the requirements were those expressly listed in the regulation's definition of 'temporary building', as well as an implicit requirement that, in nature and purpose (objectively assessed), the building was temporary (see paras [10] [17] [18] [26]). A 'temporary building' is defined as 'any building that is so declared by the owner and that is being used or is to be used for a specified purpose for a specified limited period of time, but does not include a builder's shed'. Therefore, a temporary building is a building that is not a permanent one, and whether a building is permanent or temporary is ordinarily determined by its objective nature, characteristics, and purpose (para [14]). The court found that upon an objective consideration of the nature and purpose of the base station, it was not a temporary building (para [17]). The Supreme Court of Appeal continued that the definition of 'temporary building' and regulation A23 must be read with regulation A1(7), which contains two important considerations. First, it provides that before granting provisional authority in terms of regulation A23, the local authority must, inter alia, assess the building in relation to its intended use and expected life. This clearly requires an objective assessment. Second, it indicates the type of building that should be regarded as temporary, such as an exhibition stall (reg A1(7)*(b)*) or a building for experimental, demonstration, testing, or assessment purposes in terms of regulation A1(7)*(c)*) (para [25]).

The court concluded that it was necessarily implicit in the regulations that an objective assessment of the nature and purpose of a building must determine whether it is a temporary building or not. Consequently, the court *a quo* correctly concluded that the City materially erred in regarding the base station as a temporary building, and the appeal had to be dismissed.

The court advised that as the judgment of the court *a quo* suggested, MTN could apply to the City for approval of the building plans of the base station in terms of section 4 of the Act (paras [26] [27]).

Spatial Planning and Land Use Management Act 16 of 2013

See the discussion of *Ex parte Whitfield & similar matters* 2017 (5) SA 161 (ECP) under 'Removal of restrictive conditions' above.

PROPERTY LAW (INCLUDING REAL SECURITY): LEGISLATION

CG van der Merwe*
JM Pienaar†

Deeds and Registries

During the course of 2017 two bills relating to deeds and registries were published for comment: the Deeds Registries Amendment Bill of 2017 (*GG* 41041 of 15 August 2017), aimed at amending the Deeds Registries Act 47 of 1937; and the Electronic Deeds Registration Systems Bill (B35-2017, *GG* 41308 of 7 December 2017), aimed at introducing a new electronic deeds registration system for the country.

At an overarching level, the Deeds Registries Amendment Bill of 2017 has the following objectives: to introduce less cumbersome procedures so as to streamline all relevant processes overall; to be more in line with gender developments and address gender-related discrepancies; to address specific shortcomings in extant processes and practices; to address *lacunae*; and finally, to create greater uniformity amongst similar or related processes and practices. Accordingly, the amendments are all technical and relate to how processes are approached and dealt with in theory and practice. In this process a large number of sections stand to be amended and adjusted.

Gender matters are addressed in various clauses, for example, in clause 1 of the Bill, where 'chairman' is replaced with 'chairperson'. Similar adjustments are encountered in clause 3*(b)–(c)*, *(f)* and *(g)* in relation to section 9 of the principal Act, which deals with the establishment of the Deeds Registries Regulations Board.

Clause 2 seeks to amend section 3 of the Act, which deals with the duties of the Registrar of Deeds. Despite providing in the existing section 3(1)*(i)* of the Act that the Registrar must register waivers of preference in respect of registered real rights in land in

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favour of mortgages, the provision does not provide for such registration (eg, usufruct) in favour of leases. The amended version will now also provide for leases. Currently, provision is made for the registration of copies of powers of attorney in more than one deeds registry. However, problems emerge with the continued use of such powers of attorney which have been cancelled in one deeds registry, but not in the deeds registry in which the copy was registered. This practice enabled fraudulent transactions to take place. The amendments to section 3(1)*(u)*, set out in clause *2(b)*, aim to rectify this position by not requiring further copies, but by providing for the registration of powers of attorney whereby the agents they name are authorised to act generally for the principals granting such powers, or to carry out a series of acts or transactions.

Clause 3 sets out the duties of the members of the Deeds Registries Regulations Board established under section 9 of the principal Act. This clarity is required as no duties are set out in the current formulation of section 9(1). Another *lacuna* which requires attention relates to when a member dies or vacates his or her office during the currency of his or her term. This is now addressed in clause 3*(e)* by inserting sections 9(3B) and 9(3C), which allow the Minister to fill the vacancy for the unexpired portion of the relevant term. A further amendment to section 9 of the Act was required as the existing formulation provides for the Board to make regulations, whereas this is the duty of the Minister. That position is rectified by clauses 3*(h)–(j)*, amending sections 9(8) and 9(10). The same correction is made by clause 4 of the Bill with regard to section 10, which lists matters on which regulations may be made, and specifically to section 10(1), where the Board is again replaced by the Minister.

Despite calling for the lodging of diagrams in duplicate where state land is concerned, only a single diagram is required in practice. That position is now correctly reflected by the amendment of section 18(3) by clause 5.

Clause 6 amends section 34 of the principal Act by providing for the registration of real rights (eg, usufruct) over undivided shares in land. This was necessary because, despite section 34(1) providing that a person may not transfer, hypothecate, or lease only a part of his or her undivided share in land unless a certificate of registered title is obtained for his or her share, the section did not provide for a certificate of registered title to be obtained where a person wished to register a real right over the undivided share in land. Section 34(1) is amended accordingly.

Clause 7 amends section 57 of the Act, which provides for the substitution of a debtor in respect of a bond. Section 57(1) provides that where the owner of land which is hypothecated under a registered mortgage bond transfers the whole of the land hypothecated under the bond to another person, the Registrar may register the transfer and substitute the transferee for the transferor as debtor in respect of the bond. There is, however, no uniformity in the deeds registries with regard to the implementation of section 57, as certain deeds registries allow the substitution of bonds over shares in hypothecated land. The proposed amendment to section 57(1), as contained in clause 7, aims to create uniformity in this regard so as to clarify that a reference to the whole of the land excludes reference to a share in the land.

Section 62 provides for the registration of notarial bonds. Currently, section 62(1) provides for the registration of a notarial bond in more than one deeds registry where the debtor resides and carries on business in areas where different deeds registries operate. Such a notarial bond must then be registered in the area where the debtor resides, as well as in every deeds registry area in which the debtor carries on business. As this section and section 62(5) are currently formulated with respect to the time periods relevant for the registration in the respective successive deeds registries, the ambiguity leads to notarial bonds being registered after the expiry date of the prescribed time period as the provisions are differently interpreted. The proposed amendment to section 62(5), set out in clause 8, aims to provide clarity as to how the respective dates are to be calculated.

Section 99 of the principal Act deals with liability and exemption from liability for acts and omissions by the deeds registries' staff. It provides that no act or omission by any Registrar or officer employed at the deeds registry renders the government or such staff member liable for damage sustained by any person as a consequence of the act or omission. The section further provides that if the act or omission is *mala fide,* or if the Registrar or officer has not exercised reasonable care and diligence in carrying out his or her duties, they shall be liable for damage caused. A Registrar or officer guilty of such an act or omission shall be liable to make good any loss or damage to the government which has been caused *mala fide*. Clause 9 aims to amend section 99 by seeking to provide for the Registrar or official to also be liable in

instances where they have failed to exercise reasonable care or diligence in performing their duties.

Electronic deeds

The Electronic Deeds Registration Systems Bill [B35-2017] was introduced on 7 December 2017 (*GG* 41308 of 7 December 2017). Various considerations underlie the introduction of the Bill. While the integrity of the deeds registries system and security of title are integral to the South African system, the envisaged increase in the number of transactions, coupled with the need to link these developments to the Cadastral Information System so as to improve the efficiency and accuracy of the deeds system, necessitated development and adjustment. This developmental thrust is also tied to the demand for decentralising services and the need to consolidate and rationalise the diversified registration services resulting from legislative measures of the previous political dispensation. Any development in this arena must still provide flexibility and allow for the registration of other possible forms of tenure that may be introduced in *lieu* of the land reform programme. At present, apart from the extant electronic system by which the electronic land register is maintained, the preparation of documents, their lodging by the conveyancer, and their processing by the Registrar, all take place manually. In view of this a variety of needs and demands necessitated a fresh look at the deeds registries system.

This is where the Electronic Deeds Registration System (e-DRS), as provided for by the 2017 Bill, enters the picture. The system aims to provide for the effective registration of large volumes of deeds; improve turnaround times; provide country-wide access to deeds registration services; improve accuracy of examination and registration; make information available to the public; and introduce security features that include confidentiality, non-repudiation, integrity and availability.

Following the definitions in clause 1 of the Bill, clause 2 provides for the development, establishment, and maintenance of the e-DRS by the Chief Registrar of Deeds. He or she is empowered to issue practice and procedure directives dealing with, amongst other things, the functional requirements of the new system, its technical specifications, and its operation.

The validity of deeds and documents is addressed in clause 3. In this regard, any deed or document generated, registered, and executed electronically is the only original and valid record.

Likewise, documents, or any other executed deed scanned or otherwise incorporated into the e-DRS by electronic means, is also for all purposes deemed to be the only original and valid record. There should, therefore, be no discrepancies between paper-based documents that have been scanned and incorporated, and new electronically created documents.

The project is a massive one with obvious financial implications for the state. However, the main source of funding is from the fees charged by the various deeds registries for the registration of deeds and the sale of deeds registration information, as provided for in section 84 of the Deeds Registries Act 47 of 1937.

Clause 1 provides for relevant definitions; clause 2 deals with the development, establishment, and maintenance of the system; clause 3 provides for the validity of deeds and documents; and clause 4 for authorised users. The latter requires that all users authorised by the regulations must be registered in the manner and format provided for by the Chief Registrar of Deeds. Clause 5 provides that the Minister may, on the recommendation of the Regulations Board under section 6 of the main Act, make regulations relating to proceedings for the electronic lodging of deeds and registries; for electronic record storage; for the manner of identification of persons who prepare, execute, lodge, and register any relevant deed or document; the manner in which electronic payment of fees may be introduced; the process and manner of accessing the electronic deeds registration system for information purposes; the authorisation of users; and any other matter relevant to the e-DRS.

Clause 6 is pivotal, as it provides for transitional provisions. Clause 6(1) confirms that the Act does not affect the validity of any registrations effected prior to its coming into operation. Accordingly, the Registrar must continue with the registration, execution, and filing of deeds and documents as prescribed by the Deeds Registries Act of 1937 and the Sectional Titles Act 95 of 1986, until the electronic deeds registration system or related regulations are in place. After this date, the registration, execution, and filing procedures in terms of the Deeds Registries and Sectional Titles Acts, will be discontinued in respect of all deeds, documents, and deeds registries (cl 6(2)). In the meantime, conveyancers, notaries, and statutory officers must likewise continue with their preparation and lodging of relevant documents until the electronic systems are in place (cl 6(3)). Furthermore, any deed or document electronically executed or registered

shall be deemed to have been executed and registered in the presence of the Registrar by the owner or by a conveyancer authorised by a power of attorney. However, despite the envisaged discontinuation of document- or paper-based systems, the Chief Registrar may still issue directives for the continuation of the manual preparation, lodging, registration, execution, and filing of deeds and documents for a period determined by the Chief Registrar (cl 6(4)).

It is thus envisaged that the extant document-based system that is processed and managed manually is to be replaced as a whole, although the underlying considerations, motivations, and objectives of the deeds registry system remain unchanged.

Surveying

The South African Council for the Quantity Surveying Profession constituted a disciplinary tribunal in terms of sections 30, 31 and 32 of the Quantity Surveying Profession Act 49 of 2000 (Board Notice 16 *GG* 40660 of 3 March 2017). The Council is a statutory body that regulates the quantity surveying profession in accordance with the Act. The disciplinary tribunal must consist of at least one person who specialises in the field relating to the charge that was lodged; a professional who has appropriate experience; and a person qualified in law who has the necessary experience.

Sectional Titles Amendment Regulations, 2017

General

The separation of the provisions of the Sectional Titles Act 95 of 1986 dealing with registration and survey matters from those that apply to governance and administration, the consolidation of the latter provisions in the Sectional Titles Schemes Management Act 8 of 2011, and the retention of the provisions on surveying and registration in the Sectional Titles Act, necessitated changes in the Sectional Titles Regulations.

Definitions and certificate required for conversion of rental buildings into sectional title schemes

The Sectional Titles Regulations promulgated in 1988 (GN R664 of 8 April 1988), as amended by the insertion of the definition of

Sectional Titles Schemes Management Act 8 of 2011 (the STSMA) in regulation 1, were amended in 2017 (GN R427 *GG* 40842 of 12 May 2017). Regulation 4 deals with the certificate contemplated in section 4(3)*(a)*(ii) of the Sectional Titles Act to be furnished by the developer on the conversion of a rental building into a sectional titles scheme. In terms of regulation 4*(i)*(v) the certificate must indicate all other costs in respect of the common property which are normally recovered from the owners of units as contemplated in section 3(1)*(a)* of the STSMA instead of section 37(1)*(a)* of the Sectional Titles Act.

Documents that must accompany submission of sectional plan of extension of the scheme by the Surveyor-General

Regulation 6, dealing with the documents which must accompany the submission of the draft sectional plan to the Surveyor-General for approval, is amended by the addition of, if applicable, a certificate from a land surveyor or an architect stating that the sectional plan of extension of the scheme in terms of section 25(1) complies with the section 25(2) plan filed in the deeds registry. In the event of a reservation by the developer for the extension of the scheme in terms of section 25(2), the application for the registration of the sectional plan must, in addition to the usual documents referred to in section 11(3), be accompanied by a plan to scale of the building or buildings on which the following items are indicated: the part of the common property affected by the reservation; the height and coverage of all buildings; the entrances and exits to the land; the building restriction areas, if any; the parking areas; and the typical elevation treatment of all buildings. It must further be accompanied by a plan to scale showing the manner in which the building or buildings are to be divided into a section or sections and exclusive use areas, or the manner in which the common property is to be made subject to the rights of exclusive use areas only; a schedule indicating the estimated participation quotas of all the sections in the scheme after such section or sections have been added to the scheme; particulars of any substantial difference between the materials to be used in the construction of the building or buildings and those used in the construction of the existing building or buildings; the certificate of real right which is to be issued in terms of section 12(1)*(e)*; and such other documents and particulars as may be prescribed (Sectional Titles Act s 25(2)*(a)–(b)*, *(c)–(d), (f)* and *(g)*).This places a strict obligation on the architect or land

surveyor concerned to check that these documents have been prepared in a diligent manner, as serious problems have arisen in practice as to the exact nature and scope of the exact right reserved by the developer in respect of future extension of the scheme.

Documents in the sectional title register that must be endorsed with a deeds registry date

Regulation 13, dealing with sectional title registers in terms of section 12(1)*(b)* of the Sectional Titles Act, is amended by the substitution of subregulation (4A). The subregulation indicates the documents that must be endorsed with a deeds registry date endorsement, being the date on which they are lodged. These include the documents, notices, and correspondence referred to in subregulations 4*(a)* and *(c)*, namely some of the documents referred to in section 11(3) of the Sectional Titles Act, including the registries copy of the sectional plan; a schedule certified by a conveyancer setting out the servitudes and conditions of title burdening or benefiting the land and other registrable conditions imposed by the developer; a certificate by the Chief Ombud stating that the rules contemplated in section 10 of the STSMA have been approved; and correspondence relating to the scheme as a whole. In addition, any certificates, plans, schedules, and other documents relating to the scheme as a whole, filed in a sectional title file, must, on lodging, be endorsed with a deeds registry date endorsement.

Certificate of real right for extension of the scheme

Regulation 14, dealing with the certificates of real rights referred to in section 12(1)*(e)* of the Sectional Titles Act, is amended by the substitution of subregulation (2). It provides that the certificate of real right contemplated in section 25(6) of the Sectional Titles Act, obtained by the body corporate for extending the sectional titles scheme, must be in the form of Form A in Annexure 1, and must be accompanied by the written consent of all members of the body corporate and of the mortgagees of all units in the scheme, as contemplated in section 5(1)*(b)* of the STSMA.

Registration of transfer of ownership and other rights in respect of parts of the scheme building

Regulation 16, relating to the registration of transfer of ownership and registration of other rights in respect of parts of

buildings, is amended by the substitution of subregulation 1. Subregulation 16(1)*(a)* provides that concurrently with the establishment of the body corporate, the Registrar must issue a certificate in the form of Form W in Annexure 1. This subregulation is subject to the proviso that the Registrar may, on application by a body corporate in respect of which a certificate has not been issued prior to 1 June 1981, issue such certificate, in the form of Form W, after the date of establishment of the body corporate. Subregulation 16(1)*(b)* requires that a draft certificate in the form of Form W must be prepared by the conveyancer and lodged in triplicate with the Registrar. Thereafter the original certificate must be delivered to the Chief Ombud, one copy must be filed in the sectional title file, and the remaining copy delivered to the conveyancer. Subregulation 16(1)*(c)* stipulates that once a certificate has been issued, no further similar certificate may be issued in respect of the building concerned. However, if required, the Registrar may issue a certified copy of the deeds registry copy of the certificate or a certificate of replacement. Subregulation 16(1)*(d)* deals with these replacements. The original certificate of replacement and one of the copies thereof must be delivered to the conveyancer, and the other copy must be filed in the sectional title file.

New regulation of provisions pertaining to the rules of a sectional titles scheme

The most important amendment to the Sectional Titles Regulations concerns the deletion of regulation 30 dealing with the rules of sectional titles schemes – a matter relating to the management of the scheme. Although regulation 30 is deleted, parts thereof have been re-enacted in regulation 6 of the Sectional Titles Schemes Management Regulations of 7 October 2016 (the STSMR) (GN R 1231 *GG* 40335 of 7 October 2016). Subregulations 30(2), (3) and (4) of the Sectional Titles Regulations are re-enacted in their entirety in subregulations 6(4), (5) and (6) of the STSMR.

Subregulation 6(4) provides that if the schedule referred to in section 11(3)*(b)* of the Sectional Titles Act contains a condition restricting the transfer of a unit without the consent of an association, the constitution of which stipulates that all members of the body corporate of the development scheme of which the unit forms part must be members, and which assigns the functions and powers of the body corporate to the association,

the developer may, when submitting an application for the opening of a sectional title register, substitute any management rule contained in Annexure 1 to the STSMR. Subregulation 6(5) provides that if, at the commencement of the Act, the members of a body corporate are all members of an association whose constitution binds its members to assign the functions and powers of the body corporate to that association, the management rules contained in Annexure 1 do not apply. Subregulation 6(6) provides that the management rules set out in Annexure 1 may be added to, amended, or repealed by a unanimous resolution of the body corporate. This is subject to the proviso that no such addition, amendment, or repeal may adopted until such time as there are owners, other than the developer, of at least 30 per cent of the units in the scheme, save in the case of a body corporate established in a scheme approved under the Sectional Titles Act 66 of 1971.

Subregulation 30(1) of the Sectional Titles Regulations is replaced by subregulation 6(3) of the STSMR. In terms of subregulation 30(1) of the Sectional Titles Regulations, when submitting an application for the opening of a sectional title register, the developer was not entitled to substitute, amend, or withdraw a long list of management rules, whereas in terms of subregulation 6(3) of the STSMR, the developer is entitled to amend only a few management rules and to add management rules that are not inconsistent with any management rule of Annexure 1. The management rules that may be changed involve the rules dealing with the number of trustees; the nomination, election, and replacement of trustees; the reimbursement of trustees; and the chairperson at trustee meetings (STSMR reg 6(3), Annexure 1 rules 5(2) and (3), rule 7, rule 8(1) and (2), and rule 12).

Subregulation 30(5) of the Sectional Titles Regulations is replaced by subregulation 6(2) of the STSMR. Subregulation 6(2) provides that for the purposes of section 10(2)*(a)* and *(b)* of the STSMA, dealing with the management and conduct rules of the scheme, the management rules are as they appear in Annexure 1 (instead of Annexure 8), and the conduct rules are as they appear in Annexure 2 (instead of Annexure 9).

Subegulations 30(6) and (7) are important subregulations deleted in 2017 as the matter is regulated completely differently in the STSMR and the Ombud Service Regulations, both promulgated and implemented on 7 October 2016. Subregulation 30(6)

provided that the notification referred to in section 35(5) of the Sectional Titles Act had to be in the form set out in Form V of Annexure 1. Section 35(5)*(a)* provided that in case of the substitution, addition, amendment, or repeal of management and conduct rules, the body corporate had to lodge a notification of such occurrence in the prescribed form (Form V of Annexure 1) with the Registrar. Importantly, section 35(5)*(b)* stated that the Registrar was *not to be involved* in the enforcement or application of the rules as contemplated, and was *not required to examine or note* any substitution, addition, amendment, or repeal thereof against any certificate or other document. Section 35(5)*(c)* further provided that any such substitution, addition, amendment, or repeal came into operation on the *date of filing* of the notification referred to above. Subregulation 30(6) provided, *ex abudanti cautela,* that the body corporate had to notify the Registrar of any addition to, amendment of, or repeal of conduct rules as contemplated in section 35(2)*(b)* of the Sectional Titles Act in the form set out in Form V of Annexure 1.

In terms of section 4(1)*(c)* and *(d)* of the Community Schemes Ombud Service Act 9 of 2011, which came into operation on 7 October 2017, the ombud service has the following important functions: to regulate, monitor, and control the quality of scheme governance documentation; and to take custody of, preserve, and provide access electronically or by other means to scheme governance documentation. This led to the repeal of section 35 of the Sectional Titles Act, regulation 30 of the Sectional Titles Regulations, and the deletion of Form V, which dealt with the notification of a change in the management or conduct rules under the repealed section 35(5). It also led to the introduction of a completely new regulation of the substitution, addition, amendment, and repeal of management and conduct rules by entrusting the monitoring of scheme rules to the ombud service in terms of the STSMA of 2011 and the STSMR, both of which also came into operation on 7 October 2017.

Section 10(5)*(a)* of the STSMA provides that in the event that the management or conduct rules are substituted, added to, amended, or repealed, the developer or the body corporate must lodge a notification of such substitution, addition, amendment or repeal in the prescribed form with the chief ombud. Section 10(5)*(b)* continues that the chief ombud must examine any proposed substitution, addition, amendment, or repeal referred to above, and must *not approve* it for filing unless he or she is

satisfied that it is reasonable and appropriate. On approval for filing, the chief ombud, in terms of section 10(5)*(c)*, must issue a certificate to that effect. Under section 10(5)*(d)*, such substitution, addition, amendment, or repeal of rules comes into operation on the date on which it is issued, or on the opening of the sectional title register for the scheme, whichever is the latest. In terms of subregulation 5(2) of the STSMR, the notification by the developer or the body corporate to the chief ombud in terms of section 10(5)*(a)* of the STSMA concerning the amendment of the management or conduct rules, must be substantially in accordance with Form B of Annexure 3.

Destruction of or damage to scheme buildings

Regulation 31, which deals with the destruction of or damage to the scheme building and transfer of interest, is amended to give effect to the provisions of the STSMA on destruction of or damage to the scheme building. Therefore, subregulation 31(1) provides that in case of damage or deemed destruction of a scheme building in terms of section 17 of the STSMA and the authorisation of a scheme under section 17(3)*(a)*, the body must notify the Registrar in the form of Form X of Annexure 1 of the STSMR. Subregulation 31(3) is substituted to provide that the Registrar must give effect to the requirements of section 17(3)*(a)*(ii) of the STSMA by making an appropriate endorsement on the relevant deeds. Subregulation 31(4) is amended to provide that the Registrar must advise the Surveyor-General and the local authority of any registration pursuant to section 17 of the STSMA accompanied by the original sectional plan and a copy thereof respectively.

Application of Arbitration Act 42 of 1965

Regulation 39 provided that the provisions of the Arbitration Act 42 of 1965 must, in so far as those provisions could be applied *mutatis mutandis* with reference to arbitration proceedings, also apply under the Sectional Titles Act. The reason for this is that the arbitration proceedings provided in Annexure 8 rule 71 of the Sectional Titles Regulations have not been re-enacted in Annexure 1 of the STSMR of 7 October 2017.

Examinations of preparation of draft sectional plans

Regulation 43, relating to the examination in connection with the preparation of draft sectional plans, is amended to add the

provisions of the STSMA to the syllabus for the examination (subreg 43(1)*(b)*); to provide for one person nominated by the South African Geomatics Council (in place of the Council for Professional Land Surveyors and Technical Surveyors) to the Sectional Titles Examination Committee (subreg 43(2)*(b)*); and to change the function of the Sectional Titles Examinations Committee to making arrangements with the South African Geomatics Council and the South African Council for Architects regarding the date, time, place, fees, and other matters incidental to conducting the examination (subreg 43(7)*(b)*).

Amendment of the Annexure 1 forms

The most important amendments in the forms of Annexure 1 concern references to the provisions of the STSMA instead of to the provisions of the Sectional Titles Act, where applicable. Thus, the headings of Form W and X are replaced by the following new headings: Certificate of establishment of the body corporate in terms of section 2(1) of the STSMA (replacing s 36(1) of the Sectional Titles Act), and Notification in terms of section 17(9) of the STSMA (replacing reg 31(1) under the Sectional Titles Regulations) respectively. In the text of Form X the reference to section 48(1) of the Sectional Titles Act is replaced by a reference to section 17(1) of the STSMA. In Form Y, concerning the notification under section 49(1) of the Sectional Titles Act, the reference to section 48 of the Sectional Titles Act is replaced by references to section 17, 17(1)*(b)* and 17(3)*(a)* of the STSMA.

Another important amendment is the deletion of Form V which dealt with the notification of a change in the management or conduct rules under the repealed section 35(5) of the Sectional Titles Act. This is as a result of the transfer of the monitoring and management of conduct rules to the ombud service.

Other amendments to the forms of Annexure 1 concern, in the main, changes to the footnotes to the forms. In a few forms a new footnote is added to omit the options which will no longer apply – for example, in Form C dealing with certificates of registered sectional title issued under section 12(1)*(d)* or 25(11)*(c)* of the Sectional Titles Act. The footnotes under Form P, dealing with the certificate of sectional title under section 22(5) of the Sectional Titles Act, and Form Q, dealing with the certificate of registered sectional title under section 23(5) of the Sectional Titles Act, are amended to provide that the types and number of the sectional title deeds under which the particular certificates are held must

be inserted. A footnote to Form Y concerning the notification under section 49(1) of the Sectional Titles Act advises as to the deletion of copies of documents which are not applicable.

Finally, the footnotes to several forms in Annexure 1 to the Sectional Titles Regulations are amended with regard to the description of the location of the land and the scheme buildings. The footnotes advise that the description of the land as indicated on the sectional title plan must be followed instead of stating the name of the town, suburb, local authority, or farm. See, for example, Form C, dealing with certificates of registered sectional title issued under section 12(1)*(d)* or 25(11)*(c)* of the Sectional Titles Act, and Form D, relating to the sectional title file and indicating the place where the building is situated.

Replacement of Annexures 8 and 9 to the Sectional Titles Regulations

One of the most important amendments to the Sectional Titles Regulations is the replacement of Annexures 8 and 9. Annexure 8 to the Sectional Titles Regulations, dealing with management rules in terms of the Sectional Titles Act, is replaced by an almost completely new set of management rules in Annexure 1 of the STSMR. Annexure 9 to the Sectional Titles Regulations is also repealed and replaced by a consolidated set of conduct rules in Annexure 2 to the STSMR.

PUBLIC INTERNATIONAL LAW

Hennie Strydom*

Treaties

Some sixty treaties and memoranda of understanding (MOUs) were concluded in the year under review. Following customary practice, the list includes the usual template-type instruments with broadly formulated terms and objectives of questionable relevance. As far as bilateral treaties and MOUs are concerned, the selection below places the emphasis on arrangements with other African countries and BRICS partners. In the multilateral treaty area the Treaty on the Prohibition of Nuclear Weapons is of specific relevance.

Bilateral Treaties

Angola

By agreement, signed on 24 November 2017, South Africa and Angola established a Bi-national Commission to seek ways and means for enhancing cooperation between the parties in various government sectors, and between the private and public sectors in the two countries. On entry into force in accordance with the states' domestic requirements, the agreement will end the Joint Commission of Cooperation established by agreement between the parties on 20 November 2000.

On the same date, the parties also concluded an agreement on mutual administrative assistance in customs matters with the aim of: ensuring compliance with customs law; preventing, investigating and repressing customs offences; and ensuring the facilitation of the international trade supply chain. Mutual assistance between the parties does not include the recovery in the requested party of customs duties, taxes, and other charges incurred in the territory of the requesting party, and also does not give rise to a right on the part of any private person to obtain, suppress, or exclude any evidence, or to impede the execution of a request. To ensure effective implementation of the agreement,

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the parties undertake to exchange all available information that may be of assistance (art 4), and to maintain special surveillance, in accordance with domestic law, over the movement, storage, and transport of goods and contraband in violation of customs laws (art 10).

The parties also concluded an MOU on 24 November 2017 on cooperation in the field of the environment. This MOU envisages the establishment in the respective countries of cooperation programmes in areas such as geographical information systems, environmental mapping, impact assessments, biodiversity and wildlife conservation, management of protected areas, oceans and coastal management, waste management, and climate change.

Belgium

On 26 January 2017, South Africa and Belgium entered into an MOU on cooperation in the field of science and technology. The objectives of the MOU are to promote the development of joint scientific and technological solutions in support of the development agendas of the two countries, and to promote the emergence of scientific, technological, and innovative research in support of creating knowledge for mutual benefit. This is to be achieved through the exchange of scientists and other specialists and scholars, the exchange of scientific and technical information, the organisation of bilateral seminars, workshops, and training courses, joint research projects, and any other form of cooperation mutually agreed upon.

Botswana

An MOU on rhino conservation and management was concluded between South Africa and Botswana on 9 July 2017. The common goal of the parties is to conserve their rhino populations for prosperity, to increase both the black and white rhino populations, and to ensure their safety and security. It should be pointed out that the black rhino is critically endangered, while the white rhino in South Africa and Swaziland may, according to the species' CITES conservation status, become extinct unless trade is subject to strict regulation. It is also common cause that poaching activities in South and Southern Africa pose a serious threat to rhino populations in the region.

In this light, the parties have agreed to cooperate by establishing, supplementing, and maintaining populations of black and white

rhino in their respective countries; building capacity in the management of rhinos pertaining to security, veterinary matters, monitoring and research; establishing bilateral custodianship for the animals; and exchanging information on illegal trade in rhino specimens, security, and management. This latter undertaking is to take place within the framework of the 1999 Southern African Development Community's (SADC) Protocol on Wildlife Conservation and Law Enforcement.

Chad

South Africa and Chad concluded an MOU on 8 October 2017 to facilitate cooperation in the field of biodiversity conservation and management. A wide range of multilateral environmental agreements are recognised by the parties as providing content to their cooperative objectives under the MOU, in addition to their respective national laws. These are the 1992 Convention on Biological Diversity, the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora, the 1971 Ramsar Convention on Wetlands of International Importance, the 1994 United Nations Convention to Combat Desertification, and any other relevant multilateral environmental agreement. The implementation of these instruments is, therefore, also listed as a priority area for cooperation between the parties.

The parties also concluded a second MOU on the same date on the re-introduction of the black rhino to the Republic of Chad. The translocation of black rhinos under the MOU will be done, inter alia, in accordance with CITES requirements and a bilateral custodianship arrangement to be developed in terms of the MOU.

A bilateral air services agreement was concluded between the parties on 20 January 2017 in furtherance of the 1988 Yamoussoukro Declaration on a New African Air Transport Policy and the 1999 Declaration Concerning the Liberalisation of Access to Air Transport Markets in Africa. In essence the agreement provides for the reciprocal granting of certain rights to enable designated airlines in either party to establish and operate international air services on the routes specified in the Annex to the agreement. Designated airlines will also be entitled to fair and equitable treatment and equal opportunity in the operation of an agreed service. A contracting party is, therefore, under an obligation to eliminate all forms of discrimination and all unfair competitive or

predatory practices adversely affecting the competitive position of a designated airline of the other party.

China

Cooperation between South Africa and China appears to be growing exponentially. On 24 April 2017 the two countries concluded an MOU on cooperation in the field of cultural industries aimed at the performing and visual arts, animation and games, new media, cultural heritage products, creative design, and digital content creation, among other cultural activities. Enterprises in these areas will be encouraged to develop cultural cooperation, jointly to develop cultural products, and to undertake mutual professional training in the field of cultural industries.

The establishment of joint research centers was the subject of a separate MOU concluded on the same date with the aim of creating long-term and stable partnerships between research institutes in the respective countries; to facilitate high-level joint research; to encourage technology transfer; and to promote the development of related industries. The implementation of the MOU is entrusted to a Joint Working Group to be established under the framework of the China-South Africa Joint Committee on Science and Technology Cooperation. The parties also agreed on a pilot project under the MOU in the form of a joint research centre in the field of development and utilisation of mineral resources, which was intended to commence in 2017.

A bilateral agreement between the parties was also concluded on the same date to further cooperation in the field of higher education and training. The objective is to expand direct education and training relations between the parties' respective higher education and training institutions by exchanging staff and researchers, academics, experts, and students. Joint research projects and study visits are also envisaged. Under the agreement, the Chinese government has undertaken to provide the South African Department of Higher Education and Training with 30 fully-funded scholarships per year which will include tuition fees, accommodation, a basic living allowance, textbooks, and medical insurance.

The parties concluded a further agreement on cooperation in the field of radio and television broadcasting. The scope of cooperation will include news coverage, documentaries, television drama, film, and animation. As China is not known for its championship of media freedom, it is not clear whether the cooperation with it will be restricted to technical exchange and

cooperation, or whether state management of news content will also fall within the scope of the agreement.

To provide for the inspection, quarantine, and veterinary health requirements for frozen beef exported from South Africa to China, the parties concluded a protocol on 24 February 2017 which requires the South African Department of Agriculture, Forestry and Fisheries to provide its Chinese counterpart with information on the regulation, production, veterinary inspection, storage, packaging, and export of frozen beef to China. This includes information on animal diseases, environmental pollutants, verification of the banning of feeding ruminants food containing prohibited components, and food safety requirements. Under the protocol it is also required that the export of frozen beef will be handled only by export establishments registered with the Certification and Accreditation Administration of the People's Republic of China.

On the same date the parties also concluded an MOU on entry and exit animal inspection and quarantine. The cooperation under the MOU relates to the implementation of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures Agreement, animal inspection, quarantine laws, regulations and standards, and major animal diseases.

European Union

The EU (acting through the European Commission) and South Africa concluded a financing agreement on 24 April 2017 in support of economic growth and employment creation through small, micro, and medium enterprises (SMMEs) in South Africa. In terms of the agreement the EU undertakes to finance the programme to the sum of EUR 52,245,800. The specific objectives are: (1) to improve the competitiveness of SMMEs and their ability to meet procurement requirements; (2) to improve access to finance; and (3) to improve the regulatory and administrative environment for SMMEs. Through these actions it is expected that the programme will contribute to the government's targets of reducing the official unemployment figure from the current 26 per cent to fourteen per cent by 2020. The areas earmarked for support include agribusiness, infrastructure, mining, and green industries.

As far as objectives and results are concerned, the agreement claims that the programme is aligned with the United Nations (UN) 2030 Agenda for Sustainable Development, in particular with Goal 8 (the promotion of sustained, inclusive, and sustainable economic growth, full and productive employment, and

decent work for all); Goal 5 (the achievement of gender equality); Goal 10 (the reduction of inequality within and among countries); and Goal 13 (urgent action for the combating of climate change and its impacts).

On 24 July 2017 the European Commission and South Africa also signed a financing agreement for improving South Africa's legislature oversight programme. This initiative is taken in response to the findings in the National Development Plan – Vision 2030, that parliamentary accountability is weak and that Parliament is failing to fulfil its most basic oversight role. The funding and development programme provided for in the agreement is aligned with the UN's 2030 Sustainable Development Goal 16 which aims to build effective, accountable, and inclusive institutions at all levels of government. The specific objectives of the programme, for which EUR 10,000,000 is made available, are to strengthen the capacity of the legislative sector to exercise oversight over the executive; devise means and mechanisms to ensure public involvement in legislative processes; strengthen cooperative governance; and improve knowledge, skills, systems, and processes in the legislative sector.

Ghana

Ghana and South Africa concluded an MOU on 24 March 2017 on cooperation in the field of environmental management and natural resources and conservation. The objectives of the MOU include the exchange of views, information, and technical support relating to environmental legislation and policies aimed at the implementation of the UN Convention on Biological Diversity, the World Heritage Convention, and the Convention on International Trade in Endangered Species of Wild Fauna and Flora. Also covered are eco-tourism, protection of the coastal and marine environment, pollution control, management of protected areas, and implementation of the 2030 Agenda on Sustainable Development.

Hungary

An MOU on cooperation in the field of water and sanitation was concluded between Hungary and South Africa on 23 May 2017. All aspects of water management and the utilisation of water resources relating to the following are covered by the MOU: waste water management; drinking water supply; water management and climate change management; transboundary water

management; groundwater management; mitigation of mining pollution; water governance; water-related education; and capacity building and institutional development. The implementation of the MOU will be the responsibility of a Joint Water Resources Steering Committee which will meet at intervals agreed upon by the parties.

Namibia

South Africa and Namibia concluded an MOU on the 7 September 2017 to facilitate cooperation between the countries in the field of information and communication technologies. The MOU is intended to bring about a closer working relationship between technical institutions, government, business, education, and other organisations in the Information and Communications Technology (ICT) sector. Areas identified for strategic cooperation are wide-ranging and include policy development, infrastructure development, exchange of information, management of radio frequencies and roaming services, development of e-government initiatives, digital programme development, joint investment, and equipment manufacturing. The establishment of an ICT Working Committee is foreseen in the MOU which will review the progress of cooperative activities under the MOU. The implementation of the activities listed in the MOU is dependent on the allocation of funds by the parties.

New Development Bank Africa

The Bank and South Africa entered into an agreement on 25 October 2017 for the hosting of the Bank's regional centre in Johannesburg, South Africa. The South African government will be responsible for providing and furnishing, free of charge, suitable premises for the Bank's African regional centre which will have the independence and freedom of action available to other international organisations operating in South Africa.

The Bank, its property, funds, and assets, wherever located, will be immune from every form of legal process except: (a) to the extent that the Bank has expressly waived immunity in a particular case in accordance with article 36 of the Bank's Articles of Agreement; (b) in respect of a civil action in South Africa arising from the Bank's powers to raise funds, to guarantee obligations, or to buy and sell or underwrite the sale of securities; (c) in respect of a civil action brought by a third party for damages arising from an accident caused by a vehicle belonging to the

Bank or operated on its behalf; (d) in respect of the enforcement of an arbitration award made against the bank; or (e) in respect of any counter-claim directly connected with court proceedings initiated by the Bank.

The Bank's property also enjoys immunity from all forms of seizure, attachment or execution before the delivery of final judgment against it. Property, funds, and assets of the Bank are also immune from seizure, search, requisition, foreclosure, confiscation, expropriation, and any other form of interference whether by executive, administrative, judicial, or legislative action. The South African government, or any entity or person directly or indirectly acting for or deriving claims from the government, is also interdicted from bringing any action against the Bank. Under the agreement the Director-General and staff of the Bank's regional centre are entitled to the same immunities accorded officials in diplomatic missions.

Since the immunities under the agreement are conferred in the interest of the Bank and not for the personal benefit of the individual employees, the Bank is entitled to waive any of the privileges, immunities, and exemptions where such a waiver is appropriate and in the best interests of the Bank, and when the privilege, immunity or exemption would impede the course of justice. The Bank is also duty-bound under the agreement to cooperate with the South African government to facilitate the proper administration of justice, the observance of the laws of the Republic, and to prevent any abuse of the immunities and privileges granted in the agreement. The Bank has further undertaken to prevent its premises from being used as a refuge for fugitives from justice, or for persons subject to extradition, or persons seeking to avoid legal proceedings under the laws of South Africa.

Niger

South Africa and Niger concluded a defence cooperation agreement on 25 October 2017. Notably, according to the Global Fire Power Index, of the 136 countries assessed for military strength and capability, Niger occupies the 109th place and South Africa the 33rd place. Given this disparity, Niger stands to benefit more from the agreement in areas such as the training of military personnel, the acquisition of military equipment, and the sharing of technical knowledge which are the three most meaningful objectives of the agreement. However, if one takes

into account that the United States' troop contingent and military advisers in Niger have steadily grown since 2013 to assist Niger in countering the ISIS and Al Qaeda threat in the Sahel (with the help of hunter/killer drones), it is not certain what value the agreement with South Africa will add.

Pakistan

Defence and industrial cooperation in defence are the subjects of an MOU between South Africa and Pakistan concluded on 27 March 2017. The areas of cooperation include military training, joint exercises, the acquisition and transfer of defence-related technologies, defence research, procurement of defence equipment, industrial cooperation between companies and government entities in respect of defence and related equipment, and the joint development of conventional weapons systems.

The sending party will exercise exclusive criminal jurisdiction in respect of offences committed by members of its armed forces or civilian personnel in the territory of the receiving party, and undertakes to prosecute the offenders in conformity with its national laws. The sending party is required to inform the receiving party of the outcome of the proceedings taken against the offenders.

As far as civil claims are concerned, each party undertakes to waive any claim it may have against the other party for injury – excluding loss of limbs or death – suffered by its military personnel if caused by the acts or omissions of the other party in the performance of official duties in connection with the MOU. Injuries resulting in loss of limbs or death will be dealt with under a separate protocol or arrangement. All third-party claims arising from any act or omission by the sending party in the performance of official duties in connection with the MOU will be settled by the receiving party in accordance with its domestic laws.

In the case of claims by third parties arising from acts or omissions of either party's military or civilian personnel not done in the performance of official duties, these will be settled by reasonable and just compensation by the legally responsible individual under the national laws of the parties.

Russia

Cyber security has become a matter of international concern. To address the concerns over the threats posed by the use and abuse of information technologies, South Africa and Russia

concluded an agreement on 4 September 2017 on cooperation in the field of international information security. In the preamble mention is made of threats that derive from the use of technologies in the civil and military fields which are inconsistent with the objectives of ensuring international peace and security, or undermine the sovereignty and security of states, interfere in their domestic affairs, undermine citizens' rights, and destabilise domestic political and socio-economic situations. Also reiterated in the preamble are the applicability of the principles of state sovereignty to a state's use of information and communication technologies, and a state's jurisdiction over information infrastructure and public policies relating to the information and telecommunication network and security.

The main international information security threats identified in the agreement include: the use of information and communication technologies for committing acts of aggression aimed at violating the sovereignty, security, and territorial integrity of states; the causing of economic damage; facilitating terrorist activities; the commission of crime; the incitement of inter-ethnic, inter-racial, and inter-confessional violence; and the dissemination of information harmful to socio-political and socio-economic systems.

The agreement also provides for a principled framework for cooperation between the parties. This is based on the acceptance by the parties of the principles and rules of international law, of mutual respect for sovereignty and territorial integrity, the peaceful settlement of disputes and conflicts, non-use of force or threat of force, non-interference in internal affairs, and respect for human rights and fundamental freedoms.

Tanzania

On 11 May 2017, South Africa and Tanzania concluded an MOU on cooperation in the field of biodiversity conservation and management. The MOU affirms the obligations of the parties under the 1992 Convention on Biological Diversity and the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora, and notes the global challenge posed by illegal wildlife poaching and trafficking. The areas singled out for cooperation include biodiversity management, sustainable use of biodiversity, the enforcement of multi-lateral environmental agreements, biodiversity law enforcement, protected areas management, and research and exchange of information.

On the same day, the parties also concluded an MOU on cooperation in transport-related matters. In essence, the envisaged cooperation is aimed at assisting Tanzania, through private sector involvement, to develop the country's transport sector infrastructure in certain designated areas in Tanzania. This will include identifying and sensitising South African organisations/companies with the technical and financial capacity to implement projects in partnership with their Tanzanian counterparts, and to establish joint ventures. The transport industries earmarked in the MOU are civil aviation, merchant shipping, land transport, transport services, and road traffic management.

UNESCO

The purpose of the agreement concluded between South Africa and UNESCO on 31 January 2017 is to designate the African World Heritage Fund as a category 2 centre, the functioning of which South Africa has agreed to take responsibility for under the agreement. Category 2 centres are capacity- building institutions in the regions or countries where they are located, and are legally not part of UNESCO but associated with it through formal arrangements. They are directly funded by member states in the regions where they are established.

Article 4 of the agreement makes it clear that the fund will be a legal entity, independent of UNESCO, and will enjoy the functional autonomy under South African law to conclude contracts, institute legal proceedings, acquire and dispose of property, and acquire the necessary means to fulfil its mandate. The Fund's mission is to strengthen the implementation of the 1972 World Heritage Convention in African state parties by promoting their understanding and implementation of the decisions and recommendations of the World Heritage Committee for the benefit of World Heritage properties on the African continent. As such, the Fund must assist African state parties to: prepare and update their national inventories, tentative lists, and nomination dossiers; compile integrated management plans for the management of their World Heritage properties; comply with their obligations under the World Heritage Convention; and establish a network of African expertise and partners for the improvement of African World Heritage. This will include assistance in the strengthening of human-resource capacity; legal, policy, and institutional frameworks; and heritage protection, conservation, and management in conflict, post-conflict, and natural disaster situations.

The Fund is overseen by a Governing Board comprising a representative of the government, five members representing the five African Union regions, a representative of the Director-General of UNESCO, a representative of the African Union, and the South African permanent delegate to UNESCO. In addition to these members, who have voting rights, the Board also includes observers with no voting rights.

In terms of the agreement, the South African government undertakes, inter alia, to make the necessary infrastructure for the Fund's accommodation available, mobilise resources, provide administrative staff, and to seek, together with African state parties, technical and financial support for the Fund's projects that are not funded by its annual budget.

Zimbabwe

South Africa concluded two agreements and four MOUs with Zimbabwe in 2017.

The agreements deal with the cross-border coordination of frequency spectrum and with health matters respectively. The frequency spectrum agreement was concluded on 3 October 2017 and aims at coordination between the countries on cross-border spillage of existing frequencies; new digital broadcasting transmissions; interference between analogue broadcasting transmissions; assignments in broadcasting and telecommunication services; and the sharing of information on the deployment of new services alongside broadcasting and telecommunication services. In the case of harmful interference, the parties undertook to cooperate in the detection and elimination of the interference and to exercise goodwill and mutual assistance in eliminating harmful interference.

The health matters agreement, concluded on 29 August 2017, seeks to facilitate cooperation between the parties in the following areas: health systems management; human resource development; prevention, control and management of communicable and non-communicable diseases and conditions; specialised medical care; laboratory services; regulation of pharmaceuticals, family, child health and nutrition; research and development; traditional medicine; and emergency situations.

The four MOUs deal respectively with cooperation in employment and labour, environment and conservation, energy, and information and communication technologies. The employment and labour MOU, concluded on 6 April 2017, contemplates

greater cooperation between the parties in respect of dispute resolution, labour-law reform, labour inspection, employment services, social security, occupational safety and health, and labour-migration management.

The environment and conservation MOU, concluded on 3 October 2017, aims at reducing environmental degradation and seeks to promote cooperation between the parties in the following areas: biodiversity conservation; protected areas and wildlife management; sustainable use of natural resources; alien and invasive-species management; desertification; veld-fire management; climate change; waste management and pollution control; environmental management; and compliance and enforcement.

The energy MOU, concluded on the same day as the one above, lists renewable energy, electricity, energy efficiency, and hydrocarbons as areas in respect of which the parties will promote cooperation. A technical committee and working groups will be responsible for facilitating the implementation of the MOU.

The information and communications technology MOU, concluded on the same date, foresees a closer working relationship between the parties and between their technical, regulatory, research, education, and other organisations in the ICT sector. Common interest areas are: policy formulation and implementation; project implementation; exchange of information; management of radio frequency spectra; digital programme development; capacity building; investment and business partnerships; and infrastructure development. An ICT working committee will be established by the parties to review progress with cooperative activities under the MOU.

Multilateral Treaties

Treaty on the Prohibition of Nuclear Weapons

On 20 September 2017, the long-awaited Treaty on the Prohibition of Nuclear Weapons was signed in New York, 49 years after the 1968 Treaty on the Non-Proliferation of Nuclear Weapons. South Africa also signed on this day and there are currently 59 signatories and ten state parties. The treaty will enter into force 90 days after the 50th ratification.

In terms of article 1, state parties undertake 'never under any circumstances' to: (a) develop, test, produce, manufacture, or otherwise acquire, possess, or stockpile nuclear weapons or other nuclear explosive devices; (b) transfer to any recipient, nuclear

weapons or other nuclear explosive devices or the control over such weapons or devices; (c) receive the transfer of or control over such weapons or devices; (d) use or threaten to use such weapons or devices; (e) assist, encourage or induce, in any way, anyone to engage in any prohibited activity under the treaty; (f) seek or receive any assistance, in any form, from anyone to engage in a prohibited activity; and (g) allow any stationing, installation, or deployment of any nuclear weapons or other explosive devices in their territory or at any place under their jurisdiction or control.

State parties also have a duty to submit declarations to the Secretary-General of the United Nations on their prior possession of nuclear weapons, devices, and programmes, and their elimination. This also applies to nuclear weapons and devices in their possession or under their control following their ratification of the treaty. The subsequent elimination of nuclear weapons and programmes, or the conversion of all nuclear-related facilities, must take place under international verification by an authority to be designated by the parties. The elimination and conversion must take place as soon as possible, but not later than a deadline to be determined at the first meeting of the parties and in accordance to a plan submitted by the state party and approved by a subsequent meeting of the state parties or review conference.

In cases where individuals under a state party's jurisdiction have been affected by the use or testing of nuclear weapons, that state party will be responsible for the provision of medical care, rehabilitation, and psychological support in accordance with applicable international humanitarian and human rights law. In the case of environmental damage, the state party responsible must take the necessary measures for the rehabilitation of the affected areas.

Article 7 provides for international cooperation and assistance in giving effect to the treaty. It places an obligation on state parties to cooperate with one another to facilitate the implementation of the treaty, and determines further that each state party 'shall have the right to seek and receive assistance from other states parties'. By the same token, state parties having the necessary technical, material, and financial resources must assist other state parties affected by the use or testing of nuclear weapons.

The implementation of the treaty is overseen by a meeting of the parties (art 8) which includes the adoption of measures for the

verified, time-bound, and irreversible elimination of nuclear-weapon programmes. A review conference for assessing the progress made with the implementation of the treaty will take place after a period of five years following the entry into force of the treaty. Further review conferences will take place at six-year intervals.

SADC Protocols on Extradition and on Mutual Legal Assistance in Criminal Matters

By agreement, the SADC members and parties to the above Protocols have effected minor amendments to the Protocols. In both instances the SADC Committee of Ministers of Justice/ Attorneys-General are designated to oversee the implementation of the two Protocols in terms of their mandates under the 2000 SADC Protocol on Legal Affairs.

IBSA Fund

On 17 October 2017, South Africa, Brazil, and India concluded an agreement on the establishment of a fund (the IBSA Fund) for the alleviation of poverty and hunger. Through this initiative the parties intend to fund projects involving South-South cooperation for the benefit of populations of developing countries. The Fund's capital will consist of annual contributions made by the parties of at least US$ 1 million per party per annum.

LEGISLATION

International Arbitration Act 15 of 2017

This Act repeals the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977, and provides for the incorporation into South African law of the UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985. It also gives effect to South Africa's obligations under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), and facilitates the use of arbitration in international commercial disputes and the recognition and enforcement of certain arbitration agreements and awards (s 3). Arbitration agreements and awards covered by this Act are excluded from the operation of the Arbitration Act 42 of 1965, save for purposes of Chapter 3 of the International Arbitration Act (IAA), which deals with the recognition and enforcement of arbitration agreements

and foreign arbitral awards (s 4). The IAA is binding on public bodies and applies to any international commercial arbitration in terms of an arbitration agreement to which a public body is party, but does not apply to the settlement of disputes between an investor and the government in terms of section 13 of the Protection of Investment Act 22 of 2015 (s 5).

Under the IAA, international commercial arbitration applies to any international commercial dispute the parties have elected to submit to arbitration under an arbitration agreement, unless the dispute is not capable of determination by arbitration under any law of the Republic, or the agreement is contrary to public policy. Arbitration may not be excluded solely on the ground that by law a court or tribunal has jurisdiction to determine a matter falling within the terms of an arbitration agreement (s 7).

CASE LAW

Earthlife Africa & another v The Ministry of Energy & others [2017] ZAWCHC 50, [2017] 3 All SA 187 (WCC), 2017 (5) SA 227 (WCC)

In this matter the steps taken by the South African government between 2013 and 2016 in furtherance of its nuclear power procurement programme were the subject of litigation in the High Court on two grounds. The first concerns legal challenges to two separate determinations made by the Minister of Energy in 2013 and 2016, respectively, under section 34 of the Electricity Regulation Act 4 of 2006. The second involves the tabling in Parliament of three bilateral agreements South Africa has concluded with foreign states relating to nuclear cooperation. Only the latter will be dealt with here as the former largely involves administrative-law issues.

The court's ruling on the tabling of the bilateral agreement with Russia is highly relevant in view of the questions it raises concerning the separation of powers under section 231 of the Constitution, which determines the role of the executive and the legislature, respectively, with regard to the treaty-making process, and whether the courts may decide on the correct process for tabling international agreements under section 231 of the Constitution. Of specific relevance is section 231(2) and (3). Under the former, to bind the state, a treaty negotiated and signed by the executive must be approved by resolution in both Houses of Parliament. Under section 231(3), parliamentary

approval under section 231(2) is not required in the case of an international agreement of a technical, administrative, or executive nature, or an agreement that does not require either ratification or accession. The only requirement in such instances is that the agreement be tabled in both Houses of Parliament 'within a reasonable time'.

In casu, the government tabled the Russian agreement under section 231(3) and it is the constitutionality of this decision that the applicants challenged, arguing that as the Russian agreement contained binding commitments (as opposed to the agreements with the US and South Korea) in relation to nuclear procurement, it should have been tabled under section 231(2) in order to give Parliament the opportunity to consider whether or not to approve the agreement (paras [80]-[82]).

In seeking a ruling from the court on the constitutionality of the government's conduct concerning the signature, approval, and tabling of the Russian agreement, the court was not asked to rule on the international-law validity of the agreement (as the government alleged and to which it objected on the basis of the principle of the separation of powers), but on the constitutionality and lawfulness of the relevant government decisions (para [90]). The court's point of departure, therefore, was that, as the conclusion and tabling of the agreement involved the exercise of public power, the government's conduct in this instance – as in all cases involving the exercise of public power – is justiciable and can be tested for lawfulness and rationality (para [103]). To undertake a review of this kind, and to determine under which provision the agreement should have been tabled, the court considered it not only permissible to have regard to the nature and content of the agreement, but that it was in fact its duty to do so (paras [104] [105]).

The court's ensuing enquiry into the nature and content of the agreement provided strong evidence that the tone and content of the provisions, the degree of specificity, the frequent use of peremptory language, and the parties' commitments to key elements of an agreement with far-reaching consequences, suggested a firm legal commitment to enter into a binding agreement in relation to the procurement of new nuclear reactor plants. The combined effect of these factors suggested that what the parties had in mind was not the kind of routine agreement that could fall under the exceptions listed in section 231(3) (paras [106]–[111]). What strengthened the court's hand in this assess-

ment was an explanatory memorandum by the senior State Law Advisor submitted to the Minister and the President, in which it was stated that the agreement fell within section 231(2) of the Constitution, and that parliamentary approval was therefore required. Why the government dismissed this advice emerged during the course of the proceedings, when counsel for the respondents placed on record that the Minister had acted as she had because she considered the advice of the State Law Advisor wrong. However, no explanation was given to justify the Minister's rejection of the advice, or her subsequent decision rather to proceed with the matter under section 231(3) (para [115]).

Given these facts, the court ruled against a classification of the agreement as one that falls within the ambit of section 231(3): its nature and ramifications, the court found, are such that parliamentary scrutiny under section 231(2) is required. This rendered the Minister's decision to table the agreement under section 231(3), 'at the very least, irrational' (para [116]). But potentially more damning, is the court's very next statement, that '[a]t best the Minister appears to have either failed to apply her mind to the requirements of sec 231(2) in relation to the contents of the Russian IGA or at worst to have deliberately bypassed its provisions for an ulterior and unlawful purpose' (para [116]).

Democratic Alliance v Minister of International Relations and Cooperation & others (Council for the Advancement of the South African Constitution Intervening) [2017] ZAGPPHC 53, 2017 (3) SA 212 (GP), [2017] 2 All SA 123 (GP), 2017 (1) SACR 623 (GP)

At the heart of the dispute in this matter is South Africa's withdrawal from the 1998 Rome Statute of the International Criminal Court which the country ratified on 27 November 2000, followed by the enactment by Parliament in 2002, of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002. On 19 October 2016, the national executive took a decision to withdraw from the Rome Statute, a move that had at its heart South Africa's failure to arrest President Al Bashir of Sudan during an official visit to South Africa for Rome Statute crimes, and its subsequent fruitless attempts to convince the courts – including the International Criminal Court – that its failure to comply with the country's Rome Statute obligations was legally justified (see *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development & others* 2015 (2) SA 1 (GP); *Minister of Justice and Constitutional Development & others*

v The Southern Africa Litigation Centre 2016 (3) SA 317 (SCA); and *Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al Bashir* ICC-02/05-01/09 (6 July 2017)).

On the day of the executive's decision to withdraw from the Rome Statute, the Minister of International Relations deposited a notice of withdrawal with the Secretary-General of the United Nations as required by article 127 of the Rome Statute. This meant that the withdrawal would take effect one year after receipt of the notification. Following this notification, the Minister of Justice and Constitutional Development informed both Houses of Parliament of the cabinet's decision and of his intention to table a Bill in Parliament, repealing the Implementation Act. It is this sequence of events that formed the basis of the applicant's litigation in the High Court in which it sought orders declaring unconstitutional and invalid: (a) the notice of withdrawal; and (b) the underlying cabinet decision to withdraw from the Rome Statute. It also requested that the respondents be directed to revoke the notice of withdrawal and to take reasonable steps to terminate the withdrawal process. This challenge was premised on the following grounds:

(a) The notice of withdrawal should have been preceded by parliamentary approval.
(b) Repeal of the Implementation Act was required before the delivery of the notice of withdrawal to the United Nations.
(c) The delivery of the notice of withdrawal without prior consultation with Parliament was procedurally irrational.
(d) Withdrawal from the Rome Statute breaches the state's obligations in terms of section 7(2) of the Constitution.

The ground under (a) raises a question as to the sequence of the steps the government must follow to withdraw from a treaty – a matter the Constitution leaves unregulated. Section 231(1) and (2) of the Constitution subjects the conclusion of treaties to a two-phase process in terms of which the negotiation and signature of a treaty by the executive are followed by parliamentary approval before the treaty binds the Republic internationally. At the domestic level, this process is concluded when the treaty is enacted into law by parliamentary legislation under section 231(4). Hence, the applicant argued that in the case of withdrawal, the process must be reversed and Parliament must first

approve withdrawal from a treaty before the executive may deliver a notice of withdrawal. In essence, the respondents' counter-argument was that as the conclusion of treaties is by definition an executive function, both the conclusion and withdrawal from treaties fall within the province of the executive. A requirement to interpret section 231 differently should not be lightly implied or read into the Constitution.

The court found it unnecessary to deal with the substantial irregularity under (d), leaving the procedural and rationality issues relating to Parliament's prior involvement as the sole concern here. At the centre of the dispute between the parties lies section 231 of the Constitution.

The constitutional guidelines through which the court approached the matter were: firstly, that the exercise of all public power, including an executive act, must accord with the Constitution; and, secondly, Parliament's responsibility is to make laws, and when doing so to exercise its judgment as to the appropriate route to follow (paras [44] [45]). The reading of section 231 which the court then followed was that, on a proper construction, a notice of withdrawal is the equivalent of ratification in the sense that a notice of withdrawal 'has concrete legal effects in international law, as it terminates treaty obligations' (para [47]). And since prior parliamentary approval is required before South Africa may deposit its instruments of ratification with the United Nations, not to require it for a reversal of the process would constitute a 'glaring difficulty' (para [51]). At this point, the court also relied on the separation-of-powers principle to justify its inference that Parliament retains the power to determine whether or not to remain bound to an international agreement, with the result that it would be constitutionally untenable to adopt a construction that would allow the executive to terminate the agreement unilaterally (paras [51] [53]). In other words, as, by virtue of section 231, the executive lacks the power to bind South Africa to an agreement, 'it must ordinarily go to Parliament . . . to get authority to do what the executive does not already have authority to do' (para [55]).

The court considered the rationality argument in connection with the executive's explanation that the Rome Statute impedes its role in diplomatic and peace-keeping efforts on the African continent in that, as a party to the Rome Statute, South Africa is required to arrest sitting heads of state who are subject to an arrest warrant, when present in its territory. Therefore, by withdrawing from the Rome Statute, South Africa would be free to

perform its peace-keeping role and to protect such leaders by affording them immunity. But, as the court pointed out, since South Africa's obligation to arrest fugitives from justice for Rome Statute crimes also derives independently from the Implementation Act, the government would be bound to comply while the Act remains in force. This would cause South Africa to remain bound by its international obligations domestically, while internationally it is no longer a party to the Rome Statute (paras [65] [66]).

The government's argument in this regard was that this anomaly does not arise in view of the fact that in terms of article 127 of the Rome Statute, a notice of withdrawal only becomes effective one year after the date of withdrawal, and that by then the Implementation Act would have been repealed in light of the executive having requested Parliament to attend to the matter urgently (para [67]). This request the court found impermissible in itself, as it has the potential to undermine Parliament's authority as master of its own processes as the principal legislative organ of the state which cannot be dictated to by the executive to meet the executive's own deadlines (para [67]). This issue, coupled with the executive's failure to justify the urgency of a withdrawal from the Rome Statute, resulted in the court concluding that the lodging of the notice of withdrawal by the executive without first consulting Parliament had been procedurally irrational (para [70]). It therefore follows that

> on a construction of s 231 of the Constitution, . . . prior parliamentary approval and the repeal of the Implementation Act are required before the notice of withdrawal from the Rome Statute is delivered by the national executive to the United Nations. Also, that the delivery of the notice of withdrawal was procedurally irrational. These are processed-based grounds, as they relate to the procedure by which the notice of withdrawal was prepared and handled (para [71]).

The Saharawi Arab Democratic Republic & The Polisario Front v The Owner and Charterers of the MV 'NM Cherry Blossom' & others [2017] ZAECPEHC 31, 2017 (5) SA 105 (ECP), [2018] 1 All SA 593 (ECP)

Since the 1975 annexation of Western Sahara by Morocco, a former Spanish colony, the territory has been the subject of a long-running territorial dispute between Morocco and the indigenous Saharawi people. In 1976, the Polisario Front (the PF), an indigenous independence movement, proclaimed the Saharawi Arab Democratic Republic (the SADR). This resulted in a sixteen-year-long guerilla war with Moroccan forces, which ended in

1991 with a UN-brokered ceasefire. But the promise of full independence for the territory is yet to materialise, despite the SADR having been recognised by various states and having been admitted to membership of the African Union. South Africa recognises both the SADR and Morocco.

The SADR and the PF entered the above matter as applicants on 1 May 2017, when the motor vessel NM Cherry Blossom docked to take on bunkers in the port of Coega, near Port Elizabeth. Aboard the Cherry Blossom was a cargo of phosphate mined in the northern part of Western Sahara, and destined for New Zealand, where the buyer, a fertilizer manufacturing company, had its business. By means of an *ex parte* application, the applicants sought an order interdicting and restraining the respondents from removing the cargo from the jurisdiction of the court in Algoa Bay, pending the determination of the applicants' action for delivery and possession of the cargo, unless they were furnished with suitable security for their claim. The order granted by the court operated as an interim order with immediate effect pending the return date of the rule nisi. However, as a result both of the novelty of the matter and of the complexity of the international law issues, the Acting Judge President decided that a full bench should hear the matter on the return date. This was the matter under review.

In essence, the case for the applicants was that the phosphate on board the Cherry Blossom formed part of the natural resources of Western Sahara belonged to its people, and that the two Moroccan mining companies – OCP and Phosboucraa (respondents 4 and 5) – that were involved in the mining and sale of the phosphate had misappropriated and sold it without a right to do so. On the other hand, the two respondent companies based their claim to having mined and sold the phosphate on Moroccan law, in terms of which they were incorporated and performed their activities. They also raised two further defences: that in terms of the common-law act of state doctrine, the dispute was not justiciable; and that in terms of the Foreign State Immunity Act 87 of 1981, the court was precluded from deciding the matter because it involved the laws of a foreign state.

As the central issue in this matter concerned the ownership to the cargo, and consequently, whether the applicants had established a *prima facie* right to the cargo for purposes of the interdict, the court turned to international law. It stated that 'rules of international law . . . have determined the status of Western

Sahara, the status of Morocco in relation to Western Sahara, the ownership of Western Sahara's natural resources and the conditions under which they may be exploited' (para [32]). In the first part of its analysis in this regard, the court invoked the UN Charter provisions on decolonisation (art 73), as well as the UN General Assembly's well-known resolutions on decolonisation (GA res 1514 (XV) of 14 Dec 1960), and on Western Sahara's right to self-determination (GA res 2229 (XXI) 20 Dec 1966), among other considerations, to confirm that the Western Sahara's right to self-determination is firmly established in the practice of the United Nations (paras [34]-[36] [39]). Two further developments clarified for the court the relationship between Morocco and Western Sahara and the issue of ownership over natural resources. The first was the International Court of Justice's advisory opinion on Western Sahara (1975 ICJ Reports 12), which made it clear that Morocco had no legitimate claim to sovereignty over Western Sahara; the second, the legal opinion of the then UN Under-Secretary-General for Legal Affairs, Hans Corell, to the effect that only where resource exploitation activities in non-self-governing territories are conducted for the benefit of the peoples of those territories, on their behalf, or in consultation with their representatives, will they be regarded as compatible with the UN Charter (paras [37] [38] and [44] [45]. Relying on this, and General Assembly resolutions on the rights of peoples of non-self-governing territories to the enjoyment of their natural resources, the court concluded as follows (para [47]):

> [T]he UN has developed a legal framework setting conditions in terms of which natural resources may lawfully be exploited. In essence, following the Corell opinion, administering powers may only allow the exploitation of natural resources on behalf of the peoples of a territory if to do so will be for the benefit of the peoples of that territory or in consultation with their representatives.

Fulfilment of these conditions turned out to be a crucial element in the court's assessment of whether the applicants had established a *prima facie* case in their application for an interim interdict. As the court reiterated, an applicant for this kind of relief is required to establish four elements: (a) a *prima facie* right, which may be open to some doubt; (b) the potential suffering of irreparable harm if the interdict is not granted; (c) a balance of convenience in favour of granting the interdict; and (d) the absence of any other satisfactory remedy (para [49]). As to who enjoyed the *prima facie* right, the test the court applied to (a) did

not arise as the respondent companies had not claimed to have mined the phosphate with the consent of the people of the territory. The mining operation was also not for their benefit as most of the Sahrawi population lived to the east of the mining area, or in refugee camps in Algeria. Those who benefitted were more likely Moroccan settlers in the area (para [48]). In view of the respondent companies' weak and disputed claims, the court ruled in favour of the applicants as having established a *prima facie* right to ownership of the phosphate which they asserted on behalf of the people of the Western Sahara (para [51]). As the other elements in (b) to (d) are not relevant for current purposes, what remained were the non-justiciability defences raised by the respondent companies in respect of the act of state doctrine and the principle of state immunity.

It is trite that the act of state doctrine – which, as a domestic rule of law, has its origin in English law – renders the sovereign acts of a foreign state non-justiciable before a national court, even if the national court is entitled to exercise jurisdiction. There are, however, exceptions, such as when the act in question involves gross human rights violations, or constitutes a clear violation of international law (see J Crawford *Brownlie's Principles of Public International Law* (2012) 75 76). State immunity, on the other hand, is a rule of international law, and a successful claim to it will exclude a domestic court's jurisdiction to adjudicate a matter before it.

Several factors are relevant in this regard. The first is that the mining area where the phosphate was extracted is situated outside the international borders of Morocco, and in an area over which Morocco exercises only *de facto* administrative control, but where its laws apply. Secondly, the respondent companies claimed title to the phosphate on the basis that it had been lawfully mined in accordance with Moroccan law which regulates the exploitation of minerals in non-self-governing territories. Thirdly, they claimed to conduct their activities as incorporated legal entities wholly separate from the state of Morocco, while fourthly, no legal right or interest in the phosphate had been asserted on behalf of the state of Morocco. Finally, Morocco was not a party to the proceedings.

These facts constitute serious obstacles to a successful claim to state immunity, a matter the court chose to deal with first. The approach followed by the respondent companies was that the legal rights and interests of Morocco had been impleaded by

virtue of the fact that, in hearing the matter, the court would be required to adjudicate on the validity of the law under which the respondent companies claimed a right to the phosphate. In support, they invoked the 2004 UN Convention on Jurisdictional Immunities of States and Their Property, which provides as follows in its article 6(2):

> A proceeding before a court of a State shall be considered to have been instituted against another State if that other State:
> (a) is named as a party to that proceeding; or
> (b) is not named as a party to the proceeding but the proceeding in effect seeks to affect the property, rights, interests or activities of that other State.

This provision was recently considered by the United Kingdom Supreme Court in the case of *Belhaj & others v Straw & others; Rhamatula v Minister of Defence & others* [2017] UKSC 3 (17 January 2017), and it was to this case that the court turned for guidance on the correct interpretation of article 6(2)*(b)*. In *Belhaj* the UK Supreme Court, per Lord Sumption, regarded the Convention on Jurisdictional Immunities as 'an authoritative statement of customary international law', notwithstanding the fact that it has not yet entered into force (para [194]). As to the scope of the final words in article 6(2)*(b)*, the judge followed a restrictive interpretation in holding that they related 'wholly to actions involving the seizure or attachment of public properties belonging to a foreign state or in its possession or control' – a formulation the court took from the 1991 commentary on article 6 by the International Law Commission (para [195]). In following a similarly restrictive approach, Lord Mance endorsed an interpretation in terms of which 'interests' should be limited to claims for which there is some legal foundation, as opposed to some political or moral concern of the state in the proceedings (para [26]).

Following this approach, the High Court in *Saharawi* dismissed the claim to state immunity by concluding as follows (paras [83] [84]):

> Morocco is not a party to the proceedings. It is accordingly not bound by any finding or judgment to be made in relation to the issues between the parties. It has no proprietary interest in the matter which the SADR and the PF seek to prosecute by way of the vindicatory action. . . . A finding by a domestic forum that OCP's and Phosboucraa's exploitation of minerals in the Western Sahara does not comply with the UN Framework and is illegal also can have no effect upon the legal rights of Morocco. It is after all OCP's and Phosboucraa's case

> that they conduct their activities as incorporated legal entities wholly separate from the state of Morocco.

In explaining its response to the respondent companies' act of state defence, the court again referred to the *Belhaj* case (para [95]). There, Lord Sumption (para [200]) said the following:

> Unlike state immunity, act of state is not a personal but a subject matter immunity. It proceeds from the same premise as state immunity, namely mutual respect for the equality of sovereign states. But it is wholly the creation of common law. Although international law requires states to respect the immunity of other states from their domestic jurisdiction, it does not require them to apply any particular limitation on their subject matter jurisdiction in litigation to which foreign states are not parties and in which they are not indirectly impleaded. The foreign act of state doctrine is at best permitted by international law. It is not based upon it.

Therefore, where the High Court, as a domestic court in this instance, is called upon to exercise restraint, or to refrain from adjudicating a matter in respect of which it could ordinarily exercise jurisdiction, the scope and application of the principle of restraint is a matter to be determined under domestic law. It is, therefore, bound to apply the Constitution as the supreme law of the land and to give effect to the fundamental rights therein, in particular the right of access to courts in section 34, in determining whether to decline adjudication in a matter involving the act of a foreign state. In such circumstances, the court will require clarity as to the issues to be determined (paras [96] [97]). Thus, as it was not entirely clear what the act of a foreign state on which the respondents relied was, which could render the matter non-justiciable, the court found no need to express itself on the nature or ambit of the act of state doctrine. It concluded that this was a matter to be decided in due course by the forum hearing the vindicatory action. For the moment, the court was only concerned with the fact that the applicants had met the requirements for the interdict and were therefore entitled to the remedy sought (paras [101]-[107]).

Hidden between the pages of this case is an interesting irony relating to the constitutive source of a legal title. In the ICJ's advisory opinion on Western Sahara referred to earlier, Morocco formulated its claim to 'legal ties' with Western Sahara at the time of the territory's colonisation by Spain (1884), as being based on the uninterrupted and uncontested public display of sovereignty over the territory (*Western Sahara Advisory Opinion* above paras

[90] [91]). In doing so, it invoked the decision of the Permanent Court of International Justice (PCIJ) in *Legal Status of Eastern Greenland* (PCIJ Series A/B No 53). In this matter, the PCIJ ruled that a claim to sovereignty based upon a 'continued display of authority' (45ff) involves two elements, each of which must be shown to exist: (a) the intention and will to act as a sovereign; and (b) some actual exercise or display of such authority. Using these criteria, the court in *Western Sahara* determined that what is of decisive importance regarding Morocco's claim is not 'indirect inferences drawn from events in past history but evidence directly relating to effective display of authority in Western Sahara' at the material time and immediately prior to that (para [93]). On this basis, the court concluded that the material placed before the court and examined by it did not show that Morocco displayed 'effective and exclusive State activity in Western Sahara' (para [107]).

The irony is that it is now the SADR which is not in a position to show 'effective and exclusive State activity' in the territory; eighty per cent of the area claimed falls under the control of Morocco and is administered in accordance with Moroccan laws. Therefore, while the SADR and its people may have a legitimate claim to Western Sahara and its natural resources based on the political self-determination doctrine underlying the United Nations' decolonisation process, the actual (*de facto* and *de jure*) exercise of governmental authority remains the missing constitutive element for independent SADR statehood. The incomplete nature of the state-formation project through the exercise of political self-determination is recognised in the SADR's own constitution, where the preamble notes the resolve of the Saharawi people 'to continue to struggle for the recovery of the sovereignty of the Sahrawi Arab Democratic Republic . . . over the entire national territory and achievement of total independence.'

This situation is reminiscent of South Africa's *de facto* control over SWA/Namibia, and the enforcement of its laws in that territory, even after the revocation of South Africa's mandate by the UN General Assembly on 27 October 1966 in resolution 2145 (XXI); the subsequent declaration by the Security Council in resolution 264 (1969) that the continued presence of South Africa in Namibia was unlawful; and the 1971 Advisory Opinion of the ICJ that the Mandate for South West Africa had been lawfully terminated (*Legal Consequences for State of the Continued Presence of South Africa in Namibia (South West Africa) not-*

withstanding Security Council Resolution 276 (1970) (1971 ICJ Rep 16).

At issue in both the above instances are the legal consequences of the laws of a possessor of the power of administration and legislation over a territory, based on the *de facto* (and/or *de jure*), but politically disputed, control over the territory. In *Saharawi,* the High Court has implied that the respondent companies' reliance on Moroccan law for their claim to legal title to the phosphate, and that their mining operations were lawful in accordance with that law, could be the necessary issue the trial court may be called upon to adjudicate in the vindicatory action. By the same token, the court concluded, the question of compliance with the UN framework regulating the exploitation of mineral resources in a non-self-governing territory could 'be the central issue for adjudication' (para [97]).

SENTENCING

ANDRA LE ROUX-KEMP*

LEGISLATION

No legislation directly affecting this branch of the law was adopted during the period under review.

CASE LAW

SENTENCING PURSUANT TO THE PROVISIONS OF THE CRIMINAL LAW AMENDMENT ACT 105 OF 1997

In 1997, the Criminal Law Amendment Act 105 of 1997 was passed in reaction to a public outcry for harsher sentences for convicted offenders, and in an attempt to send a clear message to offenders that 'crime does not pay'. The Act came into operation on 1 May 1998 and is still in effect today, even though it was enacted as a temporary measure at that time.

Ensuring that the charges correctly reflect the relevant provision(s) of the Criminal Law Amendment Act 105 of 1997

The applicant in *Ndlovu v S* 2017 (2) SACR 305 (CC) grievously assaulted and raped the complainant but was only charged with rape: 'unlawfully and intentionally having sexual intercourse with a female without her consent ''read with the provisions of [s]ection 51(2) of the Criminal Law Amendment Act 105 of 1997''' (para [5]). This charge was put to the applicant at the commencement of the trial and the magistrate informed him at this stage that if he was convicted on this charge, the court would be bound to impose a minimum sentence of fifteen years' imprisonment if he was a first offender (para [6]). This was indeed the first error in the trial and sentencing of the applicant as section 51(2) of the Act prescribes a minimum sentence of ten, not fifteen, years' imprisonment for a first offender who is convicted of rape. Provision is, however, made in section 51(2) of the Act for a maximum term of fifteen years' imprisonment.

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During the course of the trial, a great deal of evidence was led regarding the violent nature of the attack on and rape of the complainant and, upon finding the applicant 'guilty as charged', the magistrate proceeded to sentence the applicant to life imprisonment in terms of section 51(1) of the Criminal Law Amendment Act 105 of 1997, despite the applicant having been charged with rape read with section 51(2) of the Act (paras [6]–[8]). Section 51(1) of the Criminal Law Amendment Act 105 of 1997 prescribes a minimum sentence of life imprisonment on a conviction of rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, where the rape also involves the infliction of grievous bodily harm on the complainant. The magistrate stated as follows during sentencing (para [8] of the Constitutional Court judgment):

> Coming to the nature of the offence that the accused [has] been convicted of, the offence of rape falls within the [ambit] of the minimum sentence act whereby the court is obliged to impose a life imprisonment as it involves infliction of bodily harm. The court can only deviate from the prescribed [minimum] sentence only if there are substantial and compelling circumstances. The defence left everything in the hands of the court regarding deviation from the prescribed minimum sentence. . .
>
> Therefore the court finds that there are no substantial and compelling circumstances that may allow the court to deviate from the prescribed minimum sentence.

The applicant subsequently appealed against both his conviction and sentence on the ground that his right to a fair trial had been infringed by the reference in the charge sheet to an incorrect provision in the Minimum Sentencing Act (para [10]). On appeal to the High Court Gauteng Division, Pretoria (*Ndlovu v S* [2011] ZAGPPHC 223), Sapire and Bam AJJ did not agree, and concluded (para [11] of the Constitutional Court judgment):

> It cannot be said that the mere fact that the wrong section of the Act was initially and repeatedly used in any way prejudiced the appellant as far as the sentence is concerned.

Judges Sapire and Bam explained that the provisions of the Criminal Law Amendment Act 105 of 1997 were clear, and that the imposition of a life sentence was appropriate under the circumstances of this case. It was also noted that the applicant was legally represented at all times during the trial and that nothing could have changed the outcome of his case at trial or during sentencing (paras [11] [12] of the Constitutional Court judgment).

The Supreme Court of Appeal (*Ndlovu v S* [2014] ZASCA 149 (SCA)) agreed with this finding and held that there was no factual foundation to support the applicant's argument that the error in the charge sheet had resulted in an infringement of his right to a fair trial (paras [13] and [14] of the SCA judgment and paras [14] and [15] of the Constitutional Court judgment).

This notwithstanding, Justice Khampepe, writing for the Constitutional Court, noted that neither the High Court nor the Supreme Court of Appeal had considered whether the trial court, which was a regional court, had the necessary jurisdiction to impose a sentence of life imprisonment (para [17]). This was relevant to the applicant's appeal, as a regional court is a creature of statute and its general sentencing jurisdiction is limited to that prescribed in relevant statutes (para [19]). In terms of the provisions of the Criminal Law Amendment Act 105 of 1997, therefore, the trial court would only have had the power to impose a sentence of life imprisonment if the applicant had been convicted of an offence referred to in Part I of Schedule 2 (para [42]). This was not the case here as the pronouncement of the trial court that the applicant was found 'guilty as charged' was unambiguous; it was a conviction of rape read with section 51(2) of the Act (ie, Part III of Schedule 2), which attracts a maximum term of fifteen years' imprisonment (paras [43]–[45]). And, while a defective or incomplete charge can under certain circumstances be remedied by evidence under section 88 of the Criminal Procedure Act 51 of 1977, the charge against the applicant in the instant case was found to be complete and not defective; '[q]uite simply, the charge was not rape involving the infliction of grievous bodily harm and evidence alone could not make it so' (para [45]).

Therefore, having found that the regional court did not have the jurisdiction to sentence the applicant in terms of section 51(1) of the Criminal Law Amendment Act 105 of 1997, Justice Khampepe found it unnecessary to deal with the fair trial question and substituted the term of life imprisonment with a term of fifteen years' imprisonment (paras [47] [59]).

Particularly important about this judgment are the following comments made by Justice Khampepe. He held that this case was an example where 'the state's remissness had failed the complainant and society' (para [54]). In emphasising the constitutional duty of courts as the 'gate-keepers of justice', he held that the magistrate in this case should have been alert to the discrepancy in the evidence being led and the charge against

the applicant as formulated in the charge sheet. This was clearly a case of rape read with section 51(1) of the Criminal Law Amendment Act 105 of 1997, and not section 51(2) of the same Act (para [55]). The magistrate should, therefore, have seen, before judgment, to the charge against the applicant being amended in terms of section 86 of the Criminal Procedure Act 51 of 1977 (para [56]). Likewise, the National Prosecuting Authority is assigned with the constitutional duty to exercise its prosecutorial duties on behalf of the people of South Africa, and it is 'incumbent upon prosecutors to discharge this duty diligently and competently' (para [58]). The prosecutor in the instant case had access to the J88 form in which the injuries sustained by the complainant were fully described, and Justice Khampepe observed:

> It boggles the mind why the proper charge of rape read with the provisions of section 51(1) of the Minimum Sentencing Act was not preferred. This can only be explained as remissness on the part of the prosecutor that, further, should have been corrected by the Court. This error is acutely unfortunate – victims of crime rely on prosecutors performing their functions properly. The failings of the prosecutor are directly to blame for the outcome in this matter (para [58]).

Also see *S v Mokgalaka* 2017 (2) SACR 159 (GJ), *S v Setshedi* 2017 (1) SACR 504 (GP) and *S v Tshoga* 2017 (1) SACR 420 (SCA).

While it is important that an accused person be informed of the applicability of the provisions of the Criminal Law Amendment Act 105 of 1977, and that the charge sheet correctly reflects the alleged offences charged, note must also be taken of the *dicta* in *Director of Public Prosecutions: Gauteng Division, Pretoria v Moabi* 2017 (2) SACR 384 (SCA), where the Supreme Court of Appeal held that intention to do grievous bodily harm is not an element of rape which the state must prove for the conviction and sentence to fall within the provisions of Part I(c) of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 (para [14]). Molemela AJA and Dambuza JA for the Supreme Court of Appeal explained that 'the test for ascertaining whether grievous bodily harm has been inflicted is factual and objective. The correct approach to that enquiry necessitates a holistic consideration of all objective factors pertaining to the incident, with a view to ascertaining whether bodily injuries were inflicted and whether they are of a serious nature' (para [14]). Thus, by importing the intention of the respondent into the enquiry, the High Court in this

case committed an error of law as 'intent' is irrelevant in the determination of whether grievous bodily harm was inflicted on a complainant in the rape envisaged in Part I*(c)* of the Criminal Law Amendment Act 105 of 1997 (para [15]). Rather, the question to be answered is whether, as a matter of fact, the victim of such a rape sustained grievous bodily harm (para [15]). (Also see *Palmer v S* (979/2016) [2017] ZASCA 107 (13 September 2017).)

In *Molisalife v S* (A217/2016) [2017] ZAFSHC 48 (16 March 2017), Musi AJP for the High Court Free State Division, Bloemfontein, reiterated that

> [a]n incident of housebreaking with intent to steal and theft, committed with a single intention, is to be regarded as essentially the crime of theft, with the housebreaking as a factor that tends to aggravate the seriousness of the offence and therefore the severity of the sentence. So too should the housebreaking with the intent to commit a crime be seen as an aggravating factor when it is coupled with robbery with aggravating circumstances (paras [7] [8] quoting from *S v Maunye* 2002 (1) SACR 266 (T) at 277F–278B).

In the presence of such aggravating circumstances, such a conviction would trigger the prescribed minimum sentence of fifteen years' imprisonment for a first offender as per section 51(2)*(a)*(i) read with Part II of Schedule 2 of the Criminal Law Amendment Act 105 of 1997.

Determining whether the victim was raped more than once and/or whether repeated acts of penetration constitute one or many separate acts of rape for the purpose of Part I of Schedule 2 of the Criminal Law Amendment Act 105 of 1997

In *Ncombo v S* 2017 (2) SACR 683 (ECG) it was held that Part I of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 applies where the victim has been raped more than once by the accused. Courts and prosecutors must therefore determine whether repeated acts of penetration constitute one or many separate acts of rape for the purpose of correctly charging and ultimately sentencing an offender (see, eg, *S v Tladi* 2013 (2) SACR 287 (SCA) and *S v Maxibaniso* 2015 (2) SACR 553 (ECP)). Judge Borchers in *S v Blaauw* 1999 (2) SACR 295 (W) explained as follows:

> Mere and repeated acts of penetration cannot without more, in my mind, be equated with repeated and separate acts of rape. A rapist who in the course of raping his victim withdraws his penis, positions the victim's body differently and then again penetrates her, will not, in

> my view, have committed rape twice. This is what I believe occurred when the accused became dissatisfied with the position he had adopted when he stood the complainant against a tree. By causing her to lie on the ground and penetrating her again after she had done so, the accused was completing the act of rape he had commenced when they both stood against the tree. He was not committing another separate act of rape.
>
> Each case must be determined on its own facts. As a general rule the more closely connected the separate acts of penetration are in terms of time (ie the intervals between them) and place, the less likely a court will be to find that a series of separate rapes has occurred. But where the accused has ejaculated and withdrawn his penis from the victim, if he again penetrates here thereafter, it should, in my view, be inferred that he has formed the intent to rape her again, even if the second rape takes place soon after the first and at the same place (300a-d).

In the case of *Ncombo v S* 2017 (2) SACR 683 (ECG) the evidence supported a finding that the complainant had been raped twice by the appellant, and the prescribed minimum sentence in terms of section 51(1), as read with Part I of Schedule 2 of the Criminal Law Amendment Act 105 of 1997, therefore applied, requiring that a sentence of life imprisonment be imposed unless substantial and compelling circumstances justified the imposition of a lesser term (paras [15] [16]).

Also see *Bogatsu v S* (A100/2016) [2017] ZAGPJHC 79 (27 March 2017).

The role of previous convictions in sentencing under the Criminal Law Amendment Act 105 of 1997

In *Manopole v S* (A203/2016) [2017] ZAFSHC 44 (16 March 2017) an anomaly in Part I of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 was pointed out: Where an accused rapes more than one complainant, that accused is not at risk of being sentenced to life imprisonment in a Regional Court if he has no previous convictions for rape. However, where that same accused rapes the same complainant more than once, a minimum prescribed term of life imprisonment will apply (*S v Mahomotsa* 2002 (2) SACR 435 (SCA) and *Ngcobo and others v S* (AR759/14) [2016] ZAKZPHC 26 (3 March 2016)).

The appellant in this case was convicted of housebreaking with the intent to rob and robbery with aggravating circumstances (count 1) as well as two counts of rape (counts 2 and 3). He was sentenced to fifteen years' imprisonment on each of these counts and the trial court ordered for the sentences on the first two

counts to run concurrently (para [1]). The two counts of rape in this case related to two separate incidents (one in April 2014 and the other in June 2014), involving two complainants (paras [2] [3]).

Musi AJP for the High Court Free State Division, Bloemfontein, explained that it is only after a trial court has convicted an accused of rape that a court can have regard to such a previous conviction triggering the prescribed minimum sentence of life imprisonment (para [16]). Part I of Schedule II provides as follows:

> Rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 –
> (a) when committed –
> . . .
> (iii) by a person who has been convicted of two or more offences of rape or compelled rape, but has not yet been sentenced in respect of such convictions; . . .

The appellant in this case had no previous conviction of rape and in the absence of evidence that the rape in count 2 involved the infliction of grievous bodily harm, the correct classification of the rape was rather one as contemplated in Part III of Schedule 2 of the Act. The applicable minimum sentence for a first offender was therefore ten years' imprisonment (para [10]). Musi AJP added that in order for a rape to be classified as one involving the infliction of grievous bodily harm, the state must prove that the complainant sustained a serious injury (para [10]; *S v Rabako* 2010 (1) SACR 310 (O)). With regard to the rape in count 3, and as was indicated above,

> [i]t is only after the trial court has convicted an accused person that it may have regard to that person's previous convictions. [And], [i]t is only then that the State can prove that the accused has already been convicted of two or more rapes but not yet sentenced for such rapes. There must therefore be two or more other convictions at the time of the last conviction or convictions. . . .[Thus], [a]n adult accused who rapes the same adult complainant two or more times is exposed to the minimum sentence of life imprisonment whilst an adult accused who rapes two or more adult complainants once, and is convicted and sentenced during the same trial for all the rapes, is not exposed to such sentence (para [16]).

Also see *Magabara v S* (A800/2015) [2017] ZAGPPHC 117 (21 March 2017), *Mahlangu v S* (A392/16) [2017] ZAGPPHC 589 (15 September 2017) and *Jacobs v S* (A02/2017) [2017] ZAGPPHC 725 (3 May 2017). In the latter case, involving the determina-

tion of an appropriate sentence on a charge of robbery with aggravating circumstances, Meyer J and Ngobeni AJ for the High Court Gauteng Division, Pretoria, quoted as follows [para 8] from the Supreme Court of Appeal decision in *S v Mokela* 2012 (1) SACR 431 (SCA) at para [6]):

> It is a clear requirement of s 51(2)*(a)*(ii) that, for the appellant to attract a minimum sentence of imprisonment of not less than 20 years, the state had to prove that he is a second offender of robbery with aggravating circumstances. This is a jurisdictional requirement necessary to trigger s 51(2)*(a)*(ii). All that the state proved in this case is that the appellant had previous convictions, amongst others, for rape, robbery, theft, assault and escaping from lawful custody. In terms of s 51(2)*(a)*(ii) it is not sufficient that the appellant has a previous conviction for robbery. The conviction must be robbery with aggravating circumstances. Robbery and robbery with aggravating circumstances are two different offences calling for different sentences.

Entering on the record any and all causes, in the form of substantial and compelling circumstances, to depart from a prescribed minimum sentence

Judges Lekale and Mhlambi for the High Court Free State Division, Bloemfontein, in *Mokhobo v S* (A32/2017) [2017] ZAFSHC 104 (15 June 2017) reminded that in the event that a sentencing court finds cause, in the form of substantial and compelling circumstances, to deviate from a prescribed minimum sentence, such a court is then required to enter the substantial and compelling circumstances it found to exist on the record (para [7]). This is particularly important when a sentencing decision is taken on appeal, and the appeal court is tasked with determining whether the trial court exercised its sentencing discretion in a just and fair manner (paras [9] [10]).

The jurisdiction of lower courts to pass a sentence that falls within the purview of section 51(2) of the Criminal Law Amendment Act 105 of 1977

In *S v Makwala* (B391/2016) [2017] ZALMPPHC 9 (22 May 2017), Kganyago J for the High Court Limpopo Division, Polokwane, held that 'there is nothing preventing the lower courts in trying matters of assault with intent to do grievous bodily harm on a person under the age of sixteen years. It is only at the sentencing stage that the proceedings will be stopped, and the accused committed to the regional court having jurisdiction to sentence him/her accordingly' (para [13]). This is because the prescribed minimum sentence upon conviction, in terms of

section 51(2) of the Criminal Law Amendment Act 105 of 1997, falls outside the scope of lower courts' sentencing jurisdiction. However, such cases can be committed to the Regional Court for sentencing in terms of section 116(1)*(a)* of the Criminal Procedure Act 51 of 1977 (paras [11] [12]).

Also see *Van Wyk v S* (A88/2017) [2017] ZAGPPHC 560 (31 July 2017).

What constitute substantive and compelling circumstances justifying a deviation from the prescribed minimum sentence?

The respondent in *Director of Public Prosecutions, Gauteng v MG* 2017 (2) SACR 132 (SCA) was arraigned on three counts of rape in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, using a child for child pornography in contravention of section 20(1) of the Act, exposing, displaying or causing the exposure or displaying of child pornography in contravention of section 19*(a)* of the Act, sexual grooming of children in contravention of section 18(2)*(a)* of the Act, and possession of a film or publication containing child pornography in contravention of section 27(1)*(a)*(i) of the Films and Publications Act 65 of 1996 (para [2]). The complainant in this case was under the age of twelve years at the time of the alleged offences, and was the child of the woman to whom the respondent was married (para [3]). On conclusion of the trial, the respondent was convicted of all counts save that of sexual grooming of children. The three rape counts each attracted a term of life imprisonment as the regional magistrate found that there were no substantial and compelling circumstances present, and the remaining counts were treated as one for the purpose of sentence, and a term of ten years' imprisonment imposed. The regional magistrate also directed that the respondent's particulars be recorded in the sexual offences register in accordance with section 50(2)*(a)* of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (paras [5] [6]).

The respondent appealed against both his convictions and the sentences imposed. On appeal, Preller J and Kganyago AJ for the Gauteng Division of the High Court, Pretoria, confirmed the convictions save for two of the three rape counts which had not, based on the complainant's own testimony and the medical report submitted, been proved beyond a reasonable doubt (para [8]). The convictions on two of the three rape counts were consequently set aside and replaced with two convictions of

sexual assault in contravention of section 5(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (para [8]). With regard to the sentence on the rape conviction Judges Preller and Kganyago for the Gauteng Division of the High Court remarked as follows (paras [10] [11]):

> The first thing that struck me about the evidence of the complainant's mother was that she never mentioned finding any indication of distress or trauma about the incidents on the part of the victim when she asked her about what the appellant had done to her. She testified in chief that she had asked her child whether the appellant had touched her inappropriately, which she confirmed. . . .In her evidence the complainant stated that she participated in these activities with the appellant because he had told her that there would be trouble if she did not do as he told her. It is not clear on her evidence that she acted out of fear or that the threat was repeated on any subsequent occasion. It is in any event not her version that there was any form of compulsion on every occasion. Apart from the alleged threat there is no indication in her evidence of how she felt about the incidents – no expression of fear, disgust, embarrassment or any other negative emotion. That also appears from the two photographs in the exhibits on which her facial expression can be seen and which show no sign of fear, anguish, embarrassment, disgust or any other negative emotion. Based on the above evidence there is a strong suspicion that the victim was not an unwilling participant in the events. I am fully aware that she was at the time only ten years old and that the absence or otherwise of her consent is irrelevant as an element of the commission of the offence. It must, however, be an important factor in considering an appropriate sentence.

Therefore, the judges regarded the imputed consent of a twelve-year-old girl a mitigating factor in relation to a sentence on a count of rape (para [13]). They held as follows (para [14]):

> The personal circumstances of the appellant, the fact that he is a first offender who spent 18 months in custody awaiting trial, the nature of his offence and the limited effect that it had on the complainant and the serious consequences that his offence already had for himself, cumulatively constitute substantial and compelling circumstances that justify the imposition of a lesser sentence.

They proceeded to impose a sentence of ten years' imprisonment on the respondent, treating all counts as one for the purpose of sentence. They further suspended five years of the sentence on the usual conditions (para [14]).

The Director of Public Prosecutions subsequently appealed against the sentence, contending that in imposing sentence, Preller J and Kganyago AJ had wrongly taken into account their

own inferences that the complainant had consented to the sexual acts in question (para [17]). The legal question before the Supreme Court of Appeal was, therefore, whether the High Court had 'erred in law in imputing consent by conduct and/or acquiescence to the commission of the offences, by a child below the age of twelve and in its consideration thereof as an important factor in mitigation of sentence' (para [19]). It was argued on behalf of the state that section 57(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 states that a child under the age of twelve years is not capable of consenting to a sexual act, and that the High Court, in taking the 'consent' or 'acquiescence' of the complainant into consideration in imposing sentence, had undermined the clear and unambiguous provisions of the Act. It was also submitted that it is 'illogical to find that the complainant's supposed ''willing participation'' in sexual acts could ever be a mitigating factor when it came to the question of sentence' (paras [20] [21]). The respondent, in turn, argued that the nature of the sentence imposed could never be a question of law decided in favour of the convicted person, and that the Director of Public Prosecutions could consequently not bring an appeal against the sentence based on a question of law (paras [22] [23]).

Petse JA, writing for the majority of the Supreme Court of Appeal, held that there could be no doubt that the judges of the High Court had imputed consent to the complainant and had then taken it into consideration in imposing a sentence on the respondent (para [28]). This was a clear error of law and was therefore appealable under section 311 of the Criminal Procedure Act 51 of 1977. It was also held that the High Court judges had overemphasised the respondent's personal circumstances at the expense of the gravity of the crimes and the interests of society, including those of the complainant, and that they had lost sight of the despicable nature of the crime (paras [31] [32]). Petse JA found that the interests of justice dictate that the sentence imposed by the High Court be set aside and the case was remitted back to that court for sentencing (para [36]).

Also see *S v Amerika* 2017 (1) SACR 532 (WCC) in which Henney J for the High Court Western Cape Division, Cape Town, held that the complainant, in what could be described as 'a spousal abuse case', indicating that she did not wish to pursue prosecution, does not constitute a substantive and compelling circumstance or mitigating factor justifying a deviation from the prescribed minimum sentence. He explained (paras [21] [22]):

> Given the unique and somewhat unusual circumstances of this case an argument may therefore be made out that, due to the situation in which the victim found herself, in firstly deciding not to lay a criminal complaint against the perpetrator, secondly by having forgiven the perpetrator, and by subsequently having resumed the relationship with the perpetrator, that such conduct may serve as a mitigating factor or a consideration to conclude whether there are substantial and compelling circumstances to deviate from the prescribed sentence. Would it be in the interests of justice to do so, where the victim acted in such a manner due to the abuse that she had been subjected to? In my view, I do not think it can be regarded as a mitigating factor or as a consideration to conclude whether there are substantive and compelling circumstances to deviate from the prescribed sentence. This would clearly send out the wrong message and would be contrary to the values of the Constitution. It would furthermore undermine the dignity and humanity of abused women in this country. It would send out the message that men who make themselves guilty of spousal abuse or partner abuse by raping their partners will escape the full might of the law. In my view, rape committed in the context of an abusive relationship, should be regarded as an aggravating factor in the consideration of an appropriate sentence.

Also see *S v MD & another (2)* 2017 (1) SACR 654 (ECB).

Compensation as a Condition of a Suspended Sentence

Both applicants in *Stow v Regional Magistrate, PE, NO & others, Meyer v Cooney NO & others* [2017] 2 All SA 300 (ECG), 2017 (2) SACR 96 were given suspended sentences with compensation to be paid on a monthly basis to recover the money owed as a condition of the suspension. Such compensation as a condition of suspension usually serves three purposes: 'to keep the offender out of prison, to assist the offender to realise the consequences of her actions, and to compensate the victim for her loss' (para [24]; *S v Tshondeni* 1971 (4) SA 79 (T)).

However, having failed to adhere to the monthly repayment scheme set by the trial courts, the suspended sentences of the two applicants were put into operation in terms of section 297(9)*(a)*(ii) of the Criminal Procedure Act 51 of 1977. The applicants subsequently applied under Rule 53 of the Uniform Rules for the review and setting aside of the relevant orders by the first respondents on the basis that the first respondents had failed to exercise their discretion judicially (para [3]).

Of the judicial discretion to order that a suspended sentence be put into operation, the following was said in *Callaghan v Klackers NO & another* 1975 (2) SA 258 (E) 259G–H:

> In terms of sec. 352(6)*(b)* of Act 56 of 1955 the magistrate has a discretion to make an order further suspending such a sentence for good and sufficient reasons. In considering whether to apply the conditions of the suspended sentence or not, therefore, the magistrate is called upon to exercise his discretion in a judicial manner, after hearing argument and considering all the aspects of the case as they affect the applicant and as they affect the community. This discretion must be a judicial discretion; and this Court will not lightly interfere with the exercise of that discretion on review, unless it is of the view that that discretion was so badly exercised as to amount to a gross irregularity – in other words, that it was a grossly unreasonable exercise of the discretion.

Against this background, Roberson J for the High Court Eastern Cape Division, Grahamstown, considered the unique facts and circumstances of each of the applicants' cases. With regard to the first applicant it was noted that he pleaded guilty to and was convicted of 32 counts of having contravened section 58*(d)* read with sections 1, 28(1) and 28(2) of the Value-Added Tax Act 89 of 1991, in that he had failed to pay over to the South African Revenue Service (the SARS) value-added tax (VAT) which had been collected. The first applicant was hereupon sentenced to five years' imprisonment wholly suspended for five years on condition that he be not convicted of a similar offence during the period of suspension and that he repay a sum of R513 606,77 to the SARS by way of monthly payments until the full amount has been extinguished (para [5]). It is noteworthy that the first respondent, before sentencing the first applicant (in June 2011), had asked him directly whether he would be able to meet the payments and also warned him that if he failed to do so, 'he could not come back and say that he was never in a position to meet the payments'. To this, the first applicant replied that it was 'going to be extremely difficult but obviously I have to meet it. I have got no alternative but to meet it' (para [6]).

The first applicant subsequently returned to court in November 2011 on his own initiative, as he did not have the financial means to comply with the condition of suspension (para [8]). The monthly payments were thereupon reduced and the first applicant was warned that further rearrangement of the condition of suspension would not easily be entertained (para [10]). In June 2013 the state applied for and was granted an order for the suspended sentence of the first applicant, who was again unable to meet any of his financial commitments, to be put into operation (para [11]).

In reviewing the decision of the first respondent to activate the first applicant's suspended sentence, Roberson J for the High Court Eastern Cape Division, Grahamstown, noted that while an explicit reference was not made to the wording of section 297(7) of the Criminal Procedure Act 51 of 1977, it was nonetheless clear that the first respondent considered all the circumstances presented to him, and that he made his decision after accepting the fact that there was no prospect of the first applicant making further payments to the SARS. There was, for this reason, also no longer any reason for the sentence to be suspended further (para [22]). Moreover, the first applicant's poor financial situation was but one factor which the first respondent took into account in the exercise of the court's discretion. And with regard to this, Roberson J explained that the first respondent was indeed entitled in the exercise of his discretion and in considering all the relevant circumstances, not to accord the first applicant's lack of means significant weight (para [26]).

The second applicant in this case was convicted of having contravened section 11(1) read with section 11(2) of the Banks Act 94 of 1990, and, having entered into a plea and sentence agreement with the state in terms of section 105A of the Criminal Procedure Act 51 of 1977, was sentenced to a fine of R100 000 or 400 days' imprisonment and five years' imprisonment wholly suspended for five years on condition that he be not convicted of a similar offence in the period under suspension and that he repay the investors over a period of five years in monthly instalments as set out in a schedule. The second applicant was sentenced in April 2006 and the repayment period was set to commence in June 2006 (paras [29]–[32]).

However, in September 2009 the second applicant was arrested for having breached the condition of suspension relating to the repayment of his investors (para [34]). The applicant testified that he had sold his business in September 2007, but that the deal struck with the purchasers was ultimately not a lucrative one, and while he did not have the intention of prejudicing those whom he had a priority to repay, he unfortunately found himself in a situation where he was financially unable to do so (paras [35]–[42]). In considering whether to activate the suspended sentence the first respondent considered that the second applicant had taken a conscious decision to sell his business despite his obligation to the state, and despite having entered into a plea and sentence agreement which required that he compensate the

investors. The first respondent also found that by selling the business the second applicant had placed himself in a position different from the one he had presented to the court at the time when the plea and sentence agreement was made, and that the second applicant had for this reason been reckless towards the state and his investors and reckless in relation to the suspended sentence (para [45]). The first respondent did not, therefore, accept that the failure on the part of the second applicant to comply with the condition of suspension was through circumstances beyond his control, and accordingly ordered that the suspended sentence be put into operation (para [45]).

Also here, Roberson J found no fault on the part of the first respondent in activating the suspended sentence. He emphasised that the continued operation of the second applicant's business was indeed foundational to the plea and sentence agreement, and that the first respondent had properly and fairly considered all the circumstances within the framework of the provisions of section 297(7) of the Criminal Procedure Act 51 of 1977 in coming to the conclusion that the second applicant had acted recklessly and that the failure to meet the condition of suspension was not through circumstances beyond his control (para [50]).

In addition to challenging the activation of their suspended sentences, the two applications in *Stow v Regional Magistrate, PE NO & others, Meyer v Cooney NO & others* (above), also applied for an order declaring section 297(1)*(b)*, read with section 297(1)*(a)*(i)*(aa)* of the Criminal Procedure Act 51 of 1977, unconstitutional. The basis of this constitutional challenge was threefold. First, it was argued that there is no statutory requirement to determine whether an accused person has the necessary financial resources to fulfil the compensation order. According to the applicants, therefore, this may result in a person being discriminated against because he or she is poor (para [54]). The second ground of the constitutional challenge was that there are no legislative requirements for determining either when compensation as a condition of suspension should be imposed, or when an order in terms of section 300 of the Criminal Procedure Act 51 of 1977 should be made. Section 300 of the Criminal Procedure Act 51 of 1977 provides for an award of compensation to be ordered upon conviction, where the offence has caused damage or the loss of property to another (para [60]). Such a compensation award, therefore, holds no threat of imprisonment because a

person cannot be imprisoned for a civil debt (para [61]). And third, it was argued on behalf of the applicants that there was no provision for recognition to be given to partial fulfilment of a condition of compensation. For example, both applicants in this case had partly repaid their dues, yet, the first respondents were bound to put the whole of the suspended sentences into operation, without taking into consideration the repayments that had been made. This, according to the applicants, resulted in unfairness (para [68]).

As with the two applicants' challenges to the activation of their suspended sentences Judge Roberson also dismissed their challenge on the constitutionality of section 297(1)*(b)* read with section 297(1)*(a)*(i)*(aa)* of the Criminal Procedure Act 51 of 1977. He held that sentencing courts have a wide discretion in deciding on a just and appropriate sentence, and this includes a wide range of conditions that may be imposed when suspending the whole or part of a sentence (para [55]). Specifically with regard to compensation as a condition of a suspended sentence, it was held that fairness and justice remain paramount and that compensation as a condition would not be appropriate where the compensation ordered is beyond the means of the accused so that he does not get the intended benefit of a suspended sentence (para [57]; *S v Jackson* 1976 (1) SA 437 (A)). The judge explained as follows (paras [58] [59]):

> It is therefore in my view not inherent in the power to impose such a condition that a violation of any of the constitutional rights mentioned would as a matter of course result. Considered in the light of the discretion of a sentencing court, the guiding principles for deciding on an appropriate condition of suspension, and the safeguard of an appeal or a review, I do not regard this provision as unconstitutional.
>
> Such a condition is a very valuable one, when one considers its purpose and,. . .its compatibility with the idea of restorative justice. In my view, if it was not available as a condition of suspension, an aspect of sentencing which would benefit both accused, victim, and society would be lost.

With regard to compensation as a condition of suspension and a compensation award in terms of section 300 of the Criminal Procedure Act 51 of 1977, Roberson J held that the former was a 'flexible condition which can be adapted to a person's means and the length of time it will take to make full restitution', while the latter

> is a convenient means of recovering a debt without having to institute a civil action. The order will be made for the full amount determined as

> compensation for the damage or loss and would be executable for the full amount. Section 300 can [furthermore] only be utilised if the victim or the State applies for such an order. The victim can renounce the order, which impacts on the effectiveness of the order, whereas compensation as a condition of suspension remains the prerogative of the court and will serve a more meaningful purpose in the sentencing process (para [64]).

It was therefore clear that the award of compensation under section 300 of the Criminal Procedure Act 51 of 1977 is only available in limited circumstances and generally lacks the flexibility of compensation as a condition of suspension (para [64]).

Finally, Roberson J emphasised that a suspended sentence is not automatically put into operation when a breach occurs:

> There must be a hearing where the accused is given an opportunity to be heard on why the sentence should be further suspended. A breach of a condition of compensation will be considered like any other breach and any number of factors could be taken into account in determining whether the breach was through circumstances beyond the accused's control or whether there are good and sufficient reasons to suspend the sentence further (para [65]).

Likewise, partial fulfilment of a condition of compensation can indeed be taken into account 'as good and sufficient reason for suspending the sentence further, perhaps on further conditions or deletion of the condition, depending on all the circumstances, including the reason for not paying the full amount of compensation' (para [69]). Judge Roberson explained:

> Failure to pay anything more may well be through circumstances beyond the accused's control, which will be taken into account in the exercise of the court's discretion. There could be a variety of circumstances. An accused may have paid a large portion or a small portion of the compensation. His failure to pay the full amount could be in bad faith or wilful so that it may be appropriate for him to serve the sentence. The seriousness of the offence and the appropriateness of the sentence are other factors. All the factors would have to be considered as a whole, in the exercise of the court's discretion (para [69]).

In addition to all these safeguards, it must be observed that it always remains open to an accused person to seek relief on review where the discretion to impose compensation as a condition of a suspended sentence, or to activate such a sentence, is unfair, unreasonable, or unjust.

Also see *S v Masemola* (CM433/2016) [2017] ZAGPPHC 259 (6 June 2017), in which De Vos J for the High Court Gauteng

Division, Pretoria, restated the general principles regarding compensation as a condition of suspension (para [3], with reference to *S v Tshondeni; S v Vilakazi* 1971 (4) SA 79 (T)):

1. The first aim of a condition of suspension is to keep the convicted person out of prison. The court must guard against a sentence which is too light in the circumstances or which becomes too harsh because of the condition.
2. The second aim is to have the convicted person realise more clearly the consequences of his or her irresponsible conduct.
3. The third aim is to compensate the victim for any injury suffered by him or her. The court must guard against the idea that the convicted person pays a fine to the complainant.
4. The court must ensure that the criminal trial does not degenerate into a dispute about quantum. Nevertheless the accused must be aware that the court is busy investigating the extent of the damage caused by his or her offence and must be given the opportunity to attempt to influence the court's determination thereof by means of questions or evidence.
5. The determination of damages takes place after conviction. In this enquiry medical costs and loss of income are in issue, as well as an amount for pain and suffering, which lies within the court's discretion. Other patrimonial loss which the victim suffered can also be taken into account.
6. The amount is not limited to the magistrate's jurisdiction regarding fines (*R v Fourie and another* 1947) (3) SA 468 (C)). There are indeed limitations in terms of section 300, but they are not applicable here.
7. The ability of the convicted person to pay must be kept in mind. For that reason payment in instalments can be ordered. It is in order to award an amount which is smaller than the true damage, simply because the accused cannot reasonably pay a larger amount and would consequently have to go to prison, with the result that the complainant would get nothing.
8. Although the amount for pain and suffering is discretionary, the record must indicate the basis on which it was calculated. If it appears that the accused and the complainant agreed on an amount, there is no problem, and the sentence can be suspended on condition that the accused honour his or her undertaking within a determined time.
9. It is in order for the court to make only an order, without imposing a fine or other sentence, that the accused pay the victim compensation under threat of a suspended sentence.

Evidence on Sentence

Section 274 of the Criminal Procedure Act 51 of 1977 provides as follows:

(1) A court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.
(2) The accused may address the court on any evidence received under subsection (1), as well as on the matter of the sentence, and thereafter the prosecution may likewise address the court.

Of this provision, Judge Beshe J for the Eastern Cape Division, Grahamstown, in *S v Thetha* 2017 (2) SACR 363 (ECG) explained that while it may be worded in terms of the sentencing court having a discretion to allow parties to address it on sentence, it has in fact become

> a salutary judicial practice. . .over many years, in terms thereof courts have accepted this to be a right which an accused can insist on and must be allowed to exercise. This is in line with the principle of a fair trial. It is therefore irregular for a sentencing officer to continue to sentence an accused person, without having offered the accused an opportunity to address the court (para [6] quoting from *S v Mokela* 2012 (1) SACR 431 (SCA) para [14]).

With regard to the manner in which parties ought to be invited to address the court on sentence, Beshe J explained that parties must first lead evidence in both mitigation and aggravation of sentence, before any party will be allowed to address the court on the appropriate sentence to be imposed (para [5]; *S v LM* 2015 (1) SACR 422 (ECG) para [7]). Moreover, the invitation to address the court on sentence must be clear and unambiguous, especially where the accused is unrepresented (para [7]).

Also see *S v Masango* 2017 (1) SACR 571 (GP).

Parole

Parole refers to a period during which an offender serving a term of imprisonment at a correctional centre is conditionally released to serve the remaining part of his or her sentence in the community, under certain conditions and under the supervision and control of the Department of Correctional Services. The Supreme Court of Appeal in *S v Stander* 2012 (1) SACR 537 (SCA) emphasised that any decision about parole remains exclusively within the domain of the Department of Correctional Services (para [8]).

Fixing a non-parole period in terms of section 276B of the Criminal Procedure Act 51 of 1977

Section 276B(1) of the Criminal Procedure Act 51 of 1977 provides for a sentencing court, having imposed a term of

imprisonment for a period of two years or longer, to also fix a period as part of the sentence during which that offender shall not be placed on parole. This period is generally referred to as a 'non-parole period' and may not exceed two thirds of the term of imprisonment imposed, or twenty-five years, whichever is the shorter. Prior to the enactment of this provision, a decision about parole fell within the exclusive jurisdiction of the Department of Correctional Services, but with the enactment of section 276B, a sentencing court now has the power to make a '"predictive judgment" as to the likely behaviour of the convicted person in the future, . . . on the basis of the facts available to the sentencing court at the time of sentence' (*S v Ntozini & another* 2017 (2) SACR 448 (ECG) para [13]). The Supreme Court of Appeal in *S v Stander* 2012 (1) SACR 537 (SCA) described section 276B as an 'unusual provision' and stated that (paras [12] [13])

> despite the fact that s 276B grants courts the power to venture onto the terrain traditionally reserved for the executive, it remains generally desirable for a court not to exercise that power. . . .the Department, and not a sentencing court, is far better suited to make decisions about the release of a prisoner on parole and. . .it remains desirable to respect the principle of the separation of powers in this regard.

Therefore, an order in terms of section 276B(1) should only be made in exceptional circumstances, and only when the sentencing court is in possession of facts that would, 'after the imposition of sentence, continue to result in a negative outcome for any decision to be made concerning parole' (*S v Ntozini & another* 2017 (2) SACR 448 (ECG) para [15]; *S v Stander* 2012 (1) SACR 537 (SCA) para [16]). Moreover, before imposing a non-parole period, the sentencing court is also obliged to give prior notice to both the state and the accused, and to allow both the opportunity to address the court on whether such a non-parole period ought to be imposed (*S v Ntozini & another* 2017 (2) SACR 448 (ECG) para [16]).

The two accused in *S v Ntozini & another* 2017 (2) SACR 448 (ECG) were convicted in terms of their pleas. The first accused pleaded guilty to housebreaking with intent to steal and theft, and the second accused pleaded guilty to receiving stolen property. The first accused was thereupon sentenced to three years' imprisonment and it was further ordered that he 'serve his sentence at Cradock prison and that he be assessed of the said prison (sic) and be enrolled for the courses offered by the said institution – eg woodwork/plumbing etc for the duration of his

sentence' (para [3]). The second accused, in turn, was sentenced to two years' imprisonment and it was further ordered that he 'serve his sentence term at Cradock prison and that he be enrolled skills/trade courses (sic) offered by Cradock prison for the duration of his sentence' (para [3]). These sentences were reconsidered by Beard AJ of the High Court Eastern Cape Division, Grahamstown, on special review in terms of section 304(4) of the Criminal Procedure Act 51 of 1977.

Beard AJ noted that while these sentences did not expressly mention section 276B(1) of the Criminal Procedure Act 51 of 1977, nor did they contain the term 'non-parole period', stating that the accused be enrolled in various courses offered by the prison for the duration of their sentences indeed had the effect of a non-parole period being imposed (para [17]). This much was also evident from the magistrate's judgment on sentence, as she explained to the first accused that he would not be eligible for parole until he had completed the requisite courses: '. . .he is not legible (sic) for parole, not yet because of the Court order, up until he is done with the skills or trades that he has to be assessed for' (para [17]). Yet the magistrate gave no indication that this was her intention before imposing the non-parole periods, and she also did not invite the parties to make submissions on the issue (para [18]). The state furthermore had not requested that such a non-parole period be fixed (para [18]). Beard AJ therefore found that the magistrate had not only exceeded the maximum non-parole period as set out in section 276B(1)*(b)* of the Criminal Procedure Act 51 of 1977 – namely two-thirds of the term of imprisonment – but had also been guilty of a misdirection by failing to provide the parties with an opportunity to make submissions thereon (para [19]).

The judge also criticised the sentences imposed for directing the executive as to where the accused ought to be serving their sentences, and also as to the courses they had to complete before being eligible for release. On this, Beard AJ (para [20]) referred to what Harms JA said in *S v Mhlakaza & another* 1997 (1) SACR 515 (SCA) 521h-i:

> . . . sentencing jurisdiction is statutory and courts are bound to limit themselves to performing their duties within the scope of that jurisdiction. Apart from the fact that courts are not entitled to prescribe to the executive branch of government as to how. . .convicted persons should be detained . . . courts should also refrain from attempts, overtly or covertly, to usurp the functions of the executive by imposing sentences that would otherwise have been inappropriate.

Judge Beard emphasised that there is no provision in the Criminal Procedure Act 51 of 1977 or other legislation which permits a court to direct where a convicted person should serve out his or her sentence, and that there is also no statutory provision permitting such a court to order that an accused person be enrolled in skills transfer courses whilst serving the term of his or her imprisonment. These functions, he held, 'fall exclusively within the purview of the executive' (para [21]). The sentences and the further orders to the sentences were consequently set aside and replaced with a sentence of one year's imprisonment, seven months of which were suspended for a period of three years on the usual conditions for the first accused; and for the second accused, a term of eight months' imprisonment, four months and six days of which were suspended for a period of three years on the usual conditions (para [31]).

Also see *Ndlovu v S* (925/2016) [2017] ZASCA 26 (27 March 2017) and *Klassen v S* 2017 (2) SACR 119 (SCA). In the latter case the Supreme Court of Appeal noted that 'the power of a trial court to act under section 276B should be sparingly exercised, and then only after holding an inquiry as to the desirability of such an order and hearing argument on the issue. . . .Indeed the necessity of adopting such a procedure is so trite that it is surprising, to say the least, that this issue has recently had to be dealt with by this court on several occasions. . .' (para [11]).

The relevant legislative and policy framework for decisions regarding placement on parole of offenders serving life imprisonment

Makgoka J for the High Court Gauteng Division, Pretoria, in *Qaqa v Minister of Correctional Services & another* (83547/2016) [2017] ZAGPPHC 917 (4 July 2017) gave the following exposition of the legislative and policy framework within which decisions regarding the placement of offenders on parole are made (para [6]):

> The Correctional Services Act 111 of 1998 (the 1998 Act) and the relevant policies provide the following in respect of prisoners serving life imprisonment:
> (a) A case management committee comprising of correctional officials in each prison, assess and interview longer-term offenders at regular intervals and submit reports to the Correctional Supervision and Parole Boards (Parole Boards) regarding possible placement of offenders on parole and the conditions of such placement;
> (b) The Parole Board, established under s 74 of the 1998 Act, are

appointed by the Minister. They consider the reports of the case management committees and make recommendations to the Minister on the placing on parole of offenders serving a sentence of life imprisonment;

(c) The Minister does not act directly on the recommendation of the Parole Boards. The Act requires that the parole board make recommendations to the National Council, established under s 83. The National Council comprises among others, two judges, a regional magistrate, Director or Deputy Director of Public Prosecutions, and persons with special knowledge of the correctional system;

(d) After considering the recommendation of the Parole Board, together with the relevant record of proceedings, the National Council may recommend to the Minister that parole be granted to an offender serving a sentence of life imprisonment.

(e) If the Minister does not approve the recommendation of the National Council, and decides to refuse to place an offender on parole, he may act in terms of s 78(2) of the 1998 Act, in terms of which he [may] make recommendations in respect of 'treatment, care, development and support' of the offender which may contribute to improving the likelihood of future placement on parole or day parole.

(f) Parole decisions for prisoners serving sentences of life imprisonment prior to the coming into effect of the 1998 Act, must be made on the basis of the policies and guidelines applicable at the time they were sentences and in accordance with the repealed Correctional Services Act 8 of 1959 (the 1959 Act). The policy guidelines are contained in the 'Parole Manual' issued by the Commissioner of Correctional Services.

Also see *Minister of Justice and Correctional Services v Walus* 2017 (2) SACR 473 (SCA) and *Naidu v Minister of Correctional Services* 2017 (2) SACR 14 (WCC). At issue in the latter case was a claim for damages against the Minister of Correctional Services for the injuries suffered by the plaintiff after she was severely assaulted by a prisoner who had been released on parole by the Parole Board. It was argued on behalf of the plaintiff that the attack on her by the released prisoner was a direct result of his negligent release on parole, and that the defendant, being responsible for the prisoner's release on parole, was liable for the injuries she had suffered (paras [1] [2]). The defendant denied all liability and further submitted that even if it were to be found that the defendant had been negligent in releasing the prisoner on parole, such negligence was not causally connected to the harm that the plaintiff ultimately suffered (para [4]).

The prisoner in this case assaulted the plaintiff whilst he was on parole from Brandvlei Prison. His criminal profile revealed a long

list of previous convictions dating back to 1980, and the most recent offences and sentences (2004) for which he was granted parole in 2010, just before his attack on the plaintiff, included convictions of theft, assault with intent to do grievous bodily harm, assault, and contravening the Dangerous Weapons Act 71 of 1968 (paras [6]–[8]). For his most recent offences and sentences the prisoner had been considered for parole during 2007 but was not recommended for placement (para [11]). Noteworthy is that the prisoner thereafter contravened a number of provisions of the Correctional Services Act 111 of 1998 before his release on parole in 2010. For example, in August 2008, the prisoner was found to have contravened section 23(1)*(g)* of the Act – an inmate conductiing himself indecently by word, act or gesture. In September 2008 he was found to have contravened section 23(1)*(m)* of the Act for being in possession of an unauthorised article, and in December 2008, he was found to have once again contravened section 23(1)*(m)* of the Act in that he was in possession of dagga (paras [11]–[13]). In December 2008 the prisoner attended a three-day life skills programme, and in March 2009 the unit manager of the prison indicated that the prisoner had 'adjusted well in the prison system but he can give better full cooperation' (paras [13] [14]). The case management committee of the Brandvlei Correctional Centre nonetheless recommended to the Parole Board on 28 April 2009 that the prisoner be released on parole after having served two thirds of his sentence (para [15]). The Strand Magistrate's Court was notified of the prisoner's Parole Board hearing and the magistrate raised no objection to it or to the prisoner being released on parole (para [15]). The Parole Board subsequently approved the prisoner's placement on parole on the recommendation of the case management committee and after the prisoner had served nine-and-a-half-years of his sentence (para [16]).

An expert witness testifying on behalf of the plaintiff submitted that the Parole Board had the necessary tools to assess the existence and extent of rehabilitation, and the chance of recidivism of inmates, and that the board receives reports from professionals and has the authority to call experts to inform board hearings (para [22]). Yet this witness also testified that 'the decision to release or not to release on parole. . .had become a logistical consideration rather than an enquiry into rehabilitation and readiness to be released into society' (para [22]). With regard to the three-day life skills programme attended by the

prisoner, the expert witness stated that it is impossible to rehabilitate a person with a background like that of the prisoner in this case after only a few days of group sessions. The expert witness submitted that '[t]he yardstick applied by the defendant . . . was whether an inmate had attended a programme, not how much impact the programme had on an inmate' (para [23]).

The witnesses for the defence testified that in arriving at the decision to release the prisoner on parole, 'the board had weighed up both the negatives and positives pertaining to him. It had taken cognisance of his many previous convictions, the fact that he had committed an offence whilst out on parole in 1997 and that he had been charged with three disciplinary offences during his time in prison' (para [32]). Also taken into consideration were positive reports on the prisoner compiled by a social worker and the unit manager (para [32]). One of the defendant witnesses also indicated that 'it was possible in all cases for offenders to commit crimes once released. A person who had committed a crime whilst out on parole could. . .be considered again for parole' (para [33]). He further stated that were it not for this prisoner's profile and disciplinary offences, he would have been released on parole after having served a third of his sentence (para [38]).

Judge Meer for the Western Cape Division, Cape Town, emphasised, with reference to *Van Vuren v Minister of Correctional Services* 2012 (1) SACR 103 (CC), that the case management committee of a correctional facility has a mandatory duty to provide relevant information and reports to the Parole Board for the purpose of parole hearings (para [46]; s 42 of the Correctional Services Act 111 of 1998). Section 42 reads:

> Case Management Committee
> (1) At each Correctional Centre there must be one or more Case Management Committtees composed of correctional officials as prescribed by regulation.
> (2) The Case Management Committee must –
> (a) ensure that each sentenced offender has been assessed, and that for sentenced offenders serving more than 24 months there is a plan specified in section 38(1A);
> (b) interview, at regular intervals, each sentenced offender sentenced to more than 24 months, review the plan for such offenders and the progress made and, if necessary, amend such plan;
> (c) make preliminary arrangements, in consultation with the Head of Community corrections for possible placement of a sentenced offender under community corrections;

(d) submit a report, together with the relevant documents, to the Correctional Supervision and Parole Board regarding –
  (i) the offence or offences for which the sentenced offender is serving a term of incarceration together with the judgment on the merits and any remarks made by the court in question at the time of the imposition of sentence if made available to the Department;
  (ii) the previous criminal record of such offender;
  (iii) the conduct, disciplinary record, adaptation, training, aptitude, industry, physical and mental state of such offender;
  (iv) the likelihood of a relapse into crime, the risk posed to the community and the manner in which this risk can be reduced;
  (v) the assessment results and the progress with regard to the correctional sentence plan contemplated in section 38;
  (vi) the possible placement of an offender under correctional supervision in terms of a sentence provided for in section 276(1)(i) or 287(4)*(a)* of the Criminal Procedure Act, or in terms of the conversion of such an offender's sentence into correctional supervision under section 276(3)(ii) or 287(4)*(b)* of the said Act, and the conditions for such placement;
  (vii) a certified copy of the offender's identity document and, in the case of a foreign national, a report from the Department of Home Affairs on the residential status of such offender;
  (ix) the possible placement under correctional supervision or release of an offender who has been declared a dangerous criminal, in terms of section 286B(4)*(b)* of the Criminal Procedure Act; and
  (x) such other matters as the Correctional Supervision and Parole Board may request; and
(e) submit a report as contemplated in paragraph *(d)* to the National Commissioner in respect of any sentenced offender sentenced to incarcertation of 24 months or less.

(3) A sentenced offender must be informed of the contents of the report submitted by the Case Management Committee to the Correctional Supervision and Parole Board or the National Commissioner and be afforded the opportunity to submit written representations to the Correctional Supervision and Parole Board or National Commissioner, as the case may be.

Moreover, in terms of section 131 of the Correctional Services Act 111 of 1998, the state will be liable for delicts committed by persons subject to community corrections like parole (para [47]).

It was evident in this case that the case management committee had not complied with its mandatory statutory duty in placing

before the Parole Board crucial reports with regard to the prisoner's parole application: no reports were submitted in terms of section 42(2)*(d)*(iii), (iv) and (v) detailing the prisoner's mental state, his likelihood of relapsing into crime, the risk posed to the community, how this risk could be reduced, and the assessment results and progress with regard to the prisoner's correctional sentence plan as contemplated in section 38 of the Correctional Services Act 111 of 1998. There was also no evidence as to the existence of a sentence plan for the prisoner in this case (para [48]).

Judge Meer consequently found that both the case management committee and the Parole Board had failed to comply with their obligations under the Correctional Services Act 111 of 1998, and emphasised that decisions of this kind taken by parole boards without all the prescribed information being available, are arbitrary and capricious and must be set aside for that reason alone (para [48]; *CV v Minister of Correctional Services* 2012 ZAGPPHC 342, 30 November 2012 para [12]; *Lebotsa v Minister of Correctional Services* 2010 (1) SACR 379 (GNP) para [22]). The plaintiff's claim was consequently upheld as it was found that in the absence of the requisite evidence, the Parole Board ought to have taken reasonable steps to guard against the foreseeable harm of the prisoner's release on parole by refusing his parole application. Failure to do so, it was held, is an act of negligence (para [53]).

Plea and Sentence Agreements

The primary objective of a plea and sentence agreement is to lighten the burden of both the accused and the state – while the state is spared the time and expense of a lengthy criminal trial, the accused will face less serious implications with regard to the charges brought against him or her, and/or the gravity of the sentence imposed.

Authorisation to enter into a plea and sentence agreement on behalf of the state

The appellant in *Knight v S* 2017 (2) SACR 583 (GP) was arraigned before a regional magistrate's court on five charges of kidnapping, two counts of rape, sexual assault, and assault with the intent do to grievous bodily harm. The appellant subsequently entered into a plea and sentencing agreement with the state in

terms of section 105A of the Criminal Procedure Act 51 of 1977, in which it was agreed that he would plead guilty to five counts which would be taken together for the purpose of sentence, and that he be sentenced to life imprisonment and be declared unfit to own a firearm (paras [1]–[3]). In exercising his automatic right of appeal in terms of section 10 of the Judicial Matters Amendment Act 42 of 2013, the appellant submitted that there had been non-compliance with the provisions of section 105A(1)*(a)* of the Criminal Procedure Act 51 of 1977. He argued that the prosecutor had not been not authorised to enter into the plea and sentence agreement on behalf of the state (para [6]), and that the court had failed to comply with section 105A(8), which makes it peremptory for the court to convict the accused of the offence(s) charged, and then sentence him as per the sentence agreement (para [9]). The respondent conceded that the plea and sentence agreement did not indicate the necessary authority of the National Director of Public Prosecutions, and that a perusal of the transcribed record also reflected that the trial court had not pronounced a guilty verdict but merely proceeded with the sentencing of the appellant (para [12]).

Baqwa J for the High Court Gauteng Division, Pretoria, described this case as presenting 'a worst case scenario' and accordingly set aside the sentence and remitted the matter back to the trial court to start *de novo* (paras [18] [24]). Judge Baqwa emphasised that the necessary authorisation by the National Director of Public Prosecutions and/or his/her delegate(s) must be presented at trial and in terms of the provisions of section 105 of the Criminal Procedure Act 51 of 1977 (para [15]). And with regard to the court *a quo* having failed to pronounce on the conviction of the appellant, he stated that without a conviction there can be no sentence and that this was a fatal irregularity (para [18]).

Meaningful representations by a complainant or victim in terms of section 105A of the Criminal Procedure Act 51 of 1977

The applicant in *Wickham v Magistrate, Stellenbosch & others* 2017 (1) SACR 209 (CC) appealed against a judgment of the Western Cape Division of the High Court dismissing an appeal from the Stellenbosch Magistrates' Court against the conviction and sentence of the fourth respondent on a count of culpable homicide.

The fourth respondent was charged with two counts of culpable homicide arising from a motor vehicle accident in which the

applicant's son had died. The fourth respondent admitted that she had been negligent and also agreed in a plea and sentence agreement in terms of the provisions of section 105A of the Criminal Procedure Act 51 of 1977, to a sentence of eighteen months' correctional supervision in terms of section 276(1)*(h)* of the Criminal Procedure Act 51 of 1977 subject to certain conditions. The fourth respondent was then sentenced to a fine of R10 000 or twelve months' imprisonment, wholly suspended for a period of three years on condition that she not be convicted of culpable homicide during the period of suspension. The applicant voiced his objections to this plea and sentence agreement on numerous occasions (paras [9] [10]). Unhappy with the outcome, he applied to the Western Cape Division of the High Court for the conviction and sentence to be set aside (para [14]). However, the High Court dismissed the application, stating that the applicant lacked standing to have the plea and sentence agreement set aside, and that the magistrate had correctly declined to exercise his discretion under section 105A(7)*(b)*(i)*(bb)* on whether to hear the applicant's evidence or victim-impact statement (paras [14]–[17]). In the judgment handed down by the Western Cape High Court it was emphasised that the applicant had been given far more extensive opportunity than most victims to participate in the proceedings against the fourth respondent, and that a victim was furthermore not a party to a criminal proceeding and had no automatic right to present evidence (paras [16] [18]).

In the Constitutional Court, the provisions of the Victims' Charter, adopted in terms of section 234 of the Constitution of the Republic of South Africa, 1996, were considered. Section 2 of the Charter confers a general 'right to offer information during the criminal investigation and trial' and it allows for victims to 'participate (if necessary and where possible) in criminal justice proceedings, by attending. . .the trial [and] sentencing proceedings'. It is also stated that victims may 'where appropriate, make a statement to the court or give evidence during the sentencing proceedings to bring the impact of the crime to the court's attention' (para [25]). It is, therefore, clear that these victim rights under the Victims' Charter are not absolute, and the Charter confers 'neither standing, nor an unqualified right to give evidence or hand up papers, nor a right to be heard on demand' (para [26]). Moreover, a victim's right to participate in criminal proceedings in relation to a plea and sentence agreement must

also be considered in terms of section 105A of the Criminal Procedure Act 51 of 1977. In this regard it has been held that a prosecutor is obliged to give the victim an opportunity to make representations, but the prosecutor is not obliged to agree with the victim (para [28]).

The application for leave to appeal by the applicant was consequently dismissed as the Constitutional Court agreed with the trial court and the Western Cape Division of the High Court that the applicant's rights as a victim had been duly addressed through the extensive participation he had been afforded by the prosecutor throughout the duration of the prosecution (para [29]).

Provocation as a Mitigating Factor in Sentencing

The appellant in *Ramolefi v S* (A330/2016) [2017] ZAGPJHC 340 (10 November 2017) was convicted of murder and sentenced to fifteen years' imprisonment in terms of section 51 of the Criminal Law Amendment Act 105 of 1997. On appeal against his sentence, it was argued on the appellant's behalf that the trial court should have found the presence of substantial and compelling circumstances justifying a deviation from the prescribed sentence (para [4]). This submission was based on the fact that the deceased had severely provoked the appellant on the day of his death by assaulting him for no reason. The appellant immediately reacted to this provocation by stabbing the deceased, and when the deceased ran away, the appellant followed and stabbed him again (paras [9]–[11]). There was also some history to this surprise attack by the deceased; the deceased and the appellant knew one another as the deceased was a co-worker of, and had been in an adulterous relationship with, the appellant's wife (para [15]).

With regard to whether provocation can be considered as mitigating factor Molahlehi J, writing for the majority of the High Court Gauteng Local Division, Johannesburg, referred to what Judge Plasket said in *S v Ndzima* 2010 (2) SACR 501 (ECG):

> While it is a feature of provocation as a mitigatory factor that the criminal act that resulted from it is usually committed immediately after the provocative act, the extent to which it is mitigatory depends, essentially, on whether the accused's loss of control as a result of his or her anger would be regarded by an ordinary reasonable person – ''n gewone redelike mens' – as an excusable human reaction in the circumstances. In this matter, a reasonable person would baulk at the suggestion that the appellant's acts of executing his incapacitated

> victims were understandable in the circumstances, even though he was justifiably and understandably angry at having been assaulted and, no doubt, fearful when he fired the first shots. That he was provoked, and that the provocation was severe, is not in dispute. That the anger evoked by the provocation led him to shoot the deceased who was running away is also understandable. But then to execute both of the deceased, when he ought to have been able to reflect on what he had done and to realise that he was no longer in any danger, cannot be regarded as an excusable human reaction to the provocation.

Regard was also had to the *dicta* in *S v Mnisi* 2009 (2) SACR 227 (SCA), where it was held that '[w]hether an accused acted with diminished responsibility must be determined in the light of all the evidence, expert or otherwise. There is no obligation upon an accused to adduce expert evidence. His *ipse dixit* may suffice provided that a proper factual foundation is laid which gives rise to the reasonable possibility that he so acted' (para [26], quoting from *S v Mnisi* 2009 (2) SACR 227 (SCA) para [5]):

> The fact that an accused acted in a fit of rage or temper is in itself not mitigatory. Loss of temper is a common occurrence and society expects its members to keep their emotions sufficiently in check to avoid harming others. What matters for the purposes of sentence are the circumstances that give rise to the lack of restraint and self-control.

With regard to the instant case of the appellant, Judge Molahlehi, writing for the majority of the High Court Gauteng Local Division, Johannesburg, found that the trial court had indeed not afforded weight to the issue of provocation as a mitigating factor in sentencing the appellant to the prescribed minimum term of fifteen years' imprisonment (para [27]). Judge Molahlehi explained:

> Here the appellant was acting in circumstances of extreme provocation. The deceased was his assailant, and his wife's former lover. He had at one instance found the two in a compromising situation. This was two years before the fatal incident. Then, the appellant acted with remarkable restraint. It is not difficult to understand then that now, despite the past, when the deceased attacked him, the appellant should have lost his control over his emotions, and acted completely irrationally.
>
> These circumstances should not have been ignored when assessing the degree and the extent of the provocation by the deceased when he attacked the appellant for no apparent reason on that fatal day (paras [28] [29]).

Therefore, while the appeal court agreed that the first stabbing of the deceased by the appellant was in self-defence and in

reaction to the unsolicited attack by the deceased, the second stabbing which occurred after the deceased had run away and the appellant hsd pursued him, was found to have taken place 'in the context of utmost and severest provocation by the deceased. It is not surprising and cannot be said to be unreasonable for the appellant to have acted in the manner he did' (para [30]). The appeal against the sentence was consequently upheld and the sentence of fifteen years' imprisonment was set aside and substituted with a term of five years' imprisonment wholly suspended for a period of five years on the usual conditions (para [36]).

Increasing Sentence on Appeal

The appellant in *Joubert v S* [2017] ZASCA 3, 2017 (1) SACR 497, was convicted on twenty counts of fraud and sentenced to seven years' imprisonment wholly suspended on certain conditions for a period of five years. In appealing against his conviction, leave was erroneously granted for the appellant to appeal against both his conviction and sentence. The appeal court subsequently dismissed the appeal against conviction, and increased the appellant's sentence to seven years' imprisonment of which four years were conditionally suspended for a period of five years (para [1]). At issue before the Supreme Court of Appeal was whether the appellant's right to a fair trial had been infringed due to the failure of the appeal court to give the appellant prior notice of the court's intention to consider increasing the sentence (para [1]; *S v Bogaards* 2013 (1) SACR 1 (CC)).

Counsel for the respondent sought to cure the appeal court's failure to furnish prior notice to the appellant of its intention to increase the sentence by arguing that the state had given notice to the appellant and his attorneys, when his initial appeal was granted, that the state would seek an increase in the sentence on appeal (paras [2] [7]). This argument, according to Majiedt JA writing for the majority of the Supreme Court of Appeal, was not tenable as the procedure adopted by the state was itself fatally irregular. Where the state seeks to appeal against a sentence imposed by a lower court when an accused person lodges an appeal against conviction and/or sentence, the state must first obtain leave to cross-appeal (para [7]; *S v Nabolisa* 2013 (2) SACR 221 (CC)). Judge Majiedt held that 'it is inconceivable that one fatal irregularity can be called into aid to cure another

irregularity' (para [7]). And, while not every irregularity necessarily infringes the right of an appellant to a fair trial, the appellant in this case was found to have indeed suffered material prejudice (paras [8] [9]). Majiedt JA explained (para [10]):

> An accused person who has been given notice by an appellate court that it intends to increase the sentence imposed by the trial court has the option of withdrawing the appeal, with the leave of the appellate court. This practice, together with the requirement of prior notice to an accused person by the appellate court balances the appellant's right to a fair trial and the court's duty to ensure that the sentence is appropriate and, where necessary, to increase an inappropriate sentence. In the present instance, the appellant had not been afforded the opportunity to consider such a course of action.

The sentence was consequently set aside and the matter remitted to the Regional Court on the basis that the trial court was best placed to determine an appropriate sentence (para [12]).

Also see *DPP v Plekenpol* (333/17) [2017] ZASCA 151 (21 November 2017).

Cumulative Effect of Sentence Warranting Interference

In *Zimila v S* (1179/16) [2017] ZASCA 55 (18 May 2017), the Supreme Court of Appeal considered the cumulative effect of the sentences imposed on the appellant. The appellant was convicted on 21 counts relating to multiple robberies with aggravating circumstances, including attempted murder, and the unlawful possession of a firearm in contravention of the provisions of the Arms and Ammunitions Act 75 of 1969 (para [1]). These offences were committed on various occasions with the appellant acting as part of a group and using the same *modus operandi*, and a term of 77 years' imprisonment was ultimately imposed by the trial court. An appeal against sentence to the Gauteng Division of the High Court, Pretoria, was partly successful in that it was upheld in respect of certain charges and the effective sentence was reduced to 53 years' imprisonment (para [1]). However, the Supreme Court of Appeal found that none of the charges against the appellant individually warranted a sentence of life imprisonment, but that the effective sentence imposed was tantamount to removing the appellant permanently from society (para [7]). The Supreme Court of Appeal also noted that a term of 53 years' imprisonment has the potential of being more onerous than life imprisonment, as section 73(6) of the Correctional Services Act 111 of 1998 provides for a person sentenced to life imprisonment

to be eligible for consideration for release on parole after having served 25 years in prison (para [7]). Taking into account the cumulative effect of the sentences imposed, the Supreme Court of Appeal upheld the appeal against sentence and replaced the sentence with an effective term of 35 years' imprisonment (para [12]). This effective term was reached by ordering that certain of the sentences imposed run concurrently.

Noteworthy Specific Sentences

Determining a suitable sentence has been described as the most difficult part of a criminal proceeding. Not only does the sentencing stage of the criminal proceeding involve the interpretation and application of general principles of sentencing and specific statutory prescriptions, but the judicial officer is also required to undertake a value judgment; weighing contradictory factors and opposing interests. The punishment must further be particularised and tailor-made so as to ensure that justice is served for the accused and the complainant(s) in that particular case, and that it also serves the interests of the public generally. A number of interesting judgments during the period under review relating to specific sentencing options and related considerations are discussed below.

An appropriate sentence for environmental offences

The Supreme Court of Appeal in *Els v S* 2017 (2) SACR 622 (SCA) considered an appeal with regard to what would constitute an appropriate sentence for contraventions of the Limpopo Environmental Management Act 7 of 2003.

The appellant in this case was a game consultant manager and was charged with seven counts of having contravened provisions of the Limpopo Environmental Management Act 7 of 2003. Counts 1 to 4 related to the unlawful, wrongful, and intentional hunting of a specially protected wild animal by darting or immobilising the animals by any means or method and for trophy purposes, without a valid permit. And counts 5 to 7 related to the unlawful purchase, possession, and conveyance of the horns of specially protected wild animals without a valid permit (para [1]). The state withdrew counts 1 to 4, and the appellant pleaded guilty to counts 5 to 7 and was sentenced to an effective term of eight years' imprisonment and a compensatory fine of R100 000 per month payable to the National Wildlife Crime Reaction Unit over a period of ten months for purposes of investigating rhino-

related matters (para [3]). On appeal, the Gauteng Division of the High Court, Pretoria, set aside the compensatory fine of R100 000 per month for a period of ten months but confirmed the effective term of eight years' imprisonment (para [4]).

Saldulker JA, writing for the majority of the Supreme Court of Appeal, considered the statement made by the appellant in terms of section 112(2) of the Criminal Procedure Act 51 of 1977, and specifically the circumstances relating to the illegal purchase, possession, and conveying of the rhino horns, to which his convictions on counts 5 to 7 related (paras [5] [6]). In mitigation of sentence the appellant submitted that he was 39 years old and that his career as a game catcher and game management consultant had come to an end due to his convictions. He had no intention of selling the rhino horns illegally and stated that his intention was to collect the rhino horns hoping that when the trade in rhino horns was legalised, he would be able to sell the horns at a profit (para [8]). He further submitted that the dehorning of the rhinos was done with the necessary care provided by the manager of the Maremani Nature Reserve, and that none of the rhinos dehorned were injured or killed during the dehorning process. It was, therefore, the appellant's submission that his conduct was to be distinguished from that of the illegal hunting of rhinos (para [8]). The appellant further submitted that he had not derived any benefit from the horns found in his possession and that he was remorseful and had cooperated with the police investigation (para [8]).

In sentencing the appellant, the trial court took into account wide-ranging aspects linked to the current rhino-poaching crises. The trial judge also made mention of many offences related to the killing of rhinos and the unlawful smuggling of their horns for which the appellant was not indicted. Mention was also made of unknown and unconfirmed media reports and a television programme dealing with poaching and illegal hunting. The trial judge tended to rely on his 'general knowledge' of the illegal hunting of rhinos in the Kruger National Park where prostitutes were being 'rented' to shoot rhinos without any evidence being tendered to prove this 'general knowledge' (para [10]). Judge Saldulker described these observations on the part of the trial judge in sentencing the appellant as 'improper and untenable' (para [10]). Moreover, the trial judge also misdirected himself by finding that the appellant had been a participant in relation to the charges on counts 1 to 4, which had been withdrawn against the appellant and could, therefore, not be considered in sentencing (para [11]).

Given that the appellant in this matter was not part of a smuggling network and the offences to which he had pleaded guilty were distinguishable from those related to poaching, an effective term of four years' imprisonment was ultimately imposed (paras [16] [21]).

An appropriate sentence for convictions relating to child pornography and the sexual exploitation of children

The respondent in *S v AR* 2017 (2) SACR 402 (WCC) pleaded guilty and was convicted of 2 130 counts relating to child pornography and the sexual exploitation of children in contravention of provisions of the Criminal Law (Sexual Offences and related Matters) Amendment Act 32 of 2007 and the Films and Publications Act 65 of 1996.

The magistrate, in imposing an effective term of eight years' imprisonment wholly suspended for five years on the usual conditions, took all 2 130 counts together for the purpose of sentence, and found that there were substantial and compelling circumstances to justify the imposition of a lesser sentence than the prescribed minimum (para [2]). In coming to this conclusion the magistrate emphasised the personal circumstances of the respondent, in that he was married with two minor children and held a senior position at his work (para [19]). The respondent, furthermore, produced and used the child pornographic material for his own sexual gratification, did not have sexual intercourse with the children, and also did not reproduce the material for financial gain (paras [20]–[26]). It also transpired from the victim assessment reports compiled by probation officers that the complainants in this matter were generally unaware of what had happened and had apparently not suffered serious physical or psychological harm (para [33]).

The expert witness testifying for the respondent was of the view that he was not a paedophile as there was no evidence of grooming or any sexual encounters with his victims, which was apparently a precondition for a diagnosis of paedophilia (para [33]). The expert witness also indicated that 'the respondent was a low risk for violent sexual offences due to the following factors: his intellect, intimacy with his wife, fixed employment, middle class lifestyle, no substance dependencies or personality disorders, his insight of the offences committed and the remorse shown. . .' (para [27]). And she was of the view that the respondent's particular child pornographic addiction coupled with his

stress-induced environment could be successfully managed on a permanent basis with an appropriate community-based sentence subject to certain suspensive conditions (para [29]).

The expert witness testifying for the state, however, disagreed completely with the opinion expressed by the respondent's expert witness. According to the state's witness, the extensive use of pornography depicting prepubescent children was a useful diagnostic indicator of paedophilic disorder (para [31]). With reference to the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5) released in 2013, she also explained that the contention that a person be classified as a paedophile only if there was physical sexual contact with a child was incorrect and inconsistent with the diagnostic criteria set out in the DSM-5 (para [32]).

In considering whether the sentence imposed was too lenient, inappropriate, and disproportionate to the crimes committed, the interests of society, and the personal circumstances of the respondent (para [3]), Judges Le Grange and Weinkove for the High Court Western Cape Division, Cape Town, agreed with the submission made by the state. The judges explained that the fact that the complainants were unaware of the nature of the sexual assault that took place upon their person purely because they were asleep can hardly be regarded as a factor that diminishes the seriousness of the offence (para [37]. They also criticised the magistrate for intimating that one of the victims seemed 'a willing participant sometimes edging the accused on to take these pictures of herself' (para [38]). This they described as incongruous of the magistrate to suggest, given that the complainant was a minor at that time (para [38]):

> She was prepubescent, fully trusted the respondent and could have hardly appreciated the full psychological impact of her actions at the time. Common sense dictates that the respondent must have over a period of time created a false sense of security and trust with [the complainant]. The respondent's behaviour in this regard can hardly be described as less serious. In fact the opposite of this is more accurate. It was this false sense of trust, if not grooming, which allowed [the complainant] to participate and not speak out.

With regard to the interests of society, Judges Le Grange and Weinkove also found that the magistrate had understated the seriousness of the offences and the interests of society by not attaching sufficient weight to the bulk of child pornographic material that the respondent had produced and accumulated

over a number of years (para [39]). Of this the judges said the following (para [39]):

> Each image of child pornography in whatever form is and remains a crime scene. In the present instance the respondent also physically abused some of his victims whilst asleep. He was calculating and manipulative. He exploited his victims when they were at their most vulnerable. To suggest that he is not a danger to society is, simply, misguided. Moreover, the grouping together of all the counts for the purpose of sentence in this instance was also undesirable. Here a number of offences were committed where the elements of the crime to be proven cannot be regarded as closely connected. Our higher courts have repeatedly warned of the undesirability to take convictions in respect of divergent counts together for the purpose of sentence.

It is also noteworthy that the judges remarked that the expert witness testifying on behalf of the respondent focused primarily on the respondent's personal circumstances and admitted that she did not view the pornographic material prior to compiling her report (para [47]).

The sentence imposed was consequently set aside and replaced with a term of ten years' imprisonment, of which two years were conditionally suspended under the usual conditions (para [52]; *S v De Klerk* 2010 (2) SACR 40 (KZP); *S v Kleinhans* 2014 (2) SACR 575 (WCC); *S v Stevens* 2007 JDR 0637 (E)). Judges Le Grange and Weinkove explained that the sentencing process of an offender convicted of sexual offences like those in this matter cannot only be directed at establishing whether the offender can be rehabilitated through a non-custodial sentence. That is merely one of the purposes of sentencing. The seriousness of the offences committed and the interests of the community cannot be understated (para [48]; *S v Stevens* 2007 JDR 0637 (E)). They held that '[a] non-custodial sentence [in this instance], would. . . unduly focus on the rehabilitation of the respondent and would lessen the retribution and prevention elements of sentence, to the extent that it would bring the administration of justice into disrepute' (para [50]).

Long-term imprisonment for young offenders

The appellant in *S v Bruintjies* 2017 (1) SACR 553 (WCC) was sixteen years old when he embarked on a shooting spree in a tavern which had refused him entry. He was subsequently charged and convicted of murder, two counts of attempted murder, one count of possession of an unlicensed firearm, and

one count of possession of ammunition (para [1]). In reviewing the effective term of nineteen years' imprisonment imposed by the trial court, Judge Savage, writing for the majority of the High Court Western Cape, Cape Town, emphasised that imprisonment of young offenders is, in terms of section 69(1)*(e)* of the Child Justice Act 75 of 2008, 'a measure of last resort' and must be for the shortest possible time necessary (para [13]; *S v N* 2008 (2) SACR 135 (SCA)). Thus, while the appellant's crimes were indeed serious and brazen, and his uncooperative stance during the trial left his motive for the shooting unexplained, and also whether he had accomplices and who they were, the court nonetheless needed to consider the sentencing options as set out in sections 72 to 76 of the Child Justice Act 75 of 2008, and comply with the provisions of section 77(5) of the Act, which requires that the number of days that the child offender has spent in prison or at a child and youth care centre prior to sentence, also be taken into consideration when a term of imprisonment is imposed (para [15]).

Savage J held that 'an effective sentence of nineteen years' imprisonment for a first offender who was sixteen years old at the date of the commission of the offences' was 'startlingly inappropriate' (para [27]). Even for adult offenders, the judge noted, inordinately long periods of imprisonment have not been embraced by South African courts (para [28]; *S v Skenjana* 1985 (3) SA 51 (A) 55C–D). The sentence was consequently set aside and replaced with an effective term of thirteen years' imprisonment (para [34]).

Also see *S v Mabitle* 2017 (1) SACR 325 (NWM).

Compensation and an appropriate sentence on a conviction of rape

The appellant in *S v Seedat* 2017 (1) SACR 141 (SCA) was convicted of rape and first sentenced to seven years' imprisonment. This sentence was set aside by the High Court Gauteng Division, Pretoria, and replaced with an order that the appellant pay the complainant a sum of R100 000. This was in answer to the complainant having indicated that she would rather the appellant compensate her than just go to prison (*S v Seedat* 2015 (2) SACR 612 (GP)). The Direction of Public Prosecutions, Gauteng, then sought special leave to appeal to the Supreme Court of Appeal against the sentence imposed on the basis that the sentence was incompetent and invalid.

The Supreme Court of Appeal again considered the request by the complainant for the appellant to compensate her by way of a

cash amount and also a Toyota vehicle (paras [12]–[16]). It was noted that it was indeed 'very rare' for a complainant in a rape case to request that a lenient sentence be imposed on an accused in exchange for financial compensation (para [26]). This request could also not be construed so as to raise doubt about the appellant's guilt, as it had been found that the evidence clearly showed that the complainant had not sought to blackmail the appellant, nor was there any indication that she had fabricated the rape allegation (paras [26] [27]).

The state, in its appeal against the sentence imposed, argued that, in justifying its decision to replace the sentence imposed by the trial court with the compensation order, the High Court had placed reliance on and then conflated the provisions of section 297(1) and(4) of the Criminal Procedure Act 51 of 1977. Section 297(1) applies to persons convicted of an offence other than an offence in respect of which any law prescribes a minimum punishment; while section 297(4) applies to persons convicted of an offence in respect of which the law prescribes a minimum punishment. Section 297(1)*(a)*(i)*(aa)* furthermore permits a court that convicts a person for an offence other than an offence in respect of which any law prescribes a minimum punishment, to postpone the passing of the sentence for a period not exceeding five years, and to release the person concerned on one or more conditions, including compensation. Section 297(4), on the other hand, permits a court that convicts a person of an offence for which any law prescribes a minimum sentence to impose that sentence in its discretion, but to order that the operation of a part of the sentence be suspended for a period not exceeding five years on any condition referred to in paragraph *(a)* of section 297(1) (para [33]).

The Supreme Court of Appeal agreed with the state's submission. Section 297(1) was not available as a sentencing option in this matter, as it 'specifically prohibits postponement of a sentence where a person has been convicted of an offence in respect of which the law prescribes a minimum sentence. In any event, section 297(1) does not provide for suspension but for postponement of sentence' (para [35]). Section 297(4) was, however, available to the High Court as it had already accepted that there were substantial and compelling circumstances that justified a deviation from the prescribed minimum sentence. 'However, in order for that sentence to be competent, the court would have to impose a sentence for a specific term of imprison-

ment' (para [36]). Part of the specific term of imprisonment can then be suspended for a period not exceeding five years on any condition, including compensation (para [36]). What the High Court did in this case was to state that the sentencing of the appellant was suspended for a period of five years, and in doing so, the court failed to impose a specific sentence or a specific term of imprisonment (para [36]). The sentence imposed by the High Court was, therefore, not competent in terms of section 297 of the Act as 'there is no provision in law permitting a court to so suspend the sentencing of an accused' (para [36]). The sentence was also not competent as section 297(4) requires that part of the sentence may be suspended and not the whole sentence, '[s]o even if the court sought to impose a suspended sentence, it could not suspend the whole sentence' (para [37]).

In reconsidering the sentence afresh, the Supreme Court of Appeal referenced *Director of Public Prosecutions, North Gauteng v Thabethe* 2011 (2) SACR 567 (SCA), where it was held that restorative justice principles can be appropriate to consider in specific cases, but not for 'serious offences which evoke profound feelings of outrage and revulsion amongst law-abiding and right-thinking members of society' (para [38], quoting from *Director of Public Prosecutions, North Gauteng v Thabethe* 2011 (2) SACR 567 (SCA) para [20]). Thus, while the complainant in this matter may have though it would be appropriate rather to make the appellant pay monetary compensation, the views of the complainant were not the only factor to be taken into account (para [39]). A further matter that had to be taken into consideration was that the appellant had already paid an amount of R15 000 to the complainant, and that the complainant would probably not be able to return this amount if it were reclaimed from her as a result of the sentence being set aside (para [42]). 'The state urged the court to take this into account when considering sentence as a factor that indicates the willingness on the part of the appellant to comply with what he thought was a competent court order and, if possible, to reduce sentence accordingly' (para [42]). In this regard, Tshiqi JA, writing for the majority of the Supreme Court of Appeal, held that '[w]hilst I am in no way endorsing the award of compensation for such a serious offence, I agree with the state that his willingness to comply with what he thought to be a competent court order is to be taken into account in his favour' (para [43]). The accused was subsequently sentenced to four years' imprisonment (para [43]).

Inordinate Delay in Implementing a Sentence

The applicant in *Arendse v Magistrate, Wynberg & others* 2017 (1) SACR 403 (WCC) was convicted in the district magistrate's court at Wynberg on 18 April 2000, of having contravened section 5*(b)* of the Drugs and Drug Trafficking Act 140 of 1992. On 11 March 2003 the applicant was sentenced to an effective three years' imprisonment, and this sentence was later confirmed by the Supreme Court of Appeal on 11 September 2006 (paras [3] [7]). From the date of his conviction to the date of his sentence in 2003, the applicant spent a total of fourteen months in custody pending the outcome of a review to determine whether he was to be sentenced by the district magistrate or in the regional court (para [8]). This was the only period the applicant ever spent in custody in relation to his conviction (para [8]).

A Notice to Surrender was only issued by the appeals clerk at the Wynberg Magistrate's Court and served on the applicant on 21 January 2015, in terms of which the applicant was instructed to surrender himself on 12 February 2015 to commence serving his sentence (para [12]). The applicant failed to surrender himself and his legal representative informed the first respondent that the applicant was suffering ill-health and requested a stay of any warrant sought (para [12]). The applicant later abandoned his medical ground for opposing the issuing of a warrant, and then sought an order that he was deemed to have served a sentence of imprisonment imposed upon him by the Wynberg magistrate, or alternatively, any other order that the High Court Western Cape Division, Cape Town, considered just and equitable (para [1]). The applicant based his application for relief on 'the delay in putting the sentence into operation and on the basis that his constitutional rights to a fair trial, to dignity, freedom and the security of his person and not to be punished or treated in a cruel and inhuman or degrading way would be infringed should the relief not be granted' (para [3]).

The applicant further submitted that the delay was not due to any inertia on his part, but was rather caused 'by the ''organs of state'' responsible for the proper administration of justice' (para [17]). It was specifically stated, for example, that the applicant's attorney, William Booth, received a deposit from the applicant after the outcome of his appeal to the Supreme Court of Appeal, to take the matter to the Constitutional Court. Yet, when the applicant was served with the Notice to Surrender, it transpired that the matter had never been 'listed' with the Constitutional

Court (para [16]). It is also noteworthy that the applicant continued to abide by his bail conditions throughout this time, and continued to, for example, report twice weekly to the South African Police in Worcester (para [16]).

The Deputy Director of Public Prosecutions, on the other hand, opposed the relief sought, arguing that the court had no jurisdiction to hear the application and that the application was 'in effect a belated appeal by the applicant to the incorrect court' (para [19]). This is because the relief sought would necessarily imply an interference with the sentence already confirmed by the Supreme Court of Appeal, and the application therefore would have the same effect as an appeal against the sentence imposed (para [24]). Moreover, no affidavit from the applicant's former attorney, William Booth, was forthcoming regarding 'what was done to pursue any appeal to the Constitutional Court nor was there any proof that the said attorney had been given the required financial instructions to pursue the appeal' (para [19]). It was also submitted that the applicant had not followed up on the matter with any state office (para [20]).

Judge Bozalek of the High Court Western Cape Division, Cape Town, held that the court indeed had jurisdiction to consider the application as section 169(1) read with section 172(1)*(b)* of the Criminal Procedure Act 51 of 1977, 'bestows wide powers on the High Court to determine constitutional matters which are not in the sole province of the Constitutional Court' and this present application was found to fall within these parameters (para [26]). It was also held that the applicant expressly disavowed any direct challenge to his conviction and sentence, nor did he seek to have his sentence declared null and void; rather the applicant brought a challenge based on constitutional grounds external to the merits of the conviction and sentence (paras [26] [27]).

As to whether any delay between the dismissal of the applicant's appeal by the Supreme Court of Appeal and his being called upon to surrender himself, involved an infringement of his constitutional rights, Judge Bozalek considered the nature of the prejudice suffered by the applicant, the nature of the case, and finally, the systemic delay (paras [28]–[32]; *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC)). First, it was held that the period from the applicant's arrest to the date on which his appeal was dismissed by the Supreme Court of Appeal, could not be taken into account as this delay would already have been considered by the Supreme Court of Appeal when it confirmed

the applicant's sentence in September 2006, and the delay could in any event be attributed to the applicant himself for pursuing the appeals (para [33]). With regard to the period of eight years and three months that had passed since the applicant's sentence was confirmed by the Supreme Court of Appeal, and the Notice to Surrender having been issued, the applicant's argument suggested that the blame rested solely on his attorney who had failed to take the necessary steps, as well as the organs of state who had failed to notify him at a much earlier stage that he was required to surrender himself and serve his sentence (para [34]).

With regard to the attorney's role in this delay, an assistant to William Booth testified that the applicant had been informed of the dismissal of his appeal by the Supreme Court of Appeal, and that he would have to surrender himself to serve his sentence. The assistant also testified that the instruction and payment by the applicant to take the matter further to the Constitutional Court had been accepted (para [36]). However, the assistant indicated that despite numerous attempts made between 2006 and November 2008 to contact the applicant with a view of having him pay the further outstanding deposit required, the applicant either did not respond to the requests, or made promises which he then failed to honour (paras [36] [37]). The applicant's wife and sister, who testified on his behalf, denied most of these submissions (para [38]). The assistant to William Booth added further that 'even if his firm had failed in its duty. . .which he did not concede, the applicant was an officer in the Department of Correctional Services [prior to his arrest and conviction] and was [therefore] familiar with the procedures which apply when appeals against conviction or sentence had been exhausted' (para [37]). Ultimately, therefore, with regard to the role of the applicant's attorney in this delay, no proof of payment addressing the contradictions and disputes in the versions submitted by the applicant and his previous attorney, had been furnished, and no affidavit from his former attorney dealing with the question of financial instructions and the initiation of the appeal to the Constitutional Court, had been received (para [39]). Likewise, no explanation had been given by the relevant officials as to the delay in issuing the Notice of Surrender on the application (para [40]).

Judge Bozalek nonetheless held that

> . . . a person in the position of the applicant who for some reason does not receive a notice calling upon him to serve his sentence cannot

> simply close his or her eyes to this omission and proceed to blithely ignore the sentence hanging over his or her head as if it did not exist. At some point, depending upon the circumstances, such a person is under an obligation to make reasonable inquiries as to what has transpired in his or her appeal. At the very least, in the absence of making such an inquiry/ies such a person cannot lay claim to some advantage or some relief at a later stage and thereby seek to benefit from his or her own wilful neglect or passivity (paras [44]–[48]; *S v Mthembu* 2010 (1) SACR 619 (CC); *S v Malgas* 2013 (2) SACR 343 (SCA)).

With regard to the applicant's personal circumstances and the particularities of this case, Judge Bozalek also held that '. . .someone in the position of the applicant can hardly delay serving his sentence for an extended period and then, without more, seek to rely on his changed personal circumstances to avoid serving his sentence' (para [53]). These personal factors, it was held, can rather be raised in an application for parole once the applicant has started serving his sentence (para [53]). Thus, having found that the applicant had failed to establish any actionable infringement of his constitutional rights, the application was dismissed (para [64]).

However, Judge Bozalek also highlighted two areas of concern that 'should enjoy the attention of certain authorities' (para [67]). First, the failure of administrative officials to monitor appeals initiated and the issuing of notices to surrender must be more carefully administered, and protocols and procedures must be put in place to ensure that such extraordinary delays as in the present case are avoided (para [67]). Secondly, he requested that a copy of the judgment be sent to the Cape Law Society for its consideration and appropriate action regarding the role that the applicant's former attorney played in this delay (para [68]). In both instances the facts had not yet been established but the circumstances were found to deserve further action by the relevant authorities (para [68]).

SUCCESSION (INCLUDING ADMINISTRATION OF ESTATES)

M J DE WAAL*

LEGISLATION

LAW OF SUCCESSION

There was no legislation during the review period directly affecting the law of succession.

ADMINISTRATION OF ESTATES

Section 6 of the Judicial Matters Amendment Act 8 of 2017 amended section 103(1) of the Administration of Estates Act 66 of 1965 by inserting paragraphs *(e*A*)* and *(e*B*)*. Paragraph *(e*A*)* empowers the relevant Minister to make regulations prescribing which persons, including juristic persons, are prohibited from liquidating or distributing a deceased estate. For its part, paragraph *(e*B*)* empowers the Minister to prescribe any exemptions, which may be permanent, or to the extent specified in each case, from the prohibition contemplated in paragraph *(e*A*)*. The Judicial Matters Amendment Act commenced on 2 August 2017.

In addition, Government Notice 1161 of 3 November 2017 amended certain provisions in Schedule 2 (tariff of Master's fees) in the regulations made under section 103(1) of the Administration of Estates Act. These amendments took effect on 1 January 2018.

CASE LAW

LAW OF SUCCESSION

The applicability of the Intestate Succession Act 81 of 1987 to parties living under African customary law

The judgment in *Cele & others v Cele & others* (8488/2015) [2017] ZAKZDHC 2 (9 January 2017) is, in my opinion, worth

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mentioning only for one issue. *Cele* concerned the division of two deceased estates in terms of what was assumed by the court to be the provisions of the Intestate Succession Act 81 of 1987 (the Intestate Succession Act), which came into operation on 18 March 1988. In my view, the court was correct in deciding that under the facts of both estates, the application of the Intestate Succession Act would have resulted in the surviving spouse in each instance inheriting the entire estate of the first-dying spouse. Nor is it controversial, in my view and as the court decided, that the Intestate Succession Act was indeed applicable to the distribution of the estate of the second party, who died in March 2001. What I do regard as controversial, however, is the court's assumption that the Act was also applicable to the distribution of the estate of the first party, who died in April 1991.

In order to explain this view, it is necessary to give a brief background. The parties to the first marriage (of which the first-dying spouse died in April 1991) were married in community of property in terms of section 22(6) of the then applicable Black Administration Act 38 of 1927 (the Black Administration Act). It can, therefore, safely be assumed that they lived under customary law, and that their intestate succession position was also regulated by the Black Administration Act, as determined by the then applicable section 1(4)*(b)* of the Intestate Succession Act. However, as is by now common knowledge, parts of the customary law of intestate succession, as well as section 1(4)*(b)* of the Intestate Succession Act, were declared unconstitutional by the Constitutional Court in *Bhe & others v Magistrate, Khayelitsha & others* 2005 (1) SA 580 (CC) (see also 'Freedom of testation and its possible limitations' below). The Constitutional Court filled the *lacuna* by declaring that the Intestate Succession Act would apply to the distribution of all intestate estates in South Africa (which Act must now be read with the Reform of the Customary Law of Succession and Regulation of Related Matters Act 11 of 2009). However, regarding the retrospectivity of the court's order, Langa DCJ declared in *Bhe*:

> To sum up, the declaration of invalidity must be made retrospective to 27 April 1994. It must however not apply to any completed transfer of ownership to an heir who had no notice of a challenge to the legal validity of the statutory provisions and the customary-law rule in question. Furthermore, anything done pursuant to the winding-up of an estate in terms of the Act, other than the identification of heirs in a manner inconsistent with this judgment, shall not be invalidated by the order of invalidity in respect of s 23 of the Act and its regulations (para [129]).

It will be recalled that the court in *Cele* decided that the Intestate Succession Act also applied to the distribution of the estate of the first party, who died in April 1991. That death, of course, predated the applicable order by exactly three years. It is, therefore, not clear on what ground the court based its decision regarding the application of the Intestate Succession Act to those facts. In my view, the law under the Black Administration Act and the customary law of succession were then still applicable, and the distribution of the deceased estate should have taken place in terms of that law. Whether such distribution would have differed from that under the Intestate Succession Act is difficult to determine and not really the point for present purposes. Nevertheless, that does not detract from the general importance of the correct determination of the applicable law in cases such as this (see also 2014 *Annual Survey* 954–6).

Freedom of testation and its possible limitations

The principle of freedom of testation lies at the heart of the law of testate succession. It is also clear that, important as the principle is, it is not an unlimited freedom. However, it is sometimes difficult to establish exactly where the limit lies. This is even more so in the constitutional era, where the right to freedom of testation may come into conflict with constitutional rights, and chief among them, the right to equality. The past number of years have seen various judgments (some of which are referred to below) in which our courts have grappled with this dilemma. All these judgments concerned testamentary charitable trusts with what can be termed a 'public dimension'. The central question in all of them was whether certain restrictions based on race, gender, or religion (or a combination of these) imposed on the potential recipients of bursaries could be deleted by a court. However, to date there had been no judgment dealing with a direct (so-called 'out-and-out') disinheritance in a purely 'private' will, based on one of the grounds mentioned. Therefore, it came as somewhat of a surprise that the current review period saw two such judgments, delivered within two months of each other in the same division of the High Court and with basically the same outcome. This discussion will focus first and primarily on the later of these judgments, namely, *King & others NNO v De Jager & others* 2017 (6) SA 527 (WCC). The earlier judgment in *Harper & others v Crawford NO & others* (9581/2015) [2017] ZAWCHC 78 (30 June 2017) (now reported as 2018 (1) SA 589 (WCC)) will

only be referred to briefly in the course of and after the discussion of *King*.

King concerned a will executed in 1902, in which the testator and his spouse (the testators) among other things bequeathed their immovable property (including quite a number of farms) to their four sons and two daughters. This bequest was made subject to a *fideicommissum*, the application and interpretation of which gave rise to the dispute between the parties. The clause in the will (cl 7) containing the *fideicommissum* stipulation was in Dutch, was extremely convoluted, and comprised nearly a full page (see para [19] for the agreed translation in English). However, its gist was that on the death of the testators' six children, the properties were to devolve upon

> said children's sons and following the death of the said grandsons again and in turn to their sons, in such a way that, in the case of the death of any son or son's son who does not leave a male descendant, his share/portion will fall away on the same conditions as above and therefore pass to his brothers or their sons in their place and in the case of the death of a grandson without any brothers, to the other Fidei Commissaire [*sic*] heirs from the lineage of the sons of the appearers by representation . . . (para [19]).

Clause 7 thus constituted a *fideicommissum multiplex* (although the court did not use this term) with the testators' children as the fiduciaries, their grandsons as the first fideicommissaries, and their great-grandsons as the second fideicommissaries (regarding the *fideicommissum multiplex*, see also 2013 *Annual Survey* 993–4; 2014 *Annual Survey* 962–3).

The issue in *King* related to one of the testators' grandsons (the deceased), thus one of the first fideicommissaries. When the deceased died, he was survived only by five daughters (the second to sixth applicants, the first applicant being the co-executor of the deceased's estate). Based on the then accepted interpretation of the will, these daughters – being female – could not inherit as the second (and final) fideicommissaries. This gave rise to their application to have the will amended by the deletion of the stipulation limiting the fideicommissary heirs solely to male descendants. The sons of one of the deceased's brothers (the first to third respondents) opposed the application. They argued that, on a correct interpretation of the will, the deceased's fideicommissary property should devolve on them as the sons of one of the deceased's predeceased brothers. However, to complicate matters even further, there was also a third set of

claimants. These were the sons of the second to sixth applicants (the fourth to eighth respondents) who argued that, should their mothers' application not be successful, the fideicommissary property should devolve on them as the next (the fourth) generation of male descendants.

The applicants based their case for the proposed amendment on the contention that clause 7 of the will discriminated unfairly against women by limiting the fideicommissary heirs to male descendants. They sought a declaration of the offending provisions in the will as invalid, and the amendment of the will based on both the common law and a direct application of section 9 – the equality clause – of the Constitution of the Republic of South Africa, 1996 (the Constitution). More particularly, they argued that even before the new constitutional dispensation, a testator's freedom of testation was limited where provisions in a will were found to be contrary to public policy. They further argued that the common law has developed extensively since 1902 when the will was made, in particular 'as a result of the values which have been adopted in the Constitution, with the result that a testator's freedom of testation is limited to the extent that provisions in a will amount to unfair discrimination' (para [21]).

The court's point of departure in assessing this argument was a quotation of the so-called 'golden rule' for the interpretation of wills, formulated by Innes ACJ in the famous old case of *Robertson v Robertson's Executors* 1914 AD 503 507:

> Now the golden rule for the interpretation of testaments is to ascertain the wishes of the testator from the language used. And when these wishes are ascertained the Court is bound to give effect to them, unless we are prevented by some rule of law from doing so (*King* para [28]).

As the court noted, however, the principle of freedom of testation as encapsulated in this *dictum* was never completely unrestricted. Even before the new constitutional dispensation, there were notable restrictions derived from both the common law and legislation. In addition, the introduction of the constitutional dispensation 'and the importance which it gives to the concept of equality has, potentially at least, set the scene for a re-evaluation of the primacy hitherto given to the principle of freedom of testation' (para [28]).

In order to illustrate this, the court proceeded to analyse four cases dealing with testamentary trusts (establishing bursary schemes) that have come before the courts under the new

constitutional dispensation. In three of these cases, the courts deleted racial, gender, or religious restrictions (or a combination of these) attached to the granting of bursaries (*Minister of Education & another v Syfrets Trust Ltd NO & another* 2006 (4) SA 205 (C), 2006 *Annual Survey* 490–2; *Curators, Emma Smith Educational Fund v University of KwaZulu-Natal & others* 2010 (6) SA 518 (SCA), 2010 *Annual Survey* 1193–8; and *In re: Heydenrych Testamentary Trust & others* 2012 (4) SA 103 (WCC), 2011 *Annual Survey* 1064–5). In the fourth case, *Ex parte BOE Trust Ltd NO & others* 2009 (6) SA 470 (WCC), the court did not order the deletion of the racial restriction, but not on the basis indicated by the court in *King*. According to Bozalek J in *King*, the court in *BOE Trust* declined to do so because it held 'that the provisions in question were not contrary to public policy . . .' (para [33]). It must be noted, however, that this view of the court in *BOE Trust* was clearly only an *obiter* remark. The reason why it did not order the deletion of the contested provision was that the failure of the bursary scheme in question resulted in a number of substitute beneficiaries receiving the payments from the trust (see 2009 *Annual Survey* 1065–70).

Nevertheless, these cases bring into focus the pertinent question in *King*, namely, 'to what extent challenges to testamentary dispositions based on the right to equality (and in particular, not to be unfairly discriminated against) will be recognised outside the area of charitable testamentary trust having a public nature' (para [38]). *King* did not involve a charitable testamentary trust with a public nature containing provisions discriminating against one or more sectors of society, but was rather a case of a direct disinheritance of certain descendants in a private will (see also *Harper* para [30]). Further, the issue in *King* had to be distinguished from that which confronted the court in *Bhe & others v Magistrate, Khayelitsha & others* 2005 (1) SA 580 (CC) (see 'The applicability of the Intestate Succession Act 81 of 1987 to parties living under African customary law' above). In *Bhe*, the Constitutional Court (among other things) declared as unconstitutional the system of male primogeniture, which generally prevented women from inheriting family property. The contested provision in the will in *King* did not concern a 'system' or 'practice' as listed in section 8 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, but rather a 'one-off, private testamentary disposition' in a specific will (para [53]; see also *Harper* para [29]). Should different considerations therefore apply in a matter such as that in *King*?

The court pointed out that, apart from the judgment in *Harper* (see below), this is not a question that has yet been addressed directly in any other South African case. Therefore, it sought some guidance in academic literature where the issue has been discussed and in which four considerations have been emphasised as to why a direct ('out-and-out') disinheritance should be treated differently, and should in principle be permitted.

The court found itself in general agreement with these considerations. The first consideration is that an opposite conclusion would reduce the concept of freedom of testation to a fiction, and would render any constitutional protection of the right to freedom of testation meaningless (see here also the court's reference (para [55]) to *In re BOE Trust Ltd & others NNO* 2013 (3) SA 236 (SCA), in which the Supreme Court of Appeal concluded that the right to freedom of testation finds constitutional recognition in both s 10 (the right to dignity) and s 25 (the right to property) of the Constitution). Secondly, nobody has a fundamental right to inherit. The exclusion of a person as beneficiary does not result in an encroachment upon, or a taking away of, an existing right. Or, as Bozalek J pointed out, 'the right to equality and the hope or expectation of inheriting should not be conflated' (para [63]). Thirdly, a testator should, within the limits set by social and economic considerations, be free to institute beneficiaries of his or her own choice. Again, the court agreed, and specifically noted that 'autonomy in this respect is an important part of what gives substance to the right to human dignity' (para [65]). Finally, an opposite conclusion would lead to virtually insurmountable practical difficulties, particularly as regards where the lines should be drawn and what the appropriate remedy should be.

The court added two further considerations. First, limiting freedom of testation in this context would 'also inevitably create uncertainty in the minds of some testators as to whether their testamentary dispositions will be fully executed or not, in itself an inherently unsatisfactory situation' (para [67]). Secondly, in certain instances the result of a court intervening could lead to an arbitrary outcome (a consideration really linking with the fourth one mentioned above). For instance, in the present matter, a decision granting the required relief to the second to sixth applicants would 'favour them over many other female (and male) descendants of the testators' (para [68]).

The applicants' reliance on the constitutionally protected status of the right to equality, which competed with the testators' right to

freedom of testation and therefore had to be weighed and balanced against it, led to the next stage in the enquiry (see paras [71] [72] and *Harksen v Lane NO & others* 1998 (1) SA 300 (CC)). That is whether the contested provision in clause 7 of the will could be justified under the limitation clause in section 36 of the Constitution (see also *Harper* para [33]). After a thorough analysis (paras [72]–[79]), Bozalek J concluded:

> For all these reasons I consider that, even if it [is] assumed in favour of the female descendants of the testators that they notionally have a right to be treated equally with the male descendants in the exercise by the testators of their freedom of testation, the limitation on the second to sixth applicants' rights to equality in the form of the discrimination against them effected by clause 7 of the will is reasonable and justifiable, particularly given the importance accorded to the right to freedom of testation. The direct constitutional challenge to the disputed provisions of the will must therefore fail. Nor am I persuaded, for similar reasons, that the disputed provisions of clause 7 are against public policy. In the particular circumstances of this matter, I do not consider that the general public would regard that the testators' decision to impose the *fideicommissary* condition discriminating against female descendants as so unreasonable and offensive that such provisions must be considered as offending against public policy (paras [80] [81]).

The outcome was, therefore, that the applicants had failed to make out a case for the primary relief sought. This outcome forced the court to engage with the alternative argument advanced on behalf of the fourth to eighth respondents: that on a proper interpretation of clause 7 of the will, the deceased's grandsons had to be substituted (in the place of their mothers) as fideicommmissary heirs to the property. As this is a separate issue relating to the interpretation of wills, it is dealt with below under 'Interpretation of wills'.

The judgment in *Harper* is wide-ranging, and touches on a variety of issues. But for present purposes, it is important, in the main, because the court was confronted with the same basic issue confronting the court in *King*. However, there are two differences between the cases that must be noted immediately. The first concerns the facts. *Harper* did not deal with a gender issue, but with whether adopted children could be excluded as the beneficiaries of a particular trust. The second concerns the nature of the instrument containing the contested provisions. While *King* dealt with provisions contained in a will, the document in *Harper* was termed a 'trust deed'. Despite the fact that *King*

refers to this trust as a 'testamentary trust' (para [39] of *King*), there are strong indications in *Harper* that it was in fact an *inter vivos* trust (see, eg, paras [2] [18] [26] and [34]). This is problematic, because the court in *Harper* applied a number of arguments developed in the context of wills and freedom of testation to this (apparently *inter vivos*) trust. However, that being said, this does not detract from the importance of the judgment as providing further support for the stance taken in *King*. In particular, the court in *Harper* also termed as 'persuasive' the four considerations raised as to why freedom of testation should trump the right to equality in the context of a direct disinheritance in a private will (para [33]). The application that the words 'children', 'descendants', 'issue' and 'legal descendants' used in the trust deed included the first applicant's adopted children was thus unsuccessful. The alternative application to have the trust deed amended in terms of section 13 of The Trust Property Control Act 57 of 1988 also failed. (See also the comments on the interpretation of the trust deed in *Harper* below under 'Interpretation of wills'.)

Validity of wills: The use of expert evidence in cases of allegedly forged wills and compliance with testamentary formalities

This chapter for the previous review period contains a detailed analysis of judgments involving the use of expert evidence in the contexts of two different succession issues (see 2016 *Annual Survey* 961ff). One judgment focused on expert medical evidence as to a deceased testator's testamentary capacity, while the other considered the evidence of a handwriting expert where it was alleged that signatures on a contested will had been forged. The current review period saw another judgment falling in the first category (*Assumption & another v Reid & others* (3328/2015) [2017] ZAECPEHC 21 (22 February 2017)), and four judgments falling in the second category (*Twine & another v Naidoo & another* (38940/14) [2017] ZAGPJHC 288 (16 October 2017) (now reported as [2018] 1 All SA 297 (GJ)); *Karani v Karani NO & others* (02266/2014) [2017] ZAGPJHC 318 (20 October 2017) (now reported as [2018] 1 All SA 156 (GJ)); *Naude & others v Naude & another* (4349/2014) [2017] ZAECGHC 26 (9 March 2017); and *Mduzulwana v Mduzulwana & others* (1470/2017) [2017] ZAECMHC 7 (26 May 2017)). In light of the comprehensive treatment of the issue in the 2016 *Annual Survey*, the exercise will not be repeated here. However, it is worth pointing

out that *Twine,* in particular, appears to be a significant judgment in this respect. The main reason, among other things, is that the judgment contains a list with further analyses of no fewer than 21 'principles with regard to expert witnesses' (as Vally J termed it – see para [18(a)–(u)]).

In both *Twine* and *Karani*, the contentious issue was indeed whether or not the signatures in question were forgeries. However, as it turned out, the contested wills in both cases were in any event invalid as they did not comply with certain of the formal requirements set out in section 2(1)*(a)* of the Wills Act 7 of 1953 (the Wills Act). In *Twine*, the two witnesses signed the document and left before the testator had signed. This amounted to non-compliance with section 2(1)*(a)*(ii) of the Wills Act, which stipulates that the testator must make or acknowledge his or her signature in the presence of two or more competent witnesses. And in *Karani*, the second witness did not sign the document in the presence of the testator and the first witness, but only some time later. This amounted to non-compliance with section 2(1)*(a)*(iii) of the Wills Act, which stipulates that the two competent witnesses must sign the will in the presence of the testator and of each other.

In other words, the formality issue in *Karani* was simple and straightforward. It is, therefore, rather unfortunate that the court went further and made two very basic mistakes regarding testamentary formalities. The first was that it got one aspect of the burden of proof wrong. While the court was correct in asserting that the plaintiff (who alleged that the signature was a forgery) bore the onus of proving this, it was not correct in asserting that the second and third defendants (who were the beneficiaries in the contested will) bore the onus of proving that the document complied with the testamentary formalities (para [15]). There is a presumption that a will which appears valid on the face of it (as the contested will in this case did) is in fact valid; and the burden of proving the opposite rests on the person who alleges this (in this case the plaintiff: see, eg, MM Corbett, Gys Hofmeyr & Ellison Kahn *The Law of Succession in South Africa* 2 ed (2001) 89; MJ de Waal & MC Schoeman-Malan *Law of Succession* 5 ed (2015) 87–8; 2011 *Annual Survey* 1035; 2013 *Annual Survey* 985; 2014 *Annual Survey* 956; 2015 *Annual Survey* 1074; and see also s 4 of the Wills Act). This presumption covers both the formal validity of the will (ie, its compliance with the formal execution requirements in s 2(1)*(a)* of the Wills Act) and the capacity of the

testator and the witnesses (2014 *Annual Survey* 956; 2015 *Annual Survey* 1074). The second mistake was that the court asserted that, apart from signing the last page of a will, the witnesses must also sign the other pages (para [30]; note that this paragraph number should probably be [31]). This is not correct. Section 2(1)*(a)*(iv) of the Wills Act stipulates that where a will consists of more than one page, only the testator need sign the pages other than the last page. This makes it clear that the witnesses need only sign the last page (or, of course, that page where the will consists of only one page).

Section 2(3) of the Wills Act 7 of 1953: Acceptance of a document as a will despite non-compliance with formal requirements

Section 2(3) of the Wills Act concerns the power of a court to order the acceptance of a document as a will, despite the fact that it fails to comply with the formal requirements for a will as set out in section 2(1)*(a)* of the Act. As observed before, section 2(3) has by now become a regular theme in this chapter. It is, therefore, unnecessary once again to repeat the section's structure and requirements (see, eg, 2013 *Annual Survey* 987; 2014 *Annual Survey* 957–8; 2015 *Annual Survey* 1075–83; 2016 *Annual Survey* 965-71).In addition, the few cases for the review period in which section 2(3) did feature were quite uncomplicated as regards its application.

The will in *Pillay v Master of the High Court, Durban & another* (5663/2016) [2017] ZAKZDHC (26 April 2017) was signed by the testatrix using her thumbprint. The will was properly witnessed, and each page also contained the signature of a commissioner of oaths as required by section 2(1)*(a)*(v) of the Wills Act in instances where a will is signed by making a 'mark' (such as a thumbprint). However, the will lodged with the Master lacked a certificate by the commissioner of oaths in question, certifying that 'he has satisfied himself as to the identity of the testator and that the will so signed is the will of the testator'. It was, therefore, not surprising that the Master rejected the will. *Pillay* was an application to have the will accepted in terms of section 2(3). The commissioner then attempted to rectify the matter by submitting the required certificate. However, the Master rejected this certificate, asserting, quite correctly, that it was not attached to the will 'as soon as possible' after either the execution of the will or the death of the testator. The facts showed that the will had been executed in September 2006 and that the testatrix died in

January 2009. The late submission of the certificate occurred only in May 2015.

In my view *Pillay* is a textbook example of the type of case for which section 2(3) was intended. The application of the section in such a scenario would prevent a will from being rejected (and the testator's testamentary wishes being frustrated) owing solely to non-compliance with one of the formal requirements by an official such as a commissioner of oaths. This is also how the court in *Pillay* viewed the matter. After having satisfied itself of the plausibility of the explanation for the long delay, the court concluded that the requirements for the application of section 2(3) had been satisfied, and that it could order the Master to accept the document as the testatrix's will in terms of the section. In fact, Chetty J pointedly observed that the mistake by the commissioner of oaths in this matter 'should not be allowed to override the testamentary intention of the deceased' (para [19]).

In two further cases the section 2(3) applications were unsuccessful for very simple reasons. In *Helmie & another v Ruiters & others* (3634/2015) [2017] ZAECPEHC 13 (14 February 2017), the court was convinced that the contested document was a forgery and it therefore refused to condone it under section 2(3). And in *Tole v Master of the High Court of South Africa & others* (2070/2015) [2017] ZAECMHC 22 (29 June 2017), owing to 'a drought of information regarding the circumstances surrounding the execution of the purported will' (para [23]), the court ordered the matter to be referred for the hearing of oral evidence before it was prepared to rule on the application. (Regarding s 2(3), see also the remarks in two of the judgments referred to above under 'Validity of wills: The use of expert evidence in cases of allegedly forged wills and compliance with testamentary formalities': *Karani v Karani NO & others* (para [31]) and *Naude & others v Naude & another* (paras [109]-[111].)

Section 2(3) was also applied in *Shusha & another v Master of the High Court & others* (2404/2015) [2017] ZAECMHC 17 (7 May 2017). This is a peculiar case, however, in that the judgment contains no exposition of the nature of the formal deficiencies regarding the document in question, apart from noting that it did not comply 'with some of the formalities prescribed by the Wills Act 7 of 1953' (para [4]). More importantly, it also contains no clear reasons as to why section 2(3) could find application (see only the cryptic remarks in para [15]). In other words, there was no attempt to apply the various requirements for a section 2(3)

condonation order to this particular set of facts. Of course, this is highly problematic, as section 2(3) does not find automatic application – its requirements must be proved in every particular set of circumstances. It is clear from the judgment, however, that the court placed a high premium on the deceased's freedom of testation and the importance of giving effect to his testamentary wishes. This is apparently the reason why the court condoned the very long delay in bringing the application, and why it refused (quite correctly in my view) to afford any validity to an alleged agreement between the potential heirs to the effect that the deceased's estate should rather have been distributed in terms of the law of intestate succession. However, important as the principle of freedom of testation is, it cannot override the clear and mandatory statutory requirements for the application of section 2(3).

Capacity to inherit of someone who has taken part in the execution process of a will

Section 4A(1) of the Wills Act stipulates that, among other things, any person who attests and signs a will as a witness is disqualified from receiving any benefit under that will. It is important to note that the effect of the section is not that the will is rendered invalid; the provision only disqualifies the witness from receiving the benefit bequeathed. However, this disqualification is subject to a number of exceptions in section 4A(2). Relevant for present purposes is the exception provided for in section 4A(2)*(a)*, which provides that a court may declare the person disqualified in terms of section 4A(1) competent to receive the benefit bequeathed 'if the court is satisfied that that person or his spouse did not defraud or unduly influence the testator in the execution of the will'.

Section 4A has not featured very often in court judgments (but see, eg, *Theron & another v Master of the High Court* [2001] 3 All SA 507 (NC) and, especially, the leading judgment in *Blom & another v Brown & others* [2011] 3 All SA 223 (SCA) and the discussion of *Blom* in 2011 *Annual Survey* 1047–50). It is, therefore, a pity that, owing to a procedural issue, the court in *Ex parte Pretorius (Franklin as Intervening Party)* [2017] 2 All SA 558 (WCC) did not get the opportunity to apply the provision to the facts of the case. In *Pretorius*, in her last will the testatrix bequeathed certain benefits (including her house and motor vehicle) to the applicant – a friend of many years. But he was also

one of the witnesses to the will. In terms of section 4A(1) of the Wills Act, the applicant was thus disqualified from receiving these benefits. Not surprisingly, he then applied for a court order in terms of section 4A(2)*(a)* declaring him competent to receive the bequeathed assets

The problem, however, was that he brought the application *ex parte* by way of motion proceedings. The court decided that this was inappropriate in a matter such as this where the question of whether or not the applicant had unduly influenced the testatrix was put in the spotlight by the intervening party. This was a seriously disputed issue and it could not be resolved on the papers. Moreover, the applicant 'did not seek the referral of the matter to oral evidence, even when the disputes of fact become [*sic*] patently clear to him after the opposing papers had been filed and he had been given an opportunity in the agreed court-ordered timetable to do so' (para [45]). Thus, given the 'fundamental disputes of facts on the papers and with the applicant having failed to make out a case for the relief claimed' on the papers (para [46]), the court dismissed the application with costs.

The extension of the meaning of 'spouse' in section 2C(1) of the Wills Act 7 of 1953

Moosa NO & others v Harnaker & others (400/2017) [2017] ZAWCHC 97 (14 September 2017) (now reported as *Moosa NO & others v Harneker & others* 2017 (6) SA 425 (WCC)) concerned an unopposed application in which the 'crisp legal issue' (para [1]) was whether, in terms of section 9 of the Constitution (the equality clause), the provisions of section 2C(1) of the Wills Act can be extended to protect surviving spouses in polygynous Muslim marriages. Despite the 'crispness' of this legal issue, the outcome of the application in *Moosa* constituted yet another step in the long journey of broadening the scope of the concept 'spouse' in our law of succession in order to bring it in line with the norms of our constitutional era.

The facts in *Moosa* were quite simple. The deceased (the testator) lived according to Muslim law in a polygynous relationship with two spouses. His marriage to the second applicant was formalised in terms of the Marriage Act 25 of 1961 (the Marriage Act), but his marriage to the third applicant was never so formalised and was concluded only in terms of Muslim law and rites. On the deceased's death, his two spouses and the nine

children born of the two marriages became entitled to his assets. However, in terms of section 2C(1) of the Wills Act, the nine children renounced their right to inherit in favour of the two surviving spouses. Section 2C(1) provides the following:

> If any descendant of a testator, excluding a minor or a mentally ill descendant, who, together with the surviving spouse of the testator, is entitled to a benefit in terms of a will renounces his right to receive such benefit, such benefit shall vest in the surviving spouse.

However, the twelfth respondent (the Registrar of Deeds) refused to register the immovable property in the name of the third applicant as well. He contended that only the second applicant, to whom the testator was married in terms of the Marriage Act, qualified as a 'spouse' in terms of this section. According to him, the third applicant, to whom the testator was married in terms of Muslim law and rites and with whom he lived in a polygynous relationship, did not qualify. The applicants then sought relief which, according to the court, was 'wide in form and substance' (para [15]), but which in fact boiled down to an application for an order rectifying the unfair treatment of the third applicant and directing the twelfth respondent also to register the immovable property in her name.

In his judgment Le Grange J pointed out that section 2C(1) of the Wills Act was inserted into the Act by the Law of Succession Amendment Act 43 of 1992. It dated back to the pre-constitution era and the restricted meaning of the word 'spouse' contended for by the twelfth respondent could consequently not 'entirely be disregarded' (para [24]). However, this raised the central question of whether such a restricted interpretation would violate the equality provision in section 9 of the Constitution. It was not difficult to conclude that it would do exactly that. With reference to the judgments of the Constitutional Court in *Daniels v Campbell NO & others* 2004 (5) SA 331 (CC) and *Hassam v Jacobs NO & others* 2009 (5) SA 572 (CC), and on the basis of a comparison between the potentially different treatment of different groups of spouses (para [28]), Le Grange J found that the differentiation contended for amounted to unfair discrimination that was in breach of section 9(3) of the Constitution. He further found that such differentiation bore no rational connection to a legitimate government purpose, and that it was 'no longer accepted and sustainable in our society that is based on democratic values, social justice and fundamental human rights as enshrined in our Constitution' (para [30]).

It followed that the exclusion of widows in polygynous Muslim marriages from the protection of section 2C(1) of the Wills Act is 'constitutionally unacceptable and unjust as the provision affords a widow in a civil monogamous marriage some benefits but denies the same to a widow in a Muslim polygynous marriage' (para [33]). The court proposed as the appropriate remedy that the following words be read in at the end of section 2C(1):

> For purposes of this sub-section, a 'surviving spouse' includes every husband and wife of a de facto monogamous and polygynous Muslim marriage solemnised under the religion of Islam.

The application succeeded and the court made no order as to costs.

(Note that the declaration of constitutional invalidity in *Moosa* was confirmed by the Constitutional Court in *Moosa NO & others v Minister of Justice and Correctional Services & others* (CCT251/2017) [2018] ZACC 19 (29 June 2018). The latter judgment will be discussed in the 2018 *Annual Survey*.)

Interpretation of wills

As indicated in the discussion of *King NO & others v De Jager & others* (see 'Freedom of testation and its possible limitations' above), the applicants had failed to make out a case that the will in question should be amended by the deletion of the stipulation limiting the fideicommissary heirs to male descendants only. This outcome forced the court to engage with the alternative argument advanced, namely that on a proper interpretation of clause 7 of the will, the deceased's grandsons (the fourth to eighth respondents) had to be substituted in the place of their mothers as fideicommissary heirs to the property.

The interpretation contended for centred around the words 'a male descendant' (original Afrikaans: 'manlike nakomelinge') in the first sub-provision of clause 7, which read in translation: '. . . in the case of the death of any son or son's son who does not leave a male descendant, his share/portion will fall away on the same conditions as above and therefore pass to his brothers or their sons in their place . . .' (para [84]). The argument was that the use of the words 'manlike nakomelinge' instead of 'seun' (son), was a clear indication that the testators had a different and wider category of persons in mind than only a 'son' in the strict sense, namely *any* male descendant. On this interpretation the words 'manlike nakomelinge' (male descendants) had to include

the deceased's more remote descendants (such as his grandsons, the fourth to eighth respondents) and not only the generation after the deceased (such as the sons he never had).

In his analysis of this argument, Bozalek J relied principally on one of the central tenets of the interpretation of wills. This is that in interpreting a will one must first ask if there is a so-called 'dominant clause' and, if there is, effect must as far as possible be given to it. In *King*, there clearly was such a dominant clause and all the sub-provisions (including the one quoted above) were subject to it. This dominant clause made it clear that it was the testators' intention that the fideicommissary property end up in the hands of either their grandsons (such as the deceased) or great-grandsons (such as the sons of the deceased's brother, the first to third respondents), as the case may be. For this reason, the court found that the applicants had also failed to make out a case for the alternative relief sought. Because of the special circumstances of this case, the court concluded that 'the most appropriate result would be that all parties pay their own costs' (para [109]) – in effect meaning that there was no order as to costs.

Of course, an issue of interpretation was also central to the dispute in *Harper & others v Crawford NO & others* (see above under 'Freedom of testation and its possible limitations'). There the question was whether the words 'children', 'descendants', 'issue' and 'legal descendants' used in the trust deed (note again that it probably was not a testamentary trust, and thus not a will) included the first applicant's adopted children. Based on a very comprehensive interpretation exercise, the court concluded that they did not. In reaching this conclusion, Dlodlo J attached particular importance to the surrounding circumstances known to the donor at the time of the creation of the trust (always an important consideration in the interpretation of wills), and to the judgment of the then Appellate Division in *Cohen NO v Roetz NO & others* 1992 (1) SA 629 (A). In *Cohen*, by which the court in *Harper* considered itself bound, the Appellate Division found in very similar factual circumstances, that words such as those at issue in *Harper* did not include adopted children.

Administration of Estates

Locus standi *of an heir to apply for retransfer to estate of immovable estate asset*

In *July & others v Mbuqe & others* (2522/2013) [2017] ZAECMHC 1 (9 February 2017), the applicants applied, among other

things, for an order directing the retransfer of a certain immovable asset to the deceased estate of the late Eunice Mbuqe (the deceased). They alleged that the executor of the deceased's estate wound up the estate based on the misrepresentation that he was the deceased's only heir. Because of this misrepresentation, the immovable asset was transferred to the executor as his personal property, and after that to a number of subsequent purchasers. The applicants further alleged that, in fact, their late mother (the executor's sister) was also an heir and that they (as their mother's heirs) had an interest in the retransfer of the immovable asset to the deceased estate.

However, the eleventh respondent (Standard Bank, which was the holder of two mortgage bonds over the asset) raised a point *in limine* contesting the applicants' *locus standi* to bring the application. The bank argued that the relief sought (for the retransfer of the asset) was of a vindicatory nature and could, as a matter of law, only be claimed by the duly appointed executor of the deceased's estate (see also below under 'Application for rescission of default judgment granted against deceased estate and for retransfer to estate of immovable estate asset sold in execution'). This point *in limine* was the only one that the court had to decide.

As its point of departure, the court in *July* stated the general rule 'that an executor is the only person who can represent the estate of a deceased person' (para [6*(b)*(i)]). However, there is an exception to this rule as originally formulated in the old English case of *Beningfield v Baxter* (1886) 12 AC 167 (PC). This exception entails that, if an executor cannot act on behalf of the estate because his or her own conduct is at issue, another person with a beneficial interest in the deceased estate can so act. This so-called '*Beningfield* exception' was also received into South African law in the context of the law of trusts (see *Gross & others v Pentz* 1996 (4) SA 617 (A) and, eg, 2015 *Annual Survey* 1066–7). In *July*, it was common cause that the alleged misconduct was that of the executor. Thus, applying the *Beningfield* exception and referring to Corbett CJ's formulation in *Gross*, Dawood J concluded that it would have been 'too cumbersome a process upon the aggrieved beneficiaries to first sue for the removal of the executor and the appointment of a new executor as a precursor to possible action being taken by the new executor for the recovery of the estate assets in the circumstances of this case' (para [7*(a)*(iii)]). This meant that the applicants did have the required *locus standi* and the point in *limine* was dismissed with costs.

There can certainly be no problem with the court's application of the *Beningfield* exception in this case if one accepts the factual basis on which it was done. However, there is one complication: the executor in question had already died when the application was made. In other words, this was not really a case where the applicants first had 'to sue for the removal of the executor and the appointment of a new executor as a precursor to possible action being taken by the new executor' (see above; but note that the applicants did ask that the appointment of the deceased executor be 'set aside' – para [1(i)]). However, because the court had to decide only the point *in limine* concerning *locus standi*, its approach was perhaps understandable as the most practical under the circumstances.

Application for rescission of default judgment granted against deceased estate and for retransfer to estate of immovable estate asset sold in execution

The facts in *Kenene NO v Invela Financial Corporation (Pty) Ltd & others* [2017] 3 All SA 725 (ECG) were quite complicated, not least because the immovable estate asset, initially sold in execution, subsequently went through both a number of further sales on the open market and subsequent transfers, until it was eventually registered in the name of the sixth respondent. *Kenene* concerned an appeal by the executor of the deceased estate against the dismissal by the magistrate's court of an application to have a default judgment against the deceased estate rescinded, and the sale in execution of the immovable estate asset declared void. Because the application was also one for the retransfer of the immovable asset to the deceased estate, it in effect constituted a vindicatory action. To this extent the judgment is, of course, also of interest in the context of the law of property (see, eg, the observation of Revelas J in connection with the abstract theory of transfer of ownership applicable in South African law (para [19]), and also above under '*Locus standi* of an heir to apply for retransfer to estate of immovable estate asset').

However, for purposes of the administration of estates, *Kenene* is of interest for two main reasons. The first is that the court emphasised the distinction between the powers of a so-called 'Master's representative' appointed in terms of section 18 of the Administration of Estates Act 66 of 1965 (the Administration of Estates Act), and an executor who has been issued with formal letters of executorship by the Master. In *Kenene*, the settlement

agreement which led to the default judgment was authorised by the Master's representative (the second respondent), at a time when an executor (the appellant) had already received her letters of executorship. The effect was that the settlement agreement was not properly authorised and, therefore, invalid (para [15]). The second reason why *Kenene* is of interest is because the court once again stressed that a sale in execution of an estate asset in contravention of section 30 of the Administration of Estates Act – that is, without the authorisation of the High Court – is invalid (see also *Gounder v ABSA Bank Ltd & another* 2008 (3) SA 25 (N) and 2008 *Annual Survey* 1099–1101). This is exactly what happened in *Kunene,* and the sale in execution was consequently also invalid. The court further stressed that this result follows despite the provision in section 70 of the Magistrates' Courts Act 32 of 1944 (paras [24] [27]).

The appeal was consequently successful, and the appellant obtained the orders she had initially sought in the magistrate's court. However, the court refused to order costs against the first, sixth, and further respondents.

Nature of appeal under section 35(10) of the Administration of Estates Act 66 of 1965

In *Friedrich & others v Smit NO & others* 2017 (4) SA 144 (SCA), the Supreme Court of Appeal had to determine two issues. The first was the nature of the appeal given by section 35(10) of the Administration of Estates Act; and the second was whether the surviving spouse in question had proved that she needed maintenance in terms of the Maintenance of Surviving Spouses Act 27 of 1990. For purposes of this chapter, only the first issue is relevant (but for the background to this appeal and the reasons why the Supreme Court of Appeal decided that the spouse had not proved that she needed maintenance, see the discussion of the judgment of the full court in 2015 *Annual Survey* 1092–4 and paras [15]–[21] of *Friedrich*).

Regarding the nature of the appeal given by section 35(1)), Tshiqi JA stated:

> Both the trial court and the full court erred in their approach to the matter. The power conferred by s 35(10) of the Estates Act on the court is . . . an appeal in the wide sense in that 'the court can consider the matter afresh and may make any order it deems fit'. (See *Meyer v Iscor Pension Fund* 2003 (2) SA 715 (SCA) ([2003] 1 All SA 40) at 725I.) The decision of the master referring the matter to court for the determination of quantum did not mean that the court was confined to the determina-

tion of the quantum. It had to apply its mind to the matter afresh. Once it was found that Mrs Friedrich did not lead any evidence to show that she was entitled to reasonable maintenance, that should have been the end of the matter (para [14]).

Consequently, the appeal succeeded with costs.

Removal of executor

The issue of the removal of an executor from his or her position has either been discussed in detail or at least referred to in this chapter in all successive recent editions of the *Annual Survey* (see 2011 *Annual Survey* 1053–5; 2012 *Annual Survey* 846–8; 2013 *Annual Survey* 996; 2014 *Annual Survey* 964–5; 2015 *Annual Survey* 1095–6; 2016 *Annual Survey* 974-5). One further judgment during the review period, in which the removal of an executor has featured, is therefore only mentioned here with a brief explanation of its outcome.

Tung'ande & others v Tung'ande & others (67369/2015) [2017] ZAGPPHC 49 (14 February 2017) concerned an opposed application for the removal of the first respondent as executrix of a deceased estate, as well as for the removal of the second respondent (the executrix's appointed agent). The executrix was the surviving spouse of the deceased and the stepmother of the applicants.

The applicants applied for the removal of the first respondent in terms of section 54(1)*(a)*(v) of the Administration of Estates Act. This provision states that a court may remove an executor from office 'if for any other reasons the Court is satisfied that it is undesirable that he should act as executor of the estate concerned'. The application for removal in this case was based on two grounds. First, the applicants alleged that the first respondent had accepted an offer from her daughter for the purchase of an immovable asset of the estate, thus indicating a conflict of interests. Secondly, they alleged that the first respondent had failed on request to furnish them with information regarding both the value of the estate and the estate's creditors.

The court dismissed both these grounds for removal. Regarding the sale of the immovable asset, the court pointed out that, because the proposed sale was to a child of the executor, section 49(1) of the Administration of Estates Act was applicable. In terms of this provision, any such sale would be void 'unless it has been consented to or is confirmed by the Master or the Court'. In *Tung'ande*, the Master had not yet consented to or confirmed the

sale. Consequently, it was void and could technically not have been accepted by the first respondent. According to the court, the application for removal on this ground was thus 'premature' (para [12]). It considered the application for removal on the second ground, too, as 'premature' (para [15]). This was because the applicants had not indicated whether they had sought and failed to obtain the information in question from the Master's office, where it should have been lodged. (Regarding the general conduct expected of an executor and the importance of s 26(1) of the Administration of Estates Act in this respect, see also *Friedman NO v Master of the High Court Polokwane & others* (2464/2017) [2017] ZALMPPHC 37 (14 November 2017).)

The application for removal of the executor was therefore dismissed with costs.

TAX LAW

Tracy Gutuza*

LEGISLATION

In order to comply with the requirements of the Constitution of the Republic of South Africa, 1996, tax legislation is divided into provisions regulating money Bills requiring the application of section 77 of the Constitution, and the framework applicable to ordinary Bills dealing with tax administration. A number of amendments were brought about by the Tax Administration Laws Amendment Act 16 of 2016 (*GG* 40563 of 18 January 2018), which came into effect from 19 January 2017 unless indicated otherwise; the Rates and Monetary Amounts and Amendment of Revenue Laws Act 13 of 2016 (*GG* 40560 of 19 January 2017); the Taxation Laws Amendment Act 15 of 2016 (*GG* 40562 of 18 January 2017); and finally, the Rates and Monetary Amounts and Amendment of Revenue Laws (Administration) Act 14 of 2016 (*GG* 40561 of 18 January 2017), which came into operation from 19 January 2017 unless otherwise indicated. In addition to amending certain provisions to the Income Tax Act 58 of 1962, the Value-Added Tax Act 89 of 1991 (the VAT Act), the Tax Administration Act 28 of 2011, and the Customs and Excise Act 91 of 1964, these amendments serve to clarify existing provisions.

Income Tax: Individuals

The Income Tax Act

A number of amendments dealing with the taxation of individuals were included in the amending provisions to the Income Tax Act. They are discussed on below.

Interest-free or low-interest loans

A new anti-tax avoidance provision in the form of section 7C has been introduced to deal with the avoidance of estate duty and donations tax when an individual transfers wealth through an interest-free loan, or a loan having a low interest rate. Section 7C

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applies when a low-interest or interest-free loan is made by a natural person or company in which a natural person together with connected person/s holds at least twenty per cent of the shares. When such a loan is made, the interest-free or low-interest loan is treated as an annual ongoing donation. Certain trusts and loans are excluded from the ambit of section 7C. The trusts excluded are special trusts, public benefit organisation trusts, and vesting trusts. The excluded loans include loans used to fund the acquisition of a primary residence, a loan subject to the transfer pricing rules in section 31 of the Income Tax Act, a loan to a trust in terms of the Sharia provisions as envisaged in section 24JA of the Income Tax Act, and a loan made by a company to a shareholder by virtue of his or her shareholding (s 64E(4) of the Income Tax Act).

Employee-based share-incentive schemes

Sections 8C and 8CA of the Income Tax Act have been amended to prevent dividend-stripping schemes in employee share-incentive schemes. The amendments provide that where shares held by employees in an employee-based share-incentive scheme are liquidated, and the amount received by an employee qualifies as dividend income, that amount must be treated as remuneration in the hands of the employee. Section 10(1)*(k)*, which exempts dividend income from income tax, has been amended specifically to exclude these dividends from the exemption.

Pension, provident, and retirement funds

The changes to the tax treatment of pension, provident, and retirement funds comprise refinements to the tax treatment of these funds.

Section 10(1)*(gC)*(ii) of the Income Tax Act has been amended to remove the exemption for a lump sum, pension, or annuity where the retirement fund is located within South Africa but the relevant services have been rendered outside the Republic. However, where a resident transfers retirement assets from a foreign retirement fund to a local retirement fund, the benefits will remain exempt from tax. This amendment came into effect on 1 March 2017.

The definition of 'retirement annuity fund' in section 1 of the Income Tax Act has been amended to provide for the withdrawal of a lump sum from a retirement annuity fund on emigration, and

for recognition of the emigration by the South African Reserve Bank. This change became effective on 1 March 2016.

Section 11*(k)* was introduced in order to allow for the roll-over of excess retirement fund contributions before 1 March 2016. The provision allows for deductions in respect of contributions made to all retirement funds to be set off against passive income. However, the passive income does not include capital gains. This amendment also became effective on 1 March 2016.

Section 9(2)*(i)*, which provides that the source of lump sum and annuity payments from pension and provident funds is from a source outside South Africa if the amounts were received in relation to services rendered outside South Africa, has been amended. The new provision clarifies that this does not apply to lump sums or annuities received from retirement annuity funds. The amendment became operational as from 1 March 2017.

Paragraph 12D of the Seventh Schedule to the Income Tax Act has been amended. This section deals with the valuation of the taxable fringe benefit for retirement fund contributions where the retirement fund has a defined benefit. The amended provision clarifies that the 'retirement funding income' includes fringe benefits, and that both contributions made by the fund, and on behalf of employees, must be taken into account.

Bursaries and scholarships, learnerships, and employment tax incentives

In order to incentivise support for education and skills development, amendments have been made to the allowances for bursaries and scholarships, learnerships, and employment tax incentives.

The monetary limit for granting an employee an allowance when assisting his or her relative through a scholarship or bursary has been amended by increasing the remuneration for a qualifying employees to R400 000. Moreover, the monetary limits for exempt bursaries and scholarships has been increased from R30 000 to R40 000 (s 10(1)*(q)* became effective from 1 March 2016 and applies in respect of years of assessment commencing on or after that date).

Section 12H, dealing with deductions in terms of the learnership tax incentive, was amended by, among other things, linking the allowable deduction to the National Qualifications Framework level of the qualification (effective from 1 October 2016).

The employment tax incentive in terms of the Employment Tax Incentive Act 26 of 2013 was extended until 28 February 2019,

and an annual cap of R20 million was placed on the claim allowed for each employer.

Income Tax: Business

A number of amendments have been made to the tax treatment of hybrid instruments and tax incentive provisions. The amendments applicable to hybrid instruments aim to prevent certain tax avoidance practices, whereas the new tax incentive provisions aim to provide tax relief in terms of government policy.

As for the tax treatment of hybrid instruments, sections 8F and 8FA were amended to provide for the treatment of double non-taxation where the borrower is not a South African taxpayer. The amendment limits the reclassification of 'interest' as 'dividend' where the issuer is a resident company, or a non-resident with the interest attributable to a permanent establishment located in South Africa, or is a controlled foreign company with the interest taken into account in terms of section 9D. This amendment became effective on 24 February 2016.

Section 8F was amended to exclude from its application subordination agreements concluded between connected parties. The section also does not apply in instances where the auditors have so requested, and if the assets of the company are less than its liabilities. This provision is effective as from 1 January 2016.

Sections 8E and 8EA, which deal with debt-like hybrid instruments, were expanded by the amendment of the definitions of 'hybrid equity instrument' and 'preference share'. These definitions now include any right or interest where the value of the right or interest is determined directly or indirectly by the underlying share that is either an equity share or a share other than an equity share. This provision became effective on 1 May 2011. The effective date of section 8E was backdated to 1 April 2012.

Section 22 and paragraph 11 of the Eighth Schedule, which deal with the transfer of collateral arrangements, were amended by extending the period within which the identical share or security must be returned from twelve to twenty-four months. This was done by means of an amendment to the definition of 'collateral arrangement' in section 1 of the Securities Transfer Tax Act 25 of 2007 by including listed government bonds as instruments for security lending and collateral arrangements (effective from 1 January 2017).

Amendments to provisions dealing with tax incentives and relief for certain types of business include:

- the expansion of the ambit of section 12E, which deals with the taxation of small business corporations, to include personal liability companies;
- the amendment of section 13*quat,* dealing with urban development zones, to allow municipalities to apply for the urban development zones incentives;
- the insertion of section 12U to provide an accelerated capital allowance for infrastructure used in producing renewable energy.

The section 12J venture capital regime was refined by an amendment to the 'connected parties' requirement. Further tax relief has been provided for infrastructural spending by mining companies (s 36). Provision has also been made for tax relief in land-reform initiatives by exempting such initiatives from donations and capital gains tax (s 56, paras 64A and 64D of the Eighth Schedule to the Income Tax Act). Section 11D, which provides incentives for research and development, has been amended by allowing for the re-opening of assessments in certain circumstances.

Income Tax: Financial Institutions

The tax treatment of the short-term insurance business was amended in order to align it with changes to the long-term insurance industry and the implementation of the Solvency Assessment and Management Framework (s 29A). Similarly, amendments have been made to align the tax treatment of the audited annual financial statement of short-term insurance investor contracts (s 28(3)).

A number of amendments were made to the tax treatment of Real Estate Investment Trusts (REITs). This was done by amendment of section 25BB, which sets out the tax treatment of REITs, and other relevant sections. Equity shares in a REIT or a 'controlled company' as defined in section 25BB were excluded from the provisions deeming amounts received from the disposal of shares to be of a capital nature, to remove any conflict in the interaction of sections 9C and 25BB (proviso added to s 9C(5) with effect from 1 January 2016). Furthermore, the definition of 'rental income' in section 25BB(1) has been amended to include qualifying distributions, dividends, and foreign dividends as a

result of its exclusion from section 9C, and to take into account any amount recovered or recouped in respect of allowances previously obtained (effective from 1 January 2016).

Income Tax: International

The amendments affecting cross-border transactions mainly relate to the cross-border treatment of collective investment schemes in the controlled foreign company provisions, and withholding tax on interest.

Section 9D, which brings the income of controlled foreign companies into the South African tax net, was amended by exempting collective investment vehicles from its application, and by adjusting the comparable tax exemption for controlled foreign companies.

Various amendments have been made to the withholding tax on interest provisions (ss 50D, 50E, 50F and 50G). Section 50D has been amended to exclude multilateral development financial institutions from the withholding tax on interest. These institutions include the African Development Bank, the World Bank, the International Monetary Fund, the African Import and Export Bank, the European Investment Bank, and the New Development Bank. Section 50G has been amended to provide for refunds from the withholding of the interest, including where the interest subsequently becomes irrecoverable. Section 24I, dealing with exchanges difference, was also amended to take bad debts into account.

Despite only being introduced in 2013, sections 51A to 51H, which dealt with the withholding tax on service fees, have been repealed. As from 1 January 2017, the payment of service fees from a South African resident to a non-resident is regulated by the Reportable Arrangements in the Tax Administration Act 28 of 2011.

Value-Added Tax

The main amendments concerning value-added tax (VAT) were effected by changes to the definition of 'second-hand goods', allowing municipal entities to account for VAT under certain circumstances and to provide for a VAT exemption where imported goods are lost, destroyed, or damaged through natural disasters.

The definition of 'second-hand goods' in the VAT Act was amended to extend the deduction of the notional input tax credit

for the sale of goods containing gold, provided that the goods are 'acquired for the sole purpose of supplying those goods in the same or substantially the same state to another person' (definition of 'second-hand goods' in s 1 of the VAT Act, with effect from 1 January 2017).

The amendment with respect to municipalities aligned the VAT treatment of municipal entities to that of public authorities and municipalities by allowing municipal entities to account for VAT on the payment, not receipt basis if the amount exceeds R100 000 (s 15(2)*(a)*(iv) of the VAT Act with effect from 1 April 2017).

Schedule 1 to the VAT Act was amended to align the VAT Act with Schedule 4 to the Customs and Excise Act by exempting from VAT goods which after being imported are held in a bonded warehouse and have not entered South Africa for home consumption, and are lost, destroyed or damaged, either through natural disasters or in circumstances that the Commissioner deems exceptional.

Customs and Excise

A general anti-tax avoidance provision was inserted in the Customs and Excise Act (s 119B).

Tax Administration

A number of changes were made in order to 'enhance the independence of the Tax Ombud'. (See Memorandum on the Objects of Tax Administration Laws Amendment Bill, 2016.)

In particular see:

(a) the tenure of the Tax Ombud was amended to a five-year term with the possibility of a renewal (s 14(1) of the Tax Administration Act amended by s 49 of the Tax Administration Laws Amendment Act);
(b) the ability of the Tax Ombud to appoint staff was increased and the budget of the Tax Ombud to be approved by the Minister of Finance (s 15(1) and (4) amended by ss 49 and 50*(b)* of the Tax Administration Laws Amendment Act);
(c) the expansion of the mandate of the Ombud to include reviews, at the request of the Minister of Finance, or with the approval of the Minister if on the initiative of the Tax Ombud, of any 'systemic or emerging issue related to a service matter, or the application of the provisions of the [Tax Administration] Act or procedural or administrative provi-

sions of the [Tax Administration] Act' (s 16(1) amended by s 51 of the Tax Administration Laws Amendment Act);

(d) the provision of reasons by either the South African Revenue Service (the SARS) or the taxpayer in the event that the Ombud's recommendations are not accepted by the relevant party (s 20(2) amended by s 52 of the Tax Administration Laws Amendment Act).

Other amendments to the Tax Administration Act include limiting the ability of the SARS to reopen an assessment with respect to reaching finality (s 100 of the Tax Administration Act amended by s 56 of the Tax Administration Laws Amendment Act) and the possible extension of the period for objection to an assessment when there are exceptional circumstances for a delay in lodging an objection (s 104 amended by s 57 of the Tax Administration Laws Amendment Act).

The understatement penalty provisions have been amended to clarify that such penalties apply in the event of an 'impermissible arrangement' in terms of the general anti-tax avoidance rule (GAAR) in the Income Tax Act, the VAT Act and other GAAR provisions. The clarification was effected by the introduction of definitions of the concepts 'impermissible avoidance arrangement' and 'repeat case' in section 221 of the Tax Administration Act, and by amending the definition of 'understatement' to include 'impermissible avoidance arrangement' in the Tax Administration Act.

Further amendments to the Tax Administration Act include the amendment to the definition of a 'SARS practitioner' in section 1 of the Tax Administration Act to exclude external legal representatives who act with a degree of independence (amendment by s 4 of the Tax Administration Laws Amendment Act).

Disclosure of income tax status

Section 3 of the Income Tax Act, read together with section 69(8) of the Tax Administration Act, has been amended to allow the Financial Services Board to disclose the income tax approval status of pension funds, preservation funds, provident funds, provident preservation funds, and retirement annuity funds to a third party and to publish the details of such funds on the FSB website.

Notification by Commissioner that a category of persons are provisional tax payers

To deal with the collection of taxes from foreign employees of multinationals who are temporarily seconded to South Africa,

remain on home country payroll, and for whom there is no employees' withholding tax obligation, the definition of 'provisional taxpayer' in paragraph 1 of the Fourth Schedule to the Income Tax Act was amended. These people would now qualify as provisional taxpayers.

Relief from submitting a return

Section 64K of the Income Tax Act, which provides for the payment and recovery of the withholding tax on dividends, has been amended to relieve recipients of dividends which are exempt from the withholding tax on dividends, from submitting a return.

Remuneration for the purposes of PAYE

The definition of 'remuneration' in paragraph 1 of the Fourth Schedule, which is used to determine the amounts deducted or withheld by employers (PAYE) and for provisional taxpayers, was broadened to include dividend income received by directors and employees from certain restricted equity instruments, and which is not exempt from Income Tax.

Section 7B, which provides for the timing of accrual and non-acurral of variable remuneration, resulted in the repeal of paragraph 11C of the Fourth Schedule. The variable income of directors is regulated by section 7B.

CASE LAW

VOLUME 79 OF THE SOUTH AFRICAN TAX CASE REPORTS

Supreme Court of Appeal

Income tax: Capital/revenue

In *CSARS v Marula Platinum Mines Ltd* 79 SATC 127, the Supreme Court of Appeal had to decide on two issues: whether the extraction of mineral ore from the underground rock and the subsequent processing of the mineral ore to a mineral-bearing concentrate is a 'manufacturing process'; and whether the mineral ore and subsequent concentrate qualifies as 'trading stock' as envisaged in sections 1 and 23F(2) of the Income Tax Act.

The taxpayer's mining operations comprised two phases. First, the extraction of the mineral ore from the underground rock and

bringing it to the surface; and second, a process to derive mineral-bearing concentrate in powder form. The taxpayer sold the concentrate, but not the mineral ore, to a fellow subsidiary. The price of the concentrate was made dependent on the ruling market prices. Payment was made five months later.

In its tax returns for the relevant years of assessment, the taxpayer deferred, in terms of section 24M of the Income Tax Act, the inclusion of the price of the concentrate in its gross income to the following year of assessment. Furthermore, the taxpayer claimed the expenditure incurred in respect of the sales of the concentrate, under section 11*(a)* of the Income Tax Act, in the year in which it had been incurred, and not in the year of assessment in which the price of the concentrate was included in its gross income. The Commissioner's view was that the taxpayer had correctly excluded the unquantified sales of concentrate under section 24M, but invoked the provisions of section 23F(2) to disallow a percentage of the claimed section 11*(a)* deductions. Section 23F(2) provides that expenditure relating to the acquisition of 'trading stock', which is generally deductible, must be disregarded to the extent that any amounts relating to the disposal of that trading stock did not accrue during the year of assessment in which the expenditure had been incurred. The taxpayer submitted that the expenditure it had incurred related to mining activities, and not to the production, manufacturing, purchase, or acquisition of trading stock. Accordingly, the taxpayer argued, these deductions could not be recouped under section 23F(2).

Relying on *Richards Bay Iron and Titanium (Pty) Ltd & another v CIR* [1995] ZASCA 81, 1996 (1) SA 311 (A), in which 'trading stock' was analysed, the Supreme Court of Appeal stated that the purpose of mining the ore was to manufacture the concentrate. The fact that it was not intended to be disposed of in the state in which it was mined, is legally irrelevant in view of the purpose for which it had been mined (paras [16]–[19]). Applying *Richards Bay* (above), the Supreme Court of Appeal stated that as the ore was intended to be used for the purpose of manufacturing the concentrate, it constituted 'trading stock' (para [20]). Relying on *Richards Bay and Commissioner for the South African Revenue Services v Foskor (Pty) Ltd* [2010] ZASCA 45, the Supreme Court of Appeal agreed with the finding of the Tax Court that the concentrate qualified as 'trading stock', and that the process of converting the mineral ore into mineral-bearing concentrate was

a processes of manufacture within the meaning of the definition of 'trading stock' in section 1 of the Income Tax Act. The Supreme Court of Appeal concluded that both the mineral-bearing ore extraction and the concentrate qualified as 'trading stock'. Accordingly, the Commissioner was entitled to invoke the provisions of section 23F(2) of the Income Tax Act by delaying the deduction of section 11*(a)* expenses until the year of assessment in which the corresponding income was to be taxed.

Capital gains tax

The appeal to be decided by the Supreme Court of Appeal in *New Adventure Shelf 122 (Pty) Ltd v CSARS* 79 SATC 233 concerned the imposition of capital gains tax on the proceeds of the sale of an asset where the sale is cancelled before the proceeds have been paid in full, the unpaid balance forfeited, and the asset returned to the seller.

During the 2007 tax year, the taxpayer had sold immovable property and the resultant capital gain was taken into account in determining the taxpayer's tax liability for the 2007 year of assessment. However, only a portion of the purchase price was actually paid. The sale had been cancelled by agreement several years later, and the property returned to the taxpayer. The taxpayer retained the payments made as damages for breach of contract. Given that the capital gain had in effect been reversed, the taxpayer requested that the Commissioner withdraw and reduce the assessment for 2007. The request was refused. In the court *a quo* the taxpayer sought review of the decision of the Commissioner without success.

On appeal, the first hurdle faced by the taxpayer was section 81(1) of the Tax Administration Act, which provides that an objection to an assessment must be made within three years of the assessment, after which the assessment becomes final and conclusive. The taxpayer contended that, based on paragraph 35 of the Eighth Schedule to the Income Tax Act read with paragraphs 3 and 25 of the Eighth Schedule, section 81(1) did not apply to capital gains tax. It was argued that the determination of capital gains tax was not an annual event and that matching requires a re-determination of the capital gains tax (para [17]).

The court indicated a number of difficulties with the taxpayer's argument. First, the assessment of tax is an annual event. Moreover, the taxpayer's interpretation of paragraph 35(3) of the

Eighth Schedule was inconsistent with the overall scheme of paragraph 35 in requiring a redetermination at a later date. The court noted further that paragraphs 3, 4 and 25 of the Eighth Schedule did not support the taxpayer's argument (paras [18]–[26]). The court indicated that even though it may seem unfair, '[p]ayment of tax is what the law prescribes' and 'tax laws are not always regarded as ''fair''' (para [28]). The court accordingly held that 'the cancellation of the sale did not entitle the taxpayer to have his tax liability for the 2007 year re-assessed' (ibid).

Value-added tax

In *XO Africa Safaris CC v CSARS* 79 SATC 1, the taxpayer assembled tour packages for foreign tour operators (FTOs) – ie, the supplying of services under the VAT Act. The pivotal question was whether the supply was zero rated in terms of section 11(2)*(l)*, or subject to the standard rate of value-added tax in terms of section 7(1) of the VAT Act.

The taxpayer argued for the zero rating for the following reasons. It did not directly supply or render the local services directly to the FTO or to its customers. In addition, it did not have a direct relationship with the customers and it was not what one would call a 'local service'.

Based on the evidence presented, the court disagreed. The taxpayer provided goods and services, not directly to the FTOs, but to persons who were in South Africa at the time that the goods and services were provided. In the result, the supply of the services attracted VAT at the standard rate.

On appeal, the Supreme Court of Appeal, in *CSARS v Marshall NO & others* 79 SATC 49, was required to decide whether aero-medical services supplied by the taxpayer to provincial health departments were zero rated for the purposes of VAT.

The taxpayers were the trustees of the South African Red Cross Air Mercy Service Trust (the Trust), a non-profit organisation and an approved public benefit organisation (PBO) in terms of section 30 of the Income Tax Act. The PBO status meant that the receipts and accruals of the Trust were exempt from income tax in terms of section 10(1)*(c*N*)* of the Income Tax Act. The Trust was also registered as a VAT vendor in terms of the VAT Act. For rendering a 'comprehensive aero-medical service' to various provincial government health departments, the taxpayer received a fee paid in terms of a schedule of tariffs.

On 30 October 2012 the taxpayer applied to the Commissioner for a binding private VAT ruling that the fee it received qualified for a VAT zero rating in terms of section 11(2)(*n)* read with section 8(5) of the VAT Act, on the basis that it was a 'welfare organisation' as defined in section 1 of the VAT Act and was, as such, a 'designated entity' (as defined in section 1 of the VAT Act), and it rendered services to the provincial health departments in that capacity. The taxpayer contended that the services it supplied were 'deemed services' under section 8(5) of the VAT Act which qualified to be zero rated in terms of section 11(2)*(n)* (para [6]). The Commissioner's view was that the services were 'actual' not 'deemed' services, and accordingly fell outside the ambit of section 8(5) of the VAT Act (para [7]).

The Supreme Court of Appeal stated that the supply of goods and services by the taxpayer to the provincial health department constituted 'performance' in terms of the written agreement, and the payments received were fees charged in terms of the tariff set out in the agreement with the provincial health departments (para [26]). The court agreed with the Commissioner that it is only where a payment cannot be linked to any performance that it becomes necessary to 'deem' it to be provided in terms of section 8(5) (para [26]). The court further stated that the legislature must have intended to distinguish the 'payment' contemplated in section 8(5), from 'consideration' defined in section 1, and must have intended that the former would be an unrequited payment such as a grant, subsidy, or donation to a designated entity (para [27]). The court's analysis of the terms 'grant' and 'donation', as defined in section 1 of the VAT Act, identified the common feature between these terms as the absence of a (commensurate) direct benefit (para [30]). The court also referred to Interpretation Note 39 (issued by the SARS on 8 February 2013) which sets out the VAT treatment of public authorities prior to and after April 2005. It stated that these Interpretation Notes, though not binding on the courts or a taxpayer, constitute persuasive explanations in relation to the interpretation and application of the statutory provision in question (paras [31]–[33]). While stating that the deeming provision applies to an imagined and not actual supply of goods and services and that zero rating applies where payment is not linked to an actual supply of goods and services, the court also considered the substantial incentive given to PBOs and said that '[t]here is no conceivable reason why, where PBO's engage in

commercial activities they should be treated differently from other commercial entities' (para [34]).

Customs and excise

The Supreme Court of Appeal, in *CSARS v Van der Merwe NO & others* 79 SATC 283, considered the interaction between the provisions of the Customs and Excise Act and the VAT Act, on the one hand, and those of the Insolvency Act 24 of 1936 on the other, and whether equipment could be released from the customs warehouse without the payment of the relevant customs duty and VAT, on the other hand.

The taxpayer company, having been wound up because it was insolvent, had prior to its winding-up purchased equipment on hire purchase. On insolvency, the equipment became the property of the taxpayer through the application of section 84(1) of the Insolvency Act. The financiers obtained a hypothec over the equipment. The equipment, together with other equipment owned outright by the taxpayer, had been sent to the Democratic Republic of the Congo (the DRC) for operations in that country. In the ordinary course of events, on the return of the items to South Africa the taxpayer would have had to pay customs duty and VAT in terms of section 39(1) of the Customs Act and section 7(1)*(b)* of the VAT Act respectively, before the equipment could be released from the relevant customs warehouse.

On the subsequent return of the equipment, the liquidators argued that the equipment should be released without payment of the taxes, so as to allow them to take possession of it in accordance with section 391 of the 1973 Companies Act, and section 61 read with section 83(3) of the Insolvency Act. By contrast, the SARS argued that the equipment could not be released without the payment of customs duty and VAT.

The court, in balancing the policy of the fiscal purposes, the protection of local manufacturers on one hand, and on the other, the scope and purpose of provisions relating to the winding-up of companies unable to pay their debts, stated that the provisions of the Customs Act apply in the normal course of events but when a taxpayer is insolvent, the provisions of the Insolvency Act must be considered (para [20]). The court stated that '[i]t could not have been the intention of the legislature that assets of an insolvent estate, in respect of which other creditors also have real rights, should be dealt with completely outside the machinery of insolvency Act' (para [48]). Accordingly, it was concluded that the

Customs Act and VAT Act did not prevent the release of the equipment to the liquidators without the liquidators first having to pay customs duty and VAT.

High Courts

Value-Added Tax (VAT)

The Gauteng Local Division in *Masango v Road Accident Fund* 79 SATC 295 had to determine whether an attorney could charge 25 per cent of the capital amount recovered for his client from the Road Accident Fund, and secondly, whether fourteen per cent VAT could be added to this contingency fee.

The plaintiff client and his attorney had entered into a contingency fee agreement which provided for a fee of 25 per cent of the amount awarded to the client with VAT charged on this amount. The validity of the contingency fee agreement was questioned on the basis of its non-compliance with the requirements of the Contingency Fees Act 66 of 1997 (the CFA). The CFA provides that non-compliance with its requirements renders a contingency agreement invalid. The reason for the potential invalidity, in this instance, arose from the levying of VAT on the award amount.

In resolving the dispute, the court stated that the CFA distinguishes between two contingency fee arrangements: the success fee payable in the event that the client is successful; and the no-fee payable in the event that the client is not successful. The success fee is subject to limitations in the CFS. In setting out the limitations of the success fee, the court stated that the success fee is the attorney's normal fee increased by the agreed percentage (paras [11]–[18]) which may not be more that 100 per cent of the normal fee. The success fee may not exceed 25 per cent of the total amount awarded to the client (para [19]). The court accordingly held that the agreement providing for a fee of 25 per cent of the award was unlawful and invalid (paras [19]–[25]).

In considering the VAT issue, the court referred to the judgment in *Mofokeng v Road Accident Fund* [2012] JOL 29301 (GSJ). In *Mofokeng* it was held that an attorney could only recover 'out-of-pocket' expenses above and beyond the 25 per cent cap (para [50]). The court explained that VAT is not an 'out-of-pocket expense' for purposes of the facts under consideration, and that VAT should not generally be treated as a cost to the vendor (para [51]). Accordingly, the court concluded that VAT was not recover-

able above the 25 per cent cap imposed by section 2(2) of the CFA, and that the contingency agreement was invalid as it sought to authorise the plaintiff's attorney to recover VAT above the limit imposed by section 2(2) of the CFA (paras [52] [53]). The court accordingly found that the contingency fee agreement was invalid on both grounds.

Tax administration

Nondabula v CSARS & another 79 SATC 333 concerned an application by a taxpayer for an interdict in the Eastern Cape Local Division of the High Court, among other things, to prevent the use of the provisions of section 179 of the Tax Administration Act pending the final determination of its objection to an additional income tax assessment.

The Commissioner had issued income tax assessments to the taxpayer for the 2013/2014 and 2014/2015 financial years, and the taxpayer had paid the relevant amounts owing. A further assessment was issued by the Commissioner in a letter dated 29 September 2016, indicating that the taxpayer had failed to pay certain amounts and requiring payment to be made within ten days, failing which further action would be taken. The letter did not indicate how the outstanding amounts had been determined. After the taxpayer's objection had been received, the Commissioner responded by, among other things relating to technicalities, disallowing the taxpayer's objection.

In considering the matter, the court indicated that the Commissioner is a creature of statute, which is governed by and operates within its empowering statutes (para [11]). In considering section 92 of the Income Tax Act, which provides the circumstances under which an additional assessment may be issued, the court noted that issuing of an additional assessment requires compliance with sections 95 and 96 of the Tax Administration Act (paras [15] [19]). Section 95 provides for an additional, reduced or jeopardy assessment where a taxpayer fails to submit a return, or submits incorrect or inadequate returns or information. Section 96 requires the Commissioner to issue a notice and a statement of the grounds for the assessment. The court found that on the facts of the case, the Commissioner had failed fully to comply with section 96. In the letter no date for payment of the assessed amount was reflected, there was no summary provided of the procedures for lodging an objection to the assessment, and the letter did not include a statement of the grounds on which the

assessment had been based (para [20]). The court also found that the Commissioner had neglected to provide an explanation for the non-compliance with section 96 (para [20]).

The court stated that the failure to comply with section 96, and the subsequent application of the provisions of section 179(1), which allows the SARS to recover money due to the taxpayer from a third party who holds or owes the taxpayer money and which results in effectively closing down the taxpayer's business, was not only unlawful but a 'complete disregard of the doctrine of legality which is a requirement of the rule of law in a constitutional democracy' (para [22]).

Customs and excise

Encarnação NO & another v CSARS 79 SATC 247 dealt with whether certain cigarettes imported into South Africa in 2009 qualified for full rebate of customs duty in terms of Schedule 4 to the Customs and Excise Act.

The two applicants were the trustees of the Da Encarnaçäo Trust, the taxpayer. The taxpayer was a registered importer of goods and a licensee of a customs bonded warehouse. In terms of the Customs and Excise Act, imported cigarettes must be stored in a bonded warehouse with the payment of customs duty and VAT deferred until the cigarettes are removed from the warehouse for home consumption. The taxpayer in this instance did not use its own warehouse for the storage of the imported cigarettes. Instead, it used All Trans Logistics CC (All Trans), a licensed customs clearing agent, to act as its clearing agent in the importation of its cigarettes. During an armed robbery at the All Trans warehouse, the cigarettes imported by the taxpayer were stolen together with other imported items.

The taxpayer contended that the robbery qualified as a *vis maior* entitling it to a full rebate of excise duty on the stolen cigarettes. The taxpayer relied on the wording of the Rebate item 412.09 in Schedule 4 to the Customs and Excise Act, which provides for a full rebate of customs duty, among other things, if goods are lost, destroyed, or damaged in circumstances of *vis maior.* This rebate may be claimed if the event occurs while the goods are in a customs and excise warehouse, provided that there has been no payment of compensation for the customs duty or the loss, the destruction or damage is not due to any negligence or fraud on the part of the person liable for the duty, and the goods had not entered into consumption (para [22]).

The parties agreed that armed robbery can be a *vis maior* for the purposes of the rebate, and that the facts of this case supported *vis maior* in the form of armed robbery.

Tax Courts

Gross income

In *ITC 1888* 79 SATC 23, the Cape Town Tax Court had to consider whether, on the application of sections 20(1) and 103(2) and (4) of the Income Tax Act, the two changes in the taxpayer's shareholding were for the purpose of using the assessed loss or had commercial substance.

In the first change, the shares in the taxpayer were sold by DX Ltd (Australia) – a 100 per cent shareholder of the taxpayer – to JK (Pty) Ltd, a member of the Y Group. JK had purchased the taxpayer's call centre business and, on the taxpayer settling certain legal disputes, JK exercised an option to purchase the taxpayer's shares.

The second change in the taxpayer's shareholding was the sale of its shares from JK to MM Investments (Pty) Ltd, nominated by Mr A, the owner of the H Group of companies. Before the purchase, A had undertaken a due diligence exercise which indicated that the taxpayer had ceased trading after year-end; had an assessed loss; and that there was a risk that the SARS could apply section 103(2) of the Income Tax Act and disallow the assessed loss.

The court considered the causal link between the change in the first shareholding and the set-off of the assessed loss by the taxpayer during the second change in shareholding (paras [82]–[98]). Based on its interpretation of the evidence, the court stated that when JK exercised its option to acquire the shares, it could not have contemplated that selling the shares to new shareholders at a later date would result in the use of the assessed loss, as negotiations for the second purchase of the shares had not yet begun. The court held that the taxpayer had discharged the onus of showing that the sole or main purpose for the change in shareholding had not been to acquire the company to utilise its assessed loss (para [99]).

In *ITC 1890* 79 SATC 62, the Cape Town Tax Court had to consider whether the taxpayer was entitled to claim a deductible allowance for future expenditure in terms of section 24C of the Income Tax Act. The Commissioner had disallowed the deduction

on the basis that section 24C had been incorrectly applied, and in addition, levied an understatement penalty on the taxpayer.

The taxpayer, a private company which managed and administered retirement villages and their frail care centres, acquired four such villages and centres in 2006. On acquisition, the taxpayer became a party to the original contracts with the purchasers of the units in these villages and centres. In terms of the contracts between the original seller and first purchasers of the units in these villages, the taxpayer became entitled to an amount equivalent to 40 per cent of the enhancement value of the unit (the enhancement) when the unit was sold by the original purchaser, and also became contractually obliged to incur future expenditure on behalf of the subsequent purchaser. The taxpayer accordingly applied section 24C and deducted an allowance for the future expenditure.

The Commissioner, on the basis that section 24C was not applicable, disallowed the deduction. It was of the view that the enhancement accrued to the taxpayer in terms of the original contract, and the taxpayer did not have future expenditure as contemplated in section 24C in relation to the enhancement income.

Addressing the purpose of section 24C, the court stated that it provided relief for a taxpayer who received an advance payment – ie, income – in year one and incurred deductible expenditure under that contract in a subsequent year (para [13]). Absent section 24C, the income would be taxed in year one without any deduction for future expenditure, with the section seeking to place the taxpayer in the position as if the income and expenditure had occurred in the same tax year (para [13]). Applying section 24C to the facts, the court considered the link between the two contracts. The court noted that for section 24C to apply to the first contract between the original seller and first purchaser and the subsequent sale by the first purchaser – now the seller – to the second purchaser, the two contracts had to be so inextricably linked that they could be interpreted as a whole (paras [15]–[22]). On its interpretation of the contracts, the court held that the two contracts were not so linked. Therefore, the right to the enhancement income arose from the first contract, with its calculation deferred until the unit was again sold by the second contract. Consequently, the second contract was merely a trigger (paras [28]–[35]). The court also stated that section 24C required that the expenditure follow, not precede, the receipt of income (para [30]).

With respect to the understatement penalty imposed on the taxpayer in terms of section 222 of the Tax Administration Act, the court interpreted a *bona fide* inadvertent error as being an innocent misstatement by a taxpayer on his or her return, resulting in an understatement, while acting in good faith and without the intention to deceive (para [45]).

Th decision of the Port Elizabeth Tax Court in *ITC 1893* 79 SATC 159 concerned the question of whether the compensation received by the taxpayer under the Productive Asset Allowance Scheme (the PAA) was 'revenue' or 'capital' in terms of the definition of 'gross income' (s 1 of the Income Tax Act).

The PAA was a rebate certificate which reduced the amount of import duty payable on the import of motor vehicles, and having qualified for this rebate, the taxpayer initially included the PAA rebate in its 'gross income'. However, after the SARS issued Interpretation Note 59 in December 2010 dealing with the taxability of government grants, the taxpayer treated the rebate as receipts of a capital nature and accordingly did not include the rebates in its 'gross income'.

While recognising that the rebates from the PAA certificates were a grant, the court, applying relevant case law (*Burmah Steamship Company Ltd v The Commissioner of Inland Revenue* 1931 SC 156), took the view that the rebate was not used to fill the capital 'hole', but to fill the income 'hole' as the reduced payment of customs duty related to the taxpayer's 'gross income' (paras [20]–[23]). Therefore, the rebates granted as a result of the PAA certificates were not of a capital nature, but fell within the taxpayer's 'gross income' in terms of section 1 of the Income Tax Act.

The decision of the Johannesburg Tax Court in *ITC 1894* 79 SATC 167 dealt with the taxation of fringe benefits in the form of services provided by tax consultancies to the taxpayer's employees.

The taxpayer, ABC (Pty) Ltd, part of an international group which required its employees to work in foreign countries for certain periods, agreed to take responsibility for the payment of the employees' tax of the expatriate employees seconded to South Africa. To protect the interests of the group, the taxpayer arranged for certain identified tax consultancy firms to render tax advice to these expatriate employees with the taxpayer paying the tax consultancy firms.

The SARS took the view that the payments to tax consultancy firms were taxable fringe benefits in terms of para *(i)* of the

definition of 'gross income' read with paragraphs 2*(e)* and 2*(h)* of the Seventh Schedule to the Income Tax Act. This was based on the employees receiving a benefit paid for by their employers. The taxpayer argued that the employees did not receive benefits or advantages as a result of the payment within the meaning of 'gross income', and alternatively, that the payment did not fall within the categories of taxable benefits identified in paragraphs 2*(e)* or *(h)* of the Seventh Schedule to the Income Tax Act.

The court agreed with the view of the SARS that as a result of the contractual arrangement between the taxpayer and the expatriate employees, the latter became entitled to the services of a tax consultant free of charge, that this service had a monetary value, and that it thus fell within 'gross income' (paras [31]–[42]). In determining whether the fee fell within the fringe benefits provisions of the Seventh Schedule, the court stated that the fees were for the employees' private use, namely to comply with the individual tax obligations of the employees *vis-à-vis* the SARS, and accordingly were a taxable benefit in terms of paragraph 2*(e)* of the Seventh Schedule (paras [39]–[44]).

The issue decided in the Cape Town Tax Court in *ITC 1895* 79 SATC 179 was whether interest incurred on a residential home loan account was paid to earn interest income on a credit amount on the taxpayer's director's loan account, such that the interest paid on the home loan account was incurred in the production of interest income on the taxpayer's director's loan account.

The taxpayer's contract of employment required a working capital contribution in the form of a director's loan account. Tn terms of the agreement, the taxpayer would not be permitted to withdraw the outstanding balance of the loan until resignation. During 2005, the taxpayer purchased a property, secured by a mortgage bond with an access bond facility, which enabled access to available funds in the home loan account. The taxpayer paid the capital borrowed and drew on the facility to fund his expenses. He used the interest earned on the loan account, which was taxable income in his hands, to pay the interest on the home loan account.

The taxpayer, applying section 11*(a)* of the Income Tax Act, deducted the interest payable to the bank on the basis that it was an expense incurred in the production of the interest income. In support of the 'close connection' requirement between the interest expense and the interest income, the taxpayer contended that the retention by his employer of the amounts owing under the

loan account resulted in his inability to repay an equivalent amount on the home loan account, and further that this resulted in a larger interest expense on the home loan account as compared to having the amount in credit to his loan account available to him. The taxpayer relied on Practice Note 31 (issued by the SARS on 3 October 1994), in terms of which the Commissioner permits the deduction of the interest incurred on monies borrowed in the production of interest income, and limits the interest expenditure to the amount of the interest income earned.

The court held that the taxpayer had failed to prove that the purpose and the effect of the acquisition of the loan account was the production of interest income. Moreover, he had failed to show that the interest incurred on the home loan account was sufficiently close to the interest income earned on the loan account to justify a conclusion that the interest so incurred was incurred in the production of interest income (para [25]). In other words, the taxpayer had failed to discharge the onus resting on him.

The Cape Town Tax Court in *ITC 1896* 79 SATC 191 first had to determine whether 'dividend rights' should be included in the taxpayer's gross income, and secondly, whether in the event that the amounts are included in 'gross income', the SARS was precluded from issuing an additional assessment in accordance with the 'practice generally prevailing' as at the date of the original assessments as envisaged in section 79(1)(iii) of the Income Tax Act.

The dividend rights were ceded by Z to the taxpayer in the 2008 and 2009 years of assessment, and the SARS argued for the inclusion of the value of the dividend rights in 'gross income' on the basis that it was interest accruing to the taxpayer in terms of section 24J(3) of the Income Tax Act, alternatively that it should, in any event, be included in the 'gross income' of the taxpayer. The SARS further argued that the contractual restriction on the taxpayer's entitlement to dispose of the dividend right was not a condition preventing an accrual of the dividend right, and that the right was of a revenue nature and was not subject to any exemption.

The court distinguished between the dividend right and the dividends themselves, and stated that the taxpayer's argument was supported by the SARS's practice over many years of not including such rights in gross income, by the inclusion of the proviso *(ee)* to section 10(1)(k)*(i)* which disallowed the anteced-

ent cession of dividends for tax purposes, by rulings of CSARS, and by the relevant explanatory memoranda setting out the purpose of proviso *(ee)* (para [63]). Taking into account that the dividend right in question was contingent on identifying the shareholder entitled to the dividend, that a dividend right disappears when the dividend accrues, that the conditional dividend right had no value apart from the subsequent dividend, applying a face value to the dividend right in this context is uncommercial and incorrect. In considering the double taxation and the recognition of two separate accruals of gross income where only one commercial accrual exists, the court indicated was 'plainly insensible and un-businesslike and gives rise to absurd consequences' (para [63.3]) The court referred to *Commissioner for Inland Revenue v Delfos* 1933 AD 242 where it was stated that the same amount should not be taxed twice in the hands of the same taxpayer, and distinguished *CSARS v Brummeria Renaissance (Pty) Ltd & others* 69 SATC 205 on the basis that it dealt with two separate accruals, namely, the right to use money interest-free, and interest on the money obtained interest-free (para [64]). The court concluded that entitlement to a contingent right does not give rise to an accrual for the purposes of 'gross income' (para [65]). With respect to the inclusion under section 24J, the court stated that only an amount unconditionally receivable can trigger an inclusion in gross income in terms of section 24J(3) on the basis that it embodies an amount receivable (para [66]).

In *ITC 1900* 79 SATC 341, the Cape Town Tax Court had to determine whether the purchase price of immovable property should be included in the 'gross income' of the taxpayer in the 2013 tax year, even though the taxpayer only received payment against transfer of the properties to the purchasers in the 2014 tax year.

The taxpayer had entered into a number of agreements for the sale of immovable property, and save for one transaction, the relevant conditions and contingencies were met before 31 March 2013. Accordingly, the proceeds of these transactions accrued to the taxpayer and were accordingly included in the taxpayer's gross income in the 2013 tax year. The conditions of the one agreement were only met in April 2013 on receipt of a required certificate issued by the City of Cape Town.

Although the proceeds of this one agreement only accrued in 2014, the Commissioner disputed the 2014 accrual by placing reliance on section 24(1) of the Income Tax, which deals with

'credit agreements and debtors allowances'. While the taxpayer argued that section 24(1) only applied to 'credit agreements' and not to the current transactions, the court agreed with the Commissioner that it was bound by the construction of section 24(1) in *Secretary for Inland Revenue v Silverglen Investments (Pty) Ltd* 1969 (1) SA 365 (A). In *Silverglen Investments* it was held that section 24 applies to a provision in a cash sale, in which transfer of the property occurred against payment of the purchase price (para [29]).

Value-added tax

ITC 1889 79 SATC 39 was an appeal, heard in the Cape Town Tax Court, of an assessment issued for a VAT liability with the legal issue being whether the crediting of a loan is payment of full consideration in terms of section 22(3) of the VAT Act.

KL (Pty) Ltd was the sole shareholder of the taxpayer. By agreement, KL funded the taxpayer's cash flow by inter-company shareholder loans to avoid external finance for business funding. While developing residential units on land owned by the taxpayer, KL issued a tax invoice in terms of section 15 of the VAT Act to the taxpayer for the taxable supply, inclusive of VAT, of a portion of the development. The taxpayer paid for the taxable supply by crediting KL's loan account, and claimed an input tax deduction in respect of the VAT. Upon receipt of the payment of the input tax from the SARS, the taxpayer paid it to KL by way of a cash payment, and KL then used the cash to pay its output tax to the SARS in the same amount. The remaining liability due to KL was credited to the loan account of KL in the taxpayer's books.

After an audit conducted four years after the invoice had been issued, the SARS raised that the taxpayer had not paid for the service within the twelve-month period after the expiry of the tax period in which the input tax had been claimed as required by the provisions of section 22(3) of the VAT Act.

Applying the commercial transaction principle as espoused in *CSARS v Capstone 556 (Pty) Ltd* 2016 (4) SA 341 (SCA), the court stated that the legitimacy of the commercial transaction, that is, the funding arrangement between the taxpayer and KL as group companies, could not be called into question (paras [15]–[17]). By crediting the loan account, the taxpayer's liability to KL changed from being a current liability to being a long-term liability, with the dispute turning on whether the change to a long-term liability complied with section 22(3)*(b)* insofar as it

'paid the full consideration in respect of such supply' (paras [18] [19]). The court considered the undisputed evidence that the purpose of the loan was to discharge the invoice debt and that there had been a conversion of a liability under an invoice to a liability under a loan. The court then considered the purpose of section 22(3). It took into account the Explanatory Memorandum to the Taxation Laws Amendment Bill, 1996, which stated that the aim of the provision was to rectify the position in relation to irrecoverable debts insofar as a vendor who accounts for VAT on an invoice basis and writes off a bad debt is entitled to an input tax deduction equal to the tax fraction of the irrecoverable amount written off (para [25]). The court stated that it was 'the prejudice to the *fiscus* which motivated the amendments and not the current circumstances as there was no deliberate manipulation in creating a bad debt with a view to creating a tax benefit either by the taxpayer or KL' (para [125]).

The issue in *ITC 1897* 79 SATC 224 centred on whether the taxpayer qualified for an input tax deduction in respect of the acquisition of a vehicle on the application of section 17 of the VAT Act. The taxpayer, a close corporation carrying on business in the courier industry, had claimed the input tax on the basis that the vehicle had been acquired for purposes of making taxable supplies.

The SARS had disallowed the input claim applying section 17(2)*(c)*, read together with the section 1 definition of a 'motor car', to the effect that a deduction of input tax is not permitted for the acquisition of a motor car, subject to certain exceptions. In particular, section 17(2) lists non-permissible input deductions as including 'any motor car supplied to or imported by the vendor' subject to exceptions such as where the motor car is acquired exclusively for the purpose of making a taxable supply of that motor car in the ordinary course of an enterprise which continuously or regularly supplies motor cars, and where a motor car is acquired by such vendor for demonstration purposes, or for temporary use. The effect of section 17(2)*(c)* is that, in general, input tax is not deductible in respect of the VAT incurred by vendors on the acquisition of a 'motor car' as defined in section 1 of the VAT Act.

In deciding whether the taxpayer's vehicle was not constructed or converted wholly or mainly for the carriage of passengers, the court found that the taxpayer had failed to provide the necessary evidence. The appeal was accordingly dismissed (paras [17] [18]).

The Cape Town Tax Court in *ITC 1892* 79 SATC 105 had to consider whether the delivery of food orders by the taxpayer, who carried on business as a fast-foods delivery business, was a service supplied by it for consideration in the course or furtherance of its enterprise as envisaged in the VAT Act (s 7(1)*(a)*).

The taxpayer's business *modus operandi* was to contract with fast-food outlets and takeaway restaurants (outlets) to advertise their menus in its catalogue and take orders from customers based on the catalogue. The taxpayer was paid a fee on a commission basis, for soliciting and executing orders from the participating outlets based on the orders placed by customers. The commission was in effect consideration received by the taxpayer for a service supplied by it to the participating restaurants, with VAT accounted for by the taxpayer on the commissions. A separate service supplied by the taxpayer to customers was the collection and delivery of the food. The taxpayer argued that the service of collecting and delivering the order was done by independent drivers, and accordingly, not a supply made by it as contemplated in section 7(1)*(a)* of the VAT Act. The Commissioner argued that the taxpayer's business includes the delivery of the order which required the use of drivers.

The court, in deciding the matter, considered whether the drivers were employees or independent contractors was irrelevant to the dispute (para [16]). It also considered whether there was a mark-up or profit irrelevant (para [33]). The court considered the 'economic reality' of the taxpayer's business which required the delivery of the food order to the customer, and that if it were not for its delivery-service component, the taxpayer's business would not be viable (para [34]). It accordingly held that the delivery service was a service in terms of section 7(1)*(a)* of the VAT Act, and that output tax was payable by the taxpayer on the delivery charges.

Capital gains

In an appeal against a decision of the Commissioner, heard in the Cape Town Tax Court (*ITC 1898* 79 SATC 266), the court had to decide whether to disregard an assessed loss, bad debt, and expenses of the taxpayer and impose a 75 per cent understatement penalty on the taxpayer.

Through a series of transactions, the proceeds from the sale of shares on behalf of the taxpayer, a trust, and M, were transferred to a Dutch bank account held in the name of N Trading Ltd. It

subsequently transpired that an amount, which should have been paid to the taxpayer trust, had been transferred from the Dutch bank account, allegedly fraudulently.

As the taxpayer had a capital gains tax liability from the proceeds of the sale of the shares, the issue in dispute was whether the removal of the funds through the transfer from the Dutch bank account qualified as a deduction from the proceeds for the purpose of paragraph 35(3)*(c)* of the Eighth Schedule to the Income Tax Act. Paragraph 35(3)*(c)* provides for a deduction from the proceeds of a disposal when there is a 'cancellation, termination or variation of an agreement or due to the prescription or waiver of a claim or release from an obligation or any other event during that tax year'. In particular, the provision applies to proceeds that 'accrue' to as opposed to being 'received by' the taxpayer.

The court interpreted the purpose of paragraph 35(3) as providing a deduction where the proceeds, although accruing to the taxpayer, have not been paid and the payment provisions for the proceeds are varied, extinguished, waived, or cancelled (para [51]). In considering the alleged fraud and embezzlement that resulted in the proceeds being removed from the control and beneficial use of the taxpayer, the court stated that this was not an event covered by paragraph 35(3)*(c)* as the proceeds had already been received by the taxpayer (para [52]).

The taxpayer had originally been given an option to purchase the shares, which it had now sold, resulting in the second issue in dispute, namely, whether paragraph 20(1)*(c)*(ix) or paragraph 18 of the Eighth Schedule would apply to the cost of the conversion of the share options into shares.

The taxpayer's view was that it should be included in the base cost of the shares, while the SARS felt that it fell within the capital loss provisions. If there has been the exercise of an option, then paragraph 20(1)*(c)*(ix) of the Eighth Schedule provides that the base cost of an asset acquired by a person is the sum of amounts actually incurred as expenditure directly related to the acquisition or disposal of that asset, and includes expenditure incurred in acquiring an option where the asset was acquired or disposed of by the exercise of an option (subject to the exclusion of certain options). If there had been a cancellation of the shares, as opposed to the exercise of an option, paragraph 18 would apply, which provides that a capital loss must be disregarded where a person who is entitled to exercise an option, among other things,

abandons that option, allows the option to expire, or disposes of it other than by its exercise. On the evidence, the court held that there had been a conversion of the share options to shares, and accordingly, paragraph 20 rather than paragraph 18 of the Eighth Schedule should apply. In the result, the share options were included in the base cost of the shares that had been disposed of (paras [60]–[61]).

The third issue in dispute was the percentage of the understatement penalty. The SARS sought to increase the understatement penalty from 75–150 per cent on the basis of intentional tax evasion, despite not initially having raised this in the Notice of Assessment and Statement of Grounds of Assessment. The court stated that the SARS is not entitled to increase its claim for an understatement penalty without giving due notice (para [64]). Based on the testimony of the taxpayer, the court concluded that there had been no intentional tax evasion. Nevertheless, the taxpayer had failed to take reasonable care in the completion and submission of the tax returns, and the court applied a 50 per cent understatement penalty (paras [74]–[77]).

Tax administration

In a decision of the Port Elizabeth Tax Court, *ITC 1899* 79 SATC 315, the taxpayer disputed the imposition of an understatement penalty on the basis of non-compliance with the provisions of the Tax Administration Act. The court held that as the penalty had been imposed in terms of paragraph 20(1) of the Fourth Schedule to the Income Tax Act read together with Chapter 15 of the Tax Administration Act, and the taxpayer had been notified under the Income Tax Act before the Tax Administration Act came into force, the provisions of the Tax Administration Act did not apply (para [29]). Accordingly, the appeal was dismissed, and the penalty confirmed.

Foreign Judgments

Commissioners for Her Majesty's Revenue and Customs v M Fowler 79 SATC 355, decided in the United Kingdom, concerned the application of articles 7 and 14 of the treaty entered into between the Government of the Republic of South Africa and the Government of the United Kingdom of Great Britain and Northern Island for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains *GG* 24335 of 31 January 2003 (the Treaty). The tax issue in

dispute was whether the income of Mr Fowler, a tax resident of South Africa, arising from diving engagements in the UK Continental Shelf waters during the 2011/2012 and 2012/2013 tax years, had to be treated as income falling within the ambit of article 7 of the Treaty (dealing with business profits), or within article 14 (dealing with income from employment). The income would fall within the ambit of article 7 if Fowler was self-employed, and within article 14 if he was employed. In reaching its decision, the court considered the application of article 3(1) and (2) (paras [13]–[17]) of the Treaty, and the application of the Vienna Convention on the Law of Treaties 1969 (the Vienna Convention) (paras [18] [19]). Article 3(2) provides that where a term is not defined in a treaty, the domestic-law meaning applies 'unless the context otherwise requires'. The court stated that the latter phrase applied where '. . . the definition supplied by Article 3(2) results in an outcome that is either not sensible or not reasonable' (para [34]). In deciding which article to apply, the court referred to the distinction, in both the Republic of South Africa and the United Kingdom, between income derived from a contract of employment or service, and income derived from a contract for services (para [37]). The court considered that the term 'employment' was not defined in the Treaty (para [41]) and accordingly, the meaning of 'employment' in the domestic law in terms of article 3(2), English law, had to be considered (para [43]). Based on the meaning of 'employment' in the English legislation, the court accepted the argument of the Revenue authority that Fowler was employed and not self-employed, and accordingly, found that his income fell within the ambit of article 14 of the Treaty (para [77]).

TRUSTS

M J DE WAAL*

LEGISLATION

Two regulations made under section 24 of the Trust Property Control Act 57 of 1988 were substituted during the review period. They are regulation 2 (dealing with fees payable on the lodging of trust instruments) and regulation 3 (dealing with fees payable for the making and certifying of copies of documents): see Government Notice 1162 in *Government Gazette* 41224 of 3 November 2017. These substituted regulations took effect on 1 January 2018.

The Collective Investment Schemes Control Act 45 of 2002 is relevant in the context of the law of trusts as it regulates collective investment schemes (formerly and still popularly known as 'unit trusts', which were regulated by the now repealed Unit Trusts Control Act 54 of 1981). Section 290 of the Financial Sector Regulation Act 9 of 2017 (which commenced on 1 April 2018) contains – with reference to Schedule 4 – a list of the sections of the Collective Investment Schemes Control Act that are inserted, amended, or repealed. The affected sections of the latter Act are: sections 1A and 1B (inserted); sections 1, 15(1), 15A, 63, 66, 99(1), 112, 114 and 115 (amended); and sections 7, 14, 15B, 18, 22, 23 and 24 (repealed).

CASE LAW

LAW OF TRUSTS

Trust capacity: A sub-minimum of trustees cannot bind the trust

In the seminal judgment, *Land and Agricultural Bank of South Africa v Parker & others* 2005 (2) SA 77 (SCA), the Supreme Court of Appeal distinguished between two fundamental trust-law issues: 'trust capacity'; and 'trustee authority'. Both these issues featured

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in judgments delivered during the review period. *Vogel NO v Melamed & others* (35494/2016) [2017] ZAGPJHC 127 (5 April 2017) concerned the first issue of 'trust capacity' (and for the judgment dealing with 'trustee authority', see below under 'Trustee authority: The ''joint action'' rule and application of the normal principles of the law of agency'). In *Parker*, Cameron JA formulated arguably the most central aspect of 'trust capacity' in the following words:

> It follows that a provision requiring that a specified minimum number of trustees must hold office is a capacity-defining condition. It lays down a prerequisite that must be fulfilled before the trust estate can be bound. When fewer trustees than the number specified are in office, the trust suffers from an incapacity that precludes action on its behalf (para [12] and see also 2015 *Annual Survey* 1053–4 and the references there).

It is unnecessary to relate the facts of *Vogel* in any detail. In short, it entailed an application for two orders: one to compel the first respondent to transfer funds held in a bank account under his control to another bank account under the control of the applicant; and the other, to compel the first respondent to provide 'an accounting relating to transactions' in the bank account in which he held the funds. The applicant and the first respondent were the first trustees of a trust created pursuant to divorce proceedings between the second and the third respondents. However, the Master subsequently removed the first respondent as trustee in terms of section 20(2)*(e)* of the Trust Property Control Act 57 of 1988. This left the applicant as the trust's only trustee at the time of the application. Despite his removal as trustee, the first respondent nevertheless retained the funds of the trust in the bank account under his control.

The problem for the applicant was that the trust deed in question stipulated that at all times there had to be no fewer than two trustees in office. The trust deed also stipulated that in the event of the number of trustees falling below this minimum, the remaining trustee could appoint an additional trustee. This the applicant did upon the first respondent's removal from office. However, this new appointee resigned as trustee shortly afterwards – again leaving the applicant as the only trustee. It is, therefore, not surprising that the first respondent relied on the 'trust capacity' issue as formulated in *Parker*, arguing that the applicant alone lacked the capacity to bring the application.

Of course, the court in *Vogel* accepted the premise of the 'trust capacity' argument advanced by the first respondent. Neverthe-

less, it emphasised an important qualification that applied in this particular case. This qualification, again with reference to *Parker* as authority, is that 'in any given case, the specific provisions of a Trust Deed are to be considered' (para [31] and see also para [10] of *Parker*). In *Vogel*, the trust deed also contained the following provision:

> . . . if the number of acting trustees is less than the prescribed number, the remaining trustee or trustees, as the case may be, shall be entitled to exercise the powers of the other trustees *for the maintenance and administration of the trust fund* until another trustee has been appointed (para [32.1] with the court's emphasis).

Properly construed (see especially paras [34]-[36]), this provision meant that the applicant did not lack the capacity to bring the present application; or, as Bham AJ explained further:

> He [the applicant] is not seeking to bind the Trust in any manner. He is merely seeking to give effect to his obligation to maintain and administer the funds of the Trust by seeking a transfer of those funds into the Investec bank account (para [37]).

I am in complete agreement with this interpretation. Not only did it give effect to the principle of the overriding authority of the trust deed in question, but it also took full cognisance of the practicalities of the particular situation. It is also significant to note that the court also granted the second order sought, although in a more limited form than initially requested (para [47.2]). The application consequently succeeded and the court ordered the first and the third respondents (who also opposed the application) to pay the costs on an attorney-and-client scale.

Trustee authority: The 'joint-action' rule and application of the normal principles of the law of agency

This chapter in the *Annual Survey* bears testimony to the frequency with which our courts are confronted with the second issue mentioned above – that of 'trustee authority', and especially how it links with the effect of non-compliance with the so-called 'joint-action' rule in the administration of trusts (see above under 'Trust capacity: A sub-minimum of trustees cannot bind the trust' and also, eg, the discussions in 2010 *Annual Survey* 1198–1200; 2011 *Annual Survey* 1065–69; 2012 *Annual Survey* 850–2; 2013 *Annual Survey* 999–1002; 2014 *Annual Survey* 967–71; 2015 *Annual Survey* 1053–56; 2016 *Annual Survey* 1002-07). The current review period is indeed no exception. It would, therefore,

be useful to reiterate that in *Land and Agricultural Bank of South Africa v Parker* (above), Cameron JA explained that this 'fundamental rule' entails 'that in the absence of contrary provision in the trust deed the trustees must act jointly if the trust estate is to be bound by their acts' (para [15]; see also *Moraitis Investments (Pty) Ltd & others v Montic Dairy (Pty) Ltd* 2017 (5) SA 508 (SCA) para [23], where Wallis JA described this rule as 'trite'; *Jackson v Standard Cawood & others* (3945/2016) [2017] ZALMPPHC 20 (18 August 2017) para [9.10]; and the judgment of the Competition Appeal Court in *Pistorius NO & others v Competition Commission of South Africa* (148/CAC/Nov16) [2017] ZACAC 4 (10 October 2017)). However, it has also been pointed out (see, eg, 2012 *Annual Survey* 851) that strict compliance with the joint-action rule can at times cause practical difficulties. One way of alleviating these difficulties is the inclusion in a trust deed of a provision allowing trustee decisions to be taken by a majority vote among the trustees. Another possibility is that trustees can use the normal principles of the law of agency in this context. As Harms JA observed in *Nieuwoudt & another NNO v Vrystaat Mielies (Edms) Bpk* 2004 (3) SA 486 (SCA), the trustees 'may expressly or impliedly authorise someone to act on their behalf and that person may be one of the trustees' (para [23]).

The usefulness, but also the limits, of the latter mechanism were again illustrated in *Costa NO v Arvum Exports* (969/2016) [2017] ZASCA 113 (21 September 2017).

To the extent that it touched upon the law of trusts, *Costa* concerned the validity of two business agreements concluded by one of the three trustees (Costa) of a certain trust. The respondent contended that these agreements bound the trust; but the appellant (one of the other two trustees and the widow of Costa who had been murdered) contended that they did not. Both the court of first instance and the full court found for the respondent. These courts found that Costa had the actual authority to conclude the agreements on behalf of the trust, or that, in the alternative, he had at least the ostensible authority to do so. The appellant then appealed to the Supreme Court of Appeal that formulated the 'principal question' as being 'whether Mr Costa had authority, on behalf of all the trustees, to enter into [the] two agreements . . .' (para [2]).

With reference to *Vrystaat Mielies*, the Supreme Court of Appeal accepted as its point of departure that 'it is permissible for trustees to authorise one of them to act on their behalf' (para

[18]). In this matter the trust deed stipulated that, unless otherwise provided, trustee decisions could be taken by a majority of trustees present at a trustee meeting, but also that a written resolution signed by all the trustees would have the same effect as a decision taken by a majority of the trustees at a meeting (para [18]). In *Costa*, the three trustees had in fact signed a resolution stating that Costa 'in his capacity as trustee of the Klein Botrivier Trust 852/2007 is hereby appointed and *authorized to sign the necessary documentation*' (para [19] original emphasis). There was, therefore, no doubt that all three trustees had signed the resolution on which the respondent relied. But, as Lewis JA phrased it, the question was 'what meaning it bore' (para [18]).

This question called upon the court to interpret the contested resolution. On the plain wording of the resolution, it empowered Costa 'to sign the necessary documentation'. However, that raised the next question: documentation necessary for what? Because the resolution itself did not answer this question (the meaning of the words were 'obscure'), the court found it necessary to look at the context in which the resolution had been taken (para [23]). And that context was the decision to purchase a farm for the trust. The trustees, having resolved to purchase and take transfer of the farm, then authorised Costa 'to sign all documentation necessary for that purchase' (para [24]). The other trustees did not give him the authority to conclude further business agreements with other parties. To this conclusion, Lewis JA added the following more general observation:

> The conclusion of business contracts, as opposed to the day-to-day administration of a trust, is not something that trustees may delegate to a person. They must decide what contracts to conclude (para [24]).

This observation may be too broadly formulated. In my view, everything will depend on the wording of the trust deed in question. But there is no reason in principle why the trustees cannot, in terms of the normal principles of the law of agency, authorise one of their number to conclude business agreements binding the trust (see also *Moraitis Investments (Pty) Ltd & others v Montic Dairy (Pty) Ltd* above para [23]).

Be that as it may, there were also other indications that Costa had not been so authorised, and that he had in fact contracted in his personal capacity. For example, the trust was not a business trust; its sole function was to hold the farm (regarding the use of business trusts in general, see *Cargill RSA (Pty) Ltd v Bibbey NO & others/Thunderflax 52 (Pty) Ltd* (341/2017) [2017] ZAFSHC 132

(24 August 2017)). Costa's financial records also revealed that all contractual payments were made to his personal account and that he had not paid them over to the trust. Based on these and other indications (see paras [26]-[31]), the court therefore concluded that Costa did not have actual authority to conclude the business agreements in question.

Both the court of first instance and the full court found that if actual authority had not been given, there was at least ostensible authority. However, the Supreme Court of Appeal did not agree with the court of first instance that the other party could have reasonably relied on the 'vague resolution' passed some two years before the conclusion of the agreements (para [33]). For its part, the full court apparently found that Costa had himself made the representation that he had been duly authorised. The problem with this finding is that Costa was only the agent and not the principal. Only if the remaining trustees had represented to the other contract party (by their words or conduct) that Costa had been duly authorised, could ostensible authority possibly have been found. However, the other contract party did not show any conduct on their part that could lead to such a conclusion.

After also having rejected the respondent's reliance on both the allegation of the abuse of the trust (see paras [36]-[38] and 'The abuse of a trust and "sham" trusts: Circumstances warranting a court "to go behind" the trust' below) and certain provisions of the Plant Breeders' Rights Act 15 of 1976 (an issue not relevant here), the court concluded that the appeal should succeed with costs.

The abuse of a trust and 'sham' trusts: Circumstances warranting a court 'to go behind' the trust

As already observed in this chapter in recent *Annual Surveys* (see, eg, 2014 *Annual Survey* 971; 2015 *Annual Survey* 1061), probably the most contentious issue in the South African law of trusts over the past number of years has been the question as to how courts should deal with instances of the possible abuse of the trust institution. A typical example of such abuse (see, eg, 2012 *Annual Survey* 853; 2014 *Annual Survey* 971) would be where a person (often simultaneously a founder, trustee, and beneficiary of the particular trust) could try to 'hide' assets in a trust from claimants in divorce or insolvency proceedings. The question then arises whether such trust assets can be used (or taken into account) for the satisfaction of these private claims,

or whether other remedies could be crafted to address the negative consequences of such abuse. The topicality of the issue is well illustrated by the discussion of numerous judgments in recent *Annual Surveys* (see 2009 *Annual Survey* 1070–2; 2010 *Annual Survey* 1198–1202; 2011 *Annual Survey* 1070–2; 2012 *Annual Survey* 853–5; 2014 *Annual Survey* 971 – 6; 2015 *Annual Survey* 1061–2). Against this background, and for purposes of the current review period, it would, therefore, only be necessary to comment briefly on the judgment of the Supreme Court of Appeal in *REM v VM* 2017 (3) SA 371 (SCA) (also reported as *Mills v Mills* [2017] 2 All SA 364 (SCA)); and see also *Costa NO v Arvum Exports* paras [36]-[38] above under 'Trustee authority: The ''joint-action'' rule and application of the normal principles of the law of agency'.

In the words of Swain JA, it would have been 'no exaggeration' to describe the relationship between the appellant and the respondent in *REM* as 'tumultuous' – illustrated by the fact that by the time of the judgment they had already been married and divorced three times (para [1]). Much of the judgment focused on the interpretation of section 4(1)*(b)*(ii) of the Matrimonial Property Act 88 of 1984 and of certain provisions of the antenuptial contract concluded between the parties, issues that are not relevant for purposes of this chapter. However, it also concerned whether assets held in certain trusts could be taken into account in order to calculate the respondent's accrual claim in terms of the Matrimonial Property Act against the appellant – in other words, whether the court could 'go behind the trust form' or, put differently, could 'pierce the veneer of the trust' (para [17]). Regarding this latter issue, two general remarks on the *REM* judgment are warranted.

The first remark concerns a theoretical point, but one with significant practical ramifications. In *REM*, the court once again stressed the importance of the distinction between a 'sham' trust, and the issue of 'going behind the trust form' (para [17]; and see also *Van Zyl & another NNO v Kaye NO & others* 2014 (4) SA 452 (WCC); *WT & others v KT* 2015 (3) SA 574 (SCA); 2014 *Annual Survey* 972; 2015 *Annual Survey* 1062). If a trust is found to be a 'sham', there is no trust and thus nothing to 'go behind'. The respondent's claim in *REM* that the appellant used the trusts in question as his 'alter ego' necessarily involved the acceptance of the valid existence of these trusts (para [17]).

The second remark concerns the issue of *locus standi* to institute a claim for 'going behind' a trust. It may be recalled that

in *WT,* the Supreme Court of Appeal took a very narrow view in this regard. In order to found a claim, the court said, the claimant must be either a 'defined beneficiary of the trust', or must have 'transacted with the trust as a third party' (para [32] of *WT*; 2015 *Annual Survey* 1062). In the absence of either of these grounds, the trustee of a trust would have no fiduciary duty towards the claimant (this was in fact one of the reasons why the appeal in *WT* succeeded). This narrow view has been rightly criticised in my view (see, eg, Iain Matthys Shipley 'Trust assets and the dissolution of a marriage: A practical look at invalid trusts, sham trusts, and piercing the veneers of trusts/going behind the trust form' (2016) 28 *SA Merc LJ* 508 526–8; A van der Linde 'Whether trust assets form part of the joint estate of parties married in community of property: Comments on ''piercing of the veneer'' of a trust in divorce proceedings' (2016) 79 *THRHR* 165 173). It is, therefore, to be welcomed that the Supreme Court of Appeal took a different stance in *REM.* There it held that breach by the trustee of his or her fiduciary duties in the administration of the trust, is not the 'determining factor'. Rather, a claim would lie against the trust or the trustee 'on the basis that the unconscionable abuse of the trust form by the trustee, in his or her administration of the trust, through fraud, dishonesty or an improper purpose prejudices the enforcement of the obligation owed to the third party, or a spouse' (para [20]). Using a flexible test such as this would certainly better serve justice than the closed-list approach advanced in *WT* (see also Shipley (2016) 28 *SA Merc LJ* 527-8).

Regarding the respondent's claim that the assets of the trusts be taken into account in determining her accrual claim, the court in *REM* concluded that

> . . . the evidence did not prove that he [the appellant] transferred personal assets to these trusts and dealt with them as if they were assets of these trusts, with the fraudulent or dishonest purpose of avoiding his obligation to properly account to the respondent for the accrual of his estate. In addition, it was not established that the transfer of assets to these trusts by the appellant was simulated with the object of cloaking them with the form and appearance of assets of the trusts, whilst in reality retaining ownership. The assets of these trusts are accordingly not to be taken into account in determining the accrual of the appellant's estate (para [20]).

The respondent had limited success in other respects, however, and the appeal succeeded partly with the respondent being ordered to pay the appellant's costs of the appeal.

UNJUSTIFIED ENRICHMENT

HELEN SCOTT*

LEGISLATION

No legislation affecting this branch of the law was enacted during the period under review.

CASE LAW

SUBROGATION TO EXTINGUISHED RIGHTS AS A RESPONSE TO UNJUSTIFIED ENRICHMENT

Application by bank for subrogation to rights arising from a mortgage bond previously held by it over the respondent's property and extinguished by a third party using funds fraudulently obtained from it

In *Absa Bank Ltd v Moore & another* 2017 (1) SA 255 (CC), 2017 (2) BCLR 131, Mr and Mrs Moore, the respondents, owned a home over which Absa Bank, the applicant, held five mortgage bonds. These bonds – totalling R145 000 in all – were discharged in the course of a fraudulent scheme operated by one Brusson (the Brusson scam) in which the Moores had become involved. Property owners in financial distress were loaned money against which their homes were to serve as security. Under the scheme, participants were assured that they would not lose ownership in their homes, or rather, would do so only temporarily. To this end, the Moores signed an offer to purchase their property for R686 000 (the name of the purchaser or 'investor', Kabini, was subsequently inserted); a deed of sale in terms of which the property was sold back to them for R648 000; and a 'Memorandum of Agreement' between Brusson, the Moores, and Kabini that regulated their tripartite agreement. The Moores must necessarily also have signed a power of attorney. In terms of the offer to purchase, bond finance of R480 000 was to be procured from a registered financial institution. The brochure provided to participants in the scheme furnishes further details of this aspect of the

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transaction: 'The Brusson investor applies for a mortgage loan from a financial institution to cover the cost of the initial transaction, and in so doing, makes funds available to the client. Brusson in turn debits its client. Brusson guarantees the monthly instalment to the financial institution' (para [17] of *Moore & another v Sheriff for the District of Vereeniging & others* (HC) 26 September 2014 (case 22082/13). According to the deed of sale, the Moores were to pay the purchase price of R648 000 by means of minimum monthly instalments of R7 579, the first instalment being due on the transfer of the property into the seller's name (HC para [15]).

In due course, the property was transferred and registered in the name of Kabini; simultaneously, the Registrar of Deeds caused a mortgage bond of R480 000 to be registered over the property in favour of Absa; also simultaneously, the five mortgage bonds previously registered over the property were cancelled (HC para [20]). In addition, R157 651 was paid into the Moores' bank account. They were told by Brusson that they would have to pay a monthly instalment of R6 907 over a three-year period. Consequently, the parties' transaction appeared to operate as follows: the Moores owed a total amount of R648 000; the R480 00 bond procured by Kabini was to be paid off through monthly instalments of R7 579 provided by the Moores via Brusson (presumably over a period of many years), while repayment of the R157 561 cash loan would take place in instalments of R6 907 over a shorter period. (The High Court judgment suggests that the R7 579 payments corresponded to the entire notional sale price of R648 000 (HC para [15.3]). However, it seems rather that these payments were intended to correspond exactly to the R480 000 bond: see HC para [17].)

Again, the Moores were apparently under the impression that they had retained ownership of their home (paras [9] and [30] of the judgment of the Supreme Court of Appeal reported as *Absa Bank Ltd v Moore & another* [2015] ZASCA 171 and CC para [5]; compare HC para [43], where Chohan AJ expresses reasonable doubts about this proposition). In fact, the transaction set out in the brochure provided to participants appears to envisage a separation between genuine title, which would remain with the participant, and formal title, which would pass to the investor – see paragraph [17] of the High Court judgment. In any event, the scam appears to have functioned precisely by enabling the 'investor', Kabini, to obtain apparent title to the property and

thereby acquire a significant bank loan secured against it. There is no suggestion in any of the three judgments that the Moores were ever called upon to make any of the R7 579 payments to Brusson required to service that secured loan; certainly, Kabini quickly fell behind in his repayments to the Bank, and within two years of the granting of the loan, the Bank obtained default judgment against him. But that was irrelevant to the operation of the scheme; the balance of the proceeds of the R480 000 mortgage bond had presumably been appropriated by Kabini and Brusson (CC para [6]); monthly repayments on the R157 561 cash loan were essentially 'extra' (CC para [11]); and it was of no concern to the fraudsters that the Bank in due course took steps to repossess the property. At this point the Moores became aware of the purported transfer of ownership to Kabini, interdicted the sale in execution, and instituted proceedings to recover their home. It happened that the bank from which Kabini had obtained the R480 000 mortgage bond was also Absa Bank – ie, the holder of the five original mortgage bonds over the Moores' home.

Before the High Court, an order was granted declaring the Brusson agreements invalid and setting them aside. In particular, the purported transfer of the Moores' property to Kabini was held to have been simulated and therefore of no force and effect (HC paras [44]–[49]); and the mortgage bond registered by Kabini in favour of Absa on the strength of that purported transfer was declared invalid and set aside (HC paras [50]–[59]). A condition was, however, imposed on the restitution of the property to the Moores, in that it was ordered that the Moores' original mortgage bonds in favour of Absa be reinstated (HC paras [60]–[62]). The High Court also held that the Moores should be obliged to restore to the Bank the amount of the cash loan they had received from Brusson (R157 561) minus any repayments made (HC para [63]). On appeal by the Bank to the Supreme Court of Appeal (Lewis JA, Ponnan, Pillay and Saldulker JJA, and Van der Merwe AJA concurring) the various findings of invalidity were upheld – in particular, the purported transfer of the Moores' home to Kabini was held to have been without effect (applying *Legator McKenna Inc & another v Shea & others* 2010 (1) SA 35 (SCA) and *Nedbank Ltd v Mendelow & another NNO* 2013 (6) SA 130 (SCA)), as was the mortgage bond registered at his instance, although Lewis JA found the transactions to have been fraudulently induced rather than simulated (SCA para [26]). However, the condition imposed by the High Court was lifted: the Moores' home was to be

returned to them unencumbered. Absa then sought leave to appeal to the Constitutional Court on this last point only.

Leave to appeal was refused. Absa advanced two arguments as to why the five original mortgage bonds over the Moores' property should be reinstated. It was argued, first, that the cancellation of the Moores' bonds was integral to the fraudulent scheme as a whole, along with the Moores' sale of their property to Kabini, the registration of the property in his name, and the registration of Kabini's new bond over the property. The Moores' bond had to be cancelled in order to induce the Bank to accept Kabini's title to the property as security, and for it to accept him as bond debtor in the place of the Moores. The entire scheme was a fraud, and each part of it was equally bad; it was impossible to pick out any 'pure pieces from the tangle' and preserve them intact. If the Moores were found to have retained ownership of their house, then it followed that the Bank's secured debt against them also remained valid: 'Fraud . . . unravels all' (see generally CC paras [16]–[19]).

This argument was rejected. It depended, said Cameron J, delivering the unanimous judgment of the Constitutional Court, on the proposition that the agreements under which the discharge and cancellation of the bonds occurred were vitiated by the Brusson fraud, and hence that payment of the Moores' debt was ineffective. But the evidence submitted by the Bank in support of this proposition was 'patchy' at best (CC para [25]). It was not possible to determine from it how exactly Kabini had accomplished the fraud, or how the Moores' bond debt had been discharged (CC para [27]). Moreover, even if it were assumed in the Bank's favour that it was indeed Kabini who had paid the Moores' bond debt in execution of the fraud, this did not mean that his payment was without effect. As a bilateral act, payment requires the cooperation of the payer and payee, while the discharge of a debt required a debt-extinguishing agreement between the debtor (or a party acting in her name) and creditor (*Absa Bank Ltd v Lombard Insurance Co Ltd* 2012 (6) SA 569 (SCA) para [18] cited at CC para [32]). But, in contrast to some other legal systems, South African law permitted a debt to be paid without either the consent or knowledge of the debtor (CC para [33]). Furthermore, even a deposit into the account of a fraudster was effective in transferring ownership in the money (*Trustees, Estate Whitehead v Dumas & another* 2013 (3) SA 331 (SCA) paras [13]–[15] [23] and [24], cited at CC para [34]). In

fact, payment of a thief's own debts using stolen funds extinguished those debts, provided the third-party creditor accepted payment in good faith (*Lombard* para [18] cited at CC para [35]). Funds paid out in this way could, therefore, not be recovered by the victim of the theft. This was true even where the debt paid by the thief was not his or her own (*Commissioner of Inland Revenue v Visser* 1959 (1) SA 452 (A) cited at CC para [35]). It followed that Kabini's payment to Absa was sufficient to discharge the Moores' bond debts even in the absence of their cooperation, and even if payment was made in fraud on the Bank using funds that the Bank itself had provided (CC para [37]). Indeed, Cameron J ventured, this would have been true even if the Moores had colluded with Kabini (CC para [37] n23). As the victims of fraud, the Moores had a choice whether or not to avoid their loan agreement with Brusson, but it remained valid until they chose to rescind it. Still less could the Bank, a third party, 'disregard the loan agreement because of Brusson's fraud' (CC para [39]). 'The maxim is not a flame-thrower, withering all within its reach' (ibid). It followed that the fraud perpetrated by Brusson did not unravel the cancellation of the Moores' bonds: the bonds were accessory to the main debt owed to the Bank, and that debt had been validly cancelled (CC para [40]).

In light of that conclusion, Cameron J turned to the second, alternative argument advanced by the Bank. This was that the cancellation of the Moores' bonds, if valid, had resulted in their being enriched at the Bank's expense, and that the appropriate remedy in order to reverse such unjustified enrichment was to reinstate those bonds in the Bank's favour. Here the Bank drew on the common-law doctrine of restitutionary subrogation. Critical to this argument was the proposition that the Moores' debt to the Bank had been discharged using the proceeds of the loan made by the Bank to Kabini. The Bank had lent the money to Kabini on the basis that the loan was secured against the property. It never intended to expose itself to unsecured debt. Accordingly, it was argued, the Bank, in its role as lender to Kabini, should be put into the shoes of the creditor of the secured debt which its loan to him was used to discharge: namely, itself, in its role as lender to the Moores. The Bank cited several English cases (*Brocklesby v Temperance Permanent Building Society* [1895] AC 173 (HL); *Butler v Rice* [1910] 2 Ch 277; and *Ghana Commercial Bank v Chandiram* [1960] AC 732 (PC)) in support of this proposition.

Cameron J also referred (CC para [42] n28) to §57 of the American Restatement (Third) of Restitution and Unjust Enrichment (ALI 2011).

Again, this argument was rejected. Cameron J gave three reasons for this. First, he said, the argument depended on disaggregating the capacities in which the Bank acted in the transactions: first, as lender to the Moores; and second, as lender to Kabini. This argument proceeded from a notional core case in which the first lender had been a different bank, the second lender then being subrogated to the position of the first. But this core case created 'an insuperable problem' for the applicant. If the first and second lenders were in fact different banks, on what terms and conditions would the court be able to impose a new bond in the second lender's favour? In such a case the court would have to create an entirely new contract between the second lender and the debtor, but it was difficult to imagine what the terms of such a contract would be. 'Must the court exercise a general equitable jurisdiction to determine these contractual terms itself?' (CC para [43]). The Supreme Court of Appeal had been entirely correct to conclude that the court 'cannot make a contract between the Bank and the Moores' (SCA para [42], cited by Cameron J CC para [44]).

Second, the Bank's argument supposed that the Moores had been enriched at the Bank's expense. But this was by no means clear: the release of the Moores' property from the bonds over it was not gratuitous but rather came at the cost of their new debt to Brusson (CC para [45]). It was argued in reply by the Bank that the Moores were not bound by that debt, as the loan was (at its strongest) voidable at their instance for fraud (CC para [46]). The answer to this argument was that the Moores might nevertheless be liable to the trustees of either Brusson's or Kabini's insolvency (depending on who had discharged the Moores' debt) in unjustified enrichment – the relaxation of the *par delictum* rule, as per *Jajbhay v Cassim* 1939 AD 537, would give rise to a restitutionary claim against them, as recently permitted by the Supreme Court of Appeal in *Afrisure CC v Watson NO & another* 2009 (2) SA 127 (SCA) para [47]). And even if this argument were unsuccessful, the Bank faced a further and – for Cameron J – insuperable obstacle, namely that it had not been impoverished: it retained its claim against Kabini in respect of the money advanced to him (R480 000 plus interest). Indeed, the Bank had obtained default judgment against him in that respect, showing that it had elected

to uphold this contractual claim. The fact that this claim might well be worth nothing in practice, owing to the insolvency of both Kabini and Brussson, did not alter the position: 'the extant claim and the judgment enforcing it insuperably impede the Bank's assertion that the fraud impoverished it to the benefit of the Moores' (CC para [49]).

Third, even if the Moores had been enriched, 'the Bank's threadbare patchwork of evidence disables its case' (CC para [52]). Although the Bank alleged that it was Kabini who had paid this debt rather than Brusson, from an undetermined source, and that he had done so with its money, this claim was speculative. Admittedly, 'it doesn't seem unlikely' that Kabini used the R480 000 his fraud extracted from the Bank to pay R157 651 to the Moores, R145 000 to the Bank to settle the Moores' mortgage debt, and R168 000 to Brusson (CC para [54] n37). However, the Bank had advanced no evidence in support of this proposition. In the absence of such evidence the Bank's contention that an enrichment claim should be developed to restore it to the security it had previously enjoyed over the Moores' property could not be sustained.

Cameron J closed the substantive portion of his judgment with the following remarks:

> Beneath these contentions lies the Bank's complaint that the Moores received an unmerited windfall at its expense. It is true that the Moores are better off now than before the fraud, and that the Bank, having lost its secured loan to the Moores, now has only an unsecured claim against Mr Kabini, who is probably good for nothing. But the Moores justly defend that this is not their fault. Their bond debt to the Bank was discharged because the Bank decided to take Mr Kabini, whom it thought now owned the property, as its debtor in their stead. It was the bank that decided to grant a loan to Mr Kabini. We don't know what background checks it did, or could have done, on him. We know nothing about the conveyancing attorney whom it employed, and who accepted all the documents at face value. The discharge of the Moores' debt was not subject to a condition that Mr Kabini would prove a worthy debtor. And, on the facts before us, there is no basis to develop our law so as to impose one. In the way things have turned out. . .the outcome is not unjust. The Bank, which enjoyed the institutional resources and power to protect itself against the fraudulent scheme, but didn't do so, has to suffer the loss its loan to Mr Kabini caused to it (CC paras [56] [57]).

In my view this this decision represents a missed opportunity. In an uncodified civilian system like South Africa's, one who brings an unjustified enrichment claim in respect of money stolen

or fraudulently obtained out of a bank account receives only very limited protection against the insolvency of the thief or fraudster: her claim enjoys no priority over that of other creditors, and she cannot pursue the funds into the hands of third parties; lacking any persisting right of ownership capable of vindication, the victim of such theft or fraud can rely only on a personal remedy, typically available only against the wrongdoer herself. This limited diet of remedies seems unsatisfactory, especially given the very high prevalence of financial crime in contemporary South Africa.

One strategy for dealing with such cases – first raised by the Supreme Court of Appeal in *First National Bank of South Africa Ltd v Perry NO* 2001 (3) SA 960 (SCA), and further developed in *Nissan South Africa (Pty) Ltd v Marnitz NO (Stand 186 Aeroport (Pty) Ltd Intervening)* 2005 (1) SA 441 (SCA) – is to deny the holder of stolen funds in a bank account any right to those funds as against the bank at which the account in question is held. According to this analysis, the bank itself is held to be enriched by receipt of funds held to the account of the thief, rendering it a potential defendant to an unjustified enrichment claim by the victim of the theft. In at least one decision of the Supreme Court of Appeal (the *Nissan* case itself), this has afforded the original holder of the funds significant protection against the thief's insolvency. The utility of this strategy is limited, however, by the rule (accepted in *Absa Bank Ltd v Lombard Insurance Co Ltd* 2012 (6) SA 569 (SCA)) that a payment made to a good-faith, third-party creditor of the thief by the thief herself can be retained by that creditor – in the *Lombard* case itself, the defendant banks in their roles as both mortgagees and unsecured lenders to the thief – as having validly satisfied the thief's debt. (The *Lombard* case is cited to this effect in CC para 32 n10. It is unclear to this author that the finding of successful discharge by the thief of a good-faith, third-party's claim in *Lombard* supports the same conclusion where the debt in question has been discharged by a fraudster in pursuance of her fraud.) It appears, further, that the *Nissan* rule is limited to cases of theft, although it is arguable that the fraud at issue in the case under discussion here (and indeed in the original decision in *Perry* above) was of a more fundamental kind than the fraudulent misrepresentation at issue in *Trustees, Estate Whitehead v Dumas & another* 2013 (3) SA 331 (SCA), where the *Nissan* rule was disapplied. Finally, it is difficult to say precisely what the doctrinal basis of this body of cases is: whether the victim's claim against the bank, although a personal

one, amounts to a species of substitute *vindicatio* arising from the invasion of her original property rights in the money, which might be susceptible to further elaboration along principled lines, or whether it is founded rather on a specific policy of affording protection against insolvency to the victims of theft in certain clearly defined circumstances. At the very least, the evolution of this body of cases demonstrates that the South African law of unjustified enrichment is not averse to providing such protection.

Thus it seems that the strategy boldly employed by counsel for the Bank in this case – to attempt to introduce into South African law the common-law doctrine of restitutionary subrogation – was not without foundation: it was, after all, likewise an attempt to secure for the victim of serious fraud protection against insolvency; not only that of the fraudsters Kabini and Brusson, but also that of the Moores themselves. Subrogation in English law enables the claimant to obtain the benefit of the extinguished rights of another as against a third party. The Bank, in its role as unsecured lender to Kabini, was seeking to be subrogated to its own (now extinguished) secured claim against the Moores, by virtue of the fact that the Moores' bond had been discharged using the proceeds of the loan fraudulently procured from it by Kabini. A similar argument could conceivably have been run by the victim of theft in the *Lombard* case, ie, that it should be subrogated to the banks' extinguished rights over the thief's immovable property.

Whatever the merits of this argument in the case at hand, the short shrift afforded it by Cameron J suggests that the South African courts are unlikely in future to embrace either restitutionary subrogation in particular or proprietary restitution in general as a response to unjustified enrichment (cf the limited scope of the subrogation doctrine in contemporary South African law in, eg, Jacques du Plessis *The South African Law of Unjustified Enrichment* (Juta Cape Town (2012) 324–7). In assessing the Bank's subrogation argument, Cameron J uncritically accepted the remarks of Lewis JA at paragraph [42] of the Supreme Court of Appeal judgment, to the effect that, 'this court cannot make a contract between the Bank and the Moores. We cannot order that the Moores pay an amount that they did not owe to the Bank, nor that they register a bond over their property in favour of the Bank. There is no longer any contractual nexus between these parties. The court *a quo* simply did not have the power to make a contract for the parties.' This modest assessment of its own powers is

highly uncharacteristic of the Constitutional Court. On the other hand, it must be admitted that several of the other concerns raised by Cameron J in this context – his objection that such a remedy would permit the Bank to evade or distort the 'enrichment' and 'impoverishment' requirements by leapfrogging over the fraudsters, Kabini and Brusson, to reach the Moores – echo contemporary English debate regarding the 'at the expense of' requirement, and in particular, academic criticism directed at the wide understanding of that requirement adopted by the majority of the Supreme Court in *Menelaou v Bank of Cyprus UK Ltd* [2015] UKSC 66; see, eg, Robert Stevens 'The unjust enrichment disaster' 2018 134 *Law Quarterly Review* 574.

Finally, it is not clear to this author that Cameron J's analysis of the facts is correct in every respect. In particular, it is not clear which debt he is referring to when he says at paragraph [45] that the release of the Moores' property from the original bonds over it was not gratuitous but rather came at the cost of their 'new debt' to Brusson. The monthly R6 907 repayments made by the Moores to Brusson appear to have related only to the R157 651 cash loan; again, it does not appear that any repayments in respect of the R480 000 mortgage bond obtained by Kabini from Absa were ever made by the Moores, nor that such repayments were even genuinely contemplated. The discharge of the Moores' original mortgage debt may have been effective, but the network of transactions in pursuance of which it was effected, and in particular the purported obligation on the part of the Moores to pay off the R480 000 bond debt (in instalments of R7 579 per month), was surely a sham. Thus, it is hard to see how this notional debt (owed by the Moores to Brusson) could work to block the Bank's claim against the Moores by negating the 'enrichment' element. In fact, as Cameron J implicitly acknowledges at paragraph [47], any enrichment claim arising in respect of the R145 000 used to discharge the Moores' original mortgage bonds – whether available to Brusson, Kabini, or their trustees on insolvency – would have been one arising from the payment of another's debt: the extended action modelled on the *actio negotiorum gestorum contraria* (see, eg, Du Plessis *Unjustified Enrichment* ch 10) rather than the *condictio ob turpem vel iniustam causam* (claim in respect of money or property transferred under an illegal agreement) at issue in the *Afrisure* case referred to by Cameron J. In other words, any such claim arose from the fact of the payment itself, not from the network of

contractual obligations – whether valid, voidable or void – constructed by the Brusson scheme. On the other hand, it does seem overwhelmingly likely that the R480 000 obtained by Kabini through his fraud on the Bank was indeed used to discharge the original bonds over the Moores' property; in other words, that it was Kabini who paid the Moores' debt, and that he paid it using funds fraudulently obtained from the Bank. Taking these points together, it seems highly artificial to separate the two transactions – the loan of R480 000 by Absa to Kabini, and the discharge of the Moores' original bond debt – in such a way as to immunise the Moores against the Bank's enrichment claim. In effect, it was Absa that discharged the Moores' debt, Kabini acted merely as a conduit. The Moores were indeed enriched at the Bank's expense.

Therefore, it may be that the outcome in this case is better understood as an expression of social justice than private-law doctrine. As the paragraph quoted above suggests, at bottom the Court took the view that the equities favoured the Moores: that the Bank, a big corporate player, ought to have been more careful in lending money to Kabini, and that the Bank, being in a far better position to protect itself against the fraudulent scheme than the Moores, ought to suffer the loss thus caused. Yet the difficulties with this line of reasoning are obvious. First, it is not clear what the legal (or moral) relevance of fault on the part of the plaintiff is to a claim in unjustified enrichment. The mere fact that the Bank could have been more careful (if indeed that is so) should not affect the availability of an enrichment claim in principle. The mortgage bond by means of which the Bank sought to secure the loan showed beyond doubt that it had not taken the risk of Kabini's insolvency. Second, many victims of financial crime are, of course, not banks or other large corporations, but rather small companies (as in the *Lombard* case) or individuals (as in the *Whitehead* case). It seems unfortunate that this opportunity to develop the law in favour of the victims of theft and fraud – by adopting at least some aspects of the English doctrine of proprietary restitution, perhaps in reliance on the right to property entrenched in section 25 of the Constitution – was missed. Perhaps in the next case, when the equities are reversed, the court may be persuaded to intervene. (See again, *Lombard*, as discussed by Danie Visser 'Unjustified enrichment in the context of the fraudulent manipulation of bank accounts: Principle, pragmatism, and equality before law' in Visser C & Pretorius J (eds) *Essays in Honour of Frans Malan* (LexisNexis South Africa Durban 2014) 359.

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