

LEXISNEXIS CASE LAW INDEX

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CIVIL PROCEDURE AND PRACTICE

SPOLIATION AND A BMW

Mr Diedricks handed his BMW to Autoglen Motors for a maintenance service. But the keys were given to persons who had papers that showed ownership of the car by Street Talk. Autoglen later handed the vehicle to Street Talk on payment of the invoice for the service. Mr Diedricks launched an urgent spoliation application and the High Court granted an order that possession of the BMW be immediately restored to him.

On appeal, **Goosen AJA** considers the contentions that (1) a *mandament van spolie* ought not to have been granted because Diedricks was not, as matter of fact and law, in possession of the motor vehicle when the spoliation occurred; and (2) that Autoglen was not in possession of the BMW, which had been passed to Street Talk, so Autoglen could not restore possession.

The appeal succeeds and the order of the High Court is set aside.

(Dambuza JA and Plasket JA concurred.)

* See Schippers JA (and Mabindla-Boqwana AJA) dissenting from para [37].

** And see Plasket JA from para [74] on why he disagrees with the reasoning of Schippers JA.

Monteiro and another v Diedricks [\[2021\] JOL 49792 \(SCA\)](#)

STAY OF EXECUTION AND RULE 45A

Applicants urgently applied to stay the sale in execution of a herd of dairy cows and certain farming equipment. The Judge issued an order that was telephonically conveyed to the sheriff conducting the sale in execution directing that the auction not proceed until the application was determined later in the morning. The execution of the writ was stayed and the sale in execution pursuant to such writ was cancelled.

Binns-Ward J gives reasons for the order and discusses Uniform Rule 45A and the case law on stays of execution; and the court's discretionary power. See "general principles" and the *Gois* case from para [17].

Stoffberg NO v Capital Harvest (Pty) Ltd [\[2021\] JOL 49817 \(WCC\)](#)

RES JUDICATA AND AN EXCEPTION

Plaintiff had claims of interdictory relief, damages and contempt of court. All five defendants brought an exception to the particulars of claim.

Cloete J looks at Amlers and the case law on whether a defence of *res judicata* can be raised by exception, or if it must be raised in a plea or special plea.

The defendants' exception is dismissed.

Technical Systems (Pty) Ltd v RTS Industries [\[2021\] JOL 49784 \(WCC\)](#)

AMENDED RULE 32 – SUMMARY JUDGMENT AND FILING A REPLICATION

Plaintiff seeks summary judgment for almost R2 million for goods sold and delivered. The defendant seeks to set aside the application under Rule 30 (irregular proceedings) because plaintiff has waived its rights to apply for summary judgment by delivering a replication to defendant's plea.

Gibson AJ discusses plaintiff's argument that it filed its replication at the same time as the application for summary judgment as the recent amendment to Rule 32 does not prohibit the filing of a replication; and defendant's contention that by filing a replication the plaintiff has answered the defendant's plea with fresh facts and has progressed the pleadings to the prejudice of the defendant.

The Rule 30 application is dismissed.

The application for summary judgment is dismissed and defendant given leave to defend.

Quattro Citrus (Pty) Ltd v F & E Distributors (Pty) Ltd ta Cape Crops [\[2021\] JOL 49833 \(WCC\)](#)

MEDICAL RECORDS FOR LITIGATION AND RULE 38

Ms Gordon claimed damages as a result of injuries sustained when she visited the applicants (Divine Inspiration and Alphen Farm). Applicants seek an order against two doctors directing them to provide all medical reports and x-rays held by them for Ms Gordon.

Hockey AJ discusses the subpoenas *duces tecum*; Rules 35 and 38; doctors' ethical duties prohibiting disclosure of medical information without the consent of their patient; the National Health Act 61 of 2003; the Protection of Personal Information Act 4 of 2013; the right to dignity and privacy; and the disclosure of documents for litigation.

The two doctors are ordered to file all the medical records in relation to Ms Gordon.

Divine Inspiration Trading 205 (Pty) Ltd v Gordon [\[2021\] JOL 49822 \(WCC\)](#)

REQUIREMENTS FOR RESCISSION

Gamble J granted an urgent order for the provisional sequestration of the applicant, who now applies for rescission in terms of Rule 42(1)(a) or under the common law.

Pangarker AJ discusses rescission under the Rule and under the common law; whether there were facts not placed before the Judge which would have affected the outcome; the submission that the applicant did not receive proper notice as required in urgent applications; and whether the applicant has a bona fide defence.

The application for rescission is dismissed.

Coosner v Nuttall [\[2021\] JOL 49892 \(WCC\)](#)

"There is a limit beyond which a litigant can escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered."

Saloojee and Another NNO v Minister of Community Development [\[1965\] 1 All SA 521 \(A\)](#)

CONCURRENT JURISDICTION OF MAGISTRATES COURT AND HIGH COURT

Alphera seeks summary judgment against Mr Lemmetjies, based on the breach of a written instalment sale agreement, for the return of an Audi A4, but he raises two special pleas.

Dosio AJ considers whether Alphera has failed to provide motivation for proceeding in the High Court where the amount claimed under a credit agreement falls within the jurisdiction of the magistrates court; and alternatively, that Alphera should have proceeded in Mr Lemmetjie's closest division of the High Court, being Johannesburg.

Also discussed is section 46(2)(c) of the Magistrates' Court Act 32 of 1944; the case law; and the position where specific performance is sought without an alternative claim for damages.

Summary judgment is granted.

Alphera Financial Services v Lemmetjies [\[2021\] JOL 49891 \(GP\)](#)

RULE 35(12) – DOCUMENTS REFERRED TO

Ms Mkhwebane contended that statements made by the DA were defamatory and that the public understood the statements to mean she was a spy of the State Security Agency. The DA sought the production of certain documents under Rule 35(12) but Ms Mkhwebane and the Protector's Office refused to produce two items. The High Court dismissed the DA's application to compel the production of the documents.

On appeal, **Navsa ADP** discusses Rule 35(12) and the production of documents referred to in annexures; the meaning of "reference"; and the compellability of documents that are not specifically mentioned in affidavits, but which are referred to in annexures to the affidavits.

The appeal is upheld and the order of the High Court substituted with one directing the production of Ms Mkhwebane's application for the post of Analyst: Domestic Branch: DBO1 in the State Security Agency by no later than 1 April 2021.

Democratic Alliance v Mkhwebane [\[2021\] JOL 49889 \(SCA\)](#)

MATERIAL FACTS FOR EVICTION

De Villiers AJ considers an appeal against a magistrate's order evicting the appellant and all those who occupy the property through him.

The court discusses the PIE Act; establishing the facts and onus; whether the papers addressed the material facts; and the unenviable position a magistrate finds herself in when having to decide a matter that has been prepared inadequately.

The appeal is upheld and the order of the court *a quo* replaced with one dismissing the application.

Trollip v Davis and another [\[2021\] JOL 49910 \(GJ\)](#)

RES JUDICATA AND ISSUE ESTOPPEL

The core dispute in the litigation between the parties was that Ms Cassiem contended that she was entitled to payment in full from the Medical Scheme of her claims for dialysis services rendered to its members, irrespective of what she charges.

A previous application on an urgent basis, seeking interim relief in the form of a money judgment against the Scheme was dismissed. Almost a year later, Ms Cassiem launched the present application, similarly for a money judgment, also by way of an order for relief, *pendente lite*.

Wille J (Cloete J and Kusevitsky J concurring) discusses proceeding by way of application when facts will likely be disputed; res judicata and issue estoppel; *lis pendens*; no cause of action; urgency and costs.

The application is dismissed with costs on the scale of attorney and client.

Cassiem and another v Government Employees Medical Scheme [\[2021\] JOL 49907 \(WCC\)](#)

EXCEPTIONS AND RULE 23(1)

The excipients, the defendants in an action instituted by the plaintiffs, excepted to the particulars of claim on the basis that it lacked averments necessary to sustain an action, or that they were legally unsustainable. The Court considered the provisions of Rule 23(1) of the Uniform Rules of Court dealing with exception and which has the primary purpose to avoid the leading of unnecessary evidence. The Court held that exceptions should be dealt with sensibly as they provide a useful mechanism to weed out cases without legal merit.

On the case law, the principle distilled on exceptions, was whether on all possible readings of the facts no cause of action is made out. It is for the defendant to satisfy the court that the conclusion of law for which the plaintiff contends cannot be supported upon every interpretation that can be put upon the facts. On the facts the Court was satisfied that the particulars of claim did not sustain a claim relating to voidable dispositions under section 26(1) of the Insolvency Act 26 of 1936 and the exceptions of the first to the fourth defendants were upheld.

Strydom NO v Snowball Wealth (Pty) Ltd [\[2021\] 2 ECL 72 \(WCC\)](#)

PENALTY IN SETTLEMENT AGREEMENT

Applicants seek an order declaring that they have complied fully with their obligations under a settlement agreement and an order reducing to nil, or setting aside, a penalty of R15 million provided for in the agreement.

Ploos van Amstel J discusses whether the instalment in question was paid timeously, and, if it was not, whether the provision relating to the payment of R25 million was a penalty as defined in the Conventional Penalties Act 15 of 1962.

The penalty provided for in the settlement agreement is reduced to nil and the clause declared unenforceable. It is declared that the applicants have complied with their obligations under the settlement agreement.

Tetra Pak SA (Pty) Ltd v Blakey Investments (Pty) Ltd [\[2021\] JOL 49900 \(KZD\)](#)

INTERVENTION AT MUNICIPALITY

The Provincial Executive imposed a comprehensive recovery plan on the Kannaland Municipality, which had been in a dire financial crisis, unable to provide basic municipal services and spending money on litigation due to the conclusion of questionable contracts.

Mangcu-Lockwood AJ considers an intervention to prevent the municipality from appointing a service provider for a period exceeding 25 years by way of an unsolicited bid process; increasing their staff of political office bearers; and to pay a performance bonus to a former manager.

An order is granted in terms of the draft order handed up by the applicants.

[82] As indicated earlier, the respondents also argue that the applicants could have used “a plethora of legislative machinery to counter [the] alleged malpractices” instead of approaching this Court. The specific remedies mentioned in this regard are recouping wasted funds, and laying criminal charges against the recalcitrant individuals. In my view, such a piecemeal approach to dealing with the fundamental governance problems

posed by the conduct of the respondents, would be inadequate. What is required is relief that will be adequate enough to bring to an end what the applicants have referred to as the “capture of the Municipality”.

Executive Council of the Western Cape v Kannaland Municipality [\[2021\] JOL 49968 \(WCC\)](#)

USE OF PRIVILEGED DOCUMENTS PROVIDED IN ERROR

The UK Commercial Court hears an application by the defendants for permission to use the contents of four witness statements, otherwise the subject of privilege, but inadvertently disclosed by the claimants' lawyers in their lists of documents, allegedly due to an error by a junior lawyer.

Sir Michael Burton GBE discusses privilege and providing documents for inspection; the situation where privileged documents are provided by mistake; and the relevance of the documents to the merits of the case.

The defendants are granted permission to use the documents.

Barclay-Watt v Alpha Panaretti Public Limited [\[2021\] EWHC 642 \(Comm\)](#)

THE PRIMARY FUNCTIONS OF A COURT

Four learners were killed when a bridge at their high school collapsed. Comments were made about the deaths on the official Twitter account of Black Land First and Solidarity then approached the Equality Court for an order declaring the comments to be hate speech.

The order that was issued declared the proceedings a nullity, purportedly due to the case of **Qwelane v Human Rights Commission** [\[2020\] 1 All SA 325 \(SCA\)](#), which appeal was pending at the Constitutional Court.

Nicholls JA discusses the primary functions of a court and the purpose of its orders.

Solidarity's appeal is upheld and the order of the court a quo is set aside. The matter is remitted to the Equality Court to be finalized.

One of the primary functions of a court is to bring to finality the dispute with which it is seized. (See para [10].)

Solidarity v Black First Land First [\[2021\] JOL 49971 \(SCA\)](#)

DISCOVERY – DEFAMATION AND THE TRUTH DEFENCE

The plaintiff claimed R1,5 million for defamation due to a tweet to the effect that she had gone rogue. She was at the time the CEO of the Estate Agency Affairs Board and the defendant was at that time was a parliamentary member.

Wille J considers two applications to compel further discovery and discusses the plaintiff's refusal to produce certain documents; and relevance to the defence of truth.

See the obiter remarks from para [28] on the documents requested having been referred to by way of annexure to the plaintiff's affidavit.

The plaintiff is ordered to discover a list of documents. See order at para [35].

Mulaudzi v Powell [\[2021\] JOL 49980 \(WCC\)](#)

CONSTITUTIONAL LAW

UNFAIR DISCRIMINATION – AGE REQUIREMENTS

The Tebeila Institute supports further education for persons from poor communities and challenged the Navy's age requirements for admission to training under the military skills development system. The High Court found that the age requirements constituted unfair discrimination because our education history means that most young people battle to finish their degrees or diplomas in the specified age range of 18 to 26

Unterhalter AJA considers the Navy's appeal and discusses unfair discrimination; the functional requirements for recruitment for the defence force; section 9(3) of the Constitution prohibiting the State from unfairly discriminating against anyone; and section 29(1)(b) on the right to further education.

The appeal is upheld and the order of the High Court replaced with one dismissing the application.

South African Navy v Tebeila Institute of Leadership [\[2021\] JOL 49934 \(SCA\)](#)

SECRET BALLOT FOR MOTION OF NO CONFIDENCE

The ATM political party seeks to review and set aside the decision of the Speaker who declined its request to hold voting in a motion of no confidence against the President by secret ballot.

Lekhuleni AJ discusses whether the Constitutional Court has exclusive jurisdiction to hear the matter; section 102(2) of the Constitution (motions of no confidence) and section 167(4)(e) which provides that only the Constitutional Court may decide that Parliament or the President has failed to fulfil a constitutional obligation; and whether the applicant's case, based on an alleged unlawful decision by the Speaker, falls within these circumstances. The court then considers the factual background and whether the Speaker's decision was based on sound reasons. The court finds that the High Court does have jurisdiction to consider the matter and the application is dismissed.

African Transformation Movement v Speaker, NA [\[2021\] JOL 49981 \(WCC\)](#)

ESTATE AGENTS AND THE RIGHT TO PRACTICE A TRADE

Urgent relief was sought against the Real Estates Agency Board to compel the issuing of Fidelity Fund Certificates to estate agents, it being a criminal offence for a person to act as an estate agent without a valid certificate.

Kathree-Setiloane J discusses the Estate Agency Affairs Act 112 of 1976; the perennial problems experienced by estate agents in getting their certificates; issues of urgency; and the board's attempt to file a supplementary affidavit.

A detailed order is made ordering the board to issue certificates to qualifying estate agents.

REBOSA v Estate Agency Affairs Board [\[2021\] JOL 49917 \(GJ\)](#)

CORPORATE AND COMMERCIAL

SPECIAL CONDITIONS IN DEED OF TRANSFER

The decision by the municipality to sell a beachfront property to Rinaldo Investments, for development as a film studio, has been drawn through the courts for more than a decade. The land was donated by the municipality (formerly the Corporation) to the government for military purposes, subject to an express condition that the property was to be used for defence purposes only, and in the event of it not being used or required for such purposes, the land would revert to the Corporation.

Chetty J discusses the suspensive condition that the municipality first acquire the property from the Defence Force; the special conditions in the deed of transfer; whether the Defence Force has left the property and the contention that it needs the property at some time in the future; and issues of *locus standi*.

It is declared that the special conditions in the deed of transfer have been met and the Minister of Public Works is ordered to take all steps necessary to effect the transfer the Natal Command Property to the eThekweni Municipality within 30 days.

Rinaldo Investments (Pty) Ltd v Minister of Public Works [\[2021\] JOL 49886 \(KZD\)](#)

[86] The Department of Defence avers in its answering affidavit that it intends to establish accommodation and hotel facilities for the Department of Defence on the property in light of piracy and other criminal conduct taking place in the Mozambican channel. This statement is vague and unsubstantiated by any evidence of the need or budget for such a project. As if to justify the vague assertion, the Minister of Defence's affidavit contends that it is not necessary to explain in any detail what its plans for the property are and further that there is no time bar contained in the special conditions and therefore it is sufficient for it to state that it simply has the intention to use the property for defence purposes, sometime in the future.

* See also **Giant Concerts CC v Rinaldo Investments (Pty) Ltd** [2013 \(3\) BCLR 251 \(CC\)](#)

DEVELOPMENT CONTRIBUTION FOR LESS FORMAL TOWNSHIPS

Nu-Way applied to have land in Langa designated for less formal settlement and this was approved subject to conditions that Nu-Way at its own cost provide the internal electrical reticulation and street lighting serving the subdivision. Nu-Way later sued the City of Cape Town for recovery of R2 million, which they alleged was an unanticipated electricity development contribution which Nu-Way had paid the City, under protest. Nu-Way based its claim on the *condictio indebiti*, alternatively in contract, and the High Court upheld the claim on both bases.

On appeal, **Rogers AJA** discusses whether this charge was in law due and payable; whether this charge was part of the City's broader electricity tariff and its purpose; the terms of approval; and the applicable legislation and policies.

The appeal succeeds and the order of the court is replaced with one dismissing the application.

City of Cape Town v Nu-Way Housing Developments (Pty) Ltd [\[2021\] JOL 49911 \(SCA\)](#)

RESTRAINT OF TRADE AND A FAMILY BUSINESS

Tron Lubricants and two related companies seek to enforce restraint of trade agreements with former employees who they allege set up KNT Business to unlawfully compete with them.

Mossop AJ discusses the restraint agreements; the founder's investigations and the results of the CIPC search; whether the applicants have a proprietary interest worthy of protection; and whether the restraint agreements are unreasonable and contrary to public policy in regard to the area that they cover and their duration.

* Note at paras [37] to [39] how one email was devastating to the respondents' defences.

The orders are granted with restraints of 14 months for the first, second and fifth respondents.

The claim against the fourth respondent is dismissed.

Tron Lubricants (Pty) Ltd v KNT Business Solutions [\[2021\] JOL 49915 \(KZP\)](#)

BANK'S LIABILITY FOR THIRD PARTY DEPOSITS

Mr Paulo agreed that Spar would run the Umtshingo franchise and that proceeds deposited into the accounts at FNB were Spar's funds. Was FNB liable to Spar because it had knowledge that Umtshingo had no entitlement to the funds deposited by Spar, but nevertheless permitted Mr Paulo to make disbursements from the accounts? The High Court dismissed Spar's claims, but on appeal the full court found that Spar had proven its case.

Sutherland AJA and Unterhalter AJA discuss FNB's defence that it had lawfully appropriated the sums claimed because these were amounts due and payable to FNB; ownership of money deposited into a bank and set off; third party deposits and entitlement to the funds; and who acquires the personal right to the credit arising from the deposit.

The appeal is dismissed. (Cachalia JA, Dambuza JA and Makgoka JA concurred.)

Firststrand Bank Limited v Spar Group Limited [\[2021\] JOL 49920 \(SCA\)](#)

ACTIO REDHIBITORIA AND A DEFECTIVE VEHICLE

A purchaser attempted to return a defective car after paying the full purchase price, but the sellers resisted, so the purchaser clocked up 70,000 km. The regional magistrate upheld the purchaser's claim for cancellation of the agreement and payment of the full purchase price against the return of the vehicle.

On appeal, **Mathebula J** (Daniso J concurring) discusses the principles of the *actio redhibitoria*; and whether the thing must be restored in exactly the same condition as it was at the moment of delivery; and whether fault of the seller gives latitude to the buyer.

The appeal is dismissed with costs.

Van Der Boon NO v Moletsane [\[2021\] 2 ECL 38 \(FB\)](#)

CRIMINAL LAW

DISCHARGE AT CLOSE OF STATE'S CASE

Mr Bongo was accused of offering a bribe to Mr Vanara, the evidence leader of the Eskom Inquiry, in order to delay or collapse the Inquiry.

The state preferred charges on corrupt activities relating to public officers (offering a gratification) under the Prevention and Combating of Corrupt Activities Act 12 of 2004.

Hlophe JP discusses the charges; how the State's case rested largely on the evidence of Mr Vanara; the application in terms of s 174 of the Criminal Procedure Act 51 of 1977 for discharge at the close of the State's case; and the credibility of the State witnesses.

The application is granted and the accused is found not guilty and discharged.

S v Bongo [\[2021\] JOL 49797 \(WCC\)](#)

CONJUGAL VISITS AND A CELLPHONE IN PRISON

Applicant was convicted of high treason and is serving his sentence at a correctional facility. He seeks relief relating to conjugal visits with his spouse and the use of a mobile phone to communicate with his spouse and relatives.

Kollapen J discusses the applicant's reliance on the right to establish and maintain healthy family relations; applications under s 38 of the Constitution where human rights are violated or a violation is pending; the marriage policy of the department; the case law and the international framework.

The application is dismissed.

WP v Minister of Justice and Correctional Services [\[2021\] JOL 49884 \(GP\)](#)

DELICT

MALEMA AND THE DEFAMATION CASE

News24 report that Julius Malema has dropped the R1 million defamation case against Thembinkosi Rawula, who resigned from the EFF and made various statements about Malema and his lifestyle funding.

The judgment by **Mullins AJ** of 12 November 2019 makes for interesting reading, especially the quote of the offending statement, see page 5 of the judgment. Rawula's defence was that his utterances were the truth and in the public interest, fair comment, privileged or protected by s 16(1) of the Constitution.

See the discussion from para [20] on defamation claims brought on notice of motion for a final interdict and damages; and the *Manuel* and *Hanekom* cases.

The application was dismissed, but the court mentions at para [46] that Malema was at liberty to institute an action for damages in accordance with the *actio iniuriarum*, if so advised.

* See para [31] on the answering affidavit and mention of the VBS money.

Malema v Rawula [\[2019\] JOL 49783 \(ECP\)](#)

SLIPPERY FLOORS AND DAMAGES CLAIMS

The High Court dismissed a claim for damages where Ms Holtzhausen slipped and fell in a mall.

On appeal, **Sher J** (with Allie J and Samela J) discusses the facts of the rainy day and the “wet floor” warning sign; and give a useful survey on the case law from paras [21] to [52].

The appeal is upheld and the order of the court a quo is replaced with one finding the defendants liable for such damages as the plaintiff may prove.

Holtzhausen v Cenprop Real Estate (Pty) Ltd and another [\[2021\] JOL 49834 \(WCC\)](#)

INJURED BY PROTESTORS – AN OCCUPATIONAL INJURY?

Ms Churchill worked for the office of the Premier and one day was caught up in a labour protest where she was assaulted. She sued for nearly R7,5 million for past and future medical treatment, general damages and past and future loss of income.

The High Court upheld the special plea that her claim constituted an occupational injury under the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA) and was therefore excluded by s 35(1). **Wallis JA** considers the ambit of the appeal; the law on the application of COIDA; and these facts.

The appeal is upheld and the order of the High Court replaced with one dismissing the special plea.

Churchill v Premier of Mpumalanga and another [\[2021\] JOL 49829 \(SCA\)](#)

OMISSION AND A RUNNING RACE

Ms Salie was a pedestrian at a running race where she claims she was pushed out of the way by a runner, leading to a fall and injuries to her femur and knee. She claimed R718,000 from the race organizer and the runner.

Cloete J discusses the duty of care and the involvement of the race marshals; the duties of the runner; and whether the plaintiff was negligent by stepping out while a race was in progress. The plaintiff's claim is dismissed.

Salie v Western Province Athletics [\[2021\] JOL 49936 \(WCC\)](#)

CLAIM AGAINST DOCTOR FOR DOWN'S SYNDROME

The parents of a child born with Down's Syndrome sued Dr Engelbrecht for wrongful birth. The High Court found against the parents and on appeal to the full court the main issue was whether Dr Engelbrecht was negligent in providing ante-natal care to the mother.

Ranchod J discusses screening and diagnostic tests during pre-natal care; the sonar form; and the alleged lack of counselling provided by the doctor.

The appeal is dismissed with costs. (Hughes J and Van der Westhuizen J concurred.)

NC v Dr Engelbrecht [\[2021\] JOL 49975 \(GP\)](#)

FLOODING A FREAK OF NATURE OR FORESEEABLE?

A family were staying in a chalet on the defendant's farm when the Groot Marico River burst its banks and flooded the chalet. The family scrambled to escape, but their young boy was swept away and his remains were found the next morning.

Makoti AJ discusses whether the defendant was negligent in constructing the chalet within the 100-year floodline and failing to take preventative steps; whether the flood had been a freak of nature and not foreseeable; and whether the plaintiffs had waived their right to sue due to exemption notices.

The defendant is found liable for the proven damages.

Black v Erasmus [\[2021\] JOL 49992 \(NWM\)](#)

FAMILY LAW

DOMICILE AND JURISDICTION FOR DIVORCE

Two foreign nationals came to South Africa and married in Cape Town, because of unfavorable laws on same-sex marriages in Namibia and Russia. Later, the court *a quo* dismissed the unopposed divorce action on the ground that the jurisdictional requirements of s 2(1) of the Divorce Act 70 of 1979 had not been met – that the parties or either party was domiciled or ordinarily resident in the area of jurisdiction of the court on the date at which the action was instituted.

On appeal, **Cloete J** (Henney J concurring) discusses the deeming provision in s 1(2) of the Act and the case law; and finds that at the time of the institution of the divorce proceedings appellant was domiciled within the court's area of jurisdiction.

The appeal succeeds and the order of the court *a quo* is replaced with one granting the divorce.

* See Saldanha J dissenting from page 15.

OB v LS [\[2021\] JOL 49916 \(WCC\)](#)

THE RIGHT TO BURY FOETAL REMAINS

Applicants sought an order related to the Births and Deaths Registration Act 51 of 1992 such that in the event of loss of pregnancy other than stillbirth the parents have the right to bury the dead foetus, if they so choose.

Mngqibisa-Thusi J discusses the Act; the requirements for a burial order; the meaning of “burial” and “corpse”; and that in South Africa a foetus is regarded as viable at 26 weeks; and that the Act provides that the remains of miscarriage or induced loss of pregnancy are treated as waste and incinerated with other medical waste.

A detailed order is made that includes a declaration that in the event of a loss of pregnancy other than stillbirth or loss of pregnancy through human intervention, the bereaved parent or parents have the right to bury the dead foetus, if such bereaved parent or parents so elect.

Voice of the Unborn Baby NPC v Minister of Home Affairs [\[2021\] JOL 49991 \(GP\)](#)

INTELLECTUAL PROPERTY

PASSING-OFF AND A SHOWER GEL

The issue in this appeal is whether Beiersdorf, the manufacturer and distributor of NIVEA MEN personal care products, can prevent Koni Multinational from selling a product, known as CONNIE MEN ACTIVE SHOWER GEL, by asserting unlawful competition in the form of passing-off. Beiersdorf had obtained an interdict against Koni in the High Court.

Schippers JA discusses the get ups of the products and the potential for confusion; whether Beiersdorf established that its goods have acquired a particular reputation among the public; and the concept of goodwill. The appeal is dismissed with costs, with the judgment being referred to the Legal Practice Council for investigation.

* See Makgoka JA dissenting from para [39].

Koni Multinational Brands (Pty) Ltd v Beiersdorf AG [\[2021\] JOL 49933 \(SCA\)](#)

PATENTS AND AN INVENTIVE STEP

Groundprobe claimed patent infringement by Reutech, but the Commissioner of Patents upheld the counterclaim for revocation of the patent, finding that each of the claims of the patent were obvious to a person skilled in the art.

On appeal, **Ponnan JA** considers whether it is inventive to mount a known radar system, used to monitor slope system stability in open cast mines, on a vehicle.

The appeal is dismissed with costs.

Groundprobe (Pty) Ltd v Reutech Mining (Pty) Ltd [\[2021\] JOL 49935 \(SCA\)](#)

LABOUR LAW

RESIGNING IN THE FACE OF DISCIPLINARY CHARGES – CHILOANE

Ms Chiloane worked for the bank and cashed a cheque without following proper procedure. The cheque was fraudulent and cost the bank just under R30,000.

On the day that she received notice to attend the disciplinary hearing, she handed in her letter of resignation, which stated that it was of immediate effect.

The Labour Court found the resignation of immediate effect; that the employer could not insist that the employee serves the notice period; and that the employee's dismissal pursuant to the disciplinary hearing was "null and void".

On appeal, **Waglay JP** discusses whether an employee can by a letter of resignation immediately end the relationship with the employer, irrespective of the contractual or statutory provisions which provide for notice to be given before termination can take effect.

The decision of the Labour Court is set aside.

Standard Bank v Chiloane [\[2020\] JOL 49530 \(LAC\)](#)

RESIGNING IN THE FACE OF DISCIPLINARY CHARGES – MTHIMKULU

After being subjected to a disciplinary inquiry to face charges of fraud and gross dishonesty, the applicant was found guilty. While the presiding officer was considering the sanction, the applicant resigned with immediate effect. The sanction of dismissal was handed down two days later. The applicant approached the Labour Court on an urgent basis for an order setting aside his dismissal.

Moshoana J finds that the court lacks jurisdiction and the application falls to be dismissed.

"The election to cancel lies with the aggrieved party and not the aggressor. The Bank as an aggrieved party elected to keep the contract alive."

See paras [12] - [15].

Mthimkhulu v Standard Bank [\[2021\] 1 BLLR 86 \(LC\)](#)

RESIGNING IN THE FACE OF DISCIPLINARY CHARGES – COETZEE

After the applicant received a letter requesting his response to several allegations of misconduct, he launched an urgent application for orders, *inter alia*, declaring that the respondent lacked jurisdiction to discipline him because he had resigned with immediate effect after receiving the notice and halting any further disciplinary proceedings against him.

Rabkin-Naicker J finds that the applicant was bound to give four weeks' notice of resignation and the respondent was entitled to exercise its contractual rights during the notice period. There was, accordingly, no bar to the holding of a disciplinary inquiry during this period.

The application was dismissed.

Coetzee v Zeitz Mocoa Foundation Trust [\[2018\] 9 BLLR 909 \(LC\)](#)

PRASA AND A LABOUR ISSUE

Ms Munthali sought urgent relief declaring her employment contract with PRASA as remaining extant, and further ordering PRASA to comply with the terms of that agreement by retrospectively reinstating her in its employ.

Tlhotlhemaje J discusses urgency and irreparable harm; and applicant's contention that PRASA acted in bad faith, knowing that there was no legal basis to justify its stance, and that its conduct smacked of gross abuse of power. See paras [21] - [23].

It is declared that the employment contract between Ms Munthali and PRASA remains extant.

PRASA is ordered to comply with the terms of the employment contract, and to reinstate Ms Munthali retrospective from 29 January 2021.

And PRASA is to pay costs on an attorney-and-own-client scale.

Munthali v Passenger Rail Agency of South Africa [2021] JOL 49781 (LC)

PRASA – URGENT LABOUR ISSUE

The three applicants urgently approached the court to set aside the termination of their employment contracts. The application is opposed with pleas of lack of urgency and that the Labour Court lacks jurisdiction.

Baloyi AJ discusses the board resolution directing the termination of the contracts; the jurisdiction issue; the challenge to urgency; and whether the applicants' contracts were fixed to a term of five years.

The application is found to be urgent; it is declared that the applicants' employment contracts are extant; the termination of their contracts is set aside; and reinstatement is ordered, retrospective from date of termination.

Ngoye and others v PRASA [2021] JOL 49795 (LC)

DISMISSAL FOR FAILING LIE DETECTOR TEST

A security guard took a lie detector test after a client of the company complained that its stock was being stolen. After the test result registered deception, the guard was presented with a draft "settlement agreement", which he refused to sign. His services were then terminated. He claimed that he had been unfairly dismissed. The company maintained that it was contractually entitled to terminate his employment.

The CCMA found that a provision in his employment contract that he could be dismissed solely because of negative results in a lie detector test could not be said to be fair. Instead of granting the applicant a hearing, the company had presented him with a separation agreement, which he had justifiably refused to sign. His dismissal was, accordingly, substantively and procedurally unfair.

The applicant was awarded compensation equal to a year's salary.

Mlangeni / Corporate Investigating and Veracity Assessments [2021] 3 BALR 264 (CCMA)

And see this article on a recent Labour Court case on polygraph tests. [Read the article here.](#)

DISMISSAL - GOLD THEFT AND A POLYGRAPH TEST

Following an attempted theft of gold, the company subjected seven employees to a polygraph test and Mr Maziya failed. The CCMA found his dismissal substantively unfair and awarded maximum compensation.

Tlhotlhemaje J considers the company's application for review and discusses the facts; whether there was corroborating evidence; and the contention that an award of maximum compensation was not reasonable in the circumstances.

The application to review and set aside the arbitration award is dismissed with costs.

[Goldplat Recovery \(Pty\) Ltd v CCMA \[2021\] JOL 49890 \(LC\)](#)

TIME ON SOCIAL MEDIA AT WORK

After nine years of employment as a litigation secretary, Ms Jacobs was dismissed from the firm of attorneys for accessing and discussing a list of salaries, insubordination, and spending too much time on social media. The CCMA found the dismissal substantively unfair but procedurally fair and awarded her nine months' salary.

Lagrange J considers the review application and discusses the grounds of reasonableness; the findings on the breach of confidentiality, on insubordination and on computer usage.

The award is set aside and substituted with one that finds Ms Jacobs guilty of the first and third charges of misconduct, but not the second; and that the dismissal was substantively fair.

* See para [34] on the portion of the working day spent on non-work computer use.

[Lucas Dysel Crouse Inc v CCMA \[2021\] JOL 49885 \(LC\)](#)

DISMISSAL FOR SEXUAL HARASSMENT

A senior manager was dismissed for sexually harassing a subordinate female employee by stroking her thigh under the table during a presentation in the boardroom. At the CCMA he challenged his dismissal on procedural and substantive fairness.

The Commissioner noted that sexual harassment can take a number of forms, which include physical contact. Whether an incident constitutes an act of sexual harassment depends on the relationship between the parties involved; if that relationship has never gone beyond a professional contact a sudden caress in a private area may constitute harassment. The complainant's shocked reaction had corroborated her version. The applicant's dismissal was, accordingly, fair.

The application was dismissed.

[10] After that, she was called twice to the office of Mr Mkhize, who was Mr Khoza's Manager. He asked her whether she has a problem, and that he does not want people there who have problems. He said that she was blowing hot air.

[Khoza and National Energy Regulator of South Africa \[2021\] 3 BALR 259 \(CCMA\)](#)

TAPED PHONE CONVERSATION AS EVIDENCE

At the CCMA arbitration in 2011, Mr Davids objected to the Special Investigating Unit leading evidence about the contents of a certain tape recording, which he alleged had been unlawfully obtained.

The commissioner noted that the case gave the CCMA and its users an opportunity to consider certain evidentiary and legal issues. The CCMA is not a court of law. However, that statement frequently belies the reality of situations faced by commissioners, of which this was a preeminent example. Proceedings in the CCMA often reflect a strange dichotomy between the commission's status as an administrative tribunal and commissioners' duty to promote legal certainty.

Evidence relating to the recording of the telephone conversation was ruled inadmissible.

[Davids and Special Investigating Unit \[2011\] 12 BALR 1275 \(CCMA\)](#)

CUSTOMS AND TAX

IS THE GALAXY A7 A TELEPHONE?

Samsung seeks to set aside a decision of the Commissioner of SARS to replace a tariff determination for its Galaxy S7 smartphone. The classification was changed from smart device to telephone, meaning that Samsung would not get an expected refund of customs on previously imported goods.

Mngqibisa-Thusi J discusses the legal principles for customs classification of goods; the meaning of "telephone"; and Samsung's contention that the principal function of the product relates to the connection to the internet, social media, music and games and not the making of telephone calls.

The application is dismissed with costs.

[Samsung Electronics SA \(Pty\) Ltd v CSARS \[2021\] JOL 49988 \(GP\)](#)