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BOBOTYANA AND OTHERS v DYANTYI AND OTHERS 2021 (1) SA 386 (ECG)

Practice — Judicial case management — Eastern Cape Division, Grahamstown — Case management also applicable to motion proceedings — Attempt to circumvent procedures — Court finding that application not properly set down — Application postponed — Uniform Rules of Court, rule 37A.

The applicants applied on an urgent basis for an order staying the administration of a deceased estate pending determination of the validity of the deceased's will. The respondents delivered a notice of intention to oppose but failed to deliver their answering affidavit on the stipulated date. The applicants enrolled the matter for hearing on a Thursday, six weeks from the date of issue of the application. When the matter was brought to the attention of the Judge President by the Registrar, the Judge President notified the parties that they would be required to address the court on the propriety of setting the matter down for hearing on a Thursday, a motion court

day, without having a directive to that effect. Counsel for the applicants informed the court that her instructing attorney had approached the duty judge seeking a directive but was informed that a directive was not required because the matter was to be heard on a Thursday, which was a motion court day. The present inquiry was prompted because of uncertainty in the division as to whether a directive was needed. Counsel submitted that a directive by a judge permitting a litigant to set down an urgent application on a Thursday was, on a proper interpretation of rule 12*(d)* of the Eastern Cape Practice Directions, not a requirement.

The court ruled that the matter was to be examined not on whether Thursday was ordinarily a day on which a motion court sat, but rather the difference in the procedure followed when motions that were opposed and those that were not were being set down. That differentiation was significant: under rule 6(5)*(f)*(i) the Registrar allocates dates for the hearing of opposed motions while unopposed motions are set down by the applicant by placing the matter on the roll, usually on Tuesdays. Since the answering affidavits were not filed in time, the applicants ought to have asked the Registrar to set the matter down as an uncontested opposed application on the Tuesday roll. (See [11], [13], [15].)

The advent of judicial case management inaugurated a new dispensation for the setting-down of cases. By virtue of para 5.2.4 of the Norms and Standards for Judicial Officers — which made it incumbent on judicial officers to actively take cases from initiation to conclusion — read with rules 37A(1)*(b)* and 37A(2)*(a)* of the Uniform Rules of Court — which regulated case management — there was no reason in law or logic why case management should not, mutatis mutandis, also apply to motion proceedings. (See [17] and [20].)

By launching and pursuing the application heedless of the formalities set out above, the applicants arrogated to themselves the entitlement to appoint a date for the hearing of an application on a day set aside for opposed motions, which was for the Registrar to do. So, under the pretext of urgency, the applicants nominated a date that was both six weeks away and fell on a day set aside for the hearing of opposed motions. This sort of circumvention of the rules and procedures was unfair to other litigants and not in the interests of justice. (See [16], [26].)

Unopposed urgent matters should be set down on Thursdays only if so allocated by the Registrar. Since the present application was not properly set down, it would be

postponed to a date to be arranged by the parties with the Registrar for hearing in the opposed motion court.

MEC FOR CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS, KZN v NQUTHU MUNICIPALITY AND OTHERS 2021 (1) SA 432 (KZP)

Practice — Judgments and orders — Enforcement — Application to enforce previous consent order, stemming from certain interdict proceedings, which order applicant claiming granted it certain immediate relief against respondents on interim basis, pending final determination of proceedings — Court rejecting claim of respondents that order not granting interim relief, and finding that respondents were in wanton disobedience of such order — Application granted.

Appeal — Leave to appeal — Refusal by Supreme Court of Appeal — Referral by President of Supreme Court of Appeal for reconsideration — Application for — Whether application for reconsideration has effect of suspending order appealed against — Superior Courts Act 10 of 2013, s 17(2)*(f)*.

What originally gave rise to the present matter were decisions by the Nquthu Municipality (first respondent) and the council thereof (second respondent) to renew the contracts of employment of its municipal manager (third respondent), its chief financial officer (fourth respondent) and its Director: Planning and Economic Services (fifth respondent). It was the view of the MEC for Co-operative Affairs that such renewals had not taken place in accordance with applicable legal prescripts, and it accordingly requested certain information from the first and second respondents. When that request was not complied with, it instituted an application in the High Court for certain interdictory relief. The matter came before Mahabeer AJ on 18 December 2018; however, after being called, the matter was stood down and, pursuant to discussions between the parties' legal representatives, it was decided that certain manuscript amendments be effected to para 2 of the original notice of motion in the form of a rule nisi with a view to taking a consent order. The amended order was handed to Mahabeer AJ, who signed it after having made some further amendments herself (see [2.4]). However, the order typed and issued by the

registrar's office did not exactly match the manuscript order; certain indicated insertions were differently positioned; and certain words had been changed. The typed order purportedly ordered the suspension of the contract renewals pending the provision by the first and second respondents of certain information (which was requested), or pending the institution of review proceedings; however, the respondents were of the view that the parties' agreement as encapsulated in the manuscript order was not that there be an immediate suspension.

When not all requested information was forthcoming, the applicant launched review proceedings, on 27 March 2018, to set aside the contract renewals. The review application eventually came before Gorven J, who ruled the contract renewals to be illegal and ultra vires, and he set them aside. The respondents were unsuccessful in their attempts to seek leave from the High Court, and then from the SCA, to appeal such decision. This prompted them to file a request with the Judge President of the SCA to reconsider the SCA's refusal in terms of s 17(2)*(f)* of the Superior Courts Act 10 of 2013, which request was still pending.

In the interim, the third to fifth respondents did not vacate their posts, but continued to act in those capacities. This prompted the applicant in the present matter to seek an order, inter alia (and to comply with Gorven J) directing the respondents to comply with the order of Mahabeer AJ, and the third to fifth respondents to vacate and remain away from the first respondent's offices. The respondents opposed the relief, principally on two grounds. *(a)* They alleged that the interim order of Mahabeer AJ sought to be enforced did not exist in the terms alleged by the applicant, and one could not be in contempt of an order that did not exist (lis pendens argument — see [5.1]). *(b)* Further, they alleged that it was impermissible for the court to enforce the order granted by Gorven J, as the appeal process pertaining to that order had not been resolved. In this regard they referred to s 17(2)*(f)* of the Act, and submitted that the proviso contained therein suspended the operation of the order granted.

The court undertook to interpret the terms of the order, applying basic rules of interpretation (see [17].) The court acknowledged an element of ambiguity in the order (see [16] and [17]), but held that, when extrinsic circumstances surrounding the granting of the order were considered, it was clear the order issued by the registrar was to operate with immediate effect pending finalisation of the application (see [17] and [18]). The court added that, to the extent that the order issued by the registrar might have differed from what was agreed as per the manuscript order, an order

stood until it was set aside by a court of competent jurisdiction. Until this was done, the order had to be obeyed even if it might be wrong. There was a presumption that an order was correct. (See [20].)

The court also addressed the impact of the application for reconsideration on the existing order by Gorven J. The court held that the refusal of a petition to the Supreme Court of Appeal for leave to appeal was a final determination of the application for leave to appeal, which refusal revived the operation and execution of the order appealed against. An *application for reconsideration of such refusal did not suspend the original order*, the court held. (See [32].)

The court ultimately found that the respondents were in 'wanton disobedience' of the order of Mahabeer AJ (see [25]). It ordered the respondents to comply with the order with immediate effect, and the third to fifth respondents to vacate and remain away from the offices of the first respondent (see [36]).

MICROFINANCE SA AND ANOTHER v NATIONAL CREDIT REGULATOR AND OTHERS 2021 (1) SA 487 (GP)

Credit agreement — Consumer credit agreement — Cost of credit — Limitation — Interest on deferred initiation fees — Whether permissible under NCA — National Credit Act 4 of 2005, s 101(1).

Credit agreement — Consumer credit agreement — Cost of credit — Limitation — Monthly service fee — Full service fee in last month of loan agreement — Whether permissible under NCA — National Credit Act 4 of 2005, s 101(1).

This matter dealt with the effect of limitations on the cost of credit imposed by s 101(1) of the National Credit Act 4 of 2005 (NCA). The first applicant, a non-profit company representing 1300 microlenders, sought declaratory orders in respect of aspects of the statutory requirements for the granting of credit in which they alleged uncertainty existed for credit providers and which impacted on the short-term unsecured credit industry.

The first issue related to the charging of interest on deferred initiation fees, and the second on the charging of a full service fee in the final month of a loan agreement.

The second applicant, the Banking Association of South Africa, representing all banks registered under the Banks Act 94 of 1990, was granted leave to intervene in the matter. The first applicant contended, in respect of adding interest on deferred initiation fees, that by deferring payment of what would otherwise be an upfront charge, namely the initiation fee, without charging interest on it, would be to extend free credit into the market which would render the provision of unsecured credit prohibitively unattractive to lenders, and that this would then impact negatively on the poorest consumers. The first respondent contended that the adding of interest on deferred payment of initiation fees would make the cost of unsecured credit too expensive for consumers.

In respect of the further question whether a credit provider was entitled to a full service fee of a credit agreement in the last month, the applicants argued that, after the first month of the credit agreement, their members were entitled to charge the full maximum prescribed service fee per month for the lifetime of the agreement, including the calendar month during which an agreement terminated.

Held

As to the first question, that there was nothing in the NCA that suggested that it intended to deprive credit providers of interest on deferred amounts. The interpretation of the NCA and its regulations contended for by the applicants was therefore the interpretation to be preferred in order to give a businesslike and purposive interpretation on the issue of charging of interest on deferred initiation fees. (See [3.22] and [3.24].)

As to the second question, that there was nothing to negate the first applicant's contentions. The monthly service fee was not required to be charged only on a pro rata basis for the calendar month in which the agreement terminated.

MOROPA AND OTHERS v CHEMICAL INDUSTRIES NATIONAL PROVIDENT FUND AND OTHERS 2021 (1) SA 499 (GJ)

Review — Grounds — Legality — Members of provident fund, as well as two previous commercial service providers (the companies) to Fund, bringing application against Fund to review decisions of latter to *(a)* terminate contracts with companies; and *(b)* to appoint certain parties to provide same services previously provided by companies — No legal standing on part of companies, given that, in absence of any claims of non-

compliance by Fund with its contractual duties, they had no legal interest in matter — Court also finding without merit member applicants' ground for review that Fund had failed to consult them prior to terminating contracts of companies — Court further rejecting claims of corruption on part of Fund — Application dismissed.

Practice — Parties — Locus standi — Own-interest litigant — To establish standing on basis of commercial own interests when challenging decision of private body, litigant must show that challenged decision affecting own rights or potential rights or interests — Exception, to effect that litigant claiming own interest and failing on this score may still be allowed to proceed with challenge if in interests of justice, applying only to decision of public body and not to decision of private body.

Costs — Attorney and own client costs — Whether part of South African law.

What gave rise to the present dispute heard before the Johannesburg High Court, were the decisions of the board of trustees of the Chemical Industries National Provident Fund (the Fund), a registered national provident fund, to —

(a) terminate the suite of contracts it had concluded with the company NBC in terms of which the latter provided to it administration and investment consulting services, amongst others; and

(b) appoint the companies Akani, Novare and Moruba to provide henceforth such services instead.

Consequently, aggrieved by such decision, NBC and a number of members of the Fund instituted a review application in the High Court. Both the member applicants and NBC sought to review and set aside the decision to terminate the contracts with NBC, and the appointment of Akani, Novare and Moruba as replacement parties. NBC in addition sought the removal of the PO and trustees of the Fund.

The standing of the parties

The court first addressed the question of the legal standing of NBC, which challenged the decision of the board to terminate its contract on the basis that the board was driven by an improper motive. The court firstly noted that NBC was challenging on the basis of its own commercial interests a decision of a private body (see [29] – [30] and [35]); it was not claiming to represent anyone else. Such a litigant, the court held, had to show that the challenged decision affected their own rights or potential rights or interests (see [35]). The court acknowledged that a litigant

claiming own interest and failing on this score may still be allowed to proceed with the challenge if it was in the interests of justice; however, this exception, the court insisted, applied only to a decision of a public body and not to a decision of a private body. (See [32] – [34].).

The court noted that NBC did not have a right to the contracts it had lost (see [37]). (NBC accepted that the board complied with the terms of the contracts in terminating them (see [29]).) In addition, it could show no interest in which parties were appointed to replace it: none of its rights or potential rights were affected by that decision; which parties replaced it was a matter that rested solely in the discretionary hands of the Fund. Consequently, the court concluded, NBC has no standing to approach the court for the relief it sought. (See [37].)

The court also addressed the standing of the member applicants, which Akani challenged on the basis that these applicants were merely the alter ego of NBC. The court acknowledged the weighty evidence pointing to a lack of independence on the part of the member applicants, yet took the view that it would not be in the interests of justice to non-suit them (see [43]).

The case of the member applicants

In seeking the relief they did, the member applicants relied on the common law, incorporating the principle of legality, alternatively the provisions of PAJA. The member applicants' case lay in three contentions: there was a failure to consult regional advisory committees (RACs); decisions to appoint Akani, Novare and Moruba as replacement service providers were marred by corruption and/or a conflict of interests on the part of three board members.

The court held that member applicants were not entitled to rely on PAJA, as the decisions in question — the Fund's termination of the contracts, and its appointment of Akani — could not be classified as administrative action: The Fund, when taking the impugned decisions, was not 'exercising a public power or performing a public function'. Further, the relationship between the member applicants and the Fund was governed purely by contract. The fact that the contractual relationship was regulated by statute, the Pension Funds Act 24 of 1956 (the Act), did not change the nature of the relationship. When terminating the contracts and appointing Akani, the Fund was acting in terms of a contractual right and not exercising public power. (See [44] – [46].) The court went on to deal with the challenge on the basis of legality (see [47]).

The court held that, in terms of the rules of the Fund, the board was under no obligation to consult the RACs (see [54] and [56]), and accordingly rejected the member applicants' first ground of challenge.
The court declined to pass judgment on the allegations of corruption, holding that they should be left to the Financial Sector Conduct Authority (FSCA) (see [72]), which had already started investigating them (see [14] and [63]) and had asked the court that it be allowed to exercise its powers and functions in terms of the Act (see [69]). The court referred to the constitutional principle that courts do not interfere with the work or usurp the powers or function of administrative bodies. Courts, it held, had to show deference to such bodies. (See [72].)
Finally, the court found that the member applicants had failed on the facts to establish that there had been a conflict of interest. (See [78] – [80].)
The court in conclusion dismissed the application for review (see [93]).

Costs

Akani sought the costs of three counsel on the scale as between attorney and *own client*. The court addressed whether such a scale of costs existed in South African law. After a detailed review of the case law on the topic (see [82] – [90]), the court concluded that it did not, and further declined to develop the law (see [90]). The court, however, concluded on the facts that Akani was entitled to a punitive costs order on the scale as between attorney and client.

SA v JHA AND OTHERS 2021 (1) SA 541 (WCC)

Prescription — Extinctive prescription — Judgment debt — What constitutes — Maintenance obligations in consent paper incorporated into divorce order — Whether amounting to 'debt' prescribing after three years or 'judgment debt' prescribing after 30 years — Prescription Act 68 of 1969, s 11*(a) and (d)*.

The first respondent caused a writ of execution to be issued against the applicant in respect of arrear maintenance dating back to July 1993, the date of their divorce order which incorporated a consent paper setting out applicant's cash maintenance obligations.
The writ was stayed pending the outcome of the present proceedings in which the applicant challenged the validity of the writ on the basis that the maintenance claim

had prescribed. At issue was whether an undertaking to pay maintenance in a consent paper incorporated into a divorce order — given the fact that such an order did not have the character of a final judgment — was a 'judgment debt' prescribing after 30 years, or 'any debt' prescribing after three years, as contemplated in ss 11*(a)*(ii) and 11*(d)* of the Prescription Act 68 of 1968 (the Prescription Act).

Held

A consent paper that is made an order of court must be construed as a judgment of the court and, as such, was a judgment debt. Accordingly, the 30-year prescription period applied. A maintenance order formed part of a consent paper and should be treated no differently to any other part of the order; it was final and enforceable until varied or cancelled and like any other order must be carried out immediately.

SJ v SE 2021 (1) SA 563 (GJ)

Marriage — Divorce — Rule 43 proceedings — Applicability of to parties married under Islamic law where talaq was issued.

Court — High Court — Referral of matter to full court — When permissible — Superior Courts Act 10 of 2013, s 14.

Practice — Parties — Amicus curiae — Admission of — Amicus being party's witness — Problematic.

The respondent raised a point in limine to an application in terms of rule 43 of the Uniform Rules that had been brought by his wife. Less than a week before the hearing of the application, the respondent issued a talaq against the applicant, to whom he had been married in terms of Islamic law, thereby divorcing her. The applicant's attorneys requested the matter to be heard before the full court, citing the importance of the matter to the Islamic community and the apparent uncertainty arising from decisions in other divisions.

The presiding judge held that she, sitting as a single judge in a matter, did not have the authority to refer a matter to the full court because s 14 of the Superior Courts Act 10 of 2013 removed this power, formerly granted by s 13(1)*(b)* of the Supreme Court Act 59 of 1959. After consideration of the matter in consultation with the Judge President, the request was rejected, inter alia, on the grounds that the request had

been made late and no cogent reason for the delay had been advanced; that, although the matter was of importance to the Islamic community, the matter was not res nova; and that judgments by the other divisions of the High Court were not conflicting. (See [18.1].)

The court was also required to consider the status of the amicus curiae, a moulana who described himself as an Islamic scholar. Although his admission as amicus was achieved by agreement between the parties, neither of the parties had raised a constitutional issue in which he had an interest. More problematic was his personal involvement in the matter, having been approached by the respondent for assistance in issuing a talaq certificate. To that extent, he was the respondent's witness in the proceedings. (See [24] and [26].)

In respect of the point in limine, the court held that the parties owed each other the reciprocal duty of support arising from their Islamic marriage and the question of the legal effect of the Talaq was issued in the pending divorce action. Until that issue was resolved there was a matrimonial dispute between the parties that served as the jurisdictional factor for the rule 43 application and the point in limine stood to be dismissed.

UNION-SWISS (PTY) LTD v GOVENDER AND OTHERS 2021 (1) SA 578 (KZD)

Practice — Trial — Electronic means — Considerations in respect of logistics, defendants' rights and assessment of witnesses.

In late 2018 applicant, which was the plaintiff in an action against the respondents, had been allocated a trial date in August 2020 (see [20]). But before that time, applicant sought an order that the trial proceed, and this by means of Microsoft Teams, audiovisual software allowing for meetings over the internet, between participants in physically separate locations (see [1] and [8]).

The legal background was a directive of the Minister of Justice that non-urgent matters could not be placed on the roll during the lockdown, but which gave heads of court a discretion to authorise hearing of matters by electronic means (see [15]).

In accord with this direction, the Judge President of the KwaZulu-Natal Division had issued his own direction, that where it was urgent for a trial to proceed, he, in his discretion, would direct further conduct of the matter (see [16] and [25]).
Applicant's application was made in light of this direction.
The court, while it refused the application on the ground that it was non-urgent (see [32] and [34]), addressed the logistics of an electronic trial (see [8] – [10] and [18]); its impact on the defendant's rights to confront a witness and put forward its version (see [19]); and the judge's ability to gauge demeanour (see [19] and [27]).

[33] In light of the novel issues raised in the application and the grounds on which it was brought, I deem it fair that each party bear their own costs. The first defendant was legally represented and significant indulgences were granted to enable the first defendant to place his version before the court. The plaintiff had legitimate grounds for bringing the application and it cannot be considered frivolous.
[34] In the result, I make the following order:
1. The application is dismissed.
2. Each party is to pay its own costs.

Gordhan v Public Protector and others [2021] 1 All SA 428 (GP)

Constitutional and Administrative Law – Public Protector – Jurisdiction – Section 6(9) of the Public Protector Act 23 of 1994 providing that except where the Public Protector in special circumstances, within her discretion, so permits, a complaint or matter referred to the Public Protector shall not be entertained unless it is reported within two years from the occurrence of the incident or matter concerned – Absence of special circumstances rendering report reviewable.

Constitutional and Administrative Law – Public Protector – Review of report making adverse findings against office bearers – Report tainted by unsubstantiated allegations, flawed reasoning and bias by Public Protector and proposed incompetent remedial action.

A report issued by the first respondent (the “Public Protector”) in July 2019 made adverse findings against the first applicant (“Minister Gordhan”), the eighth respondent

("Mr Pillay") and the ninth respondent ("Mr Magashula"). Minister Gordhan was accused of having established an unlawful intelligence unit at the South African Revenue Service, of misleading the National Assembly, and of irregularly appointing Mr Pillay. The present application was for the review and setting aside of the report. Mr Gordhan and Mr Pillay averred firstly that the Public Protector had no jurisdiction over the complaints under section 6(9) of the Public Protector Act 23 of 1994. Secondly, they contended that the Public Protector had failed to exercise her powers and functions in compliance with the Constitution and the Public Protector Act in that she had failed to act independently, impartially, and without fear, favour or prejudice. The third ground of review was that the Public Protector took into account irrelevant considerations, relied on discredited reports and failed to take into account the extensive evidence that was placed before her, particularly in the detailed affidavits submitted by Mr Pillay. Fourthly, it was submitted that the Public Protector's remedial action was *ultra vires*, unlawful, incapable of being implemented and fell short of the appropriate standard. Finally, the applicants alleged manifest bias against the applicants by the Public Protector.

Held – In respect of jurisdiction, section 6(9) of the Public Protector Act stated that except where the Public Protector in special circumstances, within her discretion, so permits, a complaint or matter referred to the Public Protector shall not be entertained unless it is reported within two years from the occurrence of the incident or matter concerned. The complaints in the present case concerned matters that were older than two years, with some being more than ten years older. Despite repeated requests, the Public Protector failed to explain the special circumstances on which the exercise of her discretion was based. Concluding that there were no special circumstances present, the Court held that the review should succeed in its entirety on the first ground alone.

Proceeding nevertheless to consider the remaining issues, the Court found that the allegations made against Minister Gordhan, Mr Pillay and Mr Magashula were unsubstantiated. The Public Protector, in the course of her investigation and findings, was found to have displayed a lack of understanding of the Parliamentary Ethics Code and relevant law. She also ignored Mr Pillay's extensive evidence, thereby displaying manifest bias. Her conclusions were based on flawed reasoning. The remedial action

proposed in the report was not competent or appropriate, and the affected parties were not given a fair hearing before the report was published.

Insofar as the report directed the President of South Africa to submit an implementation plan to the Public Protector for her approval, indicating how the remedial action would be implemented, the Public Protector exceeded her powers.

Finally, the Court held that costs on a punitive scale was warranted as the conduct of the Public Protector was egregious.

Mzayiya v Road Accident Fund [2021] 1 All SA 517 (ECL)

Legal Practice – Ethical duties of legal representatives – Duty not to mislead court – Evidence of unprofessional conduct – Misrepresentation in particulars of claim and improprieties in signing and commissioning of affidavits resulting in matter being struck from roll and referred to professional bodies for investigation.

Application for default judgment was made by the plaintiff in a motor vehicle accident case. In his particulars of claim, the plaintiff alleged that an unidentified motor vehicle had collided with him on 20 March 2019. Compensation was sought from the defendant.

In an affidavit deposed to on 18 August 2020, the plaintiff's attorney ("Mr Klaas") admitted that the allegation that the accident occurred on 20 March 2019 was false, and it was stated that the accident in fact occurred on 15 February 2007, more than twelve years earlier.

Held – Several issues were of concern to the Court. No explanation was given for the misrepresentation and no amendment was sought to correct the date. Another troubling aspect raised by the court was the possibility that someone other than the plaintiff might have signed the affidavits. The affidavit in support of the claim was commissioned by the same advocate who appeared in court for the plaintiff. The Court questioned the propriety of the advocate's subsequently appearing in a matter where he had commissioned one of the affidavits relied upon in support of the application, he being at all material times under an ethical duty to maintain his independence in relation to his client and the litigation.

The Court held that the claim was a bogus one because it was based on the incorrect premise that the accident occurred on 20 March 2019 and that future medical expenses and loss of earnings should be calculated from that erroneous date onwards. How the incorrect date came to be used in the papers was a matter of concern as the accident reports clearly showed the correct date. Moreover, a draft order presented to court reflected the correct date, suggesting an attempt to obtain relief by way of a draft order containing facts materially different to what was contained in the particulars of claim and affidavit deposed to in support of the default application, and without the knowledge of the defendant.

The issues raised led the Court to explain the ethical standards required of legal practitioners. A legal practitioner has a pre-eminent duty to the Court not to embark on a litigation plan that will mislead the court.

As the particulars of claim upon which the application for default judgment was sought referred to a non-existent accident, the relief sought could not be granted. In any event, given the manner in which the plaintiff's legal representatives approached the court, the matter could not be entertained, and was accordingly struck from the roll. The court questioned whether the legal representatives who were responsible for lodging and prosecution of the claim and seeking default judgment might have been guilty of unprofessional conduct. As a result of the questions about their *bona fides*, the matter was referred to the appropriate bodies for further investigation. Should the plaintiff wish to proceed with the claim he was required, within 21 days, to bring a substantive application for leave to amend his particulars of claim to reflect the correct date of the accident and was required to give a full explanation as to the matters raised in the court's judgment.

TN obo BN v Member of the Executive Council for Health, Eastern Cape
[2021] 1 All SA 561 (ECB)

Civil Procedure – Court orders – Interpretation of – Court first looks to the plain meaning of the order to ascertain its meaning – If there is ambiguity in the meaning, then the court is entitled first to consider extrinsic evidence surrounding or leading to the order, and if there is still ambiguity in the meaning, the court is entitled to consider other relevant extrinsic evidence.

Civil Procedure – Defence of res judicata – Not applicable where issue in current proceedings was completely different to that which was raised and determined when court order was made.

Civil Procedure – Pleadings – Amendment of pleadings – At any point in the proceedings before judgment, either of the parties is entitled to apply to amend their pleadings.

Alleging medical negligence by the respondent's personnel at a hospital, in their handling of the delivery of the applicant's baby, the applicant (as plaintiff) sued the respondent for damages. The respondent conceded liability, leading to an order being taken by agreement. Subsequent to the granting of the court order, the respondent filed a Notice of Intention to Amend her plea. The envisaged amendment entailed the introduction of certain defences (the "DZ defences") referred to as public health system defences and arising from the Constitutional Court judgment in *Member of the Executive Council for Health and Social Development*, *Gauteng v DZ obo WZ* 2017 (12) BCLR 1528 (CC). The applicant replicated to the respondent's amended plea, taking issue with the introduction of the DZ defences, and contending that the issue of the respondent's liability and the basis thereof were *res iudicata* by reason of the court order.

The present application was brought in terms of Rule 33(4) of the Uniform Rules of Court as a stated case for adjudication by the court of the parties' conflicting contentions with regard to the import and meaning of the court order.

Held – The common law would require development if the DZ defences were permitted since, currently, it required an unsuccessful defendant to pay damages to a successful plaintiff on a "*once and for all*" basis in one upfront lump sum amount, representing the net present value of the future medical costs. The common law required payment of damages in money, not in kind.

In interpreting court orders, the court first looks to the plain meaning of the order in order to ascertain its meaning. If there is ambiguity in the meaning, then the court is entitled first to consider extrinsic evidence surrounding or leading to the order. If there is still ambiguity in the meaning, the court is entitled to consider other relevant extrinsic evidence.

The Court found that the court order merely held the respondent liable for the applicant's proved damages referred to in the order. It made no reference at all to the manner in which such liability was to be discharged. It did not order payment as a manner of discharging such liability. It made no reference to the mode or manner of the respondent's settlement of the proven damages for which it had been held liable. Nothing in the order precluded the respondent from invoking the DZ defences. The DZ defences contemplated both monetary compensation as well as compensation in kind.

At any point in the proceedings before judgment (on *quantum*) either of the parties is entitled to apply to amend their pleadings. The applicant's interpretation of the court order suggested that the court that deals with the quantum aspect of the claim should not hear the respondent in relation to the pleaded defences in the amended plea. The respondent is sought to be precluded from leading the aforementioned evidence and not to have an opportunity to explain why she was of the view that the common law should be developed to allow for the DZ defences – despite the fact that she had amended her plea so as to incorporate such defences, without objection by the applicant. That was unconstitutional and could not be allowed.

For *res judicata* to apply, the previous determination must have been in relation to, at the very least, the same issue or cause. In this case, the court order in issue was in respect of merits (liability) only. The issue of *quantum* was completely different to that which was raised and determined when the court order was made. The Court thus made a finding against the applicant.

Trustees for the Time Being of the Burmilla Trust and another v President of the Republic of South Africa and another [2021] 1 All SA 578 (GP)

Civil Procedure – Particulars of claim – Exceptions to claim for "moral damages" – Liability of South Africa to compensate non-national where South African government breached international law outside country, causing economic loss which was suffered outside our borders – Exceptions upheld where no such liability found to exist resulting in particulars of claim not establishing legal causation.

The plaintiffs' claim was for constitutional damages, said to arise from the drastic curtailment of jurisdiction and capacity ("shuttering") of an international tribunal, before which the plaintiffs and others had a case pending against the Kingdom of Lesotho. Of the three claims set out in the amended particulars of claim, the first was for loss of

profits – a claim said to have been ceded to the first plaintiff ("Burmilla"). The second claim was said to have been suffered personally by the second plaintiff ("Mr Van Zyl") as "moral damages" for humiliation, indignity and the like caused by harassment and intimidation. The third was for the wasted costs incurred in cases in other fora, all of which were from the plaintiffs' perspective ultimately unsuccessful, in an effort to prevent or reverse the shuttering or to have their claims against Lesotho heard in another forum.

Mr Van Zyl was a South African who controlled various Lesotho companies.

Plaintiffs' cause of action was that the South Africa government violated the plaintiffs' rights through its conduct in relation to the Southern African Development Community Tribunal (the "SADC Tribunal"). In brief, the Government was a party to a series of decisions of the Southern African Development Community ("SADC") which sought to alter and restrict the jurisdiction and reach of the SADC Tribunal, a body which the SADC had created. The intention behind those decisions was to render the SADC Tribunal unable to hear and pronounce upon a pending case before the SADC Tribunal brought by the plaintiffs and the Tributing Companies against Lesotho as well as three other cases then pending before the SADC Tribunal.

The defendants raised 14 exceptions to the particulars of claim. The court did not deal with all of them individually because there were certain issues of principle on which some of the exceptions had to be upheld and because the exceptions in some respects overlapped.

Held – A question in this case was whether the law should recognise liability under the South African Constitution to pay monetary compensation to a non-South African national for acts committed by South Africa in breach of our Constitution and in violation of international law, outside our borders, which caused economic loss which was suffered outside our borders. The Court held that morality, the convictions of the South African community and policy do not require that South Africa should be held liable to compensate a non-national where the South African government breached international law in circumstances such as the present. The plaintiffs' particulars of claim therefore did not establish legal causation, on the plaintiffs' claim for monetary compensation. The exceptions to the claim for moral damages were upheld.

The Court also upheld three other exceptions but dismissed the remainder.

The plaintiffs were granted leave to amend their particulars of claim.

Myeni v Organisation Undoing Tax Abuse and Another (15996/2017) [2021] ZAGPPHC 56 (15 February 2021)

Company law-delinquent directors- section 162(5) of the Companies Act

On 27 May 2020 Tolmay J declared Ms. Dudu Myeni ("the appellant") to be a delinquent director in terms of section 162(5) of the Companies Act. based on the finding that the appellant has seriously misconducted herself during her tenure as the former non-executive chairperson of South African Airways SOC Ltd ("the principal order.")

[2] When Tolmay J made her order declaring the applicant a delinquent director, the order immediately came into operation on the date of the order (27 May 2020) and could be executed. When the applicant filed her application for leave to appeal on 18 June 2020 – which was well within the prescribed time period for the filing of an application for leave to appeal**[2]** – the principal order was immediately suspended pending the outcome of the application for leave to appeal. On 9 July 2020 the respondents (the Organisation Undoing Tax Abuse NPC and the South African Airways Pilots' Association) filed their counter-application in terms of section 18 of the Superior Courts Act**[3]** for the enforcement of the principal order pending the outcome of the decision in the application for leave to appeal.

[19] As such, an important question would then be what effect would the lodging of the petition after the right to appeal has lapsed then have on the principal judgment's order. Having regard to the case law, in light of the belated petition now filed by the appellant, the principal judgment's order continues to remain operational for the mere fact that the service of an application to condone the late filing of the petition to the SCA does not suspend the operation and execution of any order.**[10]** To conclude otherwise would give rise to an untenable situation in law

where, after an order has been operational for a number of months, a party could simply bring a condonation application which would result in such an order suddenly being suspended. Such a situation would clearly give rise to far reaching consequences that this court cannot condone.

[21] Returning to the present matter: Whilst it is correct that in the present matter, as in *Ntlemeza*, further appeal processes have been anticipated (as is also evidenced from a reading of the execution order by Tolmay J), the difference is that, in the present matter, the application for leave to appeal (the petition) to the SCA of the principal order was filed out of time. In *Ntlemeza* the application for leave to appeal was filed shortly after the execution order was made and within the prescribed time period.

[22] What is the effect thereof? We have already referred to the submission on behalf of the respondents that the failure of the applicant to file the application for leave to appeal to the SCA within the prescribed one-month period has the effect that, by operation of law, the order by Tolmay J dated 27 May 2020 is now in full force and effect. On a proper application of the law, this submission is correct.

[23] This issue was also pertinently considered by the High Court in *Panayiotou v Shoprite Checkers (Pty) Ltd and Others*.**[13]** The court in that matter pointed out that, in terms of section 18(5) of the Superior Courts Act, and as a matter of fact and of law, "a decision becomes the subject of an application for leave to appeal or of an appeal as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules". Section 18 thus contains "the conditions necessary for a judgment of the High Court to be suspended, pending a petition to the Supreme Court of Appeal for leave to appeal..."**[14]**

[24] For a decision to become the subject of an application for leave to appeal, the application must have been lodged in terms of the Rules (section 18(5) of the Superior Courts Act). Although section 18(4) grants an automatic right of appeal to

be heard urgently, it does not dispense with the requirement to comply with the time periods prescribed by the rules for the launch of an application for leave to appeal to the SCA.

[25] Where an application for leave to appeal is filed out of time, all that is before the SCA is a condonation application. The court in *Panayiotou*, with reference to a plethora of authority,**[15]** explains:

> "[12] It has been argued that s 18(5) is prescriptive and that the text emphasises that the application for leave to appeal be lodged with the registrar 'in terms of the rules'. Accordingly, it is argued, until (and only if) condonation is granted can the petition be 'lodged'. All that is before the Supreme Court of Appeal at present is an application for condonation, whose fate is uncertain. In support of this proposition reference was made to several authorities.
>
> [13] The failure to serve notices of appeal or court records within the prescribed periods is commonplace. The result of such failures is that the appeals lapse and require condonation to revive them."

CONCLUSION

[26] The application for leave to appeal in the present matter has lapsed. In order for the application for leave to appeal to be revived, condonation will have to be granted by the SCA. Until such time, there is no application as contemplated by section 18(5) of the Superior Courts Act, and the ineluctable consequence is that the section 18(4) appeal is not competent. We further hold the view that, although the length of the delay in filing the application for leave to appeal to the SCA is negligible, having read the principal judgment of the court *a quo* and the judgment in the application for leave to appeal, the prospects of the appellant succeeding with her condonation application to the SCA are rather slim.

[27] The appeal must clearly be struck off. In respect of costs, both parties were *ad idem* that this is a self-standing application and that costs should follow the result.

ORDER

[28] In the event the following order is made:

1. The application is struck from the roll.
2. The appellant is to pay the costs, such costs to include the costs of three counsel where so employed.

School Governing Body Paarlzicht Primary School v Member of the Executive Council for Education Western Cape and Others (14098/2019) [2021] ZAWCHC 23 (11 February 2021)

This is a review application. Initially, this matter served before this Court on an urgent basis. It consisted of two parts, i.e. Part A and Part B. Part A dealt with an application for an interdict and Part B dealt with the review proceedings. The applicant and the second respondent have since reached an agreement with regard to the prayers in Part A and it was recorded that there shall be no order in respect of Part A as a consequence thereof. In essence, the issues before this Court relates to Part B, that is, the review proceedings.

[2] The applicant (a School Governing body of the third Respondent) seeks to review and set aside the decision of the second respondent taken on 26 January 2019 to appoint, the fourth respondent ("Mr. Duraan") as the principal of third respondent. Plainly summarized, the applicant avers that the second respondent as a result of bias, decided to appoint Mr Duraan as the principal of the third respondent. When the second respondent so appointed Mr Duraan, he did so unreasonably and without considering the preferred candidate by the applicant being the fifth respondent *("Mr Oormeyer")* by placing too much weight and / or emphasis on the psychological assessment of Mr Oormeyer, and without considering factors

indicating that Mr Oormeyer was a better candidate than Mr Duraan. The applicant contended that the decision of the second respondent is procedurally tainted.

[3] As stated by the parties, the schooling system at the third respondent has not been disrupted by this application. At the hearing of this matter, the Court was informed that all the necessary arrangements have been made towards the management of the third respondent. What was outstanding, was the finalization of this review application. This application is only opposed by the second respondent.

Minnies v Ayshlie and Another (23032/2014) [2021] ZAWCHC 24 (12 February 2021)

In this common law delictual action, the plaintiff claims compensation in damages in respect of the injuries he suffered in a shooting incident at the Merweville police station on 25 July 2012.

[2] The plaintiff was employed as the cleaner at the police station, and it was in that capacity that he was present there at the time he was shot. It was common ground that he fell to be regarded, for the purposes of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 ('COIDA'), as an 'employee' of the second defendant, the Minister of Police.**[1]** The plaintiff's duties encompassed cleaning the police station and the adjoining cell block and keeping the yard tidy. He was shot by the first defendant, who was a police constable in the South African Police Service stationed at Merweville.

[3] The first defendant was on duty and in uniform at the time of the incident. He was handling his service issue handgun when he shot the plaintiff.

[4] The bullet struck the plaintiff in the head. He lost his left eye as a result, and I was warned by his counsel, when the plaintiff was called to testify, that he could be hard of hearing, reportedly also due to the consequences of the shooting.

[5] As the member of the Cabinet responsible for the police service, the second defendant has been sued on the grounds of his alleged vicarious liability for the wrongful conduct of the first defendant. He delivered a special plea in which he contended that the proceedings by the plaintiff against him were precluded by virtue of the provisions of s 35(1) of COIDA. He also pleaded over and denied any liability at common law for the plaintiff's damages.

[6] Section 35(1) of COIDA provides (underlining supplied for emphasis):

> ***Substitution of compensation for other legal remedies***
>
> (1) *No action shall lie by an employee or any dependant of an employee for the recovery of damages in respect of any occupational injury or disease resulting in the disablement or death of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death.*

Global Environmental Trust and Others v Tendele Coal Mining (Pty) Ltd and Others (1105/2019) [2021] ZASCA 13 (9 February 2021)

Interdict to stop coal mining – interpretation of statutes – National Environmental Management Act 107 of 1998 (NEMA) – environmental authorisation to undertake listed activity under s 24 – whether required by holder of mining right and environmental management programme in terms of the **Mineral and Petroleum Resources Development Act 28 of 2002** – no case made out for interdict in founding papers – municipal approval of land use – **Spatial Planning and Land Use Management Act 16 of 2013**, KwaZulu-Natal Planning and Development Act 6 of 2008 and Mtubatuba Local Municipality Spatial Planning and Land Use Management By-Law, 2017 – not required by virtue of transitional arrangements – **National Environmental Management Waste Act 59 of 2008** – waste management licence not required by reason of transitional provision – non-compliance with the KwaZulu-Natal Heritage Act 4 of 2008 – relocation of ancestral graves – no reasonable apprehension of harm – interdict refused.

Supreme Court of Appeal (SCA) handed down judgment dismissing the appeal against an order of the KwaZulu-Natal Division of the High Court, Pietermaritzburg.

The issue before the SCA was whether Tendele Coal Mining (Pty) Ltd, the respondent, is mining without the necessary statutory authorisations and approvals. The SCA held that the appellants, Global Environmental Trust and Mfolozi Community Environmental Justice Organisation did not make out a case in their founding papers

that the respondent was conducting listed activities requiring environmental authorisation as contemplated in s 24 of the National Environmental Management Act 107 of 1998 (NEMA). The SCA also found that the respondent did not require municipal approval for land use in terms of the Spatial Planning and Land Use Management Act 16 of 2013; or a waste management licence under the National Environmental Management: Waste Act 9 of 2008, because of transitional arrangements in these statutes. The appellants' application for an interdict to prevent the relocation of ancestral graves was also refused on the basis that the appellants failed to establish a reasonable apprehension of harm.

In a separate minority judgment it was held that respondent's mining operations were unlawful and unconstitutional without an environmental authorisation under s 24 of NEMA. This order was suspended for one year to enable the respondent to obtain the necessary environmental authorisation. It was also held that an order declaring that the respondent's mining operations is unlawful and unconstitutional unless it obtained approval in terms of the KwaZulu-Natal Heritage Act 4 of 2008, to alter or remove additional graves, was appropriate.

Bravospan 252 CC v Greater Tzaneen Municipality (393/2018) [2021] ZALMPPHC 3 (2 February 2021)

Action-The Plaintiff instituted a claim against the Defendant based on various causes of action for payment of money, arising out of rendering security services by the Plaintiff. The dispute arises from a Service Level Agreement (SLA) entered into between the parties on the 28 August 2014.

Pleas of *Res judicata*. Non-compliance with the provisions of **section 3(2)** of the **Institution of Legal Proceedings Against Certain Organs of State Act No. 40 of 2002**; Plaintiff's fourth cause of action (i.e constitutional damages) not appropriate remedy;Prescription.The following order is granted:The Plaintiff has made out a case against the Defendant based on unjust enrichment. The Defendant is ordered to pay Plaintiff an amount determined under the disputed quantum.The Defendant to pay the costs of this action on party and party scale.

XXX

I**[....] v H[....] (97132/16) [2021] ZAGPPHC 60 (3 February 2021)**

his is an application for the variation of the order granted by this court, per the Honourable Crutchfield AJ, on 23 June 2017. The application is in terms of Rule 43(6) of the Uniform Rules of Court.

[2] The order which the applicant seeks to vary, was granted pursuant to an application in terms of Rule 43. A tender by the respondent in that application (the applicant in the present application) in terms of Rule 34(1), culminated in the granting of the order, albeit that argument was seemingly presented in regard to certain aspects of the relief granted.

[3] The applicant now seeks a variation of that order on the grounds that there has been a material change in the applicant's financial circumstances, as contemplated in Rule 46(3).

[4] At the outset of the matter, I was required to deal with an application for condonation for the late delivery of the respondent's replying affidavit. The condonation application was opposed by the applicant. However, given the time which has elapsed since the delivery of the replying affidavit, it appeared to me that there was no prejudice to the applicant which arose as a result of the late delivery of the replying affidavit. Indeed, the applicant's counsel, quite properly, indicated that whatever prejudice may have been suffered by the applicant at the time of the late delivery of the affidavit had been ameliorated by the significant period of time which had, since, elapsed.

[5] I accordingly granted the application for condonation.

accordingly make the following order:

1. The application in terms of Rule 43(6) is dismissed with costs, such costs to include the wasted costs arising from the postponement which occurred on 18 November 2020.

Absa Bank Limited v Centurion Bus Manufacturers (Pty) Ltd (A46/2018) [2021] ZAGPPHC 48 (5 February 2021)

This appeal emanates from an order for absolution from the instance granted by Mbongwe AJ on 22 June 2016. For ease of reference, the parties will be referred to herein as cited in the court *a quo*.

Facts common cause

[2] The plaintiff, ABSA Ltd ("ABSA"), is a public company and credit provider that trades *inter alia* as bankers and financiers.

[3] The defendant, Centurion Bus Manufacturers (Pty) Ltd, ("CBM"), obtained credit from ABSA in terms of various credit agreements pertaining to certain equipment ("assets") purchased by it.

[4] CBM did not honour its payment obligations in terms of the various agreements, which prompted ABSA to institute legal proceedings for the recovery of the assets and certain ancillary relief.

In the premises, I propose the following order:

The appeal is upheld with costs.

The order of the court *a quo* is set aside and substituted with the following order:

"*The application for absolution from the instance is dismissed with costs."*

Interpark South Africa (Pty) Limited v Acuity On Point Solutions (Pty) Limited and Others (A5073/2018) [2021] ZAGPJHC 15 (2 February 2021)

Search and seizures – *Anton Piller* orders – nature – *Anton Piller* order directed at preserving evidence that would otherwise be lost or destroyed – not a form of early discovery or mechanism for applicant to determine whether it has cause of action –

Appeal against setting aside of Anton Piller order dismissed.

City of Ekhuruleni Metropolitan Municipality v Mazibuko and Others (2020/26215) [2021] ZAGPJHC 5 (5 February 2021)

The applicant is a municipality that has appointed a panel of contractors to effect certain work within the municipal area. The applicant has appointed one of those contractors to effect repair water leaks within its municipal area. The community in which the leaks are being repaired is dissatisfied with this state of affairs and with the applicant's engagement with them and, so is alleged by the applicant, has sought to disrupt and prevent the contractor from carrying out the repairs.

2. The applicant seeks interdictory relief directed at preventing the disruption of the contractor from carrying out the repairs.

3. The applicant has alleged that it has identified the first to seventh respondents as leaders within the community who have engaged in this alleged disruptive activity, and so has cited these natural persons as the primary respondents against which it seeks interdictory relief. I shall refer to the first to seventh respondents, who are individually cited natural persons, as 'the opposing respondents".

4. Also cited, as the eighth respondent, is a faceless, generic group of persons described as "*the unknown individuals unlawfully gathering, interfering, interrupting, disrupting, intimidating and provoking the applicant's contractors and employees working on the Tsakane War on Leaks 3 Project"*. No person falling within this category has opposed these proceedings.

5. The municipal and national police have been cited as the ninth and tenth respondents respectively as they are directed to give effect to the relief, including to effect arrests of persons who transgress the interdictory relief. They have not participated in the proceedings.

M[....] v M[....] (34446/2019) [2021] ZAGPJHC 9 (18 February 2021)

Practice – Separation of issues in terms of r 33(4) of Uniform Rules of Court – The parties entered into a customary marriage in community of property and some years later into a civil marriage that excludes community of property, community of profit and loss and the accrual system – An issue in the divorce action is whether the civil marriage and antenuptial contract should be set aside as void *ab initio* – Applicant seeks such issue to be separated and decided before any other question in the action.
Separation not appropriate, given the anticipated course of the litigation between the parties as a whole, that it will facilitate the proper, convenient and expeditious disposal of the litigation between the parties and that it will be appropriate and fair to both of them.

Hyde v Hyde and Others (8509/2020) [2021] ZAWCHC 9 (3 February 2021)

This is an application in terms of the Promotion of Access to Information Act 2 of 2000 ("PAIA") in which the applicant seeks to compel the respondents to provide him with the annual financial statements of the second respondent for the years ending 2014 to 2020 inclusive ("the record"). The applicant claims costs only against the first respondent.

[2] The first and second respondents oppose the relief sought whereas the third respondent abides the Court's decision.

[3] The applicant and first respondent are brothers who have been involved in a series of commercial partnerships for many years. The first respondent is the sole member of the second respondent. The third respondent is the second respondent's firm of auditors and as such is responsible for the preparation of its annual financial statements.

he following Order is made:

> **1. It is declared that the failure by the first and second respondents to respond at all to the applicant's request for access to the annual financial statements of the second respondent for the years ending 2014 to 2020 ("the record") in terms of section 53 of the Promotion of Access to Information Act 2 of 2000 ("PAIA") is a deemed refusal in terms of section 58 thereof;**

2. The deemed refusal referred to in paragraph 1 above is reviewed and set aside;

3. The third respondent's refusal to furnish the applicant with the record pursuant to his section 53 request is reviewed and set aside;

4. The respondents are directed to furnish the applicant with the record, or certified copies thereof, within 15 (fifteen) days from date of this Order; and

5. The first respondent (in his personal capacity) shall pay the costs of this application on the scale as between party and party as taxed or agreed, including the costs of one senior junior counsel as well as the reasonable travel and accommodation costs of the applicant's counsel for his attendance at the hearing.

Mineral Sands Resources (Pty) Ltd and Another v Reddell and Others; Mineral Commodities Limited and Another v Dlamini and Another; Mineral Commodities Limited and Another v Clarke (7595/2017; 14658/2016; 12543/2016) [2021] ZAWCHC 22 (9 February 2021)

This matter involves exceptions to two special pleas which introduce a novel Strategic Litigation Against Public Participation (SLAPP) defence. Redell, Davies and Cullinan are environmental attorneys. Cloete, Dlamini and Clarke are community activists. In the first set of special pleas the defendants allege that they had been SLAPPed in the context of environmental activism. Two related mining companies and their directors, are suing three environmental attorneys as well as three community activists for defamation, and damages in the in the sum of R14,25 million, alternatively the publication of apologies. The two mining companies are involved in the exploration and development of major mineral sands projects in South Africa, and are referred to as the Tormin Mineral Sands Project and the Xolobeni Mineral Sands Project. Second plaintiffs are in the employ of the mining companies *inter alia* as director and executive chairman. The main issue to be determined in this matter are two substantially identical special pleas raised by the defendants in each of the three separate actions. The respective mining companies in each of these three actions are the excipients to the two special pleas.

South African Legal Practice Council v Chetty (10029/2020) [2021] ZAWCHC 25 (12 February 2021)

This is an application for the striking of the respondent's name off the roll of attorneys of this Court. The application was issued on 29 July 2020 and served on the respondent on 6 November 2020. There is no opposition, and I deal with this below.

[2] The application was considered on the papers and written submissions filed by the applicant's attorney without oral argument, in accordance with paragraph 10.1 of the Directives dated 2 May 2020 issued by the Chief Justice in terms of **s 8(3)(b)** of the **Superior Courts Act 10 of 2013**, as read with Section D (1) of the Directives issued by the Judge President of this Division on 26 January 2021 (effective 1 February 2021).

[3] The respondent was admitted as an attorney by this Court on 7 December 2012 and commenced practice for her own account on 1 August 2013. The initial relief sought by the applicant included other far-reaching orders such as the appointment of a curator to take control of the respondent's practice and to wind it up. However it has since been accepted by the applicant that the respondent ceased practice with effect from 1 November 2018 and simultaneously closed her firm's trust account at Nedbank. The applicant thus only asks that the respondent's name be struck off the attorneys' roll together with the customary costs order.

DJB v MB (13973/2020) [2021] ZAWCHC 27 (18 February 2021)

On 12 February 2021, I granted the following Order on an urgent basis after hearing argument from counsel for the parties:

> *1. Leave is granted for the parties' two minor children to relocate with the Applicant to Centurion, Gauteng, where they will continue to primarily reside with her.*
>
> *2. The Applicant, with the Respondent's assistance if necessary, is authorised to enrol the children at the following schools in Centurion, Gauteng, in order that they commence schooling as from 15 February 2021:*

2.1 Midstream College (daughter)

2.2 Midstream Ridge Primary School or Midstream College Primary School (son).

3. The remaining relief sought by the Applicant shall stand over, pending the Court's written reasons which shall be furnished electronically to the parties' legal representatives.

[2] These are my reasons for the above order and for the remaining relief sought by the Applicant. For purposes of this judgment, the children are referred to by their initials, *I* and *M*.

[3] The parties are the divorced parents of two minor children, a 13 year old daughter and a 12 year old son. The parties divorced on 8 December 2011 under case number 15770/2010. The Parenting Plan incorporated in the Final Divorce Order, granted primary residence of the children to the Applicant (mother) and reasonable contact to the Respondent (father). The parties are co-holders of parental responsibilities and rights and co-guardians as envisaged by section 18 of the Children's Act**[1]**.

TWO-PART APPLICATION

[4] In March 2020, the Respondent's attorneys informed the Applicant that the former does not consent to the children's relocation to Centurion nor the schools which the Applicant wished to enrol them in. Mr Schneider was appointed as mediator and after consultation, suspended the mediation pending an assessment by Dr Martalas, a clinical psychologist, to determine what would be in the children's best interests. Early in the doctor's assessment, the Respondent consented to the children's relocation to Centurion. The assessment was consequently suspended and mediation of the remaining disputes regarding the Respondent's contact and maintenance, continued. In mid-December 2020, the Respondent withdrew his consent to the children's relocation and withdrew from the mediation process. The result of this about-turn was that Dr Martalas' assessment had to proceed.

END-for now