CIVIL LAW UPDATES JANUARY 2021[1]

INDEX

CASE NAMES

[1] Compiled by Matthew Klein. Please note that the summaries are for the benefit of the reader for his/her personal use.

Joubert and Another v City of Tshwane, Metropolitan Municipality and Others (94370/16) [2021] ZAGPPHC 3 (14 January 2021)

Knoop NO and another v Gupta (Tayob as intervening party) [2021] 1 All SA 17 (SCA)

Legal Practice Act (Misconduct)

Limpopo Province Voluntary Group Scheme Board and Others v Mahubane and Others (HCAA14/2019) [2021] ZALMPPHC 2 (28 January 2021)

Magricor (Pty) Ltd v Border Seed Distributors CC (1072/2020) [2021] ZAECGHC 2 (12 January 2021)

Main Road Centurion 30178 (Pty) Ltd v Fixtrade 378 (Pty) Ltd and Others (2010/2020) [2021] ZAECPEHC 2 (21 January 2021)

Malawu v MEC for Co-Operative Governance and Traditional Affairs, Eastern Cape and Another (779/2020) [2021] ZAECGHC 7 (19 January 2021)

Maluti-A-Phofung Municipality v Eskom Holdings SOC Limited and Others (2719/2020) [2021] ZAFSHC 3 (15 January 2021)

Mandela v Toti and Others (3508/20) [2021] ZAECMHC 3 (26 January 2021)

Masoga and Another v Evangelical Lutheran Church in Southern Africa and Others (62810/2018) [2021] ZAGPPHC 11 (18 January 2021)

Matsi Mailula Incorporated v Mailula and Another (93439/2020) [2021] ZAGPPHC 2 (15 January 2021)

Minister of Transport v Brackenfell Trailer Hire (Pty) Ltd and Others (707/2019) [2021] ZASCA 5 (14 January 2021)

Molefe v Taxing Master and Another (81552/2015) [2021] ZAGPPHC 18 (25 January 2021)

Molefe v Taxing Master and Another (81552/2015) [2021] ZAGPPHC 18 (25 January 2021)

MUNYAI v ROAD ACCIDENT FUND AND RELATED MATTERS 2021 (1) SA 258 (GJ)

Ndabeni v Municipal Manager: OR Tambo District Municipality and Another (1066/19) [2021] ZASCA 8 (21 January 2021)

Nketoana Local Municipality v Eskom Holdings (SOC) Limited (1222/2018) [2021] ZAFSHC 1 (7 January 2021)

Olive Health Consulting (Pty) Ltd and Another v South Africa Reserve Bank (66863/2020) [2021] ZAGPPHC 19 (18 January 2021)

Omega Construction and Building v Dlodlo and Others (100/2020) [2021] ZAECPEHC 4 (21 January 2021)

Pepkor Holdings Ltd and others v AJVH Holdings (Pty) Ltd and others and related matters [2021] 1 All SA 42 (SCA)

Premier for the Province of Gauteng and others v Democratic Alliance and others [2021] 1 All SA 60 (SCA)

Prescription Act (Prescription in Civil and Criminal Matters Certain S Offences Amendment Act)

Rikhotso v Premier, Limpopo Province and Others (CCT 79/20) [2021] ZACC 1 (25 January 2021)

Road Accident Fund and others v Mabunda Incorporated and others and related matters (Law Society of South Africa and others as Intervening Parties) [2021] 1 All SA 255 (GP)

Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Jacob Gedleyihlekisa Zuma [2021] ZACC 2

Shevel v Alson Development Sea Point (Pty) Ltd and Another (A77/2020) [2021] ZAWCHC 7 (27 January 2021)

SS Profiling (Pty) Ltd vTerblanche (65745/2019) [2021] ZAGPPHC 17 (25 January 2021)

SS Profiling (Pty) Ltd vTerblanche (65745/2019) [2021] ZAGPPHC 17 (25 January 2021)

Steyn v Registrar of Medical Schemes (23378/2018) [2021] ZAWCHC 5 (25 January 2021)

TM v Road Accident Fund and a related matter [2021] 1 All SA 285 (GJ)

United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others (1032/2019) [2021] ZASCA 4 (13 January 2021)

Van Pletzen v Taxing Master of the High Court and Other (4992/2014) [2021] ZAFSHC 4 (15 January 2021)

Wetback Contracts (Pty) Ltd v Topfix Scaffolding (Pty) Ltd [2021] JOL 49384 (GP)

SUBJECT INDEX

Advocate-fees-fees paid into trust account-attorney runs away - Fidelity Fund will not pay - contractual relationship between counsel and attorney, counsel is the creditor, and the attorney the debtor. In the contractual relationship between the attorney and client, the attorney is the creditor, and the client the debtor. Pursuant to that contractual arrangement, counsel had a right to claim his fees from the attorney. Advocate Leysath v Legal Practitioners Fidelity Fund Board of Control on

behalf of the Legal Practitioners Fidelity Fund previously known as the Attorneys Fidelity Fund Board of Control and the Attorneys Fidelity Fund [2021] JOL 49396 (GP)

Appeal – Adducing of further evidence on appeal – Section 19(b) of the Superior Courts Act 10 of 2013 empowering court to receive further evidence on appeal, provided evidence is weighty and material. Pepkor Holdings Ltd and others v AJVH Holdings (Pty) Ltd and others and related matters [2021] 1 All SA 42 (SCA)

Appeal – Suspension of order pending appeal – Application for execution order – Section 18(3) of the Superior Courts Act 10 of 2013 – Requirements – Applicant for execution order must prove exceptional circumstances; that they will suffer irreparable harm if the order is not made; and that the party against whom the order is sought will not suffer irreparable harm if the order is made. Knoop NO and another v Gupta (Tayob as intervening party) [2021] 1 All SA 17 (SCA)

Appeal– application for leave to appeal – referral for oral argument in terms of s 17(2)*(d)* of the Superior Courts Act 10 of 2013 – leave sought against order of the high court directing applicant to provide security for costs in terms of s 8 of the Close Corporations Act 69 of 1984 – demand for security made under Uniform rules 47(1) and 47(3) – high court exercising narrow discretion in making order – powers of appellate court to interfere with exercise of such discretion circumscribed – no basis for interference on appeal established.On appeal from: Western Cape Division of the High Court, Cape Town (Allie J sitting as court of first instance):Fusion Properties 233 CC v Stellenbosch Municipality (932/2019) [2021] ZASCA 10 (29 January 2021)

Appeal- leave to appeal to the Supreme Court of Appeal in terms of Rule 49 (1) of the Uniform Rules of Court against my judgment delivered on 09 October 2020 in which I ordered that: That the attachment in execution by the first respondent of the applicant's funds in its current bank account with the third respondent, account number: 620 2615 3221, be immediately uplifted Maluti-A-Phofung Municipality v Eskom Holdings SOC Limited and Others (2719/2020) [2021] ZAFSHC 3 (15 January 2021)

Appeal – Suspension of decision pending appeal – Section 18(3) of the Superior Courts Act, 2013 – Implementation of order pending appeal – Test involves establishing whether exceptional circumstances exist; proof on a balance of probabilities by the applicant of the presence of irreparable harm to the applicant if order is put into operation and executed; and absence of irreparable harm to respondent seeking leave to appeal. Road Accident Fund and others v Mabunda Incorporated and others and related matters (Law Society of South Africa and others as Intervening Parties)[2021] 1 All SA 255 (GP)

Appeal-leave to appeal-default judgment - defendants having been *ipso facto* barred from filing their plea, the plaintiff applied for default judgment- leave to appeal granted Omega Construction and Building v Dlodlo and Others (100/2020) [2021] ZAECPEHC 4 (21 January 2021)

Appeals– General rule is that an order is suspended pending appeal – For execution of order pending appeal, applicant must prove on a balance of probabilities that he will suffer irreparable harm if the court does not so order and that the other party will

not suffer irreparable harm if the court so orders – Infringement of peremptory provision of Constitution constituting exceptional circumstances warranting granting of execution order. Premier for the Province of Gauteng and others v Democratic Alliance and others [2021] 1 All SA 60 (SCA)

Application for leave to appeal- In a judgment that was delivered on the 30 November 2020, I dismissed Mr Malawu's application wherein the reviewal and setting aside of a decision by the first respondent to remove him from office as a councillor was sought. The applicant is now seeking leave to appeal the said judgment. Malawu v MEC for Co-Operative Governance and Traditional Affairs, Eastern Cape and Another (779/2020) [2021] ZAECGHC 7 (19 January 2021)

Attorney — Rights and duties — Authority — Ostensible authority — Consent to judgment — After merits settled and made order of court, parties' legal representatives jointly seeking damages order in absence of agreement thereto by defendant — Previous conduct indicating that defendant's legal representatives had authority to agree to such order — Draft damages order made order of court. DENBY v EKURHULENI METROPOLITAN MUNICIPALITY 2021 (1) SA 190 (GJ)

Attorney- contingency fee agreement - respondent is to pay to the applicant the amount of R798,612.18, alternatively R346,416.71 being the amount due to applicant as at the 31st of January 2020-concluded a contingency fee agreement with the respondent on applicant's behalf. Applicant subsequently also signed a contingency fee agreement similar to the one that was signed by his wife Erasmus v Williams (248/2020) [2021] ZAECGHC 6 (19 January 2021)

Attorneys-two attorneys have practised as co-shareholders and co-directors of Matsi Mailula for nine years. When, due to his failure to have proceeded as contemplated in Rule 30A (2), this point was rejected, he did not ask for a postponement or any other relief. Consequently, the orders referred to above, were granted. Matsi Mailula Incorporated v Mailula and Another (93439/2020) [2021] ZAGPPHC 2 (15 January 2021)

Constitutinal court-urgent applications-Section 3 of the Commissions Act 8 of 1947 — the power of a commission to compel a witness to appear before it — urgent application — direct access — privileges of a witness before a commission Organs of State v Jacob Gedleyihlekisa Zuma [2021] ZACC 2

Constitution — section 34 — access to courts-Constitution — section 33 — just administrative action-order of the High Court of South Africa, Limpopo Local Division, Thohoyandou, is set aside.The matter is remitted to the High Court for consideration Rikhotso v Premier, Limpopo Province and Others (CCT 79/20) [2021] ZACC 1 (25 January 2021)

Contempt of court – Failure to comply with maintenance order – Whether applicant for order of contempt established that respondent's failure to pay maintenance was wilful and mala fide – Reasons advanced by respondent for failure to comply with order found to be unsatisfactory and court finding conduct to be both wilful and mala fide. AK v JK [2021] 1 All SA 139 (WCC)

Contempt of court proceedings – failure to comply with court order – application for declarator to that effect – standard of proof required – applicant for declarator

required to prove non-compliance on a balance of probabilities – once existence of court order, service thereof and non-compliance established, respondent bears evidentiary onus to show that non-compliance neither wilful nor *mala fide* Ndabeni v Municipal Manager: OR Tambo District Municipality and Another (1066/19) [2021] ZASCA 8 (21 January 2021)

Costs-issue of costs-On 02 October 2020 Jolwana J granted an *interim* order interdicting and restraining the respondents from burying the remains of one Khaya Nkundleni, the deceased, on a piece of land which is described as Mvezo Great Place; and as an ancillary thereto, directing the respondents to refill the dug grave thereon; stop damaging the issue of the premises and to repair the damaged fence. Mandela v Toti and Others (3508/20) [2021] ZAECMHC 3 (26 January 2021)

Court – Recusal application – Delay in bringing application – Delay suggesting that applicant did not consider there to be a risk of bias – Interests of justice requiring that trial proceed to finality. Bennett and another v S; *In re*: S v Porritt and another [2021] 1 All SA 165 (GJ)

Declaratory order- Reserve Bank-a foreign owned South African company seeks to have a “block” which the South African Reserve Bank (the Reserve Bank) has placed on funds in the company’s bank account, uplifted. The blocking of funds was done in terms of Exchange Control Regulations. Olive Health Consulting (Pty) Ltd and Another v South Africa Reserve Bank (66863/2020) [2021] ZAGPPHC 19 (18 January 2021)

Exceptions- mass of material not allowed in particulars of claim. Wetback Contracts (Pty) Ltd v Topfix Scaffolding (Pty) Ltd [2021] JOL 49384 (GP)

Interdict- Interim interdict – appealability – whether there is an absence of irreparable harm – per majority judgment: interests of justice do not require that appeal be entertained - per minority judgments: interests of justice do require appeal to be entertained.The appeal is struck from the roll. United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others (1032/2019) [2021] ZASCA 4 (13 January 2021)

Interdict– Interim interdict – Preservation of property pendente lite – Doctrine of res litigiosa – Requirements are those for an ordinary interim interdict, plus property which is the subject of the interim interdict must be subject of the action, and the action and the interim application must be between the same parties. Pepkor Holdings Ltd and others v AJVH Holdings (Pty) Ltd and others and related matters [2021] 1 All SA 42 (SCA)

Interdict- that the Respondent be interdicted and restrained from implementing electricity restrictions in Nketoana Municipality including those which is advertised to commence on Tuesday, 13 March 2018, and that the aforementioned electricity restrictions be stayed, pending the initialization and finalization of a process for the debatement of the Applicant’s account with the respondent. Nketoana Local Municipality v Eskom Holdings (SOC) Limited (1222/2018) [2021] ZAFSHC 1 (7 January 2021)

Interdict-final interdict, alternatively an interim interdict pending a final interdict, further alternatively an interim interdict pending the institution of a review application.

Costs were only sought against those Main Road Centurion 30178 (Pty) Ltd v Fixtrade 378 (Pty) Ltd and Others (2010/2020) [2021] ZAECPEHC 2 (21 January 2021)

Interlocutory proceedings — Trials interlocutory court, Gauteng divisions — Judge President's Directive 2 of 2019, part A, items 19 to 25 — Abuse of process by practitioners (i) submitting affidavits containing unsubstantiated allegations; and (ii) asking court to prematurely compel other party to discover or to appoint experts within specified time — Proper interpretation of items 20 (succinctness) and 25.5 (failure to secure expert timeously). MUNYAI v ROAD ACCIDENT FUND AND RELATED MATTERS 2021 (1) SA 258 (GJ)

Interpretation of statutes – Applicant seeks declaratory orders that section 47(1) of the Superior Courts Act 10 of 2013 does not apply to retired Judges and that the term ‘civil proceedings’ does not relate to review applications instituted against regulatory bodies such as the Judicial Services Commission (JSC) but not against Judges even if they have an interest in the matter Freedom Under Law v Motata (33227/2020) [2021] ZAGPPHC 14 (28 January 2021)

Legal practitioners- practical vocational training contract with a candidate attorney/pupil-rules Legal Practice Act (Misconduct)

Legal Proceedings Against Certain Organs of State Act 40 of 2002 (“the Act”)-condonation for their failure to comply with Section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 (“the Act”). Joubert and Another v City of Tshwane, Metropolitan Municipality and Others (94370/16) [2021] ZAGPPHC 3 (14 January 2021)

National Credit Act 34 — Consumer credit agreement — Debt enforcement — Preliminary procedures — Notice of default — Delivery — Failure to deliver notice prior to commencement of proceedings — Effect — Non-compliance cannot be cured by attaching proof of purported compliance to summons or application — Compliance not elective but compulsory — Contrary precedents not followed — National Credit Act 34 of 2005, ss 129, 129(1)*(a)*, 130, 130(4). FIRSTRAND BANK LTD t/a FIRST NATIONAL BANK v MOONSAMMY t/a SYNKA LIQUORS 2021 (1) SA 225 (GJ)

Prescription — Extinctive prescription — Interruption — By acknowledgment of liability — Whether series of payments in reduction of loan constituted acknowledgments of liability interrupting prescription — Prescription Act 68 of 1969, s 14. INVESTEC BANK LTD v ERF 436 ELANDSPOORT (PTY) LTD AND OTHERS 2021 (1) SA 28 (SCA)

Prescription Act-The Amendment Act added offences that do not prescribe. (Available on request) Prescription Act (Prescription in Civil and Criminal Matters Certain Offences Amendment Act)

Rescision-default judgment that the applicant now seeks to have rescinded in terms of rule 42(1)(a) of the Uniform Rules of Court.-serving of summons-After default judgment was granted against the applicant company, it seeks the rescission thereof

in terms of rule 42(1)(a) of the Uniform Rules Magricor (Pty) Ltd v Border Seed Distributors CC (1072/2020) [2021] ZAECGHC 2 (12 January 2021)

Review — Organ of state seeking, in public interest, to review decision of another organ of state — Whether Promotion of Administrative Justice Act 3 of 2000 or principle of legality appropriate path to review. COMPCARE WELLNESS MEDICAL SCHEME v REGISTRAR OF MEDICAL SCHEMES AND OTHERS 2021 (1) SA 15 (SCA)

Review and set aside the Appeal Board on 25 August 2018.Termination of the applicant's membership The crux of this application, as it will appear fully in the course of this judgment, is whether the decision of Profmed to cancel the applicant's medical insurance membership can be successfully reviewed and set aside. Steyn v Registrar of Medical Schemes (23378/2018) [2021] ZAWCHC 5 (25 January 2021)

Review application-pastors removed as pastors-The two applicants are members of the Evangelical Lutheran Church of Southern Africa (the first respondent). They have held the office of self-supporting pastors of the Tembisa West Parish of the first respondent ("the church"). Masoga and Another v Evangelical Lutheran Church in Southern Africa and Others (62810/2018) [2021] ZAGPPHC 11 (18 January 2021)

Review-Administrative Law: Review of decision of the Health Professions Council of South Africa: allegations that doctor persuaded patients to invest in a financially distressed company of which he was a director and misappropriated moneys invested by patients: Council the primary custos morum of the health professions: decision in line with the Council's supervisory duties over the health profession: no proper basis for review. The appeal succeeds with costs. Health Professions Council of South Africa and Others v Grieve (1356/2019) [2021] ZASCA 6 (15 January 2021)

Review-Elected board members- Old Mutual Group Policy Scheme The appellants were respondents in the court *a quo* whilst the respondents were applicants. Limpopo Province Voluntary Group Scheme Board and Others v Mahubane and Others (HCAA14/2019) [2021] ZALMPPHC 2 (28 January 2021)

Rule 35 for an order in the following terms:- Compelling the respondent to furnish a reply to the Applicant's notice in terms of Rule 35(3) dated 21 April 2020 within ten (10) days of the delivery of the aforementioned order on the respondent's attorney of record; Authorising the applicant's attorneys of record to attend to the delivery of the order; Directing the respondent to pay the costs of this application; and Granting the applicant further and/or alternative relief as the above Honourable Court may deem fit. Erasmus N.O v MEC for Health, NC Province (1342/2014) [2021] ZANCHC 1 (8 January 2021)

Security for costs-close corporation and security for costs of s 8 of the Close Corporations Act 69 of 1984 – demand for security made under Uniform rules 47(1) and 47(3) – high court exercising narrow discretion in making order Fusion Properties 233 CC v Stellenbosch Municipality (932/2019) [2021] ZASCA 10 (29 January 2021)

Settlement agreements – Need for judicial oversight to ensure that Road Accident Fund, as a public body, acts with proper regard for disbursement of public funds TM v Road Accident Fund and a related matter [2021] 1 All SA 285 (GJ)

Settlement-deed of-The question the court was required to determine was whether the second defendant's obligations in terms of a deed of suretyship dated the 4 February 2004 were extinguished by the settlement Shevel v Alson Development Sea Point (Pty) Ltd and Another (A77/2020) [2021] ZAWCHC 7 (27 January 2021)

Statutes – interpretation of – traffic offences – s 73(1) of the National Road Traffic Act 93 of 1996 (the Act) – meaning to be ascribed thereto in relation to a trailer in tow – whether a trailer towed by a self-propelled vehicle as defined in s 1 of the Act is itself actually being driven – whether presumption in s 73(1) of the Act applies to owner of a trailer in tow hired out to third parties.-The appeal is dismissed with costs, including the costs of two counsel. Minister of Transport v Brackenfell Trailer Hire (Pty) Ltd and Others (707/2019) [2021] ZASCA 5 (14 January 2021)

Summary judgment- which emanates from an action instituted against the defendant/respondent (J P Terblanche) for the alleged breach of a written loan agreement entered into between the plaintiff/applicant (SS Profiling Pty Ltd) and Gateway Auto Body CC, in respect of which the respondent has purportedly bound himself as surety thereto. SS Profiling (Pty) Ltd vTerblanche (65745/2019) [2021] ZAGPPHC 17 (25 January 2021)

Summary judgment- which emanates from an action instituted against the defendant/respondent (J P Terblanche) for the alleged breach of a written loan agreement entered into between the plaintiff/applicant (SS Profiling Pty Ltd) and Gateway Auto Body CC SS Profiling (Pty) Ltd vTerblanche (65745/2019) [2021] ZAGPPHC 17 (25 January 2021)

Taxation-review of taxation as contemplated in Rule 49 (1) of the Uniform Rules of Court. The applicant was dissatisfied with the ruling of the taxing master for having disallowed certain items on the taxed bill of costs. Van Pletzen v Taxing Master of the High Court and Other (4992/2014) [2021] ZAFSHC 4 (15 January 2021)

Taxied costs-Rule 48. The rule provides that any party dissatisfied with the ruling of the Taxing Master as to any item or part of an item which was objected to or disallowed *mero motu* by the Taxing Master, may by notice require the Taxing Master to state a case for the decision of the Judge. Molefe v Taxing Master and Another (81552/2015) [2021] ZAGPPHC 18 (25 January 2021)

Taxied costs-Rule 48. The rule provides that any party dissatisfied with the ruling of the Taxing Master as to any item or part of an item which was objected to or disallowed *mero motu* by the Taxing Master, may by notice require the Taxing Master to state a case for the decision of the Judge. Molefe v Taxing Master and Another (81552/2015) [2021] ZAGPPHC 18 (25 January 2021)

CASES

Wetback Contracts (Pty) Ltd v Topfix Scaffolding (Pty) Ltd [2021] JOL 49384 (GP)

Exceptions- mass of material not allowed in particulars of claim.

Plaintiff subcontracted defendant to perform work at the Kusile Power Station. When the agreement was terminated, plaintiff claimed over R62 million and defendant counterclaimed for almost R100 million.
Baqwa J considers the defendant's exception to the plaintiff's plea to the counterclaims; discusses Uniform Rule 23 and the case law; and examines each of the exceptions.The defendant's exceptions are upheld.
"A litigant cannot, as it were, throw a mass of material contained in the record of an enquiry at the Court and his opponent, and merely invite them to read it so as to discover for themselves some cause of action which might lurk therein, without identifying it."
Lipschitz and Schwartz, NNO v Markowitz 1976 (3) SA 772 (W)
See full quote at para [27].

Legal Practice Act (Misconduct)
Legal practitioners- practical vocational training contract with a candidate attorney/pupil-rules
The Council has decided that it is misconduct on the part of a principal/training supervisor to enter into a practical vocational training contract with a candidate attorney/pupil which incorporates any unreasonable or unusual terms, which terms may include, without limitation, a requirement that the candidate attorney/pupil be in possession of a valid driver's licence, or owns or has access to the use of a vehicle for use in the course of the latter's service under the contract.
Note: It is now also misconduct for an attorney seeking to employ a candidate legal practitioner to stipulate in an advertisement that it is a requirement that an applicant must be, or to enquire of an applicant whether he/she is, in possession of a valid driver's licence or owns or has access to the use of a vehicle for use in the course of his/her prospective employment as a candidate legal practitioner.
Further note: It is now also misconduct for a training supervisor to enquire of an applicant for a practical vocational training contract whether he/she is in possession of a valid driver's licence or owns or has access to the use of a vehicle for use in the course of his/her prospective employment as a candidate legal practitioner.
Final note: The rule does not seem to give any regard to the open ended uncertainty it may create in relationships, including weighing up the new risk of giving additional training beyond the minimum
requirements of the attorney, or to the actual environment and service needs of an attorney.

Prescription Act (Prescription in Civil and Criminal Matters Certain S Offences Amendment Act)
The Amendment Act added offences that do not prescribe.

Ndabeni v Municipal Manager: OR Tambo District Municipality and Another (1066/19) [2021] ZASCA 8 (21 January 2021)

Contempt of court proceedings – failure to comply with court order – application for declarator to that effect – standard of proof required – applicant for declarator required to prove non-compliance on a balance of probabilities – once existence of

court order, service thereof and non-compliance established, respondent bears evidentiary onus to show that non-compliance neither wilful nor *mala fide* – respondents failing to discharge evidentiary onus.The appeal is upheld with costs on an attorney and client scale.The order of the high court is set aside and replaced by the following:The respondents' conduct in failing to comply with the order of Mjali J (save for para 2 thereof) issued on 13 December 2016 is declared unlawful.The respondents are declared to be in contempt of the aforesaid order. The respondents are ordered to purge the aforesaid contempt within 30 days of the date of this order.The respondents are ordered to pay the applicant's costs on an attorney and client scale'.

The Supreme Court of Appeal (the SCA) upheld an appeal against the decision of the Eastern Cape Division of the High Court, Mthatha which held that the respondents were not in wilful contempt of the order previously granted by Mjali J on 13 December 2016.

The appellant was employed as a contract employee by the O R Tambo District Municipality (the second respondent) in July 2005. In January 2011 the second respondent's municipal council adopted a resolution to convert all its contract employees to permanent employees. The appellant was part of a group of temporary employees. For unknown and unexplained reasons, the appellant was excluded from the implementation of this resolution. Aggrieved by her exclusion, the appellant then launched an application in the Mthatha Division of the High Court (the high court) against the municipal manager, as first respondent, and the second respondent to enforce the operation of the resolution. The high court granted the order in terms of which the appellant was declared the second respondent's permanent employee together with other ancillary relief. This, after the respondents failed to file their answering affidavits timeously. The respondents' application for leave to appeal was refused by the high court and so was their petition for leave to appeal to the SCA.

When the respondents failed to comply with the court order, the appellant launched contempt of court proceedings against the respondents which were opposed by the latter. In resisting the application, the respondents explained that their non-compliance with the court order was neither wilful nor mala fide because complying with the court order would be in contravention of s 66 of the Municipal Systems Act 32 of 2000. Section 66 prescribes that no one should be employed by the municipality unless their post is in the staff establishment of the municipality. The high court agreed with the respondents and declared the earlier court order a nullity for these reasons. With the leave of the high court, the appellant subsequently appealed against that decision to the SCA.

The majority judgment of the SCA held that the court order of 13 December 2016 did not have the effect of employing the appellant but rather, in accordance with the municipal resolution of 2011, declared her a permanent employee. It held, therefore, that the provisions of s 66 of the Municipal Systems Act were not applicable and the court order in issue was not a nullity. It also held that the respondents' non-compliance was wilful and mala fide as they failed to discharge the evidentiary burden resting on them. And that their silence in not explaining why the appellant was not permanently employed pursuant to the resolution was deafening. A punitive cost order was granted against the respondents to mark the SCA's displeasure for the shoddy manner in which they conducted the litigation.

The minority judgment agreed with the high court that the court order concerned was a nullity as the contention that the appellant's post was not in the municipality's staff establishment was not disputed. It also found that the order as it stood created a post for the appellant, something which was the preserve of the municipal council. Therefore the court was usurping powers it did not have, hence the order was a nullity. It further held that the respondents were not wilful and mala fide in their non-compliance as they honestly believed that compliance with the court order would be in contravention of s 66 of the Municipal Systems Act. The minority, however, agreed with the punitive costs order against the respondents.

The SCA therefore set aside the order of the high court declaring the order of 13 December 2016 a nullity. Instead, it declared the respondents' conduct in failing to comply with such an order to be unlawful. Hence the appeal was upheld.

Omega Construction and Building v Dlodlo and Others (100/2020) [2021] ZAECPEHC 4 (21 January 2021)

Appeal-leave to appeal-default judgment - defendants having been *ipso facto* barred from filing their plea, the plaintiff applied for default judgment- leave to appeal granted

[2] On the day appointed for the hearing of the application for default judgment, first and second defendants without a legal representative and sought to argue based on the merits of the case that the default judgment application should not be granted. This, without applying for either the lifting of or a postponement of the matter. In which case they would have been required to show good cause for the indulgence they seek.

[3] It is now submitted that judgment should not have been granted *inter alia* because:

The Particulars of Claim do not disclose a cause of action in respect of first and second defendants. Evidence should have been placed before court to show / prove the fraudulent actions complained of. Also on the basis that the claim was not for a liquidated amount.

The suggestion here being that such evidence should have been *viva voce* evidence.

[4] The application for default judgment was supported by an affidavit deposed to by the Contract Director of the plaintiff: **Mr Richard Andrew Hutton**.

[5] Even though I was satisfied based on the averments made in the said affidavit and the Particulars of Claim that a cause of action had been disclosed, and that the claim was for a liquidated amount, I am unable to say that another court may not find otherwise and that therefore the appeal has a reasonable prospects of success. This is also in view of the fact that the issue of the difficulties brought about by the declaration by the State President of the state of disaster during the conduct of this litigation having been caused, coupled with the fact that the defendants were not legally represented at the time of the granting of the default judgment.

[6] Accordingly, leave to appeal is granted to the full bench of this division. Costs to be costs in the appeal.

Erasmus N.O v MEC for Health, NC Province (1342/2014) [2021] ZANCHC 1 (8 January 2021)

Rule 35 for an order in the following terms:- Compelling the respondent to furnish a reply to the Applicant's notice in terms of Rule 35(3) dated 21 April 2020 within ten (10) days of the delivery of the aforementioned order on the respondent's attorney of record; Authorising the applicant's attorneys of record to attend to the delivery of the order; Directing the respondent to pay the costs of this application; and Granting the applicant further and/or alternative relief as the above Honourable Court may deem fit.

When a claim of confidentiality is made over information that is sought to be discovered, considerations of fairness arise, as formulated by Deputy Chief Justice Moseneke in as follows:

"*[27] Even before the advent of the Constitution, courts often, and correctly in my view, recognised that when there is a claim of confidentiality over information that is sought to be discovered or disclosed other considerations of fairness arise. These are well recognised by Schutz AJ in Crown Cork & Seal Co Inc and Another v Rheem South Africa (Pty) Ltd and Others:* **1980 (3) SA 1093** *(W)*

"*[A conflict arises] between the need to protect a man's property from misuse by others, in this case the property being confidential information, and the need to ensure that a litigant is entitled to present his case without unfair halters. And, although the approach of a Court will ordinarily be that there is a full right of inspection and copying, I am of the view that our Courts have a discretion to impose appropriate limits when satisfied that there is a real danger that if this is not done an unlawful appropriation of property will be made possible merely because there is litigation in progress and because the litigants are entitled to see documents to which they would not otherwise have lawful access. But it is to be stressed that care must be taken not to place undue or unnecessary limits on a litigant's right to a fair trial, of which the discovery procedures often form an important part."* **[9]**

[72] Wherefore I make an order in the following terms:The defendant's application is dismissed.2. The costs of the application are to be paid by the defendant.

Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Jacob Gedleyihlekisa Zuma [2021] ZACC 2

Constitutinal court-urgent applications-Section 3 of the Commissions Act 8 of 1947 — the power of a commission to compel a witness to appear before it — urgent application — direct access — privileges of a witness before a commission
On Thursday, 28 January 2021 at 10h00, the Constitutional Court handed down judgment in an urgent application filed directly in this Court by the Secretary of the Judicial Commission of Inquiry into Allegations of State Capture (the Commission). On 20 October 2020, the Commission summoned former President Jacob Zuma to appear before it on 16 November to 20 November 2020 to give evidence and be questioned on various matters that are subject of the Commission's investigations.

Mr Zuma attended the Commission's proceedings on 16 and 17 November 2020. On 16 November 2020, during his attendance at the Commission's proceedings, Mr Zuma moved an application for the recusal of the Chairperson. The ruling was given on 19 November 2020 and the Chairperson dismissed the recusal application. Thereafter, Mr Zuma's legal team informed the Chairperson that Mr Zuma had decided to "excuse himself" from the proceedings. The proceedings adjourned for a break, after which it transpired that Mr Zuma and his legal team had left without the Chairperson's permission. This led to the Commission's urgent application in this Court.
The Commission sought to compel Mr Zuma to comply with the summons issued by the Secretary of the Commission, directing him to appear before the Commission on specified dates in January and February 2021. It also sought an order declaring Mr Zuma's conduct, leaving the Commission without permission in November 2020, to be unlawful and in breach of section 3(1) of the Commissions Act.

In a unamious judgment penned by Jafta J, this Court granted direct access on the ground of urgency. In doing so, it considered the prejudice in the public interest in the Commission's investigations, the fact that the matter was not opposed and that it bore reasonable prospects of success. The Court held that section 3 of the Commissions Act empowered the Commission to compel witnesses to appear before it and that failure by those summoned to obey laws that govern the Republic amounted to a direct breach of the rule of law, one of the values underlying the Constitution and which forms part of the supreme law. The Court further held that Mr Zuma was entitled to the privileges envisaged in section 3(4) of the Commissions Act, including the privilege against self-incrimination. However, Mr Zuma was not entitled to the right to remain silent, as this right, guaranteed by section 35 of the Constitution, is only available to arrested and accused persons, and not witnesses appearing before a commission of inquiry. The Court directed that Mr Zuma appear and testify at the Commission.

The applications for admission as amicus curiae by the Council for the Advancement of the South African Constitution and the Helen Suzman Foundation were granted. Advocate Ngalwana SC's application to be admitted as amicus curiae was dismissed as it sought relief that differed materially from that sought by the Commission and introduced facts that were not already on record.

Fusion Properties 233 CC v Stellenbosch Municipality (932/2019) [2021] ZASCA 10 (29 January 2021)

Appeal– application for leave to appeal – referral for oral argument in terms of s 17(2)*(d)* of the Superior Courts Act 10 of 2013 – leave sought against order of the high court directing applicant to provide security for costs in terms of s 8 of the Close Corporations Act 69 of 1984 – demand for security made under Uniform rules 47(1) and 47(3) – high court exercising narrow discretion in making order – powers of appellate court to interfere with exercise of such discretion circumscribed – no basis for interference on appeal established.On appeal from: Western Cape Division of the High Court, Cape Town (Allie J sitting as court of first instance):The application for leave to appeal is dismissed with costs, including the costs of two counsel.

Security for costs-close corporation and security for costs of s 8 of the Close Corporations Act 69 of 1984 – demand for security made under Uniform rules 47(1) and 47(3) – high court exercising narrow discretion in making order

Fusion CC instituted legal proceedings against the municipality for breach of contract, claiming R32 million after Fusion failed to purchase municipal land that it wanted to develop in Stellenbosch. Because Fusion was an empty shell with no assets, the municipality invoked s 8 of the Close Corporations Act 69 of 1984 and demanded R2,6 million in security for costs. The municipality approached the High Court, which granted an order for security for costs, despite Fusion's opposition on grounds that the municipality delayed in demanding costs. The High Court dismissed Fusion's application for leave to appeal, so Fusion approached the Supreme Court of Appeal in terms of s 17(2)(b) of the Superior Courts Act 10 of 2013.

Petse DP discusses a court's unfettered discretion in applications for security; the power of an appeal court; the contentions by Fusion on delay by the municipality; and the counter argument of the municipality that Fusion "seeks to have a free pass to litigate luxuriously without the risks of indemnifying the municipality".

The application for leave to appeal is dismissed with costs.

SS Profiling (Pty) Ltd vTerblanche (65745/2019) [2021] ZAGPPHC 17 (25 January 2021)

Summary judgment- which emanates from an action instituted against the defendant/respondent (J P Terblanche) for the alleged breach of a written loan agreement entered into between the plaintiff/applicant (SS Profiling Pty Ltd) and Gateway Auto Body CC, in respect of which the respondent has purportedly bound himself as surety thereto.

The defences raised by the respondent in this regard are, in my view, *bona fide*. The defences are valid and good in law and it is clear that there is a possibility that the special pleas advanced may succeed on trial.

Molefe v Taxing Master and Another (81552/2015) [2021] ZAGPPHC 18 (25 January 2021)

Taxied costs-Rule 48. The rule provides that any party dissatisfied with the ruling of the Taxing Master as to any item or part of an item which was objected to or disallowed *mero motu* by the Taxing Master, may by notice require the Taxing Master to state a case for the decision of the Judge.

[2] For ease of reference, and due to the number of applications referred to herein, I intend to refer to the parties in their names. I shall refer to the applicant, in this review application, as Mr Molefe and to the second respondent herein as Mrs Molefe. Mr Molefe, is the first defendant in the action that was brought by Mrs Molefe against him and the Government Employees Pension Fund ("the GEPF"), as the second defendant, for the claim of the amount of R1 361 762, 92, being half of the pension benefits due to Mr Molefe from the GEPF ("the main action"). Mr Molefe is, also, the first respondent in an interlocutory application that ensued from the main action ("the application to compel") that has now become the subject matter of this review application. The GEPF is not participating in these proceedings.

[3] The review application, itself, pertains to a Bill of Costs taxed by the Taxing Master on 20 February 2020 in relation to an order of costs granted on 15 May 2018, against Mr Molefe in the application to compel.

[4] The application to compel pertains to the notice in terms of uniform rule 35 (3), which had previously been served on Mr Molefe's attorneys and was not responded to. The application to compel was served on Mr Molefe's attorney by Mrs Molefe's attorneys on 11 February 2018, and enrolled for hearing on 15 May 2018.

[5] Although the application to compel is referred to in the papers before me, it does not form part of the record. However, from the perusal of the other documents, it appears that two prayers were sought in the application to compel, namely, prayer 1, which sought to compel the respondents' therein (Mr Molefe and the GEPF) to comply with the prayers demanded by Mrs Molefe in terms of the uniform rule 35 (3) notice, which prayers required the said respondents to discover certain documents; and prayer 2 being for the payment of costs.

[6] It is common cause that Mr Molefe's attorneys, complied with prayer 1 of the application to compel by delivering the reply to the notice in terms of uniform rule 35 (3) to Mrs Molefe's attorneys on 7 March 2018, that is, before the hearing of the application to compel. On 15 May 2018, when the parties appeared in court, an order to remove the matter from the roll and that the respondents, in that application, pay the costs jointly and severally, was granted.

[7] The Order in question was written as follows:

> " IT IS ORDERED THAT
>
> 1. The matter be and is hereby removed from the roll.
>
> 2. First and Second respondents to pay the costs jointly and severally."

Magricor (Pty) Ltd v Border Seed Distributors CC (1072/2020) [2021] ZAECGHC 2 (12 January 2021)

Rescision-default judgment that the applicant now seeks to have rescinded in terms of rule 42(1)(a) of the Uniform Rules of Court.-serving of summons-After default judgment was granted against the applicant company, it seeks the rescission thereof in terms of rule 42(1)(a) of the Uniform Rules-The crucial issue centred around whether the default judgment was erroneously sought or erroneously granted, with applicant contending that the summons was not properly served, so it had no idea that the respondent had instituted legal proceedings against it.-Bloem J gives a useful discussion of rule 4(1)(a)(v), which deals with service by the sheriff of process on a corporation or company.-The court found service of the summons to be improper, which constituted an error in the proceedings and the default judgment was rescinded.-[17] In the circumstances, service in terms of rule 4(1)(a)(v) is good firstly, when the process is served on a company's employee; or secondly, when there is an employee, but he is unwilling to accept service, by affixing a copy of the

process to the main door of the company's registered office.

Erasmus v Williams (248/2020) [2021] ZAECGHC 6 (19 January 2021)

Attorney- contingency fee agreement - respondent is to pay to the applicant the amount of R798,612.18, alternatively R346,416.71 being the amount due to applicant as at the 31st of January 2020-concluded a contingency fee agreement with the respondent on applicant's behalf. Applicant subsequently also signed a contingency fee agreement similar to the one that was signed by his wife-

Malawu v MEC for Co-Operative Governance and Traditional Affairs, Eastern Cape and Another (779/2020) [2021] ZAECGHC 7 (19 January 2021)

Application for leave to appeal- In a judgment that was delivered on the 30 November 2020, I dismissed Mr Malawu's application wherein the reviewal and setting aside of a decision by the first respondent to remove him from office as a councillor was sought. The applicant is now seeking leave to appeal the said judgment. The application will be considered with the provisions of Section 17 (1) (a) (i) of the Superior Courts Act[1] which provides that: Leave to appeal may only be given where the judge or judges concerned are of the opinion that –(a) (i) the appeal would have a reasonable prospect of success." The main application was premised on the contention that the decision taken by the first respondent was not procedurally fair and was irrational in that:It could not have been based on the report of the investigating team that he had appointed. The impugned decision was taken on the 18 March 2020. The report was signed by a Ms Sihunu on the 20 March 2020.

Nketoana Local Municipality v Eskom Holdings (SOC) Limited (1222/2018) [2021] ZAFSHC 1 (7 January 2021)

Interdict- that the Respondent be interdicted and restrained from implementing electricity restrictions in Nketoana Municipality including those which is advertised to commence on Tuesday, 13 March 2018, and that the aforementioned electricity restrictions be stayed, pending the initialization and finalization of a process for the debatement of the Applicant's account with the Respondent; that the Respondent be ordered to render a complete reconciled account, fully motivated and supported by the underlying contracts, vouchers and meter readings, if applicable, on which the Respondent rely to hold the Applicant liable for electricity payments, such account to be delivered within 30 days from the date of order; that the Respondent avail three days after the period of 30 days in terms of paragraph 2.2 above has lapsed, on which it will avail personnel to meet with the Applicant's representatives at the Respondent's offices in Bloemfontein to debate the account of the Applicant;that the Respondent pays the costs of the application in the event of it opposing same.That the relief in paragraph 2.1 above will apply with immediate effect as an interim interdict pending the finalization of the application.

Joubert and Another v City of Tshwane, Metropolitan Municipality and Others (94370/16) [2021] ZAGPPHC 3 (14 January 2021)

Legal Proceedings Against Certain Organs of State Act 40 of 2002 ("the Act")-condonation for their failure to comply with Section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 ("the Act").

United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others (1032/2019) [2021] ZASCA 4 (13 January 2021)

Interdict- Interim interdict – appealability – whether there is an absence of irreparable harm – per majority judgment: interests of justice do not require that appeal be entertained - per minority judgments: interests of justice do require appeal to be entertained.The appeal is struck from the roll.

Minister of Transport v Brackenfell Trailer Hire (Pty) Ltd and Others (707/2019) [2021] ZASCA 5 (14 January 2021)

Statutes – interpretation of – traffic offences – s 73(1) of the National Road Traffic Act 93 of 1996 (the Act) – meaning to be ascribed thereto in relation to a trailer in tow – whether a trailer towed by a self-propelled vehicle as defined in s 1 of the Act is itself actually being driven – whether presumption in s 73(1) of the Act applies to owner of a trailer in tow hired out to third parties.-The appeal is dismissed with costs, including the costs of two counsel.

Health Professions Council of South Africa and Others v Grieve (1356/2019) [2021] ZASCA 6 (15 January 2021)

Review-Administrative Law: Review of decision of the Health Professions Council of South Africa: allegations that doctor persuaded patients to invest in a financially distressed company of which he was a director and misappropriated moneys invested by patients: Council the primary custos morum of the health professions: decision in line with the Council's supervisory duties over the health profession: no proper basis for review. The appeal succeeds with costs.2 The order of the high court is set aside and replaced with the following order:'1 The point in limine is dismissed with costs The matter is remitted to the Professional Conduct Committee'.

Rikhotso v Premier, Limpopo Province and Others (CCT 79/20) [2021] ZACC 1 (25 January 2021)

Constitution — section 34 — access to courts-Constitution — section 33 — just administrative action-order of the High Court of South Africa, Limpopo Local Division, Thohoyandou, is set aside.The matter is remitted to the High Court for consideration

Van Pletzen v Taxing Master of the High Court and Other (4992/2014) [2021] ZAFSHC 4 (15 January 2021)

Taxation-review of taxation as contemplated in Rule 49 (1) of the Uniform Rules of Court. The applicant was dissatisfied with the ruling of the taxing master for having disallowed certain items on the taxed bill of costs. On 28 May 2019, a notice of review was filed requiring the taxing master to file a stated case in terms of Rule 48 (3) of the Uniform Rules of Court.In the result, I am of the view that the Taxing Master erred and was clearly wrong in disallowing the amounts as per items 167 and 277 of the allocator. I am therefore satisfied that his ruling should be interfered with.

Steyn v Registrar of Medical Schemes (23378/2018) [2021] ZAWCHC 5 (25 January 2021)

Review and set aside the Appeal Board on 25 August 2018.Termination of the applicant's membership The crux of this application, as it will appear fully in the

course of this judgment, is whether the decision of Profmed to cancel the applicant's medical insurance membership can be successfully reviewed and set aside.In the result, having read all the documents filed and having heard arguments from both parties, the following order is granted:The Appeal Board's ruling / order of the 25 August 2018 is hereby reviewed and set aside.The termination by Profmed of the applicant's membership under membership number 10118222, and or that of her dependents, is declared unlawful and is set aside.Profmed is ordered to honour the contractual commitments vis-à-vis the applicant and or her dependents under the policy that governs the said membership. Profmed is ordered to pay the costs of suits, including the costs attendant to the employment of counsel.

Mandela v Toti and Others (3508/20) [2021] ZAECMHC 3 (26 January 2021)

Costs-issue of costs-On 02 October 2020 Jolwana J granted an *interim* order interdicting and restraining the respondents from burying the remains of one Khaya Nkundleni, the deceased, on a piece of land which is described as Mvezo Great Place; and as an ancillary thereto, directing the respondents to refill the dug grave thereon; stop damaging the issue of the premises and to repair the damaged fence. The relief sought was opposed by the respondents. To that end, answering papers were delivered on 09 October 2020, the step which was followed by filing of a replying affidavit on 13 October 2020.

Main Road Centurion 30178 (Pty) Ltd v Fixtrade 378 (Pty) Ltd and Others (2010/2020) [2021] ZAECPEHC 2 (21 January 2021)

Interdict-final interdict, alternatively an interim interdict pending a final interdict, further alternatively an interim interdict pending the institution of a review application. Costs were only sought against those Respondents opposing the application.*The pharmacy licence granted in terms of* Section 22 *of the* Pharmacy Act, 53 of 1974 *in respect of the subject property; The registration and issuing of registration certificate by the Fourth Respondent in respect of the subject property.* The application is dismissed;The Applicant is ordered to pay the First, Second and Sixth Respondents' costs on an attorney and client scale;The Applicant's attorney, Jan Adriaan Venter, is ordered to pay the First and Second Respondent's costs occasioned by the appearance in Court on 8 September 2020 *de bonis propriis* on an attorney and client scale, such costs to be on an opposed basis.

Maluti-A-Phofung Municipality v Eskom Holdings SOC Limited and Others (2719/2020) [2021] ZAFSHC 3 (15 January 2021)

Appeal- leave to appeal to the Supreme Court of Appeal in terms of Rule 49 (1) of the Uniform Rules of Court against my judgment delivered on 09 October 2020 in which I ordered that: That the attachment in execution by the first respondent of the applicant's funds in its current bank account with the third respondent, account number: 620 2615 3221, be immediately uplifted; The third respondent be authorised to release the funds of the applicant held by it on account number 62026153221; First respondent be prohibited, pending the outcome of the intergovernmental relations framework dispute resolution, already in process as per the court order of 22 October 2018, from executing the judgments against the applicant under case numbers 4723/2014 and 5523/2018; No order as to costs." The application for leave to appeal is dismissed with costs.

Limpopo Province Voluntary Group Scheme Board and Others v Mahubane and Others (HCAA14/2019) [2021] ZALMPPHC 2 (28 January 2021)

Review-Elected board members- Old Mutual Group Policy Scheme The appellants were respondents in the court *a quo* whilst the respondents were applicants. The respondents have launched an application seeking an order to review and set aside the decision of the appellants to nullify the elections of the respondents and other elected members to the board during August 2016; a declaratory order confirming the validity of the board's election of the first appellant held during August – October 2016 in terms of the first appellant's constitution; and that the appellants be interdicted from preparing for the rerunning of the election of the board of the first appellant with immediate effect.

Masoga and Another v Evangelical Lutheran Church in Southern Africa and Others (62810/2018) [2021] ZAGPPHC 11 (18 January 2021)

Review application-pastors removed as pastors-The two applicants are members of the Evangelical Lutheran Church of Southern Africa (the first respondent). They have held the office of self-supporting pastors of the Tembisa West Parish of the first respondent ("the church"). This is an application for relief in the following terms: (a) an order reviewing and setting aside a decision, number 199 of 24 January 2018 of the third respondent removing the applicants as pastors of the Tembisa West Parish; (b) an order reviewing and setting aside decision number 141 (taken during on or about 27 to 30 May 2018) of the second respondent withdrawing the ordination rights of the applicants with effect from 24 March 2018; and (c) an order that the applicants' ordination rights be restored and that they be reinstated as pastors of the Tembisa West Parish.

Olive Health Consulting (Pty) Ltd and Another v South Africa Reserve Bank (66863/2020) [2021] ZAGPPHC 19 (18 January 2021)

Declaratory order- Reserve Bank-a foreign owned South African company seeks to have a "block" which the South African Reserve Bank (the Reserve Bank) has placed on funds in the company's bank account, uplifted. The blocking of funds was done in terms of Exchange Control Regulations.

Molefe v Taxing Master and Another (81552/2015) [2021] ZAGPPHC 18 (25 January 2021)

Taxied costs-Rule 48. The rule provides that any party dissatisfied with the ruling of the Taxing Master as to any item or part of an item which was objected to or disallowed *mero motu* by the Taxing Master, may by notice require the Taxing Master to state a case for the decision of the Judge.

Freedom Under Law v Motata (33227/2020) [2021] ZAGPPHC 14 (28 January 2021)

Interpretation of statutes – Applicant seeks declaratory orders that section 47(1) of the Superior Courts Act 10 of 2013 does not apply to retired Judges and that the term 'civil proceedings' does not relate to review applications instituted against regulatory bodies such as the Judicial Services Commission (JSC) but not against

Judges even if they have an interest in the matter – alternative relief is for consent to be granted in terms of the section to cite a retired Judge – meaning and purpose of section 47(1) restated – doctrine of leave to sue applies with equal force to retired Judges –- case by case approach required when consent requested –- Retired judges continue to feature in judicial functions and activities - the safety net of section 47(1) is largely aimed at protecting judicial independence – test is The applicant is hereby granted leave in terms of s 47(1) of the Superior Courts Act 10 of 2013 to issue legal process against the respondent relating to the main application in this matter under case no. 17374/2020.

Matsi Mailula Incorporated v Mailula and Another (93439/2020) [2021] ZAGPPHC 2 (15 January 2021)

Attorneys-two attorneys have practised as co-shareholders and co-directors of Matsi Mailula for nine years. On 1 February 2019, Mr Mailula resigned as director and employee of Matsi Mailula Inc and "withdrew" his shareholding of that firm.Mr Mailula had also, by choice, refrained from delivering an answering affidavit. At the hearing of the main application, he was represented by counsel and sought to rely on the issue of his complaint raised in his Rule 30A (1) notice. When, due to his failure to have proceeded as contemplated in Rule 30A (2), this point was rejected, he did not ask for a postponement or any other relief. Consequently, the orders referred to above, were granted.

Shevel v Alson Development Sea Point (Pty) Ltd and Another (A77/2020) [2021] ZAWCHC 7 (27 January 2021)

Settlement-deed of-The question the court was required to determine was whether the second defendant's obligations in terms of a deed of suretyship dated the 4 February 2004 were extinguished by the settlement of the first action, alternatively, at the moment that the plaintiff and the first defendant entered into the second credit agreement on 29 January 2008, or whether those obligations remained in force in respect of debts incurred by the first defendant in terms of the second credit agreement. The finding of the court *a quo* was to the effect that the second defendant was not released from his obligations as a surety when the first defendant's indebtedness that arose from the agreement of January 2004 was settled. Appellant was granted leave to appeal the abovementioned judgment on the 1 March 2019, to the full bench of this division.

SS Profiling (Pty) Ltd vTerblanche (65745/2019) [2021] ZAGPPHC 17 (25 January 2021)

Summary judgment- which emanates from an action instituted against the defendant/respondent (J P Terblanche) for the alleged breach of a written loan agreement entered into between the plaintiff/applicant (SS Profiling Pty Ltd) and Gateway Auto Body CC, in respect of which the respondent has purportedly bound himself as surety thereto. The defences raised by the respondent in this regard are, in my view, *bona fide*. The defences are valid and good in law and it is clear that there is a possibility that the special pleas advanced may succeed on trial.

COMPCARE WELLNESS MEDICAL SCHEME v REGISTRAR OF MEDICAL SCHEMES AND OTHERS 2021 (1) SA 15 (SCA)

Review — Organ of state seeking, in public interest, to review decision of another organ of state — Whether Promotion of Administrative Justice Act 3 of 2000 or principle of legality appropriate path to review.

Appellant, a medical scheme, sought to change its name and to this end submitted a name-change application to first respondent, the Registrar of Medical Schemes (see [2]).
The Registrar, however, refused to approve the change on the basis that the Medical Schemes Act 131 of 1998 prevented him changing a name to one 'likely to mislead the public' where he was of the view that the proposed name was likely to so mislead (see [2]). (Section 23(1)*(c)* provides in this connection that 'The Registrar shall not . . . change the name of a medical scheme to a name . . . which is likely to mislead the public.' (See [1].)

Appellant then appealed to second respondent, the Council for Medical Schemes, but it dismissed the appeal. Appellant then appealed further to third respondent, the Appeal Board of the Council for Medical Schemes (see [2]). The Board upheld the appeal, and ordered the Registrar to make the name change, subject to appellant abiding by certain conditions (see [2]).

This prompted the Registrar and Council to apply to the High Court to review the Board's decision. The High Court duly granted the application and set aside the decision, and later granted the Board's application for leave to appeal to the Supreme Court of Appeal (see [11]).

There, the first issue was whether the Board's decision was reviewable under the Promotion of Administrative Justice Act 3 of 2000 or the principle of legality (see [12]). To this end, the Registrar and Council claimed standing, and the court found they had standing to bring the review, in the public interest (see [15] and [17]). This aligned the case with an earlier matter in which a natural person had claimed standing in the public interest to review a decision of an organ of state (see [19]).

There it was held that the natural person, in acting in the public interest, had stepped into the shoes of a member of the public, and had come to bear the rights such member would have borne, had it chosen to litigate (see [19]). Accordingly PAJA was held to be the appropriate means to review the decision in that case (see [19]).

Here, similarly, the Registrar and Council had brought the application in the public interest, and in doing so had stepped into the shoes of a member of the public, so coming to bear that member's right to just administrative action, which they acted to defend (see [20]). PAJA thus applied to the review (see [20]).

The second issue was whether the Registrar and Council had established the ground of review they relied on, that is, that the Board had not been authorised to act as it had by the empowering provision concerned (s 6(2)*(a)*(i) of PAJA).

This in turn raised subquestions. The first was whether the Registrar had a discretion to permit a name change, even despite it being likely to mislead the public (see [27]). If the Medical Schemes Act did indeed confer such a discretion, then the Board would have acted within its powers in making its decision (see [27]).

Held, that s 23(1) conferred no such discretion: when the Registrar had decided that a proposed name fell within ss 23(1)*(a)*, 23(1)*(b)* or 23(1)*(c)*, the Act was clear — the Registrar could not register the name or allow a change to that name (see [28]). In this regard nothing in s 23(1) suggested that a discretionary power to deviate from the section's express terms was intended, necessary for attainment of its purposes, or incidental to the express provisions (see [29]). Indeed such a discretion would create a conflict within the section (see [29]).

The second subquestion was whether, even where a name change was likely to mislead, the Act nonetheless gave the power to attach conditions to an approval, to prevent this occurring (see [30]). Authority was to the effect that in the absence of an express provision providing so, a power could not be interpreted to embrace the wider power of attaching conditions (see [31]). In this regard, s 23(1) did not expressly empower the Registrar to impose conditions, and there was no basis to imply such a power (see [32]). Indeed had the legislature intended such a power, it would have said so, as it did in s 24(1) (see [32]).

Held, accordingly, that the High Court had been correct to set aside the Board's decision: the Registrar had no power to approve the name change once he had taken the view that the proposed name was likely to mislead the public, nor did the Registrar have the power to approve such change subject to conditions (see [33]). As a result, the Board exceeded its powers in ordering the Registrar to approve a name likely to mislead the public, subject to conditions (see [33]).
Appeal dismissed (see [34]).

INVESTEC BANK LTD v ERF 436 ELANDSPOORT (PTY) LTD AND OTHERS 2021 (1) SA 28 (SCA)

Prescription — Extinctive prescription — Interruption — By acknowledgment of liability — Whether series of payments in reduction of loan constituted acknowledgments of liability interrupting prescription — Prescription Act 68 of 1969, s 14.

The appellant Investec had advanced a loan to the first respondent company Erf 436, secured by the passing of a notarial mortgage bond over a 50-year long notarial lease, in respect of a commercial property, concluded by Erf 436 as lessee and the South African Rail Commuter Corporation (SARCC) as lessor. The further respondents stood as sureties for Erf 436's debt under the loan. It was a term of the loan agreement that Investec had an option to replace Erf 436 as lessee in the event of Erf 436 defaulting on its obligations to SARCC. Erf 436 did default, and so, as it was entitled to, Investec demanded, on 10 September 2002, payment within seven days of the full outstanding amount. The commencement of prescription of the debt was thus 17 September 2002, being the due date of payment.

When payment was not forthcoming, Investec elected to exercise its option and conclude a lease with SARCC. Despite this, *an agreement was reached between Investec and Erf 436* that the latter would continue to manage the property, collect

monthly rental from subtenants, and pay those amounts over to Investec to be credited to its loan account. The parties so conducted themselves until around mid-2003, when another agreement was reached between Investec and Erf 436 providing that the former would take over management of the property, itself collect rental from subtenants and credit the Erf 436 account with the amounts collected each month. It was further understood that endeavours would be made to find a purchaser for Investec's rights in the property and the purchase price would be credited to Erf 436's loan. Investec so managed the lease until July 2009, when it sold its rights as lessee to the entity Johnny Prop, and credited Erf 436's loan account with the purchase price, as agreed.
Investec subsequently, in a summons issued in the High Court served on 21 January 2011, claimed the outstanding amount it alleged was owing in terms of the loan agreement — R3 979 184,50 — from Erf 436, as well as the sureties. Erf 436 and the sureties raised a special plea of prescription. Investec, in response, pleaded that, on the basis of the number of payments made to reduce its loan, as well as various statements made in letters on behalf of it, Erf 436 had made a series of acknowledgments of liability, the effect of each acknowledgment being to interrupt prescription against Erf 436, and hence against the sureties too. The High Court, however, upheld the special plea of prescription. Investec appealed to the SCA to press its case.

The court first stressed that, in order to determine whether the various payments and statements amounted to acknowledgments of debt for the purposes of interrupting prescription in terms of s 14 of the Prescription Act 68 of 1969, they had to be viewed holistically and in their broader context. Here in particular, the two agreements referred to above relating to the management of the property. (See [32] and [43].)

The SCA held that the following acts, *given the context in which they took place,* constituted acknowledgments of debt by Erf 436, each of which had the effect of interrupting prescription:

- *During the period in which Erf 436 was responsible for collection of the subtenants' rental*, the multiple payments made by Erf 436 to Investec, the last of which occurred on 30 September 2003. (See [33].)
- Two letters, dated 7 May 2003 and 13 June 2003, respectively written by one of the directors of Erf 436 in which he expressly acknowledged liability on behalf of Erf 436. (See [33].)
- *During the period in which Investec managed the property*, the multiple payments made by Investec to reduce Erf 436's loan account, the last of which occurred on 17 July 2008. (See [38].)
- A payment to Investec on 29 March 2006 made by another entity, for the purpose of, as agreed with Investec, reducing Erf 436's loan. (The court held that such payment could be inferred to have been made on behalf of Erf 436, given the involvement and acquiescence of a director common to both entities.) (See [36].)
- Queries on 21 May 2007 by a director of Erf 436 as to the mechanics of the monthly payments into the Erf 436 account, and relating to how the VAT components of the rentals would be dealt with. (See [37] – [38].)
- The payment of the purchase price of Investec's rights in the property into the Erf 436 account in around July 2009.

The court concluded that, at the time of service of summons, the claim in question had not prescribed, given the series of interruptions of prescription. The court upheld Investec's appeal. (See [47] – [48].)

AIRPORTS CO SA LTD v SPAIN NO AND OTHERS 2021 (1) SA 97 (KZD)

Business rescue — Business rescue plan — Whether company no longer financially distressed — Court to have regard to actual financial statements of company, not projected income — Companies Act 71 of 2008, s 141(2)*(b)*(ii).

Business rescue — Business rescue plan — Whether plan substantially implemented — Court to adopt sensible interpretation of documents placed before it without attempting to analyse plan in such detail that scrutiny resulting in plan having no practical effect — Companies Act 71 of 2008, s 152(8).

The applicant, a state-owned entity as intended in the Public Finance Management Act 1 of 1999 (the PFMA), leased premises to the second respondent to carry on business as a restaurant in an airport. Later, following a resolution taken in September 2017 under the Companies Act 71 of 2008 (the Act), the applicant was placed in business rescue. The first respondent was appointed as the business rescue practitioner. The applicant's claim against the second respondent was for more than R5 million.

The background facts were that the applicant and the second respondent had concluded the lease agreement (the original lease) in August 2009. The lease period was from May 2010 to April 2015. The second respondent fell into arrears and the applicant instituted an action which was not finalised. An application for the eviction of the second respondent was also not persisted in. Instead, the applicant continued trading and placed itself in business rescue.

In the present proceedings the applicant sought an order compelling the first respondent to end business rescue under s 141(2)*(b)*(ii) and to give notice that the applicant was no longer financially distressed under s 152(8) of the Act.
The business rescue plan put forward by the first respondent provided for the continued occupation of the business premises by the second respondent despite the institution of eviction proceedings by the applicant. Relying on correspondence between it and the applicant, the second respondent sought to show that the original lease had been extended almost a year after it had expired. The validity of this renewed lease agreement, for which fair tender procedures were not followed, was in issue before the court.

The first respondent argued that security of tenure was necessary for the survival of the business. Being a state-owned entity, the applicant was obliged under the PFMA to follow fair tender procedures before concluding any contract for goods or services. The applicant contended in the light of this that it was being held to an unlawful agreement. For its part the second respondent contended that even if the agreement was unlawful, it remained valid and binding until set aside on review, for which no application had been brought in the present case.

Held

As a state-owned enterprise, the applicant had a constitutional duty to follow a fair process in concluding a lease extension. Its conduct could not simply be ignored and had to be set aside in a direct or an indirect review (see [22]). Since the applicant never sought a review, it could not complain that it was being held to an unlawful agreement (see [25]).
The principal issue before court was whether the applicant made out a case that the second respondent was no longer in financial distress (see [27]). The applicant's case was based on assumptions drawn from the business rescue plan and the financial indications in it, the highwater mark being its allegation that, having regard to the projected cashflow surplus reflected in the business plan, it had to be concluded that the second respondent had generated sufficient cashflow to settle admitted debts as recorded in the business rescue plan. (See [27].) That was hardly a sufficient basis on which to conclude that the second respondent was no longer in financial distress, which had to be ascertained with reference to cashflow projections in its actual financial statements. The true test of the liquidity of a business could only be assessed by having regard to the 'actuals' in terms of cashflow statements and the ability of the business to meet its day-to-day expenses. (See [28].)

In determining whether the business rescue plan had been substantially implemented as intended in s 152(8), the court had to adopt a sensible interpretation of the documents before it, without attempting to analyse the plan in such detail that the scrutiny under which it was placed resulted in the plan having no practical effect. There was, however, nothing before the court to indicate how far the process had gone and neither was there anything before the court in terms of the negotiations towards the conclusion of a lease between the applicant and the second respondent, as directed in terms of the plan. The applicant accordingly failed to discharge the onus of establishing that the first respondent had achieved substantial implementation of the business rescue plan. (See [31] – [33].) Application accordingly dismissed (see [34]).

DENBY v EKURHULENI METROPOLITAN MUNICIPALITY 2021 (1) SA 190 (GJ)

Attorney — Rights and duties — Authority — Ostensible authority — Consent to judgment — After merits settled and made order of court, parties' legal representatives jointly seeking damages order in absence of agreement thereto by defendant — Previous conduct indicating that defendant's legal representatives had authority to agree to such order — Draft damages order made order of court.

In an action for damages arising from bodily injuries to plaintiff, the parties' legal representatives had, after the issue of merits was settled and made an order of court, agreed upon a joint memorandum seeking the court to make an order for payment in terms of a draft order to which the parties' legal representatives had agreed, but the defendant itself not.

Held
By all accounts, the defendant had left it in the hands of its legal practitioners to deal with the matter. In the absence of something to the contrary, that would include making such admissions and confessions at a pretrial conference as were appropriate, which would include the ultimate consequence of agreeing that an order be granted if that was the outcome of the pretrial engagement. There was no

suggestion that what the defendant's legal representatives had agreed to was anything but bona fide, and in the circumstances the court would grant an order on the terms agreed to by the parties' legal representatives.

FIRSTRAND BANK LTD t/a FIRST NATIONAL BANK v MOONSAMMY t/a SYNKA LIQUORS 2021 (1) SA 225 (GJ)

Credit agreement — Consumer credit agreement — Debt enforcement — Preliminary procedures — Notice of default — Delivery — Failure to deliver notice prior to commencement of proceedings — Effect — Non-compliance cannot be cured by attaching proof of purported compliance to summons or application — Compliance not elective but compulsory — Contrary precedents not followed — National Credit Act 34 of 2005, ss 129, 129(1)*(a)*, 130, 130(4).

In an application for summary judgment on a credit agreement subject to the provisions of the National Credit Act 34 of 2005 (the NCA), the respondent's defence was that the contract required a prior demand before the debt became payable but no such notice had been given, and if such notice was necessary, it had to be given, and it had to be alleged as having been given, before a default notice could be given under s 129. Counsel for the applicant, relying on High Court authority of that division, contended that there would have been proper compliance with the NCA if the s 129 default notice was attached to the summons. The contract did contain notice terms that the plaintiff had to comply with before the loan became repayable but those terms were not pleaded.

Held
The plaintiff did not plead a completed cause of action. The cause of action was not verified and the particulars of claim were therefore excipiable. In the circumstances summary judgment would be refused. However, the applicant, having alleged that it had complied with ss 129 and 130, could amend its particulars of claim. Therefore the court had to consider whether there was indeed compliance with those sections. (See [8] – [9].)

Non-compliance with s 129 could not be cured by attaching proof of purported compliance with s 129 to a summons, an application for default judgment or one for summary judgment. Compliance with ss 129 and 130 was not elective but compulsory. The NCA made no provision for the curing of the non-compliance with s 129, other than a stay of proceedings until a court order in terms of s 130(4) was given effect to. Therefore, the application for summary judgment had to be dismissed and the defendant granted leave to defend. The action proceedings would be stayed until 10 business days after the plaintiff, in due compliance with ss 129 and 130 of the NCA, had served a notice as contemplated in s 129(1)*(a)* on the defendant. (See [47] and [49].)

In reaching the above finding the court refused to follow a line of Gauteng cases, originating with *SA Taxi Development Finance (Pty) Ltd v Phalafala* 2013 JDR 688 (GSJ), which held that non-compliance with s 129 could be cured by attaching a s 129 default notice to the summons.

MUNYAI v ROAD ACCIDENT FUND AND RELATED MATTERS 2021 (1) SA 258 (GJ)

Interlocutory proceedings — Trials interlocutory court, Gauteng divisions — Judge President's Directive 2 of 2019, part A, items 19 to 25 — Abuse of process by practitioners (i) submitting affidavits containing unsubstantiated allegations; and (ii) asking court to prematurely compel other party to discover or to appoint experts within specified time — Proper interpretation of items 20 (succinctness) and 25.5 (failure to secure expert timeously).

In eight matters that came before the interlocutory court in terms of the Judge President's Directive 2 of 2019, the court felt itself obliged to comment on (i) the lackadaisical way in which affidavits were being drafted; and (ii) the nature of relief sought, in particular the abuse by practitioners of items 20 (succinctness) and 25.5 (failure to timeously secure expert witness) of the Directive.

Held
The interlocutory court was intended to be an easily approachable court, its purpose being to assist parties to obtain procedural relief against recalcitrant litigants who are delaying matters from becoming trial-ready (see [1], [17]).
While the court would assist litigants by ensuring that their cases were trial ready and by calling to order recalcitrant litigants that were preventing it, legal procedure and protocol had to be followed nevertheless (see [8]).

Practitioners were taking the stance that item 20 allowed them to negate their professional obligations and submit affidavits containing largely unsubstantiated allegations, leaving the judge the unenviable task of making assumptions. This was noticeable in matters where an applicant sought an order to compel the other party to discover. In the applications before the present court no allegations were made that either a rule 35(1) notice had been delivered or that the other party had received notice of the trial date — the court was expected to assume that such a notice had been served. (See [5] – [7].)

Practitioners were also misconstruing item 25.5 of the Directive as giving a licence to applicants to ask the interlcutory court to direct a respondent to appoint experts and to do so within specified time periods. The Directive was never intended to confer any power on the courts to order a litigant to appoint experts but was merely intended to enable an applicant to approach the court for an order to place a respondent on terms to decide how it wished to conduct and/or present its case. Similarly, practitioners had taken to interpreting item 25.5 to mean that the court could compel a defendant to cause a plaintiff to submit to a medical examination. That interpretation was only partially correct. If the defendant had given notice, in terms of rule 36(9)*(a)*, of its intention to call a particular expert, the court could be approached to compel the defendant to cause the plaintiff to submit to a medical examination in terms of rule 36(1).

Knoop NO and another v Gupta (Tayob as intervening party) [2021] 1 All SA 17 (SCA)

Appeal – Suspension of order pending appeal – Application for execution order – Section 18(3) of the Superior Courts Act 10 of 2013 – Requirements – Applicant for execution order must prove exceptional circumstances; that they will suffer irreparable harm if the order is not made; and that the party against whom the order is sought will not suffer irreparable harm if the order is made.

The respondent, together with her husband and his two brothers (collectively referred to as the "Guptas"), were shareholders in equal shares of two companies ("Islandsite" and "Confident Concept") which were controlled by a holding company ("Oakbay"). The two companies were placed under supervision and went into voluntary business rescue on 16 February 2018 after major South African banks ceased to offer them banking facilities due to allegations made about the Guptas.

The appellants, Mr Knoop and Mr Klopper, were appointed as the business rescue practitioners ("BRPs") of the companies. Disputes between the BRPs and Oakbay's Chief Executive Officer and other employees led to the respondent applying to the High Court for the removal of the BRPs in terms of section 139(2) of the Companies Act 71 of 2008. The granting of the order saw the appellants lodging an application for leave to appeal against the removal order. In turn, the respondent brought an application for leave to execute. The BRPs' application or leave to appeal was granted and an execution order was also granted to the respondent in terms of sections 18(1) and (3) of the Superior Courts Act 10 of 2013. That led to the present urgent appeal by the BRPs.

Pending the hearing of the urgent appeal, the execution order was suspended in terms of section 18(1) of the Superior Courts Act. The Full Court, however, granted an order that the urgent appeal would not suspend the operation of the execution order and new BRPs were appointed. The intervening party in the present appeal ("Mr Tayob") was the new BRP of Islandsite. The actions taken by the new BRPs included withdrawal of the appellants' appeals against the removal order and purported termination of the business rescue.

Held – The first question to be addressed was whether the execution order was appealable. Section 18(1) of the Superior Courts Act provides for automatic suspension of an order pending the outcome of an appeal against it. As a safeguard against irreparable prejudice caused by a court granting an execution order when it should not have done, so the aggrieved party has an automatic urgent right of appeal. An appeal against an execution order is one of right and the party that obtained the execution order cannot object to it. If they wish to sustain the execution order, they must oppose the appeal. Section 18(4)(iv) states that an execution order is suspended pending an urgent appeal by the aggrieved party. The suspension of the original order in terms of section 18(1) of the Superior Courts Act continues until the disposal of the urgent appeal. The Full Court's order was held to be invalid for flying directly in the face of the provision that pending an urgent appeal under section 18(4) the operation of an execution order is suspended.

The nullity of the Full Court order meant that the execution order was suspended pending the present appeal. No lawful steps could be taken to remove the appellants as BRPs until the urgent appeal had been finalised. Substitute BRPs could not be appointed to take their place, because the order for their removal was not yet effective.

On the merits of the appeal against the execution order, the court stated that an applicant for an execution order must prove three things, namely, exceptional circumstances; that they will suffer irreparable harm if the order is not made; and that the party against whom the order is sought will not suffer irreparable harm if the order is made. Those requirements were not satisfied by the respondent.

The appeal was accordingly upheld.

Pepkor Holdings Ltd and others v AJVH Holdings (Pty) Ltd and others and related matters [2021] 1 All SA 42 (SCA)

Civil Procedure – Adducing of further evidence on appeal – Section 19(b) of the Superior Courts Act 10 of 2013 empowering court to receive further evidence on appeal, provided evidence is weighty and material.

Civil Procedure – Interim interdict – Preservation of property pendente lite – Doctrine of res litigiosa – Requirements are those for an ordinary interim interdict, plus property which is the subject of the interim interdict must be subject of the action, and the action and the interim application must be between the same parties.

In terms of an interim interdict issued by the High Court, the appellant companies in each appeal were prevented from dealing freely with their property, pending the determination of an action which was instituted by the first to fifth respondents (the "respondents"). The appellants in the first appeal were referred to collectively as "the Pepkor entities". One of those appellants ("Tekkie Town") was a business which was at the centre of the agreements between the parties in both appeals. The appellants in the second appeal were Steinhoff International Holdings NV ("Steinhoff NV") and Town Investments (Pty) Ltd ("Town Investments").

In August 2016, the respondents and Steinhoff NV entered into a written agreement, in terms of which they sold 56,94% of their shares in, and ceded their claims against, Tekkie Town to Steinhoff NV, for a purchase price of R3 257 250 000 (the "sale agreement"). On 17 January 2017, the purchase price was discharged by the issue of consideration shares in Steinhoff NV to each of the respondents, in proportion to its aliquot share as defined in the sale agreement. By March 2018, the respondents claimed that the value of the consideration shares had been overstated and were but a fraction of their value when the sale agreement was concluded. They alleged that the then CEO ("Mr Jooste") of Steinhoff NV had fraudulently misrepresented and concealed Steinhoff NV's true financial position, to induce them to enter into the sale agreement.

In May 2018, the respondents instituted action against Steinhoff NV and Town Investments, alleging fraudulent misrepresentation by Mr Jooste concerning Steinhoff NV's financial position, which induced the respondents to enter into the sale agreement. They alleged in the particulars of claim that they had resiled from the agreement.

Almost a year after they had instituted the main action, the respondents launched an urgent application for the interim interdict referred to above. The High Court's granting of the relief sought led to the present appeal.

Held – The first question was whether the order was appealable. The court held that it was in the interests of justice that the order granted against the appellants was appealable.

In support of their claim for the interim interdict, the respondents had invoked the doctrine of *res litigiosa*. Their case was that the Tekkie Town shares and business became *res litigiosa*, which entitled them to an interdict pending the final determination of the main action. *Res litigiosa* is property which is the subject of litigation. A plaintiff may in principle apply to preserve *res litigiosa*, *pendente lite*. The requirements are those for an ordinary interim interdict. As a general principle, there are two additional inherent features: the first is that the property which is the subject of the interim interdict is the subject of the action; and the second, that the action and the interim application are between the same parties. The Court found that the doctrine was inapplicable in this case as the latter requirements were not present.

The respondents' allegation that the sales and transfers of the shares in Tekkie Town were simulated transactions and that Steinhoff NV was guilty of fraud was not established on the papers in the interdict application. It was also not true that Steinhoff NV controlled all corporate actions and activities within the Steinhoff group. The High Court erred in finding the contrary.

Finally, the court refused an application by the respondents to adduce further evidence on appeal. Although section 19(b) of the Superior Courts Act 10 of 2013 empowers the present court to receive further evidence on appeal, such evidence must be weighty and material – which was found not to be the case in this matter. The application was thus dismissed.

The two appeals before the Court were upheld.

Premier for the Province of Gauteng and others v Democratic Alliance and others [2021] 1 All SA 60 (SCA)

Civil Procedure – Appeals – General rule is that an order is suspended pending appeal – For execution of order pending appeal, applicant must prove on a balance of probabilities that he will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders – Infringement of peremptory provision of Constitution constituting exceptional circumstances warranting granting of execution order.

Local Government – Dissolution of municipal council – Appointment of administrator – Section 159(2) of the Constitution requiring election to be held within 90 days of dissolution of municipal council – Allowing administrator to continue in office beyond 90 days impermissible.

The first respondent (the "DA") applied for the review and setting aside of a decision of the second appellant (the "Gauteng EC") to dissolve the Council of the City of Tshwane Metropolitan Municipality (the "Tshwane Council") and appoint an administrator in terms of section 139(1)(c) of the Constitution to run its affairs. The Full Court found in favour of the DA and set aside the dissolution of the council.

Subsequently, the first appellant (the "Premier", the "Gauteng EC", the third appellant (the "MEC") and the ninth respondent (the "EFF") launched a conditional

application for leave to appeal to the present Court, pending the application for direct access to the Constitutional Court. As a result, the DA launched an application in terms of section 18(3) of the Superior Courts Act 10 of 2013 in the High Court, to implement the Full Court's decision pending the appeal process. The High Court found that there were exceptional circumstances justifying the grant of the relief sought by the DA; that it would suffer irreparable harm if the order was not granted; and that the Gauteng EC would not suffer irreparable harm.

Held – The issue in the present appeal was whether the DA had satisfied the requirements of section 18 of the Superior Courts Act for interim enforcement of a judgment pending an appeal. The Court emphasised that what was before it was an appeal against the order putting into operation the judgment and orders made by the Full Court, pending an application for direct appeal to the Constitutional Court and the conditional appeal to the present Court.

The default position is that in terms of section 18(1) read with section 18(5), the noting of an appeal suspends the operation and execution of the order pending the decision of the appeal or application for leave to appeal. The judgment or order is also suspended whilst an application for leave to appeal is pending before the present Court or the Constitutional Court. Section 18(3) is an exception to this general rule. Under section 18(1), a court may order otherwise "under exceptional circumstances". A party who requires the court to order otherwise is in terms of section 18(3) required to prove on a balance of probabilities that he will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.

The question was whether the High Court, in granting the order to execute, had due regard to the relevant provisions of section 18 and applied them correctly. The High Court rightly held that the circumstances of the case were exceptional, given that they involved the infringement of peremptory provisions of the Constitution; and that the DA had made out a proper case under section 18(3). The running of the City of Tshwane by an unelected administrator ran counter to democratic and accountable government for local communities, enshrined in section 152(1)(a) of the Constitution. The DA contended that allowing an administrator to be in office for longer than the 90-day period stipulated in section 159(2) of the Constitution goes against the constitutional scheme and, as such constituted irreparable harm – referring to an injury that is permanent or irreversible. Finding that the order could not be faulted, the majority of the court dismissed the appeal.

In the minority ruling, it was held that the administrator's appointment endured beyond the 90-day period, until a newly elected municipal council assumes office.

AK v JK [2021] 1 All SA 139 (WCC)

Civil Procedure – Contempt of court – Failure to comply with maintenance order – Whether applicant for order of contempt established that respondent's failure to pay maintenance was wilful and mala fide – Reasons advanced by respondent for failure to comply with order found to be unsatisfactory and court finding conduct to be both wilful and mala fide.

In terms of their divorce order issued in 2013, the respondent undertook to maintain the applicant until her death, or remarriage or until she co-habited with a third party for a period in excess of 6 months. The maintenance was initially fixed at R52 000 per month and was subject to escalation in accordance with an agreed formula. By the beginning of 2018, the monthly sum payable by the respondent had escalated to R63 417,45 and it presently stands at R69 384,48. From February 2018, the respondent unilaterally reduced the maintenance until by May 2020, he was paying R10 000 per month. It was common cause that at the end of October 2020, he was in arrears in the sum of R1 539 158,96. He claimed that he could not afford the agreed maintenance.

The applicant sought an order that the respondent be held to be in contempt of the divorce order and that he be sentenced to an appropriate term of imprisonment which should be suspended on terms which included the repayment of the arrears and future compliance with the order.

Held – The issue in dispute on the aspect of contempt of court was whether the applicant had established that the respondent's failure to pay maintenance was wilful and *mala fide*. The Court took into account the assets of the respondent, and his financial situation. His allegation that he lacked funds to meet his maintenance obligations to the applicant was not borne out by the facts. Both wilfulness and *mala fides* were clear in this conduct. He was found to be in contempt of the divorce order.

The respondent was directed to pay to the applicant the amount of R1 539 158,96 in respect of his non-compliance with the maintenance order, plus interest *a tempore morae* which was to run from 1 February 2018 until date of payment and was to be calculated on each unpaid maintenance instalment during the said period. He was also declared to be in contempt of the order and was committed to imprisonment for a period of 60 days. The period of imprisonment was suspended for a period of two years on stipulated conditions.

Bennett and another v S; *In re*: S v Porritt and another [2021] 1 All SA 165 (GJ)

Civil Procedure – Recusal application – Delay in bringing application – Delay suggesting that applicant did not consider there to be a risk of bias – Interests of justice requiring that trial proceed to finality.

Civil Procedure – Recusal application – Test for recusal – Question is whether a reasonable, objective and informed person would, on the correct facts, reasonably apprehend that the judge had not or would not bring an impartial mind to bear on the adjudication of the case, ie a mind open to persuasion by the evidence and the submissions of Counsel – Party alleging bias or an apprehension of bias bears the onus of proving it and an apprehension of bias can only arise based on correct facts.

An application was brought for the recusal of the judge in this matter, by two accused facing over 3000 counts involving white collar crime. The offences ranged from common law fraud and tax-related offences to exchange control contraventions, market manipulation, stock exchange listing contraventions, money laundering and racketeering.

The bias of which the judge was accused was said to have occurred in August 2016. A delay of over three years occurred before the recusal application was brought. The

delay would be a ground for refusing the application unless some new incident was alleged to have arisen which independently supported the application.

The first applicant ("Bennett") filed an application for a special entry under section 317 of the Criminal Procedure Act 51 of 1977 on 18 September 2019, requiring the judge to consider *mero motu* whether he should recuse himself. Bennett contended that it was a material irregularity for the court not to have disclosed or explained to the accused the circumstances under which the judge's name appeared on a 2002 list of income tax defaulters issued by SARS. On being provided with proof of the incorrectness of the allegations made against the judge, Bennett withdrew the section 317 application and brought the present application a month later.

Held – The question was whether a reasonable, objective and informed person would, on the correct facts, reasonably apprehend that the judge had not or would not bring an impartial mind to bear on the adjudication of the case, ie a mind open to persuasion by the evidence and the submissions of Counsel. An apprehension of bias can only arise if it is founded on the correct facts. The test is objective and the party alleging bias or an apprehension of bias bears the onus of proving it.

On the issue of delay, the Court held that the first consideration was whether the failure to bring an application within a reasonable time constitutes evidence that the accused themselves did not consider there to be a risk of bias, perceived or real. The other consideration was the interests of justice. It was concluded that the accused's conduct was not that of a person who is concerned about the possibility of bias on the part of the presiding judge. Because of the length of time already taken in hearing witnesses and various other factors, the court was satisfied that the interests of justice required that the trial proceed to finality unless there was some more recent event which, standing on its own, raised an apprehension of bias or demonstrated actual bias. The two issues relied on by the applicants as new events were found to be of no assistance to them.

The request for recusal was thus refused.

Road Accident Fund and others v Mabunda Incorporated and others and related matters (Law Society of South Africa and others as Intervening Parties) [2021] 1 All SA 255 (GP)

Appeal – Suspension of decision pending appeal – Section 18(3) of the Superior Courts Act, 2013 – Implementation of order pending appeal – Test involves establishing whether exceptional circumstances exist; proof on a balance of probabilities by the applicant of the presence of irreparable harm to the applicant if order is put into operation and executed; and absence of irreparable harm to respondent seeking leave to appeal.

Until the end of May 2020, the three respondents in the present appeal, together with 41 other applicants in one of the applications, served on a panel of attorneys contracted by the Road Accident Fund ("RAF") by virtue of service level agreements ("SLAs") entered into between the panel attorneys and the RAF. Having operated at a deficit for a number of years, the RAF decided to take measures to curb expenditure. It identified fees paid to panel attorneys as a major expense. It consequently decided not to renew the services of its panel attorneys. Its request for the attorneys to hand over files in cases which remained not finalised sparked litigation. The respondent

attorneys obtained an order that the notices of handover were invalid and fell to be set aside.

In June 2020, two of the respondent firms (*Fouriefismer* and *Maponya*) *and the Pretoria Attorneys' Association* launched an application in terms of section 18(3) of the Superior Courts Act, 2013 for leave to carry the orders into execution pending the appeals process. The present appeal was against the granting of the order.

Held – Section 18, dealing with the suspension of a decision pending appeal, brought about more stringent and onerous measures for the implementation of orders pending appeal. The test involves establishing whether exceptional circumstances exist; and proof on a balance of probabilities by the applicant of the presence of irreparable harm to the applicant to put into operation and execute the order, and the absence of irreparable harm to the respondent seeking leave to appeal.

Addressing the question of whether the prospects of success on appeal should be considered in a section 18(4) appeal, the court held that in appropriate cases, and without being definitive on the prospects of success or otherwise on appeal, the court may have regard to those prospects and the stronger the prospects of success the less likely the prospect of the granting of exceptional relief. Having regard to all the considerations relied upon by the court *a quo*, the court was not satisfied that considered either individually or cumulatively, they constituted exceptional circumstances. The appeal therefore had to succeed on that basis alone.

The Court nevertheless considered the issue of irreparable harm, and found that the appellants would suffer irreparable harm if the orders were put into operation.

The appeal was upheld, and the order of the court below was set aside.

TM v Road Accident Fund and a related matter [2021] 1 All SA 285 (GJ)

Settlement agreements – Need for judicial oversight to ensure that Road Accident Fund, as a public body, acts with proper regard for disbursement of public funds – Where settlement agreements purported to validate inflated claims, court setting such agreements aside.

Two actions against the Road Accident Fund ("RAF") came before court so that agreements of settlement entered into between the plaintiffs and the fund could be made an order of court. The fund was not represented in court, and the attorneys for the plaintiffs made it clear that the court's approval of the settlement agreements was not being sought.

Dissatisfied with the stance taken by the attorneys, the court insisted on being addressed on the validity of the settlements and the legality of the RAF's position in the matter.

Held – The RAF is a critical organ of State which provides compulsory social insurance cover to all users of South African roads. The main source of income received by the Road Accident Fund is a levy that is based on fuel sales, which is, in effect, a compulsory contribution by the public to social security benefits. A central power of the RAF is the investigation and settling, subject to the Act, of claims arising from loss or damage caused by the driving of a motor vehicle. Thus, if there is no loss or damage, the RAF does not have the power to settle a claim and if it purports to do

so, this would be *ultra vires*. The fund has been beset by maladministration and financial problems. The court stated that *o*ne of the main bulwarks against venality and incompetence in public bodies is judicial oversight.

Recent steps taken to put in place controls and to enhance scrutiny by the judiciary were chronicled in the judgment. Included in the directives issued by the Judge President is the need for courts to interrogate settlement agreements where public funds are involved.

The scheme of the Act requires that certain criteria are met before compensation may be awarded. As the relevant enquiry is not always clear cut, experts are often used in such matters. The Court explained the role of such experts, with particular reference to actuaries. The expert witnesses are enjoined by court directive and general procedure to meet and see if they can find common ground on salient aspects of the matter. They are expected to prepare and sign what is known as a joint minute.

In both cases addressed by the court, the claims of the plaintiffs were inflated and their loss exaggerated. Those fallacious assumptions were used by the actuary to calculate a loss of earning capacity which yielded significantly inflated figures because of the exponential nature of the calculation. The RAF was not represented and overwhelmed by the sheer volume of cases, its officials placed undue reliance on the representations of the plaintiff's attorneys as to the loss.

The Court decided that the RAF officials did not act lawfully to conclude the settlements and for that reason they were void *ab initio*.

Concerned about the manner in which the legal representatives of the plaintiffs and the RAF officials had comported themselves, the court referred their conduct to their respective professional bodies.

Advocate Leysath v Legal Practitioners Fidelity Fund Board of Control on behalf of the Legal Practitioners Fidelity Fund previously known as the Attorneys Fidelity Fund Board of Control and the Attorneys Fidelity Fund [2021] JOL 49396 (GP)

Advocate-fees-fees paid into trust account-attorney runs away - Fidelity Fund will not pay - contractual relationship between counsel and attorney, counsel is the creditor, and the attorney the debtor. In the contractual relationship between the attorney and client, the attorney is the creditor, and the client the debtor. Pursuant to that contractual arrangement, counsel had a right to claim his fees from the attorney

An advocate sought a monetary order against the Fidelity Fund for fees due by an attorney, after performing his functions according to the instructions given.
Van Nieuwenhuizen AJ discusses whether the money was "entrusted"; the pertinent case law; the contractual relationships between attorney and client and then between attorney and counsel; and whether the applicant had suffered pecuniary loss due to the theft of money entrusted.
The application is dismissed with costs.
[13] It follows that there are two distinct separate legal arrangements in the trinity of counsel, attorney, and client.
[13.1] Firstly, there is a contractual relationship between the attorney and the attorney's client, which is wholly separate from counsel. Secondly,

there is a contractual relationship between an attorney and counsel, which but for the fact that the services requested by the attorney are to be rendered on the client's behalf, has otherwise no bearing on the client.
[13.2] As the authorities demonstrate, the agreement between an attorney and counsel renders the obligation for payment of counsel's fees on the attorney. That position cannot in law not be altered by passing the obligation to the attorney's client. Pursuant to that contractual arrangement, counsel had a right to claim his fees from the attorney, and the attorney was obliged to make payment towards counsel of counsel's fees. Whether or not the client had paid the attorney was irrelevant insofar as that contractual relationship was concerned, unless their agreement was qualified in some manner whereby counsel would not render any work unless satisfied that counsel's fees were secured by the attorney in the form of a deposit.
[13.3] Irrespective of the agreement between counsel and the attorney, in contrast, in the contractual relationship between the attorney and the attorney's client places an obligation on the client to pay the attorney, and thus the attorney is vested with the right to claim from the client payment, in respect of services rendered by the attorney, as well as disbursements for which the attorney would be liable, such as counsel's fees.
[13.4] Put differently, in the contractual relationship between counsel and attorney, counsel is the creditor, and the attorney the debtor. In the contractual relationship between the attorney and client, the attorney is the creditor, and the client the debtor.
[14] It follows then that when clients paid deposits to Costa to ensure that there were funds available to pay Costa's disbursement in the form of the Applicant's fees (or other counsels' fees), such money was *"entrusted"* to Costa.
15
Who entrusted money to Costa, or on whose behalf was money entrusted to Costa?
[15] If then, money was entrusted to Costa, who so entrusted it? The money was certainly not deposited by the Applicant and it follows that it was entrusted by the client or clients of Costa.
[16] That is certainly the starting point of the enquiry. If the money was entrusted to Costa by his clients, was it done on the Applicant's behalf, or on the clients' behalves? In my view, it can never be said that the money entrusted as deposits by Costa's clients was so entrusted on the Applicant's behalf. It may well be that its purpose was to ensure that counsel's fees were covered, but it would be farfetched to suggest that deposits were paid with the sole purpose only of covering counsel's fees as a disbursement and not other disbursements, such as sheriff's costs, correspondent's fees, messenger's fees and the like (including at least part of the attorney's own initial fees).
[17] In my view, the Applicant conflates the purpose of the money so entrusted by Costa's clients with the interest (in the legal sense) for which the money was entrusted.
[17.1] The client had no obligation towards counsel. The client's sole obligation was to the attorney. The purpose of a deposit, on the assumed
16
facts in favour of the Applicant, was to ensure that the disbursements for

which Costa would be liable *vis-à-vis* counsel, would be covered and that Costa thus would not be out of pocket. Such an arrangement is sensible if an attorney does not wish to run the risk of being out of pocket due to his obligation to counsel, and his client defaulting on the obligation to pay the attorney.
[17.2] If clients had entrusted money on counsel's behalf, then counsel would be free to direct what should be done with such money. It has not been suggested by the Applicant that he had ever been so entitled to direct what might be done with money that was so entrusted. If money was indeed so entrusted, then the Applicant would be liable for income tax and VAT (from the invoices attached to the founding affidavit, the Applicant was a registered VAT vendor) once the money was deposited with Costa, as it would then accrue to the Applicant if held on his behalf. Such a proposition is merely to be stated to be rejected as untenable. If that were not the case, it would lead to the absurd scenario where a client, who paid a significant deposit, but subsequently terminated the mandate of the attorney, would be precluded from claiming whatever money is left in trust which had not yet been spent on disbursements or in respect of the attorney's fees. The client would then have to, on the Applicant's contention, claim such money from counsel based on some *condictio*.

[18] It follows, that at this hurdle, the Applicant's case already falls short.
Has the Applicant suffered pecuniary loss due to the theft of money entrusted?
[19] From the conclusion in respect of the second question above, it follows logically that the Applicant had not suffered a pecuniary loss. This further follows from the ratio quoted of F H Grosskopf JA in **ICF** *supra* with reference to 143J – 144A.

END-FOR NOW