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Application for summary judgment – defence being a denial of particular averment in annexure to the particulars of plaintiff's claim – no denial of averment in the particulars of claim implicating the first defendant – requirements for summary judgment and for defence based on denial of certain facts alleged by plaintiff – the statement of material facts in affidavit resisting summary judgment required to be sufficiently full to constitute a defence to plaintiff's claim – presenting as narrow a front as possible and a blurred one suggests that the defendant dishonestly sought to avoid the dangers inherent in presenting a clearer version of the defence – *Breitenbach v Fiat SA (Edms) Bpk* **1976 (2) SA 226** (T) applied – summary judgment granted.

[1] The first and second respondents are the joint provisional liquidators of the Small and Medium Enterprises Bank Limited ('the SME Bank'), a registered bank in the Republic of Namibia, which was finally liquidated by order of the Namibian High Court on 29 November 2017. The final liquidation order was preceded by a provisional liquidation order, which was granted by the High Court of Namibia on 11 July 2017, on which date the respondents were also issued with letters of appointment as provisional liquidators by the Master of the High Court in Namibia. In their official capacities as joint provisional liquidators of the SME Bank, the respondents sued Gold Reef City Mint (Pty) Limited ('Gold Reef City Mint'), as the first defendant, and Mr Glen Schoeman ('Mr Schoeman'), as the second defendant, for repayment of an amount of R650 000 on the basis of fraud and unjust enrichment. Mr Schoeman is the sole director of Gold Reef City Mint. To avoid confusion, I shall refer to the parties as referred to in the action in the High Court.

[2] The first and second plaintiffs are cited in the summons and the plaintiffs' particulars of claim as having the power to litigate in Namibia and South-Africa, which powers they derive from their letters of appointment and an Order of this Court dated 13 June 2018 under case number 19193/2018, which order duly recognizes the plaintiffs as the joint provisional liquidators of the SME Bank.

[3] The plaintiffs applied for summary judgment against the first and second defendants. This was opposed by the defendants on the basis of a number of points *in limine* and on the ground that in their particulars of claim, the plaintiffs failed to make out a case against the defendants or, for that matter, against either one of the two defendants. The High Court (Skibi AJ) agreed with the defendants that, as regards the second defendant (Mr Schoeman), the plaintiffs did not make out a case for summary judgment against him. However, as regards the first defendant, the Judge rejected the defendants' main defence as well as all of the legal defences raised by them in their opposition to the application for summary judgment. The

Judge held that the first defendant had not established a *bona fide* defence to the plaintiffs' claim, and granted summary judgment against it.

[4] In sum, the court *a quo* held that the defendants' affidavit opposing summary judgment, in relation to the first defendant, was not comprehensive enough and fell short of establishing a *bona fide* defence to the plaintiff's claim based on the averment that an amount of R650 000 was erroneously paid into the bank account of the first defendant. All of the preliminary legal points raised by the defendants in their resisting affidavit were also dismissed by the court *a quo*. Summary judgment was accordingly granted against the first defendant and the second defendant was granted leave to defend the main action. Curiously, the court *a quo*, as part of its summary judgment against the first defendant, ordered 'the defendants' to pay the 'plaintiffs' costs of suit for one Counsel'.

[5] The first defendant appeals against the summary judgment granted against it by the court *a quo* and the second defendant appeals against the 'costs of suit' order seemingly granted against him as part of the costs order granted against the first defendant. This appeal is with the leave of the High Court, which was granted by Skibi AJ on 12 March 2020.

Ardnamurchan Estates (Pty) Limited v Renewables Cookhouse Wind Farms 1 (RF) (Pty) Ltd and others [2021] 1 All SA 829 (ECG)

Applications- – Answering affidavit – Late filing – Filing of replying affidavit in response to late answering affidavit signifying acceptance of the fact that the answering affidavit was not to be treated as a nullity – Where an answering affidavit is delivered out of time and an applicant takes a further step by delivering a replying affidavit, that applicant is in the same position as an applicant who has agreed in terms of Rule 27(1) to afford a respondent an extension for the delivery of the answering affidavit.

The first respondent, an entity conducting a wind farming operation, erected a wind turbine on a farm owned by the fifth respondent. The applicant, a property-owning company, whose farm was adjacent to the farm owned by the fifth respondent, claimed acquisitive prescription in respect of the land upon which the wind turbine was erected and sought the removal of the wind turbine. The first respondent denied that the applicant had acquired the land through acquisitive prescription and pleaded, in the alternative, that the applicant was estopped from claiming a right of prescription. The first and fifth respondents brought a counter-application for compensation in lieu of removal of the wind turbine and tendered such compensation.

Held – Parties agreed that a preliminary issue relating to the late filing of the first respondent's answering affidavit and the applicant's replying affidavit should be decided separately. A related question was whether, in delivering a replying affidavit, the applicant had effectively abandoned or foregone its right to complain about the late delivery of the answering affidavit. The court was of the view that the delivery of a replying affidavit was an acceptance of the fact that the answering affidavit was not to be treated as a nullity. It held that where, as in this case, an answering affidavit is delivered out of time and an applicant takes a further step by delivering a replying affidavit, that applicant is in the same position as an applicant who has agreed in

terms of rule 27(1) to afford a respondent an extension for the delivery of the answering affidavit. If condonation was going to be an issue, then the applicant was required to have engaged the first respondent on the issue and to have conveyed to it that it regarded its answering affidavit as an irregular step because it had been delivered outside of the time period. As the applicant had already responded to the matter in the answering affidavit, requiring the first respondent to bring an application for condonation would be a waste of time.

The preliminary issue was decided in first respondent's favour and the answering affidavit to the main application was admitted.

OB v LBDS Case 20540/2018 Western Cape, full bench, 9 March 2021

Jurisdiction-domicile and jurisdiction for divorce

Two foreign nationals came to South Africa and married in Cape Town, because of unfavorable laws on same-sex marriages in Namibia and Russia. Later, the court a quo dismissed the unopposed divorce action on the ground that the jurisdictional requirements of s 2(1) of the Divorce Act 70 of 1979 had not been met – that the parties or either party was domiciled or ordinarily resident in the area of jurisdiction of the court on the date at which the action was instituted.
On appeal, **Cloete J** (Henney J) concurring discusses the deeming provision in s 1(2) of the Act and the case law; and finds that at the time of the institution of the divorce proceedings, appellant was domiciled within the court's area of jurisdiction. The appeal succeeds and the order of the court a quo is replaced with one granting the divorce.

Legent Motors (Pty) Ltd v Oakhurst Insurance Company Ltd (EL33/2020) [2021] ZAECELLC 5 (23 March 2021)

Exceptions- I must say at the outset that on my first reading of the defendant's plea, I was able to discern its pleaded defences without any difficulty whatsoever. In contradistinction, the plaintiff's notice of exception made for difficult reading. My attempt to summarise the contents of the exception in a coherent and concise manner above, belies the fact it is unnecessarily prolix and drafted in a ponderous style that makes it difficult to discern the grounds relied upon.

[1] The plaintiff has filed an exception to the defendant's plea on the grounds that it is vague and embarrassing and does not disclose a defence. It has previously filed two other exceptions to the plea, and on each of those occasions the defendant has amended its plea to address the criticisms. On this occasion, however, the defendant has decided to batten down the hatches and defend its plea.

[2] The plaintiff contends that the plea, when read in its totality, contains averments which are confusing, meaningless or contradictory, and in some instances do not raise a proper defence to its claim. It contends, in particular, that the special plea raised by the defendant in respect of the court's jurisdiction, is vague and embarrassing and contradicts other averments contained in the plea. In this

regard it contends that the objection to the court's jurisdiction is based on the acceptance that a binding contract had been entered into between the parties, while in other parts of the plea this averment has been denied.

[3] The plaintiff also asserts that the special plea raised in respect of its *locus standi* does not disclose a defence and contradicts other averments contained elsewhere in the plea. These averments have not been pleaded in the alternative and the plea is accordingly rendered vague and embarrassing. In this regard also the plaintiff contends that the assertion that it lacks *locus standi* is incompatible with the defendant's acceptance elsewhere in the plea that a valid contract of insurance had been concluded between the parties.

[4] In addition, the plaintiff contends that;

(a) some allegations in the plea are contradictory to each other and have not been pleaded in the alternative;

(b) some allegations are vague and embarrassing, do not support the contents of the plea and does not justify the conclusions sought to be drawn from them;

(c) the defendant seeks to rely on documents annexed to its plea which either contradict the contents of the plea, or do not support some of the assertions contained therein;

(d) the defendant alleges that it (the plaintiff) may have been dishonest in claiming from it in terms of the agreement, but provides no particulars on which this averment is based. This criticism apparently refers to the defendant's averment that the plaintiff did not have an insurable interest in the insured vehicle; and

(e) the special pleas in respect of jurisdiction and *locus standi* contradict each other in that in the jurisdiction plea the defendant pleads that it entered into an agreement with Monolite CC, while in the *locus standi* special plea it appears to aver that it did not conclude an agreement with the plaintiff. These averments are not pleaded in the alternative and accordingly render the plea vague and embarrassing.

[5] I must say at the outset that on my first reading of the defendant's plea, I was able to discern its pleaded defences without any difficulty whatsoever. In contradistinction, the plaintiff's notice of exception made for difficult reading. My attempt to summarise the contents of the exception in a coherent and concise manner above, belies the fact it is unnecessarily prolix and drafted in a ponderous style that makes it difficult to discern the grounds relied upon.

Mr *Kotzé*, who appeared for the defendant, has also correctly argued that it appears that the perceived ambiguity and vagueness of which the plaintiff complains, are based on its own insupportable inferences. Furthermore, they appear to be predicated on the erroneous assumption that where the assertions contained in the plea are at odds with its own averments contained in the particulars of claim or supporting documents, the plea is therefore rendered vague and embarrassing.

[26] It must have been abundantly clear from the aforementioned that there is no basis whatsoever for the contention that the plea does not disclose a defence. I am also of the view that the argument that the averments contained in the plea are so contradictory or vague that the plaintiff is left guessing as to the true meaning thereof or the defences on which the plaintiff rely, is also untenable. As I have mentioned above, the defendant has set out various defences in concise, clear and

unambiguous terms, which if proved at a trial in due course, will constitute proper defences to the plaintiff's claim. In the result the exception falls to be dismissed.

[27] Insofar as the question of costs is concerned, Mr *Kotzé* has submitted that this is an appropriate case where the court should order punitive costs, namely on the attorney and client scale. This assertion was based on the fact that the plaintiff had on two previous occasions raised exceptions to the defendant's plea and has presumably abused the court processes. I am, however, of the view that there are no grounds for such a punitive costs order. The plaintiff was entitled to file exceptions to the pleas, and it was up to the defendant to decide whether or not to oppose them. The fact that those exceptions were not opposed, compels the inference that they had some merit. Costs must accordingly be awarded on the usual scale.

[28] In the result the following order issues:

(a) The plaintiff's notice of exception is hereby dismissed, with costs.

Tetra Pak S.A (Pty) Limited v Blakey Investments (Pty) Limited (14082/2011) [2021] ZAKZDHC 6 (11 March 2021)

Settlement agreements-penalty clauses in it –when enforceable

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

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

The penalty provided for in the settlement agreement is reduced to nil and the clause declared unenforceable.

It is declared that the applicants have complied fully with their obligations under the settlement agreement.

[1] The applicants in this matter (the defendants in the action) seek an order declaring that they have complied fully with their obligations under a settlement agreement, and, in the alternative, an order reducing to nil, or setting aside, a penalty of R15 million provided for in the settlement agreement.

[2] The background of the matter is as follows. In May 2019 an action between Tetra Pak S.A. (Pty) Limited, as plaintiff, and Blakey Investments (Pty) Limited and Suman Panday, as defendants, came up for trial. The cause of action was fraud and the claim substantial. The defendants complained about the plaintiff's discovery and threatened to ask for an adjournment. This led to settlement discussions, and on 17 May 2019 a written settlement agreement was concluded. It provided for an

undertaking by the defendants to pay to the plaintiff the sum of R25 million and to execute a consent to judgment in that amount. It provided further that 'the aforesaid' was compromised on the basis that the defendants would pay to the plaintiff the sum of R10 million in instalments. The balance of the R25 million would only be payable in the event of any of the instalments not being paid timeously.

[3] Pursuant to the settlement agreement the defendants paid a sum of R5 million to the plaintiff by way of an electronic fund transfer. The balance of R5 million was payable in eight equal consecutive monthly instalments, commencing on 30 June 2019, each in the sum of R625 000. Interest on the reducing balance would be paid simultaneously with the last instalment on 31 January 2020. The agreement provided that the balance of R5 million would be secured by eight post-dated cheques, each in the sum of R625 000. The cheques were duly provided to the plaintiff.

[4] From the end of June 2019 the plaintiff presented a cheque at the end of each month, and they were duly paid. The cheque presented at the end of December 2019 was however not paid, as the bank was unable to contact Mr Panday for his confirmation. He was overseas on vacation.

[5] In January 2020 the plaintiff notified the defendants that the instalment that was due at the end of December had not been paid. This was rectified on Mr Panday's return, and a payment was made by electronic fund transfer. The plaintiff however adopted the stance that as a result of the late payment the amount of R25 million had automatically become due and payable. It applied for judgment on the confession to judgment, which was granted by the Registrar.

Alphera Financial Services, a division of BMW Financial Services (South Africa) (Pty) Ltd v Lemmetjies (6380/2020) [2021] ZAGPPHC 163 (8 March 2021):

Jurisdiction-concurrent jurisdiction of magistrates court and high court

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

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

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

Summary judgment is granted.

[1] This is an application in terms whereof the plaintiff ("the applicant") seeks summary

judgement against the defendant ("the respondent"), based on the breach of a written

instalment sale agreement ("the agreement") entered into between the parties.

[2] The application is opposed.

[3] Two special pleas have been raised by the respondent in the affidavit resisting

summary judgment, namely:

1. That the monetary amount claimed (namely, the value of the motor vehicle R390 494-89 and the arrear amount R79 508-89) falls within the monetary jurisdiction of the Magistrates' Court 32 of 1944 ("the Magistrates' Court Act"). As a result, the applicant has failed to provide any motivation for the need to institute the action in the High Court as opposed to the Magistrate Court, and has failed to obtain the High Court's consent to institute the action in the High Court.

2. Alternatively, if the Court finds that the applicant could institute the action in a High Court, the applicant should have instituted the action in the respondent's closest division of the High Court, being the Gauteng Local Division, Johannesburg.

[4] The applicant instituted action against the respondent by way of summons for the following relief:

"a) Confirmation of termination of the agreement;

b) Return of a **2012 AUDI A4** 1.8T SE MULTITRONIC ("the vehicle") with engine

number: [….] and chassis number: WAUZZZ8K1DA111581 to the Plaintiff forthwith;

c) An order authorizing the Plaintiff to apply to the Court on the same papers, supplemented insofar as may be necessary, for judgment in respect of any damages

and further expenses incurred by the Plaintiff in the repossession of the said vehicle, which amount can only be determined once the vehicle has been repossessed by the Plaintiff and has been sold;

d) Costs on an attorney and client scale, to be taxed or agreed."

[5] It is common cause that on or about 11 July 2014, the respondent and the applicant, concluded a sale agreement wherein the applicant sold the vehicle to the respondent for an amount of R390 494-89. In terms of the agreement the respondent would pay the purchase price together with interest, fees and costs by way of 58 consecutive instalments of R5 249-79 each, commencing on 16 August 2014, with a final instalment of R80 757-28 payable on 16 July 2019. It is further common cause that this matter falls within the ambit of the National Credit Act 34 of 2005 ("the **National Credit Act&rdquo**;) and that the respondent resides at 19 Hoy Street, Discovery, Roodepoort.

Bekker v Apprica Labs (Pty) Ltd and Another (74482/2014) [2021] ZAGPPHC 158 (9 March 2021)

Exception- plaintiff's particulars of claim premised on the basis that it lacks averments necessary to sustain a cause of action against the second defendant. exception is upheld.The plaintiff's particulars of claim is struck out with costs

[1] This is an exception against the The full grounds set out in the exception are:

"*1. On or about 14 January 2019 the Plaintiff sued out Summons and Particulars of Claim in the above-named matter.*

2. It is pleaded by the Plaintiff that the First Defendant obtained the services of the Second Defendant in order to procure assistance for the development of the app which forms the basis of the Plaintiffs claim in the action.

3. The Plaintiff fails to plead any contractual nexus between itself and the Second Defendant.

4. The Plaintiff fails to plead any contractual obligations owed to it by the Second Defendant,

5. The Plaintiff fails to plead that the Second Defendant failed to fulfil any contractual obligations owed by the Second Defendant to the Plaintiff,

6. The Plaintiff falls to set out how and in what respects the Second Defendant is in any way Indebted to the Plaintiff.

7. Accordingly, the Particulars of Claim do not make out a cause of action against the Second Defendant."

[2] The excipient's main contention in the exception is therefore simply that the plaintiff's particulars of claims fails to make out a claim against the second

defendant. The plaintiff failed to make reference to the second defendant in any of the paragraphs in paragraph four of the particulars of claim where the plaintiff refers to the agreement entered into between the plaintiff and the first defendant. Thus the excipient contends the pleading is rendered excipiable for failing to disclose a cause of action in respect of the excipient.

[3] Plaintiff's claim is based on a written agreement with the first defendant on 24 October 2013, to develop an app for the price of R95 400.00 (excluding VAT). A further written agreement was entered into on 30 June 2014 relating to the development of the app. The first defendant enlisted the assistance of a third party, the excipient. The plaintiff agreed to pay fifty percent in advance, twenty-five percent during the development of the app and the final twenty-five percent upon completion of the project. The written agreements between the plaintiff and the first defendant signed on 24 October 2013 and on 30 June 2014 were attached to the particulars of claim. The agreements appear to have as their objective of the first defendant designing and developing a mobile app according to the plaintiff requirements.

[4] In *Data Color International (Pty) Ltd v Intamarket (Pty) Ltd* **[2001] All SA 581** (A) at paragraph [1] the Court stated:

“Repudiation has sometimes been said to consist of two parts: the act of repudiation by the guilty party, evincing a deliberate and unequivocal intention no longer to be bound by the agreement, and the act of his adversary, "accepting" and thus completing the breach. So for example Winn LJ remarked in Denmark Productions Ltd v Boscobel Productions Ltd **[1969] 1 QB 699** at 731F-732A:

"Where A and B are parties to an executory contract, if A intimates by word or conduct that he no longer intends, or is unable, to perform it, or to perform it in a particular manner, he is, in effect, making an offer to B to treat the contract as dissolved or varied so far as it relates to the future. If B elects to treat the contract as thereby repudiated, he is deemed, according to the language of many decided cases, to 'accept the repudiation' and is thereupon entitled (a) to sue for damages in respect of any earlier breach committed by A and for damages in respect of the repudiation, (b) to refrain from himself performing the contract any further."

[5] Uniform Rule 23 provides for exceptions as follows:

“(1) Where any pleading is vague and embarrassing, or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto and may apply to the registrar to set it down for hearing within 15 days after the delivery of such exception:

(2) …

(3) Wherever an exception is taken to any pleading the grounds upon which the exception is founded shall be clearly and concisely stated.

(4) Wherever any exception is taken to any pleading or an application to strike out is made, no plea, replication or other pleading over shall be necessary.”

I agree with Ms Adams that the averment made in the plaintiff's particulars of claim are not such that enable the excipient to plead thereto. They fail to plead any contractual nexus between plaintiff and the second defendant; they fail to plead any contractual obligations owed to plaintiff by the second defendant; the plaintiff has failed to plead that the second defendant failed to fulfil any contractual obligations owed by the second defendant to the plaintiff; and to specify such and finally the plaintiff has failed to set out how and in what respects the second defendant is in any way indebted to the plaintiff. This is especially so when the agreement attached was concluded with the first defendant and the plaintiff has already obtained a judgment in the matter against the first defendant according to Mr Blignaut.

[14] Even when regard is had to the repudiation, the agreement is concluded with the first defendant. The plaintiff has not indicated any communication in this regard or agreement that it relies on with the excipient. Mr Blignaut suggested that unfortunately the plaintiff has no evidence in this regard and relies on the first defendant against whom it has taken judgment to be subpoenaed as a witness. At present the plaintiff has no case to which the excipient can be expected to answer and given the first defendant already had a judgment against it for the same matter it is in the precarious position where judgment has been taken against it by the plaintiff it is the most undesirable and unreliable source of evidence where there are no written agreements on which the plaintiff can rely on. It cannot make out its case agains the second defendant.

ORDER

[16] In the result:

1. The exception is upheld.

2. The plaintiff's particulars of claim is struck out with costs

Baker & McKenzie Amsterdam N.V. v Gencorp Investments (Pty) Ltd (88431/2016) [2021] ZAGPPHC 147 (12 March 2021)

Fees-attorney-fairness and reasonableness-how established

The plaintiff, Baker & McKenzie Amsterdam N.V., a private company registered in the Kingdom of the Netherlands, claims payment in the amount of EUR 157 422, 00 from the defendant, GenCorp Investment (Pty) Ltd ("GenCorp"), a private company registered in South Africa for legal services rendered to it in terms of a written agreement between the parties.

[2] The written agreement was concluded on 27 February 2015 and provided that:

[2.1] the plaintiff will represent GenCorp in its dispute with KyotoCooling B.V. and its shareholder Mr Drossos;

[2.2] the plaintiff's fees for rendering the legal services would be based on time spent on the matter, computed at the plaintiff's hourly rates for the persons performing the services as well as a general 3% overhead surcharge and actual disbursements made in the course of the assignment;

[2.3] GenCorp will be invoiced monthly and payment will be due upon receipt of the invoice.

The liability of GenCorp to pay the remainder of the invoices issued to it in respect of the services rendered by the plaintiff is in dispute.

[6] GenCorp pleaded that it is not liable to pay the outstanding invoices, because:

[6.1] Reinier Lehmann, who allegedly represented GenCorp in concluding the agreement was not authorised to do so; and

[6.2] the fees claimed by the plaintiff are not fair and reasonable and/or were not properly calculated at the hourly rates ordinarily charged by the plaintiff for the services.

he fairness and reasonableness of the fees

[60] In order to succeed on the question of whether the fees claimed by the plaintiff are fair and reasonable, the plaintiff bears the *onus* of proof.

Submissions on behalf of plaintiff

[61] In addressing this issue, Mr Cross submitted that the uncontested evidence of Oosterhoff proved the following:

61.1 the plaintiff performed all the services reflected in the invoices without any complaint from GenCorp and even praised the plaintiff's work as late as 23 June 2015. The submission is based on an e-mail sent by Reinier to Werner on 23 June 2015, which reads as follows:

"*Can you please update Itse with the payment status?! Any confirmation or issuing documentation would be helpful. B & M is performing good as valuable council* (sic) *to us and we cannot afford them to stop assistance."*

61.2 the services were performed on the instruction or at the request of Gencorp and in terms of the agreement between the parties;

61.3 the invoices were all carefully scrutinised by Oosterhoff to ensure their accuracy;

61.4 the April 2015 invoice was paid without complaint;

61.5 after receipt of the 12 May 2015 invoice in the amount of EUR 35 394, 43 GenCorp continued to instruct the plaintiff to perform work;

61.6 Reinier made several promises to pay the invoices;

61.7 Gencorp paid the 10 April 2015 invoice on 25 June 2015 without demur or complaint. At that stage Gencorp had already received the 12 May 2015 invoice;

61.8 after receipt of the 10 July 2015 invoice in the amount of EUR 70 844, 98, GenCorp continued to instruct the plaintiff to perform further work;

61.9 on 13 July 2015 Reinier unconditionally acknowledged GenCorp's liability to pay EUR 106 239, 39, being the amount outstanding at that stage. The relevant portion of Reiner's email dated 13 July 2015 reads as follows:

"*I am once again ashamed because of the late payment!!....It will absolutely be paid; we cannot get away from that.*"

61.10 At no stage did Gencorp complain about the time recorded in the invoices or in any way raised the fairness and reasonableness of the plaintiff's fees.

[62] In view of the aforesaid uncontested evidence, Mr Cross, submitted that the plaintiff has successfully established, at the very least on a balance of probabilities, that the invoices were fair and reasonable in the circumstances.

[63] In response, GenCorp did not present any evidence to challenge the fairness and reasonableness of the plaintiff's invoices.

[64] In respect of the taxation of the bill, Mr Cross pointed out that the Taxing Master only has authority to tax bills of costs of attorneys in South Africa.

Submissions on behalf of GenCorp

[65] Mr Arnoldi submitted that when considering Oosterhoff's evidence, one should bear in mind that he was not qualified as an expert on legal costs and was not called as an expert witness. In order for the plaintiff to prove that the fees were fair and reasonable it should have:

65.1 followed the internal process at its firm and in addition should have considered a possible reference to the Dean of the Bar Association in the Netherlands; or

65.2 suggested a taxation of its bill of costs by the Legal Practice Council; or

65.3 called an expert on legal costs.

[66] The fact that the plaintiff did, furthermore, not discover the pleadings, e-mails and other documentation on which time was spent, to make up the hours reflected in the invoices, is according to Mr Arnoldi fatal to the plaintiff's claim.

[67] In the result, the plaintiff did not prove that the fees were fair and reasonable.

Legal principles and discussion

[68] Should a defendant wish to question the fairness and reasonableness of legal fees claimed by an attorney, the defendant may file a dilatory plea requiring the taxation of the bill of costs. The matter will then only proceed, once the bill has been taxed. [See: *Benson v Walters* **1984 (1) SA 73** A]

[69] In this matter and due to lack of jurisdiction of the Taxing Master, it is clearly not an option.

[70] In *Melamed & Hurwitz Inc v Blank* **2004 CLR 217** C, the court was faced with a bill of costs that was not taxed. At paragraph [39] Van Zyl J stated the following:

> "*[39] A contract between attorney and client for payment of an agreed fee is not illegal or contrary to public policy (Nicholls v MacMuldraw* **1923 CPD 401** *at 404-405; Law Society of South 1923 SWA 47 at 52). This is so even if the attorney chooses to place an extravagant value on his work and services (Cape Law Society v Luyt* **1929 CPD 281** *at 287). A court may, however, interfere with an agreement as to costs if it should appear to be unjust, unfair or unreasonable, or if the client should allege that he has been overreached, in the sense that the attorney has taken undue advantage of him by charging unconscionable, excessive or extortionate fees, or has induced him to agree to payment of the fees in question as a result of duress, fraud, misrepresentation or mistake. The court may remedy the situation by ordering the costs to be taxed, in which event the matter will be suspended pending the determination of the taxing master. …"*

[71] In the *Melamed* matter *supra*, the defendant was being sued by her husband for a divorce. The defendant, Mrs Blank enlisted the services of Mr Melamed ("Melamed"), an attorney to provide her with legal advice and assistance. In the execution of his mandate, Melamed consulted with Mrs Blank, perused certain documents, including a settlement agreement and provided legal advice to her.

[72] Mrs Blank initially did not have a problem with Melamed's bill. It was only when she learnt that she and not her husband must pay the bill that she suggested for the first time that Melamed's fee was unreasonable. Melamed instituted an action for payment of his bill and during the trial, Mrs Blank, although the issue was not raised on the pleadings, disputed the amount of hours spent by Melamed on the matter. Mrs Blank was of the opinion that, in view of the limited amount of work Melamed had according to her, done he was not entitled to the fees claimed by him.

[73] Melamed during his evidence explained what work he had done and stated that the hours spent accords with the work that was involved in providing legal advice in a divorce action. Mrs Blank in her evidence denied Melamed's assertion without tendering any evidence to support her allegation that the fees were unreasonable.

[74] Having summarised the evidence, Van Zyl J remarked as follows in paragraph [46]:

"…*In any event, even if there had been advance notice of this special plea, I am quite satisfied that, on Mr Melamed's evidence, there is no question of unreasonableness of the fee and even less of overreaching. A defendant relying on such serious allegations should at least tender some evidence in support thereof."*

[75] GenCorp agreed to pay the hourly tariff of the attorneys involved in the execution of its mandate. The only issue in dispute is therefore whether the amount of time that was spent in the execution of the mandate was fair and reasonable.

[76] The evidence of Oosterhoff clearly and precisely explained the nature and complexity of the work involved in the execution of the mandate given by GenCorp. Oosterhoff, furthermore, testified that he scrutinised each item on the bill to make sure it is reasonable. Should he be of the opinion that the amount of hours charged were not reasonable, he would amend the bill to reflect fewer hours spent on the work.

[77] Each invoice presented to GenCorp meticulously recorded the work that was performed and the time that was spent on the work. Save for the entries of 10 April 2015, none of the other entries were questioned or disputed.

[78] Mr Arnoldi did submit that the plaintiff should have discovered all the documents perused and prepared, to substantiate the amount of time spent on the work. The fact that the plaintiff chose not to discover the documentation and to present the evidence of Oosterhoff in explaining the extent of the work that was done, is not necessarily fatal to the plaintiff's claim.

[79] The evidence presented by Oosterhoff established at least *prima facie* that the hours spent was justified. The invoices were at all relevant times in GenCorp's possession and GenCorp was at liberty to request discovery of the documents referred to in the invoices.

[80] One should also bear in mind that GenCorp actively participated in the litigation process, was kept up to date with what the strategy entailed and received correspondence and agreements drafted by the attorneys working on the mandate.

[81] It is telling that no complaint was ever raised in respect of the invoices that were presented to GenCorp. The first invoice was paid without problems. Reinier praised the work performed by the plaintiff and went so far as to state: "*!!....It will absolutely be paid; we cannot get away from that"* and "*B & M is performing good as valuable council* (sic) *to us and we cannot afford them to stop assistance".*

[82] Significantly, the fairness and reasonableness of the fees were raised for the first time in GenCorp's plea. One would have expected Erwin or Reinier to have objected to the hours spent upon receipt of the first invoice. This they did not do.

[83] In presenting its defence it was up to GenCorp to challenge the evidence presented by Oosterhoff. This it did not do. In the result, there is no basis to find that the fees charged by the plaintiff in executing its mandate are unfair and unreasonable.

[84] In having had regard to the evidence as a whole, I am satisfied that the plaintiff established on a balance of probabilities that the fees charged for the work performed by it is fair and reasonable.

ORDER

[85] In the premises, the defendant is ordered to pay to the plaintiff:

1. The amount of EUR 157 422, 23;
2. Interest on the aforesaid amount *a temporae morae* from date of each invoice to date of payment;
3. Costs of suit.

115 Electrical Solutions (Pty) Ltd and Another v City of Johannesburg Metropolitan Municipality and Another (86870/19) [2021] ZAGPPHC 146 (16 March 2021):

Applications-leave to amend notice of motion

[1] The applicants seek an order that the respondents be interdicted from disseminating, replicating or referencing in any manner whether electronic or otherwise, the document or any part thereof, titled "*Investigation into allegations of theft, fraud and corruption at the Johannesburg Market*" dated 6 February 2017 ("*the report*") until any reference to them has been redacted from it. Alternatively, until an addendum correcting the findings made against them and/or recording their version in relation to such findings has been prepared and attached to it ("*the main application*").

[2] The applicants have also filed an application for leave to amend their notice of motion ("*the interlocutory application*").

[3] The main application is opposed by the first and the second respondents.

[4] The interlocutory application is only opposed by the first respondent.

The parties

[5] The first applicant is 115 Electrical Solutions (Pty) Ltd, hereinafter referred to as "*115 Electrical*". The second applicant is Mr Mpati. He is a professional electrical engineer registered with the South African Institute of Electrical Engineers. He is the sole shareholder and director of the first applicant. The first and second applicants will be referred to jointly as the applicants. Where appropriate they will be referred to separately as 115 Electrical and Mr Mpati.

It is trite that a court hearing an application for an amendment has a discretion whether or not to grant it. This discretion must be exercised judicially.**[1]** The primary object of allowing an amendment is "*to obtain a proper ventilation of the dispute between the parties, to determine the real issues between them, so that justice may be done*".**[2]**

[59] Watermeyer J made the following statement in *Moolman v Moolman**[3]*** which has been relied upon**[4]**:

> "*The practical rule adopted seems to be that amendments will always be allowed unless the application to amend is mala fide or unless such amendment would cause an injustice to the other side which cannot be*

compensated by costs, or in other words unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleadings which is sought to be amended was filed."

[60] If the real issue in a case is imperfectly or ambiguously expressed in the pleadings, an amendment designed to place on record the true issues will be allowed.**[5]** The legal position on an amendment introducing a new cause of action has been summed up by Erasmus as follows:

"*The courts have recognised that in many cases it may be convenient to incorporate fresh causes of action in original proceedings. An amendment which introduces a new cause of action will only be allowed if no prejudice is occasioned thereby. There is no objection in principle to a new cause of action or defence being added by way of amendment, even though it has the effect of changing the character of the action and necessitating the reopening of the case for fresh evidence to be led if that is necessary to determine the real issue between the parties. The amendment must be bona fide and if it is, it will be granted, especially where the effect of refusing it would again bring the same parties before the same court on the same issue. If there is a valid cause of action upon the summons the court may allow the plaintiff to add a new cause of action which has accrued or been perfected since the issue of the summons. Except in special or exceptional circumstances, a summons may not be amended so as to include a cause of action not existing at the time of its issue. It has further been held that in terms of its inherent powers the court may grant an amendment of a fatally defective summons so as to cure the defect where such amendment will occasion no prejudice and will prevent the waste of costs.*"**[6]**

[61] Prejudice has been interpreted as follows:

"*Where a party would be no worse of if the amendment was granted with a suitable order as to costs than if his adversary's application or summons was dismissed unamended and the proceedings were commenced afresh, there is no prejudice in granting the amendment: the mere loss of the opportunity of granting time is not in law prejudice or injustice.*"**[7]**

In the result the following order is made:

1. The applicants are granted leave to amend their notice of motion in accordance with their notice of intention to amend, dated 27 May 2020.

2. The applicants are to pay the costs of the application for leave to amend.

3. The applicants' application for an interdict and an order declaring the findings of the Nexus report dated 6 February 2017 to be inaccurate and irrational and thus defamatory of them, is dismissed.

4. The applicants are to pay the costs of the aforesaid application jointly and severally, the one paying the other is absolved

Monteiro and Another v Diedricks (1199/2019) [2021] ZASCA 15 (2 March 2021):

Spoliation- principle affirmed that remedy possessory in nature – order requiring restoration of possession must be capable of being carried into effect – high court having ordered party not in possession of spoliated property to restore possession thereof to despoiled party – whether agent of company a co-spoliator - order set aside as not capable of being carried into effect.

The Supreme Court of Appeal (the SCA) upheld an appeal against an order by the Gauteng Division of the High Court, ordering the appellants to restore possession of a BMW motor vehicle to the respondent.

In August 2019 the respondent, Diedericks, delivered a BMW motor vehicle to Autoglen Motors (Pty) Ltd (Autoglen) for routine maintenance. Street Talk Trading 178 (Pty) Ltd (Street talk Trading), the registered owner of the vehicle received a SMS notification from Autoglen that the vehicle was under maintenance. At the time Street Talk Trading and Diedericks were parties to a vindicatory action brought by Street Talk Trading. Following receipt of the SMS notification Monteiro, the first appellant, as director of Street Talk Trading took steps to ensure that Autoglen delivered the vehicle to Street Talk Trading. Upon discovery of this Diedericks launched a spoliation application against Autoglen. He cited BMW South Africa and Monteiro as respondents, although no spoliation order was sought against them.

Autoglen opposed the relief on the basis that it was not in possession of the vehicle having delivered it to Street Talk Trading. Monteiro opposed the costs order sought on the basis that Street Talk Trading had taken possession of the vehicle and had sold it to a third party.
The high court granted an order requiring Autoglen and Monteiro to restore possession of the motor vehicle.

In a split decision (penned by Goosen AJA with Dambuza and Plasket JJA concurring) the SCA found that the high court had erred in granting a spoliation order against Autoglen when such relief had been abandoned by Diedericks. It further found that the facts established that Monteiro had acted in his capacity as director of Street Talk Trading; that Street Talk trading had taken possession of the vehicle and that it had sold the vehicle. The order compelling Monteiro to restore possession was not capable of being carried into effect since Monteiro was not in possession of the vehicle and could not take steps to intervene in the contract of sale entered into between Street Talk Trading and the third party. The majority accordingly upheld the appeal with costs.

The minority (per Schippers JA with Mabindla-Boqwana AJA concurring) found that both Autoglen and Monteiro were, on the facts disclosed by them, co-spoliators together with Street Talk Trading. It was found that Monteiro had acted deliberately and mala fide to secure possession of the vehicle by Street Talk Trading in order to subvert the vindicatory action to which it was a party. He had thereupon sold the vehicle to a third party. It was found that no evidence was presented by Monteiro to

establish that the sale was bona fide. Nor was evidence presented to establish that an order requiring him to restore possession could not be carried into effect. The minority accepted that the high court order against Autoglen was wrongly granted in the light of such relief having been abandoned.

In a separate judgment concurring with the majority, Plasket JA, took issue with the minority judgment's factual findings. He held that upon the application of the principles by which facts are determined in opposed applications, the averments of Monteiro must be accepted. The effect was that Monteiro was acting as the agent of Street Talk Trading. The effect of the minority judgment, Plasket JA held, was to collapse the distinction between the separate legal personality of Street Talk Trading and its human agents. The failure to join Street Talk Trading, in the circumstances of the case, constituted a fatal non-joinder. Plasket JA also held that essential difficulty faced by Diedericks was that the order requiring Monteiro to restore possession of the vehicle was not capable of being carried into effect.

Democratic Alliance and Others v Mkhwebane and Another (1370/2019) [2021] ZASCA 18 (11 March 2021)

Uniform Rule 35(12) – production of documents to which 'reference is made' in pleadings or affidavits – meaning of – includes reference in annexures – not reference to documents by inference – excludes supposition – document sought must be relevant in relation to issues that might arise – different from relevance to issues that are circumscribed after the close of pleadings or after all affidavits have been filed – onus discussed – document material to timeline in relation to defamatory statements relevant and compellable.

Ms Mkhwebane contended that statements made by the DA were defamatory and that the public understood the statements to mean she was a spy of the State Security Agency. The DA sought the production of certain documents under Rule 35(12) but Ms Mkhwebane and the Protector's Office refused to produce two items. The High Court dismissed the DA's application to compel the production of the documents.
On appeal, **Navsa ADP** discusses Rule 35(12) and the production of documents referred to in annexures; the meaning of "reference"; and the compellability of documents that are not specifically mentioned in affidavits, but which are referred to in annexures to the affidavits.

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

[1] This is an appeal against an order of the Western Cape Division of the High Court, Cape Town, in terms of which an interlocutory application brought by the appellants in terms of rule 30A of the Uniform Rules, to compel the production of documents by the respondents requested under rule 35(12), was dismissed and they were ordered to pay the respondents' costs jointly and severally, the one paying the

other to be absolved. Additionally, the high court ordered the appellants to file an answering affidavit in the main case within 15 days of the order. It is against those two orders that the present appeal, with the leave of the court below, is directed. In the main case the respondents are seeking, on motion, an order directing the appellants to retract defamatory remarks concerning the first respondent made at a press conference and to apologise publicly for their utterances. The detailed background appears hereafter.

[2] On 6 September 2016, the second appellant, Ms Glynnis Breytenbach, acting in her representative capacity as a member of the first appellant, the Democratic Alliance, a political party registered in terms of s 26 of the Electoral Act 73 of 1998 (the DA), conducted a press conference where she published the following media statement of and concerning the first respondent, Advocate Busisiwe Mkhwebane, the Public Protector in our country, appointed to that position in terms of s 184 of the Constitution read with **s 1A** of the **Public Protector Act 23 of 1994**:

National Credit Regulator v Getbucks (Pty) Ltd and Another (140/2020) [2021] ZASCA 28 (26 March 2021)

Validity – Regulation 44 under the National Credit Act 34 of 2005 – invocation of defensive challenge to deregistration proceedings – period allowed for comment on proposed regulation inadequate – promulgation of regulation non-compliant with National Credit Act – appellant not entitled to rely on regulation in proceedings brought to deregister first respondent.

Regulation 44 (the regulation) promulgated under the National Credit Act[1] (the Act) prescribes maximum monthly service fees.[2] These are fees which a credit provider may charge a consumer. The appellant, the National Credit Regulator, (the NCR) claimed that the first respondent, Getbucks (Pty) Ltd, (Getbucks) overcharged fees and was thus non-compliant with the regulation. It accordingly approached the National Credit Tribunal to cancel the registration of Getbucks under the Act. This prompted Getbucks to approach the Gauteng Division of the High Court, Pretoria on application for, primarily, the following relief:

‘1. That it be declared that Regulation 44 of the Regulations GMR489, published in the Government Gazette of 31 May 2006 . . . in terms of the National Credit Act, 34 of 2005 is *ultra vires* and/or void.

2. Declaring that the [NCR] cannot prosecute [Getbucks] in the Tribunal for an alleged contravention of Regulation 44.’

The NCR and the second respondent, the Minister of Trade and Industry, (the Minister) opposed the application.

[2] After hearing argument, the court of first instance, per Davis J, granted the following order:

‘1. It is declared that the First Respondent is barred from prosecuting the Applicant or seeking any relief against it before the National Consumer Tribunal in respect of any alleged contravention of Regulation 44 of the National Regulations GMR 489 published in the Government Gazette of 31 May 2006, prior to its subsequent review and amendment.

2. The Respondents are ordered to pay the Applicant’s costs, including costs of two counsel.’

It is against this order that the NCR appeals, with leave of the court of first instance. The Minister took no part in the appeal.

[3] As appears from the order, the regulation was reviewed and amended prior to the date of judgment. As such, any defects which might have existed at the time no longer attend on the regulation. Since the unamended regulation was operative when the application was brought, it remains relevant as to whether Getbucks is or is not subject to deregistration for non-compliance.

[4] The relevant part of the regulation reads:

‘The maximum monthly service fee, prescribed in terms of section 105(1) of the Act, is R50.’

And that of s 105(1) of the Act, in terms of which the regulation was promulgated, reads:

‘(1) The Minister, after consulting the National Credit Regulator, may prescribe a method for calculating-

. . .

(b) the maximum fees contemplated in this Part,

applicable to each subsector of the consumer credit market, as determined by the Minister.’

[5] The first issue is whether the regulation was promulgated pursuant to s 171 of the Act or under s 11 of Schedule 3 to the Act.**[3]** The significance of this will become apparent below. The NCR contended that it was promulgated under s 171, while Getbucks contended that it was promulgated under s 11. If the court of first instance correctly held that it was promulgated under s 11, the NCR submitted that the period of 30 days required under that section was afforded or, if not, that the shorter period should have been condoned by the court.

South Africa: Western Cape High Court, Cape Town = ZAWCHC:

Technical Systems (Pty) Ltd v RTS Industries and Others (5288/2020) [2021] ZAWCHC 35 (1 March 2021):

RES JUDICATA AND AN EXCEPTION

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

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

The defendants' exception is dismissed.

[1] This is an exception brought by all 5 defendants to the plaintiff's particulars of claim. The claims advanced by the plaintiff fall broadly into 3 categories, namely interdictory relief, damages and contempt of court.

[2] The exception is directed at those pertaining to interdictory relief and damages and is formulated in the following terms:

'*1. In paragraph 12 of its particulars of claim, Plaintiff pleads that during 2014 it instituted application proceedings against the first, third, fourth and fifth defendants under case number 17470/14 for interdictory relief, based upon the misappropriation, by such defendants, of its confidential information concerning the manufacture of auger.*

2. In paragraph 13 of its particulars of claim, Plaintiff pleads that its application as aforesaid was amended to also include relief based on the infringement of copyright in its drawings.

*3. In paragraph 14 of its particulars of claim, Plaintiff pleads that it obtained an order in relation to such application ("**the 2015 Order**") and a copy of such order is annexed to its particulars of claim as "**POC 1**" thereto.*

4. In paragraph 1 of the 2015 Order it is stated that, and in any event, the 2015 Order is in full and final settlement of the aforesaid application and all matters between Plaintiff and Defendants, arising from the issues in dispute in such application.

5. Plaintiff's present claim as set out in, and ex facie*, the particulars of claim is, (except insofar as it relates to allegations of contempt in relation to the 2015 Order and the relief sought in relation to such allegations of contempt) a claim for the same relief on the same grounds and against the same parties as was determined in the application and the 2015 Order.*

6. In the circumstances Plaintiff's present claim (except insofar as it relates to allegations of contempt in relation to the 2015 Order and the relief sought in relation to such allegations of contempt) was finally adjudicated upon by a court of competent jurisdiction and has accordingly been rendered res judicata*.*

WHEREFORE *Defendants plead that Plaintiff's claim against Defendants (except insofar as it relates to allegations of contempt in relation to the 2015 Order and the relief sought in relation to such allegations of contempt) be dismissed with costs, including the costs of two counsel.'*

[3] Nowhere in the exception itself is there any allegation that the particulars of claim ("the pleading") is either vague and embarrassing or lacks averments necessary to sustain an action as required by uniform rule 23(1). No prior notice was given to the plaintiff to remove the cause of complaint as stipulated in the aforementioned sub-rule, and it can therefore be safely accepted that the defendants do not suggest the pleading is vague and embarrassing in any respect.

[4] Also absent is any prayer that the exception be upheld. Instead an order is sought dismissing the plaintiff's claims on the merits (save insofar as they relate to contempt).

[5] In heads of argument filed on behalf of the defendants the issue for determination was formulated as follows:

'*The question for adjudication is whether or not, apparent from the pleadings* [sic]*, the interdictory relief and damages claims set out in Plaintiff's particulars of claim are prohibited on the basis of the principles of res judicata.'*

Stoffberg N.O and Another v Capital Harvest (Pty) Ltd (2130/2021) [2021] ZAWCHC 37 (2 March 2021)

Execution-stay of execution and rule 45a

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

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

[1] On 3 February 2021 I made an order in the following terms in this matter, which came before me in the fast track court in the Third Division:

1. The applicants' non-compliance with the forms and service prescribed in the Uniform Rules of Court is condoned and the application is entertained as a matter of urgency in terms of Rule 6(12).

2. The execution of the writ of execution in respect of moveable property dated 1 September 2020 in case no. 8303/2020 is hereby stayed until 4 August 2021, and the sale in execution pursuant to such writ advertised to take place at 10h00 on 3 February 2021 is hereby cancelled.

3. The applicants are ordered to pay the respondent's costs of suit, including the wasted costs incurred up to and including 3 February 2021 in respect of the aborted execution of the writ of execution.

4. Written reasons for this Order will be handed down in due course.

As adumbrated in paragraph 4 of the order, these are my reasons for making it. Their provision was unfortunately delayed because the court file was detained for more than three weeks by the typists responsible for typing up the court's orders. The file was returned to my chambers only on 24 February, and the length of the interval since I had last dealt with it meant that I had to take time to refresh myself on the facts.

[2] The applicants, who are the surviving trustees of the Keert de Koe Trust ('the Trust'), applied as a matter of urgency to stay the sale in execution of a herd of dairy cows and certain farming equipment. The sale was advertised to take place at 10h00 on 3 February 2021. The application to cancel the sale and stay the execution of the writ of execution was brought immediately before the auction proceedings were due to commence. This was because, in the circumstances I shall describe presently, it was only appreciated at a very late stage that the respondent would not agree to defer execution. It was therefore necessary for me to issue an order that was telephonically conveyed to the sheriff conducting the sale in execution directing that the auction not proceed until the application was determined later in the morning.

[3] The Trust, which conducts a dairy farming business, is a judgment debtor of the respondent. The judgment was obtained by reason of the Trust's failure to redeem two loans to it by the respondent. There had been a long history of abortive arrangements between the parties to obtain the repayment of the loans before the respondent eventually took judgment against the Trust and proceeded to execute it. It was clear that the respondent had endeavoured to be as accommodating as a reasonably possible of the Trust's business difficulties, but that it had run out of patience.

Divine Inspiration Trading 205 (Pty) Ltd v Gordon and Others (22455/2019) [2021] ZAWCHC 38 (3 March 2021)

Subpoenas *duces tecum*; Rules 35 and 38- medical records

Ms Gordon claimed damages as a result of injuries sustained when she visited the applicants (Divine Inspiration and Alphen Farm). Applicants seek an order against two doctors directing them to provide all medical reports and x-rays held by them for Ms Gordon.
Hockey AJ discusses subpoenas *duces tecum*; Rules 35 and 38; doctors' ethical duties prohibiting disclosure of medical information without the consent of their patient; the National Health Act 61 of 2003; the Protection of Personal Information Act 4 of 2013; the right to dignity and privacy; and the disclosure of documents for litigation.
The two doctors are ordered to file all the medical records in relation to Ms Gordon.

[1] This is an application wherein the applicants seek an order against the second and third respondents directing them to provide the applicants and this court with all medical records, reports and x-rays ("the medical records") held by them in relation to the first respondent.

[2] The applicants require the medical records for purposes of action proceedings ("the main action") wherein the first respondent, as the plaintiff, claims damages from the applicants (the defendants in the main action) as a result of injuries sustained by her in an accident when she visited the premises of the applicants on 2 October 2015.

[3] The second and third respondents are medical practitioners, namely a general practitioner and a psychiatrist, respectively. Both of them had treated the first respondent for certain medical conditions.

[4] The second and third respondents are restricted from disclosing the medical records of the applicant by virtue of section 14 of the National Health Act, 61 of 2003 ("the NHA"), but may do so in terms of subsection (2)(b) when "*a court order or any law requires that disclosure"*.

[5] The second and third respondents do not oppose the relief sought by the applicants, but the first respondent does so on the grounds that (a) the medical records are irrelevant to the dispute between the parties in the action proceedings, (b) the discovery of the medical records would infringe on her right to dignity and privacy, and (c) the disclosure of the medical record would impinge on her rights under the Protection of Personal Information Act, 4 of 2013 ("POPI").

Ditmar and Others v Lotter NO and Others (5296 / 2020) [2021] ZAWCHC 41 (5 March 2021)

Costs-security for costs- principles outlined

[1] This is an opposed application for security for costs at the instance of the third respondent. The third respondent seeks security for costs in the sum of R500 000,00. This security is to be posted by the applicants by payment into the third respondent's attorneys' trust account. In the alternative, an order is sought that the amount and the form of the security be determined by the registrar of the court. The parties shall be referred to as cited in the main application.

[2] The applicants have launched an application to have the last two wills of their late uncle declared to be invalid and set aside. The applicants all reside overseas. The deceased resided in South Africa and his estate is accordingly located in South Africa. Neither the first respondent**[4]**, nor the fourth respondent**[5]**, oppose the relief sought in the main application. Furthermore, the applicants seek an order that the deceased's will dated the 14th of December 2011, be revived.

[3] The applicants have also cited the three beneficiaries connected with the disputed wills**[6]**, all of whom also reside in South Africa. The main application is opposed by the third respondent. It is so that the applicants are foreign litigants.**[7]** The third respondent is a local litigant.**[8]** The applicants take the view that the third respondent is seeking to gain an unfair advantage in his quest for security for costs and that his application is not bona fide.

Factual Matrix

[4] The third respondent was previously a financial advisor employed by Sanlam**[9]** and whilst in that capacity, he provided financial assistance to the deceased from time to time. To this end, the third respondent assisted the deceased in the drafting of the disputed wills. The third respondent is also recorded as being the intermediary in connection with the wills.

[5] The deceased executed the disputed wills during 2017. In terms of the disputed wills the deceased left (80%) of his shareholding in and to Chester Surrey Investments (Pty) Limited to the third respondent. This represents a value of more than R8,7 million.

In the result, the following order is granted:

1. That the applicants shall not be entitled to receive any benefit from the estate of the late *Jan Hendrik Adolphe Zipes* (Estate Number 018934/2019), until such time as any and all costs award(s), (if any), granted in favour of the third respondent in the course of the main application, as taxed or agreed, have been paid on the applicants' behalf by the executrix, being the first respondent herein.

2. That the first respondent is directed not to distribute any benefit from the said estate to the applicants until such time as any and all costs award(s), (if any), granted in favour of the third respondent in the course of the main application, as taxed or agreed, have been paid on the applicants' behalf and the first respondent is directed to pay any such costs award as a first charge against any benefit due to the applicants.

3. That the first respondent shall proceed to advertise the estate in order to ascertain if any other creditors seek to lodge claims against the estate but shall otherwise desist from finally winding up the estate pending the outcome of the main application.

4. That in the event of it appearing to the third respondent that creditors have lodged claims against the estate that will have the effect of diminishing the net value of the estate to such a degree that the share of the residue due to the applicants will be insufficient to cover any costs award that may be granted in his favour, the third respondent shall be entitled to set this application down afresh, duly supplemented as far as may be necessary.

5. That the third respondent shall be liable for the costs of this application for security for costs, on the scale as between attorney and client, as from the 1st of September 2020, including the costs of and incidental to the opposed hearing on the 24th of February 2021.

6. That the costs of and incidental to the application for security for costs, on a scale as between party and party, from the inception of the application, until the last day of August 2020, shall stand over for determination in the main application.

7. That the application for security for costs is postponed *sine die*.

8. That a copy of this order shall be served on the first respondent forthwith.

Cassiem and Another v Government Employees Medical Scheme (9619 / 2020) [2021] ZAWCHC 44 (15 March 2021)

Application when facts will likely be disputed; res judicata and issue estoppel; lis pendens; no cause of action; urgency and costs, res judicata and issue estoppel

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

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

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

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

[1] On the 15th of August 2019, the first and second applicants**[1]**, launched an application**[2]**, in which they, inter alia, on an urgent basis, sought interim relief in the form of a money judgment**[3]**, against the respondent.**[4]** The first application was opposed and was determined on the 23rd of August 2019.

[2] The first application was dismissed on the merits and also for want of urgency.**[5]** Some of the relevant findings in the first application, were the following; that the application's purportedly altruistic purpose was without merit**;** that it was an application brought for payment of money to the applicants' own benefit; that it had been brought in respect of a disputed claim forming the subject matter of a pending action and therefore it must have been reasonably anticipated that the applicants' claim would be disputed; that the application had no prospect of success and that the relief was not urgent.

[3] Almost a year after the dismissal of the first application**[6]**, the applicants launched the present application**[7]**, in which they similarly seek a money judgment**[8]**, also by way of an order for relief, pendente lite. The interim relief now sought is in all material respects a mirror image of the core relief for a money judgment which had been sought in the first application. The first application was also not the first instance in which the same relief was sought. Prior to launching the second application, the applicants sought direct access to the Constitutional Court and same was denied by no less than ten judges of the Constitutional Court.**[9]**

[4] The common thread that permeated through these various proceedings, is the contention by the applicants that the first applicant is entitled to payment in full,

from the respondent of her claims for dialysis services rendered to members of the respondent and for equipment hire connected therewith, irrespective of what she charges.**[10]** This is the core dispute between the parties.**[11]** This is precisely the very dispute which is the issue that needs to be determined in the action proceedings.

The action proceedings

[5] On the 15th March 2019, the respondent instituted action against the first applicant in which it sought repayment by the first applicant of R1 181 558,80. The respondent's case is that this sum had been paid in error to the first applicant as a consequence of inflated claims for services having been submitted by the first applicant to the respondent.

Mulaudzi v Powell (494/2020) [2021] ZAWCHC 57 (26 March 2021):

Discovery documents referred to- defamation

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

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

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

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

[1] Before me for determination are two opposed applications to compel further discovery. Both these applications are at the instance of the defendant. The two applications are interlocutory to a defamation action that the plaintiff has instituted against the defendant. The parties shall, for the purposes of clarity and convenience, be referred to as the plaintiff and the defendant.

[2] The plaintiff has sued the defendant for defamation in that it is alleged that the defendant posted a 'tweet' to the effect that the plaintiff had gone rogue. The plaintiff was at the time the Chief Executive Officer**[1]**, of the Estate Agency Affairs Board.**[2]** The defendant at that time was a parliamentary member. The claim is for damages in the sum of R1,5 million. The defendant admits to posting the tweet but avers that same is not defamatory of the plaintiff.

[3] In the alternative, it is pleaded that the content of the tweet was in the public benefit, was true, was fair and pertained to a matter of public interest. In the further alternative, it is pleaded that the tweet was not published with malice and is the subject of quasi-privilege because it was published as part of the defendant's duty to alert members of the public in connection with an alleged abuse of power. As a final

alternative, a shield is put up to the effect that the tweet was reasonable because the defendant made reasonable enquiries as to the veracity of the content of the tweet and its publication was accordingly equitable in the circumstances.

[4] The defendant in the first application to compel**[3]**, seeks an order requiring the discovery of the documents specified in the defendant's first discovery notice dated the 30th of July 2020.**[4]** Whilst, in the second application to compel**[5]**, the defendant seeks an order requiring the discovery of the documents specified in the defendant's second notice in terms of rule 35(3)**[6]**, together with compliance of the defendant's notice in terms of rule 35(12) dated the 13th of October 2020

Department of Environmental Affairs, Forestry and Fisheries v B Xulu & Partners Incorporated and Others (6189/2019) [2021] ZAWCHC 59 (30 March 2021)

Leave to appeal- **Barnabas Xulu's** law firm has failed in its application for leave to appeal a judgment that it must pay back R20m to the department of agriculture, forestry and fisheries. ... In its application for leave to appeal, the law firm and **Xulu** said Rogers erred in finding that the service level agreement was invalid.

[1] The matters requiring determination at this stage are an application for my recusal by Mr Barnabas Xulu, the fifth respondent in these proceedings, and B Xulu & Partners Incorporated ('BXI'), the first respondent - a law firm at which Mr Xulu is a practising attorney, and, in the event of that application being refused, an application for leave to appeal against an order granted by me on 27 November 2020 confirming an anti-dissipation order made by Smith J, provisionally albeit with immediate interim effect, on 12 and 15 October 2020.

[2] The anti-dissipation order is an interlocutory injunction in proceedings currently pending against Mr Xulu ('the principal proceedings') in which he has been required to show cause why he should not be declared jointly and severally liable with BXI to pay R20 242 472.90 to the Departments of Agriculture, Forestry and Fisheries and of Environmental Affairs, Forestry and Fisheries ('the applicants'). The anti-dissipation order was sought on the basis of evidence that Mr Xulu was disposing of assets in order to frustrate the ability of the applicants to execute any judgment they might obtain against him in the principal proceedings. As is usually the case in such matters, the application for the anti-dissipation order was brought without notice to the respondents.

[3] The matters up for determination now can properly be understood only with an adequate appreciation of the context in which they have arisen. For that reason, a quite extensive rehearsal of the historical background is necessary.

The historical context

[4] The order made by Smith J on 12 October 2020 provided as follows insofar as currently material:

'4. A rule *nisi* is issued calling upon all interested parties to show cause, on 25 November 2020 or as determined otherwise by this Court, why the following order should not be made in the following terms:

4.1 That pending the final determination of the rule *nisi* proceedings at which the Fifth Respondent is called on to show cause why he should not be ordered to pay the amount of R20 242 472,90 jointly and severally with the First Respondent, that:

4.1.1 The Second, Third and Fifth respondents, their agents and representatives ... are restrained and interdicted from removing or transferring funds, or in any manner utilising, dissipating transferring, withdrawing, or reducing the monies held in any bank accounts in the name of the Second, Third and Fifth Respondents, including to the extent applicable, all monies received or receivable in future, save with leave from this Court, on notice to the Second Applicant;

4.1.2 The Fourth and Sixth respondents are interdicted and restrained from clearing the transfer or withdrawal of any monies or assets from any bank and/or investment accounts or otherwise, including but not limited to the aforestated in relation to the Second, Third and Fifth respondents, or in relation to any bank account in the name of any other entity over which the Fifth Respondent exercises any control;

4.1.3 The Second and Fifth Respondents, its agents and representatives are forthwith restrained and interdicted from alienating or transferring out of the Second Respondent's name, or in any way encumbering, mortgaging, dissipating or reducing the value of:

4.1.3.1 The property located at Erf 1521 FU Portion Number 667 in the Municipality of KwaDukuza, KwaZulu-Natal, held by T357/2018 commonly referred to as 35 Sheffield Beach Estate; Sheffield Beach, Ballito, KwaZulu-Natal ("the Sheffield property"); and

4.1.3.2 Removing any movable property from the Sheffield property.

4.1.4 The Sheriff where the property is located is directed immediately to access the aforementioned Sheffield property, take a full inventory of the contents of the property and to secure the contents of the Sheffield property;

4.1.5 the Seventh Respondent is ordered to register the interdict set out in paragraph 4.1.3 against the Sheffield property's title deeds.

4.1.6 The Sheriff, Cape Town is directed immediately to take possession of the Porsche 911 Carrera GTS registration number CA 3302 for safekeeping.

4.1.7 the Fourth and Sixth respondents are directed to provide to the Second Applicant bank statements relating to all accounts held by the Second, Third and Fifth Respondents, or in relation to any bank account in the name of any other entity over which the Fifth Respondent exercised or exercises any control, if any, for the period 1 July 2019 to date.

4.2 ...

4.3 That paragraphs 4.1.1 -4.1.6 shall operate as an interim order with immediate effect pending the return date of the rule *nisi*.

Orders

[84] The following orders are made:

1. The application for recusal by the first and fifth respondents (i.e B Xulu and Partners Incorporated and Barnabas Xulu) is refused with costs, including the fees of two counsel and the wasted costs incurred by the second applicant as a result of the postponements on 1 February, 4 and 5 March 2021.

2. The application for leave to appeal against the orders made in the anti-dissipation application on 25 and 27 November 2020 is refused with costs, including the fees of two counsel.

3. B Xulu and Partners Incorporated and Barnabas Xulu shall be jointly and severally liable for the costs awarded in terms of paragraph 1 and the applicants for leave to appeal shall be jointly and severally liable to pay the costs awarded in terms of paragraph 2.

A.G. BINNS-WARD

ABSA BANK LTD v MARE AND OTHERS 2021 (2) SA 151 (GP)

Practice — Service — Delivery of process to chosen domicilium citandi — Summons affixed to grass — Uniform Rules of Court, rule 4(1)*(a)*(iv).

In this matter applicant bank lent first respondent a sum and secured it with a mortgage bond over a property first respondent owned (see [4]). First respondent was to repay the loan sum in instalments (see [4]).
Later, however, she fell in arrears with her payments, and the bank served a s 129 notice on her at the property, which was her chosen domicilium citandi (see the National Credit Act 34 of 2005 and [5]). The sheriff effected this service by attaching this notice, so his return said, to the property's gate (see [5]). When there was no response, the bank served summons. In this instance the service was effected by fixing the summons to the property's grass (see [6]). (The property itself was a smallholding with a residence on it in which first respondent lived (see [17] and [27]).)

No notice of intention to defend was forthcoming, and the bank obtained default judgment, first respondent being ordered to pay the loan sum, interest and costs, and the property being declared specially executable (see [7]).
Later it was attached, sold in execution, and registered in the name of the purchaser, second respondent, and the proceeds were deposited in an account of the bank, and not credited to first respondent's loan debt (see [7] – [8]).
In time the purchaser attended at the property, and this, said first respondent, was the first moment that she came to be aware of all that had occurred (see [9]). She thereupon proceeded for rescission under rule 42, with the court rescinding the default judgment, voiding the attachment and sale, and directing the registrar of deeds, fourth respondent, to re-register the property in her name (see [2] and [10]).
Appellant then sought leave to appeal, which was refused in respect of the rescission, but granted in respect of the voiding of the attachment, sale and transfer and the direction to re-register the property in first respondent's name (see [3]).
On appeal the full bench considered authority on the situation of a judgment that was void ab initio, subsequent sale in execution, and transfer of the property (see [13]). It allowed for vindication of the property, on the basis that the sheriff would not have the power in such an instance to sell and transfer (see [14]).
This raised when a default judgment would be void ab initio, which would occur in the scenario where there was no power to grant it (see [15]). Such could be where service was not in accordance with the rules (see [15]).
Here, on first respondent's evidence, which was not refuted, the property had no gate, so there could not, plainly, have been service of the s 129 notice by attachment thereto (see [20] – [21]).
The further issue was whether leaving the summons on the grass was 'service' contemplated by rule 4(1)*(a)*(iv) (see [21]). It allows for service where 'the person so to be served has chosen a domicilium citandi, by delivering or leaving a copy thereof at the domicilium so chosen' (see [24]). A further requisite though for proper 'delivery' was that the mode of delivery should be one that in the ordinary course would bring the process to the attention of its intended recipient (see [26]). This had not been the case in leaving the summons on the grass and accordingly there had not been service under rule 4(1)*(a)*(iv) (see [27]). (Proper delivery would have been achieved by handing the summons to first respondent personally, by giving it to her employee, slipping it under or fixing it to the front door, or depositing it in the post-box (see [27]).)
Absent proper service, the judgment was void ab initio, and the subsequent sale and transfer of the property were invalid (see [28]). It was thus open to first respondent to vindicate it (see [28]).
As for the order of reinstatement of ownership, this should stand, as it had not been opposed by second respondent and it left it open to him to proceed for his losses (see [30]).
Appeal dismissed

SCOTT AND OTHERS v SCOTT AND ANOTHER 2021 (2) SA 274 (KZD)

Curator — Curator ad litem — Application to appoint — Standing — Distinction between rules 57(2)*(e)* and 57(3)*(b)* — Burden of proof — Degree of unsoundness of mind — Peremptory nature of rules 57(1) – (3) — Waiver of requirement of doctors'

reports — Impact of Bill of Rights — Potential for rule's abuse — Compulsion to submit to medical examination — Uniform Rules of Court, rule 57.

Applicants were the son, three daughters and brother of first respondent, and second respondent was first respondent's wife. Applicants sought appointment of a *curator ad litem* under Uniform Rule 57, an order compelling first respondent to undergo medical examinations for purposes of the curator ad litem's report, and an interdict on second respondent bringing first respondent home from hospital to a place under her control (see [5]).
The court, in dismissing the application (see [66] – [67]), considered:

- The standing requirement of rule 57(2)*(a)* (see [30], [49]).
- The requirement of rule 57(2)*(c)* (facts showing unsoundness of mind), and its separateness from the requirement of rule 57(3)*(b)* (affidavits by doctors on mental condition) (see [32]).
- The burden of proof in an application for a *curator ad litem* (see [37] – [38], [60]).
- The degree of unsoundness of mind required (see [62]).
- The peremptory nature of rule 57(1), (2) and (3)'s requisites (see [48], [61]).
- Whether the requirement of doctors' reports (rule 57(3)*(b)*) could be waived (rule 57(4)) where the patient instructed his doctors not to disclose his information to the applicants for a curator ad litem (see [39]).
- The impact of the Bill of Rights on the rule's interpretation (see [63]).
- The potential for the rule's abuse (see [64]).
- When an individual could be compelled, for purposes of a *curator ad litem* reporting to the court, to submit to a medical examination (see [5], [33] – [34], [65]).

END –FOR-NOW