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State litigation-condonation of his non-compliance with Section 3(2), read with Section 4(1) and (2), of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002

[1] The Applicant makes application for condonation of his non-compliance with Section 3(2), read with Section 4(1) and (2), of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002. The application involves only the Second Defendant in the action instituted by the Applicant in this Division, and the Second Defendant is therefore cited as the only Respondent in the proceedings.

[2] Section 3(1) of the Act provides that no legal proceedings for the recovery of a debt may be instituted against an organ of state unless the creditor has given the organ of state in question notice in writing of his or her or its intention to institutes the legal proceedings in question. Section 3(2)(a) requires such notice to be served on the organ of state in accordance with Section 4(1) within six months from the date on which the debt became due. Section 4(1) provides that the notice must be served on an organ of state by delivering it by hand or by sending it by certified mail or, subject to subsection (2) by sending it by electronic mail or by transmitting it by facsimile. In terms of Section 4(1)(a) the notice sent by electronic mail in cases like the present, must be sent to the Head of the Department concerned.

[3] In terms of Section 4(2)(a) the creditor must take all reasonable steps to ensure that the notice has been received by the officer or person to whom it was sent by electronic mail or transmitted by facsimile. Section 4(2)(b) further requires the creditor, where the notice was sent by electronic mail or transmitted by facsimile, to deliver by hand or send by certified mail a certified copy of that notice within seven days after the date upon which that notice was so sent or transmitted, to the relevant officer or person, in this case the Head of the Department. The sub-section also

requires such certified copy to be accompanied by an affidavit by the creditor or the person who sent or transmitted the notice, indicating inter alia, the date and the time at which, and the electronic mail address or facsimile number to which the notice was sent or transmitted.

[4] In his founding affidavit the Applicant confirms in general the facts that are set out in his pleadings in the action. On or about 15 December 2010, he was involved in a car accident. On or about 11 February 2011, he was admitted to a hospital in Mpumalanga as an out-patient with complaints of severe neck pain, headaches and a decreased range of motion of his neck. He underwent a MRI scan, and was later informed that the scan indicated stenosis at levels L4/5 and L3/4. He was discharged on oral analgesic medication.

[5] Afterwards, and still suffering from the complaints mentioned above, he was examined by dr. Nicholas Kruger on 5 May 2011 at Groote Schuur Hospital in Cape Town. It was found that his C2-vertebra was in fact fractured and had displaced. There was also an associated spinal cord injury. Dr Kruger admitted him to the hospital on 30 May 2011 for skeletal traction and surgical reduction and fixation of the C-vertebra fracture, whereafter he was discharged on 23 June 2011. Dr Kruger advised him that there may have been negligence on the part of both Defendants in their diagnosis and/or treatment of his spinal injury. It needs mentioning here that, after the accident, the Applicant was first admitted to a Free State hospital where the fracture of the vertebra in question was also not detected

[18] In the premises, the Applicant has succeeded in satisfying this court of the three elements required by Section 3(4)(b). The following order is made:

1. The Applicant's non-compliance with Section 3(2), read with Section 4(1) and (2) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002, is condoned.

2. The Applicant is granted leave to proceed with his action against the Second Defendant.

3. There is no order as to costs.

Reynolds N.O v Smith (22726/2017) [2021] ZAWCHC 87 (7 May 2021):

Unifrom rule 35 or PAJA- applicant does not require the documentation and information sought in this application to assist him in the exercise or protection of what he considers to be the right of the deceased estate, namely the accrual claim.

[1] This is an application by the executor of the deceased estate of the late Mareze Smith ("the deceased") to compel the respondent to furnish wide-ranging information and documentation purportedly for the purpose of determining whether the deceased estate has an accrual claim against the respondent (or his estate) and, if so, the amount thereof, although in seeking this relief the applicant does not rely on PAIA (it does not apply to the respondent in his personal capacity, but it does apply to the various entities in respect of which information and documentation is also sought) or uniform

rule 35, nor any specific provision in the Administration of Estates Act or the Matrimonial Property Act ("MPA").

[2] The deceased and respondent were married to each other out of community of property by antenuptial contract incorporating the accrual system as provided in Chapter 1 of the MPA at the time of her death on 25 January 2010, although they were in the process of divorcing and had already concluded a deed of settlement (on 7 December 2009) in contemplation thereof. It is correctly not suggested by either party that the deed of settlement remains binding. It is also not in dispute that there has been no accrual in the estate of the deceased.

[3] Upon his appointment as executor on 23 April 2010 the applicant assumed the duty to recover all assets of the deceased's estate. He alleges that during its winding-up it appeared that her estate '*may have an accrual claim'* against the respondent.

[4] On 8 July 2010 the respondent was thus requested to provide valuations at date of the deceased's death of all properties registered in his name or any entity in which he held an interest, as well as his motor vehicles, furniture and any other assets (save for those excluded in the antenuptial contract), together with details of his liabilities and proof thereof. On 18 November 2010 the respondent's erstwhile attorney provided a detailed schedule reflecting these dated 31 August 2008 ("particulars schedule"), together with various supporting documents and a letter from the respondent's auditor pertaining to his 33% shareholding in a property owning company, Clifton B-Three (Pty) Ltd. The respondent also provided details of claims which he allegedly had against the deceased estate totalling R1.43 million.

I agree with *Mr Bremridge SC* who appeared with *Mr De Vries* for the respondent, that this is nothing more than an attempt to obtain pre-litigation discovery and/or impermissible pre-litigation responses to interrogatories. In a comparable context, dealing with an application in terms of PAIA, the Supreme Court of Appeal in *Unitas Hospital v Van Wyk and Another***[12]** approved the following formulation articulated in *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others*:**[13]**

> '*Information can only be required for the exercise or protection of a right if it will be of assistance in the exercise or protection of the right. It follows that, in order to make out a case for access to information… an applicant has to state what the right is that he wishes to exercise or protect, what the information is which is required, and how that information would assist him in exercising or protecting that right.'*

[40] On the established facts the applicant does not require the documentation and information sought in this application to assist him in the exercise or protection of what he considers to be the right of the deceased estate, namely the accrual claim. All that he requires, at least allegedly, is documentation

and/or information to establish the full extent of the quantum of that claim. The appropriate manner in which to procure these is by way of discovery and/or trial particulars once action has been instituted. It follows that, in my view, the application in any event cannot succeed.

[41] As far as costs are concerned, this is a matter of considerable importance to the respondent, who has had this sword of Damocles hanging over his head for the past 11 years. This factor, taken together with the manner in which the application was brought, in my view justified the employment of two counsel.

In the result the following order is made:

1. The application is dismissed.

2. The applicant, in his representative capacity, shall bear the costs of this application on the scale as between party and party as taxed or agreed, including the costs of two counsel where employed as well as any reserved costs orders.

Department of Environmental Affairs, Forestry and Fisheries v B Xulu & Partners Incorporated and Others (6189/2019) [2021] ZAWCHC 83 (4 May 2021)

Attorney-in contempt with court orders

Pangarker AJ grants orders declaring B Xulu and Partners Inc in contempt of orders by Rogers J and Smith J. It is further declared that Mr Barnabas Xulu in his capacity as director of the firm and personally is in contempt of orders by Smith J and Binns-Ward J.
A fine of R30,000 is imposed and Mr Zulu is ordered to surrender the Porsche 911 Carrera to the sheriff. Mr Xulu is sentenced to 30 days' imprisonment, wholly suspended for three years.

"The evidence, which is undisputed, paints a picture of a law firm and its director who have flagrantly, deliberately and defiantly disrespected and refused to comply with Court orders granted by the various Judges of the Western Cape High Court." Para [66].

1. The second applicant, the Department of Environmental Affairs, Forestry and Fisheries **(DEA)**, seeks to hold the first respondent, B Xulu and Partners Incorporated **(BXI)**, an incorporated firm of attorneys, and the fifth respondent, Barnabas Xulu **(Mr Xulu)**, its principal member and director, in contempt of six civil Court orders granted by the Western Cape High Court. The application came before me in the urgent fast lane Court on 25 February 2021 pursuant

to an order granted by Binns-Ward J on 27 November 2020, that the second applicant would be entitled to approach the urgent duty Judge for an appropriate order**[1]**. No relief is sought against the other respondents. I refer to Mr Xulu and BXI at various instances in the judgment as "*the respondents".*

2. The orders which form the subject matter of the application were granted by Judges Rogers, Smith and Binns-Ward during 2019 and 2020. Judge Smith is a Judge of the Eastern Cape Division of the High Court and was appointed by the Minister of Justice to act in the Western Cape High Court Division during 2020.

3. The relief sought in the Notice of Motion reads as follows:

1. Dispensing with the forms and service provided for in the Uniform Rules of Court and directing that the application be heard on an urgent basis in terms of Rule 6 (12)(a).

2. Declaring the First Respondent, B Xulu and Partners Inc., and the Fifth Respondent, Mr Barnabas Xulu, in his capacity as the sole director of the First Respondent and in his personal capacity to be in contempt of the following orders granted by this Honourable Court under the above case number:

2.1 Paragraphs 3.2.1 and 3.2.3 of the order granted by Rogers J on 21 August 2019.

*2.2 Paragraph 144 (e) of the order of 30 January 2020**[2]**.*

2.3` Paragraphs 1 and 3 of the order granted by Smith J on 5 October 2020.

2.4 Paragraph 4.1.6 of the order granted by Smith J on 12 October 2020 order as amended.

2.5 Paragraphs 6 and 7 of the order granted by Binns-Ward J on 25 November 2020.

2.6 Paragraph 4 of the order granted by Binns-Ward J on 27 November 2020.

3. Imposing a fine, jointly and severally, on the First and Fifth Respondents as deemed appropriate by this Honourable Court.

4. Imposing a period of imprisonment, such as is deemed appropriate by this Honourable Court, on Fifth Respondent, Mr Barnabas Xulu, suspended on condition that Mr Barnabas Xulu, surrenders his Porsche 911 Carrera with registration [….] ("the Porsche") to the Sheriff, Cape

Town, for safekeeping pending the finalisation of the matters remaining under case number 6189/19 (including appeals) no later than 17h00 hours on the date of the hearing of this application.

5. *Directing that unless and until the First and Fifth Respondents have purged their contempt, that they are precluded from launching any further applications against the applicants in relation to any matters involving, relating to or arising from the disputes and judgements under case number 6189/19**[3]**.*

6. *Directing the First and Fifth Respondents to pay the costs of this application on an attorney and client scale, and that until such costs are paid and that until such costs are paid the First and Fifth Respondents are interdicted from launching any further urgent interlocutory applications against the Applicants.*

7. *Granting the applicants such further and/or alternative relief as this Honourable Court may deem fit.*

Bobroff and Another v National Director of Public Prosecutions (194/20) [2021] ZASCA 56 (3 May 2021)

Attorney-appealing against warrant-dismissed

Ronald and Darren Bobroff were prominent personal injury lawyers when they left for Australia before arrest warrants could be executed. The warrants followed allegations of financial impropriety and inflated fees.

Eksteen AJA considers the appeal from the High Court and discusses the Prevention of Organised Crime Act 121 of 1998 and the power of High Court to make a forfeiture order in respect of property situated in a foreign country and belonging to persons not presently resident in South Africa; the International Co-operation in Criminal Matters Act 75 of 1996; and what constitutes the proceeds of unlawful activity.

The appeal is dismissed, save for two adjustments to the High Court order. See para [60].

See end of para [27]:

"The Bobroff's overreaching, coupled with their decision to retain their gains and investing or reinvesting same for their own benefit, after 2014, knowing that they were not entitled to the money, constituted theft."

And para [59] at page 31:

" . . . Ms van Wyk alluded to a standard instruction that all the files should be debited with R15 000 in lieu of postage and petties.

. . . on 6 000 files alone, that an amount of R90 million would have been illegitimately charged . . . "

[1] Two issues arise in this appeal. First, whether the High Court, Pretoria (the high court) had jurisdiction to make a forfeiture order in terms of s 50(1)*(b)* of the Prevention of Organised Crime Act 121 of 1998 (POCA) in respect of property situated outside the territory of South Africa and belonging to persons who are presently resident in Australia? If so, second, whether the respondent, the National Director of Public Prosecutions (NDPP), had established that the property forfeited was 'proceeds of unlawful activities' as defined in the POCA.

[2] On 28 July 2017 the high court granted an ex parte application for a preservation order, in terms of s 38 of the POCA, in respect of credit balances and interest accrued and held in two accounts in Israel in the name of the first appellant, Mr Ronald Bobroff (Ronald Bobroff) at the Bank Discount (BD), and the second appellant, Mr Darren Bobroff (Darren Bobroff) at the Bank Mizrahi Tefahot (BMT), respectively.**[1]** The NDPP contended that the credits held in these accounts were proceeds of unlawful activities as defined in the POCA. Both Ronald Bobroff and Darren Bobroff (the Bobroffs), who were temporarily resident in Australia, entered an appearance, in terms of s 39 of the POCA, to oppose the granting of a forfeiture order. They challenged the jurisdiction of the high court and argued that the NDPP had failed to establish that the credit balances constituted proceeds of unlawful activities. An application for forfeiture followed on 20 August 2019, and the high court granted an order declaring the credit balances and interest forfeit to the State, in terms of s 50 of the POCA. The appeal to this Court against the forfeiture order is with leave of the high court.

[3] The Bobroffs had been prominent attorneys practising as directors of the firm Ronald Bobroff and Partners Incorporated (the firm) in Johannesburg. Ronald Bobroff had been a member of the council of the Law Society for the Northern Provinces (the law society) for many years and was a chairperson of the Personal Injury Lawyers Association in South Africa. Darren Bobroff, Ronald Bobroff's son, was admitted as an attorney in South Africa in 2004 and became a director in the firm in 2006. The firm practiced predominantly in the field of personal injury litigation, often acting on contingency. In 2010, allegations began to surface that the firm had, over the preceding three years, charged clients inflated fees exceeding the maximum permitted in terms of the Contingency Fees Act 66 of 1997 (the CFA). During 2011, a former client of the firm filed a complaint against Darren Bobroff with the law society alleging that he had been charged inflated fees. The law society commenced a disciplinary enquiry against the Bobroffs in February 2012. The enquiry was protracted and frustrated by the failure of the Bobroffs to co-operate. In the interim, in October 2012, Ms Bernadine van Wyk, a bookkeeper employed by the firm, deposed to an affidavit pursuant to the **Protected Disclosures Act 26 of 2000**, in which she made serious allegations of significant financial impropriety by the Bobroffs. This prompted an investigation by the South African Police Service (SAPS). Eventually, on 3 March 2016, the law society filed an application to strike the Bobroffs from the roll of legal practitioners.**[2]** The application, which eventually led to the disbarment of the Bobroffs, was heard on 14 March 2016. This was the same day that the SAPS, as a result of their investigation, issued warrants of arrest for the Bobroffs. However, on 16 March 2016, before the warrants could be executed, Darren Bobroff departed for Australia, and Ronald Bobroff followed on 19 March 2016. Neither has returned since. As a result of their sudden departure, the SAPS caused a Red Notice to be circulated through Interpol.

[4] On 8 May 2017, the state attorney in Israel sent a request for assistance in a criminal matter to the Department of Justice and Constitutional Development in South Africa. The request recorded that the police in Israel were conducting an investigation into suspected crimes of money laundering, which had allegedly been committed by the Bobroffs in Israel. The investigation, it said, had arisen out of a suspicious transaction which had been transmitted by a compliance officer in the BMT on 12 February 2017. The compliance officer had reported that Darren Bobroff, a non-resident of Israel, maintained a BMT account and had given an instruction to transfer USD 3 million from his account at the BMT to an account in Australia. The transaction had appeared suspicious and the BMT accordingly declined to execute the transfer. Darren Bobroff responded with a request to withdraw the entire credit of approximately USD 7 million, which he held in the BMT account at the time. This action prompted the compliance officer to contact the Israel National Police for instructions.

Voigt NO and Another v EGH IP (Pty) Ltd and Others (1076/2021) [2021] ZAECGHC 40 (4 May 2021):

Urgent applications-requirements-application struck from roll

The liquidators of a company sought the return of certain trademarks, the transfer of which allegedly amounted to voidable dispositions. A demand to reverse the transaction was not acceded to on 24 hours notices to do so. An application was launched as a matter of urgency on a Certificate of Urgency and a consequent directive from a Judge.

Lowe J discusses urgent applications and the explanation (or lack thereof) for the delay in the applicants acting on their attorney's advice to make demand and to bring an urgent application if the demand was not met in 24 hours.

The application is struck from the roll for want of urgency.

[32] . . . Respondents, whilst no doubt working night and day putting up a well-drafted response, nevertheless and understandably complained of prejudice.

[33] It must be accepted that matters factual and legal usually require thought and careful consideration by clients and the legal team. In this matter this was substantially denied Respondents and their legal team for absolutely no good reason, Applicants having afforded themselves a considerable period to consider and draft and having had the luxury thereof.

Undoubtedly the most abused Rule in this Division is Rule 6(12). Far too many attorneys and advocates treat the phrase "which shall as far as practicable be in terms of these rules", in subrule (a) simply pro non scripto. These practitioners then feel at large to select any day of the week and any time of the day (or night) to demand a hearing. This is quite intolerable and is calculated to reduce the good order which is necessary for the dignified functioning of the Courts to shambles. Frequently one reminds counsel of certain basic matters, which I shall detail presently, only to be met with the answer that they and their attorneys are simply following practices which have arisen in the course of time. [Edited.]

1] In this matter, an application, came before me on 29 April 2021.

[2] It was launched and pursued as a matter of urgency on a Certificate of Urgency by Mr Strathern SC for Applicants, and a consequent directive from a Judge.

[3] The certificate itself urged that the matter was sufficiently urgent for the Court to dispense with the usual requirements of the Rules, on shortened time periods, in terms of Rule 6(12), but did not set out the degree of urgency or suggested timetable.

[4] The Directive given by Mnqandi AJ on 14 April 2021 reads as follows:

"Having considered the certificate of urgency placed before me in the abovementioned matter, I hereby issue the following direction(s) with regard to the hearing and further conduct of the matter:

1. The founding papers shall be issued by 16h00 on 14 April 2021.

2. The respondent shall file a notice to oppose by 14h00 on 16 April 2021 and file answering affidavits if any on or before Wednesday 21 April 2021.

3. Respondents shall file his replying affidavits on or before 12h00 on Monday 26 April 2021 together with their heads of argument.

4. The respondents shall file heads of argument by 10am on 28 April 2021 and the matter to be heard on 29 April 2021 at 9h30. If there is no opposition the matter will be heard in the unopposed roll of 28 April 2021.

Remarks : Matter is sufficiently urgent to be heard as such.

Mnqandi, AJ".

[5] The Notice of Motion adopted these time frames.

[6] It should immediately be said that a directive in such circumstances does not in any way finally dispose of the issue of urgency which is to be determined in due course by the Judge hearing the application on all the relevant facts and circumstances including those put forward by a Respondent in due course.

Vermeulen & Another v Mellet N.O. & 2 others (A142/2020) [2021] ZAFSHC 141 (27 May 2021)

Trust law- may a trust be owner of member's interest in a CC

[1] This is an appeal against the judgment and order of a single judge of this Division. The issue for consideration in this appeal is whether a trust *inter vivos* may be the owner of a member's interest in a close corporation, without complying with the statutory requirements.

[2] The three respondents are the trustees of the BLUCHER MELLET FAMILY TRUST (trust). The first and third respondents were also members of Findaload CC (corporation). They held 60% and 40% member's interest respectively.

[3] The first respondent was desirous to sell his member's interest. The two appellants offered to buy his member's interest. According to the first respondent, he wanted to ensure that payment for the member's interest should be made to the trust and not to him personally. It is for that reason that the parties agreed that his

member's interest would be transferred from him to the trust and that the trust would sell it to the appellants.

[4] The trust and the appellants entered into a written 'deed of sale of membership interest' agreement, in terms of which the trust sold 60% member's interest to the appellants for R4 504 000.00. The purchase price was to be paid into the bank account of the trust, in 45 monthly instalments of R100 088.68. They also agreed that the payments would be utilized by the trust to pay towards a bond registered over its property, the farm Ospoort.

[5] The purported agreement came into effect on 1 March 2017 regardless of the date of signing thereof

As foreshadowed above, the trust deed was not attached to these papers. The three respondents in their capacities as the trustees of the trust received the 60% member's interest as a gift or donation from the first respondent. They as trustees held the 60% member's interest for a short while and sold it to the appellants. The trust therefore had multiple trustees. There is no indication that one of them was appointed as the representative trustee to hold the member's interest and to personally have all rights and obligations of a member.

[30] Even when the legality of the transfer to the trust and the selling of the member's interest to the appellants was directly challenged, the respondents did not even attempt to mount a proper case that there was a representative trustee or how it came about that the first respondent was registered as the trustee of the trust holding 60% of the member's interest. The closest it came to showing that the conditions were met is merely by stating that the conditions were met. Not a scintilla of proof was presented to substantiated this assertion.

[31] In my view, where a litigant is faced with a direct challenge, such as in this matter, it is incumbent on such litigant to satisfy the Court that all the formalities and conditions have been met. The respondents did not even do so in their replying affidavit. They could easily have attached the trust deed, the relevant resolution and any other documents to show that there was compliance with the requirements and conditions. They did not do so. We do not even know how many beneficiaries the trust had.

[32] The fact that the registration certificate shows that the 60% member's interest was registered in the name of the first respondent as trustee of the trust is of little assistance in this matter. I say so because on the facts before us it is clear that the member's interests were fraudulently transferred and assurances were fraudulently given that the members' interests were properly transferred when in fact it was never transferred. Van Zyl was mysteriously given 10% of the member's interest without the first respondent and the appellant's knowledge. None of the parties could explain how the second respondent ended up with 100% of the member's interest.

[33] The case of the respondents is not subject to any doubt or misunderstanding. They make plain that the member's interest was transferred to the trust and not to the trustee. The purported contract also makes it clear that it is the trust, as the holder of the member's interest, and not the trustee that sold it.

[34] The trust could not sell something that it may not legally possess. The authorized trustee and not the trust could enter into an agreement to alienate the member's interest.

[35] In my view the Court *a quo* should have found that a trust *inter vivos* may be a member of a corporation upon fulfilling all the conditions in subsection 29(1A)(a) to (d) of the Act. It should have qualified its answer to the first question it posed.

[36] I do not know what benefit the first respondent or the trust wanted to derive from the process of transferring the member's interest to the trust and then selling it to the appellants. I need not speculate, but I agree with the appellants that the reason given is improbable. The money could have been paid in the first respondent's bank account and then used to pay the trust's debt. It could have been paid directly into the trust's account even though the member's interest was sold by the first respondent to the appellants. He could have nominated any account.

[37] It follows that the purported agreement is *void ab initio* and must be set aside. Restitution must take place since none of the parties could legally perform in terms of the illegal agreement.

[38] The result is very technical and unfortunate but Scott JA's warning is apposite. In **Thorpe v Trittenwein[7]** he warned that:

> 'Those who choose to conduct business through the medium of trusts of this nature do so no doubt to gain some advantage, whether it be estate planning or otherwise. But they cannot enjoy the advantage of a trust when it suits them and cry foul when it does not.'**[8]**

[39] The appeal ought to succeed. There is no reason why the costs should not follow the success.

[40] I make the following order:

40.1. The appeal is upheld with costs.

40.2. The order of the Court *a quo* is set aside and replaced with the following:

(a) The application is dismissed with costs.

(b) The counter application is granted with costs.

Note full bench one judge had minority judgment.

Timac Agro South Africa (Pty) Ltd v Nel (3379/2020) [2021] ZAFSHC 110 (3 May 2021):

Jurisdiction- litigation born from agreements that falls within the ambit of National Credit Act 34 of 2005 (NCA) should be instituted in the Magistrate's Court

[1] It is now trite law that litigation born from agreements that falls within the ambit of National Credit Act 34 of 2005 (NCA) should be instituted in the Magistrate's Court having jurisdiction in terms of section 172(2) of the NCA read with sections 29(1)(e) of the Magistrate's Court Act 32 of 1944, section 34 of the Constitution of the Republic of South Africa, 1996 and section 9 of the Constitution; the so-called equality-right.**[3]**

[2] The above dictum is sound, supported and precedent *in casu.* In addition, I would add that the High Court is obliged to consider each matter that comes before it careful on the issue so as to prevent illegal process that causes uncertainty in law and process; and law that is applied inconsistently and contradictorily. It is central in

a constitutional state and democratic economy that aim for reasonable certainty so that parties can go about their business knowing the rules of the game; constitutional integrity is vital.**[4]** It is vital to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry…**[5]**

[3] Jolwana, J in the Gqirana-judgment in his dissenting judgment went as far as to rule that the common law must be developed to the extent that all civil actions and/or applications in respect of which the Magistrate's Court and the High Court has concurrent jurisdiction should henceforth be instituted in the Magistrate's Court having jurisdiction unless leave was granted by the High Court to have a matter adjudicated in the High Court. He found that there to be no basis restricting the scope of such order to the NCA orders as was done in the majority judgment. *This is indicative of the seriousness with which Courts must regard the issue.*

[4] It goes without saying that the High has concurrent jurisdiction in NCA matters but that cases of this kind will only be entertained in this forum in exceptional circumstances. The right to access to justice and legal certainty on process as envisaged in the Constitution and the NCA, overshadows and overrules the common law practise that should more than one court have jurisdiction, the Plaintiff or Applicant as *dominus litis,* has the right to choose in which forum to institute proceedings. *Summons in NCA matters should be issued in the Magistrate's Court but for the existence of exceptional circumstances and the permission of the High Court*.

[5] Exceptional circumstances will differ from case to case and have not been defined as yet in our case law. Refusal to hear a matter in the High Court may also be based on an abuse of process that is again case specific and goes to the inherent jurisdiction of the High Court to regulate and protect its own process.

[34] ORDER

1. The objection to the jurisdiction of this Court to hear the Application for Summary Judgment and Exception is upheld.

2. The Application for Summary Judgment and the Exception are transferred to the Magistrate's Court with jurisdiction.

3. The parties are permitted to file short affidavits; if any, explaining any change in circumstances.

4. This judgment must be made available to the Magistrate's Court.

5. The Applicant/Plaintiff to pay the costs of the case to date on an attorney-and-client scale.

MN Campbell N.O. & others v F Fourie & others (879/2019) [2021] ZAFSHC 134 (17 May 2021)

Amendment of pleadings-amendment of replication

[1] This is an application by the plaintiffs for the amendment of their Replications to the pleas of the first defendant (Fourie) and that of the second and third

defendants (Steenkamp and Poolman, respectively). The plaintiffs sought an order in the following terms:

> "1. That the late filing of this application be condoned.
>
> 2. That the Plaintiffs' Replication to the First Defendant's Plea and the Plaintiffs' Replication to the Second and Third Defendants' Plea be amended in accordance with:
>
> 2.1 the Plaintiffs' Notices of Amendment dated 25 September 2020; and
>
> 2.2. the Plaintiffs' Notices of Further Amendment dated 22 October 2020.
>
> 3. Costs of this this action."
>
> Adv C Joubert SC appeared for the plaintiffs and Adv N Snellenburg SC, with Adv SG Janse Van Rensburg appeared for the first defendant

[2] The plaintiffs issued summons against the three defendants. The first plaintiff (the curator) is a chartered accountant and also the curator appointed on behalf of the second plaintiff (the Fund). Fourie was the Principal Officer and member of the Board of Trustees of the Fund. He was also a member of the Executive Committee of the Fund. Steenkamp and Poolman are Fourie's daughters. In summary, the allegations against Fourie are that in breach of his legal duties as the Principal Officer of the Fund, he authorised certain irregular monthly payments to an employee of the Fund, on condition that she channelled such amounts to Steenkamp and Poolman, via her bank account. Over a three-year period, Steenkamp received an amount R336 000.00 and Poolman received an amount of R371 000.00, causing the Fund to suffer financial damage in the total amount of R707 000.00.

[3] The plaintiffs alleged that as a result of Fourie's unjustified actions, which were *ultra vires* his authority, Steenkamp and Poolman were unjustly enriched and the plaintiffs impoverished in the amounts I have mentioned above. The plaintiffs accordingly sought, *inter alia*, an order against Fourie and Steenkamp for the payment of R336 000.00 (Claim A) and against Fourie and Poolman for the payment of R371 000,00 (Claim B). The defendants, for their part, deny the allegations of the plaintiff. I pause to mention that there is an acrimonious litigious history between these parties, with a number applications and the action from which the present application and a previous application emanate. This is, therefore, not the first time that they bring their disputes before court.

[4] Fourie raised amongst other defences, two special pleas alleging that the plaintiffs' claim has prescribed. Similarly, the second and third defendants also raised a special plea, in similar terms to Fourie's second special plea. For convenience, I set out Fourie's special pleas:

"SPECIAL PLEA

> 1,1 Plaintiffs' claim is based on a decision, taken by the Executive Committee, of the Second Plaintiff, on 5 June 2013.
>
> 1.2 On that date, 5 June 2013, Plaintiffs' claim fell due.
>
> 1.3 The Plaintiffs' summons was served on the First Defendant on 1 March 2019 which is more than three years after the date on which the claim arose.
>
> 1.4 In the premises, The Plaintiffs' claim is prescribed in terms of Act 68 of

1969 (as amended).

2.

SPECIAL PLEA

2.1 Plaintiffs' claim is based on alleged irregular payments, authorised by the First Defendant, paid during the period July 2014 to July 2017 .

2.2 Plaintiffs' claim fell due on the dates the alleged unlawfully paid payments were made.

2.3 Plaintiffs' summons was served on the First Defendant on 1st March 2019, which is more than three years after the date on which the alleged irregular payments were made".

[5] Steenkamp's and Poolman's special plea reads as follows:

"SPECIAL PLEA

1.1 Plaintiffs' claim is based on alleged unlawful, irregular and wrongfully made payments to the Second and Third Defendants from July 2014 to July 2017. The Plaintiffs' claim fell due on the date that the payments were made.

1.2 The Plaintiffs' summons was served on the Second Defendant on 4 March 2019 and on the Third Defendant on 8 March 2019, which is more than three years after the dates on which the bulk of the payments were made, and the Plaintiffs' claim arose.

1.3 In the premises the Plaintiffs' claim against the Defendants is prescribed on all payments made before 3 March 2016 in respect of the Second Defendant and before 8 March 2016 in respect of the Third Defendant respectively in terms of then **Prescription Act 68 of 1969**."

19] I turn to the application for condonation by the plaintiffs for the late filing of this application. The defendants do not oppose the grant of condonation. Their complaint is that the plaintiffs did not tender their costs for considering the issue of condonation. In my view, such costs would be negligible and the failure to tender such can hardly be said to occasion any prejudice to the defendants. In any event both parties acknowledge that the award of costs is within the discretion of the court. To the extent necessary, therefore, the late filing of this application by the plaintiffs is condoned.

[20] With regard to the costs of the application, the plaintiffs would ordinarily be expected to bear these costs, which would include, in this case, the costs of the condonation application. I have expressed the view that the opposition in this matter was unnecessary and the objections to the proposed amendments cannot be sustained. In my view, the most equitable order would be for each party to pay their own costs.

[21] In the circumstances, the following order is made:

21.1 The late filing of this application is condoned;

21.2 The Plaintiffs' Replication to the First Defendant's plea and the Plaintiffs' Replication to the Second and Third Defendants' plea, be amended in accordance with:

21.2.1 the Plaintiffs' Notices of Amendment dated 25 September 2020;

21.2.2 the Plaintiffs' Notices of Further Amendment dated 22 October 2020;

21.3 Each party to pay their own costs.

Smith NO and Another v Kalro Farming (Pty) Ltd (1594/2020) [2021] ZAFSHC 130 (18 May 2021)

Appeal-leave to appeal-the bar to granting it has been raised

[1] This is an application by the applicants for Leave to Appeal to the Full Bench of this court, alternatively to the Supreme Court of Appeal, against the whole of the judgment in this matter, which was delivered on 18 August 2020. Adv P Zietsman SC appeared for the applicants. The respondent did not oppose the application, and was not legally represented. One of its directors, Mr Karel Jacobus Smit, was present in court to observe proceedings.

[2] The judgment was assailed on a number of grounds, most of which deal with various individual aspects on which the court based its reasons for the order ultimately made. The judgment sets out the court's reasoning in detail and I do not propose to repeat those reasons here. Based on the evidence before the court, it must exercise its discretion in deciding whether an order for the provisional liquidation of the respondent should be granted. The reasons for exercising this discretion in favour of the respondent are clear from the judgment.

[3] With the advent of the Superior Courts Act 10 of 2013 (the Act), section 17 thereof now regulates the test to be applied in an application for leave to appeal. The relevant provisions of section 17(1) provide as follows:

"(1) 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; or

(ii) there is some other compelling reason why the appeal shoul d be heard, including conflicting judgments on the matter under consideration;" (my emphasis and underlining).

[4] Previously, an applicant was merely required to show that there is a reasonable possibility that another court, differently constituted, would find differently to the court against whose judgment leave to appeal is sought. It is clear from section 17(I), set out above, that the situation is now somewhat different, and an applicant for leave to appeal is required to convince the court that there is a reasonable prospect of success and not merely a possibility of success. In the matter of *The Mont Chevaux Trust v Tina Goosen + 18 2014 JDR LCC,* Bertelsmann J held that:

"It is clear that the threshold for granting leave to appeal against a judgment of a high court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion….The use of the word 'would' in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against."

[5] The Mont Chevaux decision was cited with approval in a number of cases, one such matter being *Matoto v Free State Gambling and Liquor Authority (4629/2015)* **[2017] ZAFSHC 80** *(8 June 2017)*, a decision emanating from this Division, where my brother Daffue J echoed the remarks of Bertelsmann J at paragraph 5 and remarked that "There can be no doubt that the bar for granting leave to appeal has been raised…The use by the legislature of the word "only" emphasized supra, is a further indication of a more stringent test."

Mamahule Traditional Authority v Mantebele Mabyane & others (2449/2021) [2021] ZALMPPHC 19 (14 May 2021)

Condonation-time frames- time frames in motion application-

[1] This is the applicants' application for the striking out of the third respondent's notice of intention to oppose and the answering affidavit filed therewith due to non-compliance with the time frames set by the applicants in their notice of motion and the joinder application filled in terms of Rule 10.

[2] The factual matrix in this application is that the notice of motion and the notice in terms of Rule 10 issued by the applicants calls upon the respondents to serve their notice of intention to oppose by no later than 16h00 of 16 April 2021 and their answering affidavit by no later than 21 April 2021. The call in the joinder application of the third respondents is worded: "TAKE FURTHER NOTICE" that if the third respondent if she wishes to oppose the application to be joined as a third respondent she must do so simultaneously with her notice to oppose the main application, including any intention to oppose the intended application for amendment in court by close of business the **16 April 2021** and to file an Answering Affidavit dealing with both the joinder application and the main application by no later than the 21 April 2021. In other words, the time frames in the notice of motion and the joinder application are the same. The respondents are required to file their notice to oppose and answering affidavit(s) on16 April and 21 April 2021 respectively.

[3] All three respondents are represented by one attorney. The attorney drafted the notice to oppose on the 16 April 2021 but only served it on the 19 April 2021. The applicants only came to know of the respondents' intention to oppose the application on the 19 April 2021. The third respondent is the only party who filed the answering affidavit. It is clear from her answering affidavit that she is not deposing for and or on behalf of the other two respondents. Technically, the first and second respondents only filed their notice of intention to oppose with no answer to the applicant's averment in the founding affidavit.

[4] There respondent did not apply for condonation of the late filling of her notice of intention to oppose and her answering affidavit. The issue before this court is whether the filling of the respondents' notice of intention to oppose and the third respondents answering affidavit should be struck out for non- compliance with time frames as set out by the applicants in their notice of motion.

[5] Urgent applications are regulated in terms of Rule 6(12) of the Uniform Rules of this Division. Rule 6 (12) (a) stipulates that "in urgent application the court or a Judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in

accordance with such procedure (which shall as far as practicable be in terms of the rules) as it deems fit.

[9] It is common cause that the applicant set its time frames as to when and how the respondent(s) should serve and file their notice of intention to oppose and to file their answering affidavit. It is further common cause that the respondents only filed their notice to oppose on 19 April 2021- three days after the time frames set by the applicant and the answering affidavit was served and filed on the 23 of April 2021- two days after the expiry of the date set by the applicant.

[10] It is further common cause that the respondent neither filed the condonation application nor applied from the bar for such condonation in respect of the late filing of the said notice of intention to oppose and/or answering affidavit.

[11] Counsel for the respondent submits that the abridgment of the rules sought by the applicant as provided for in terms of rule 6(12) (a), applies *mutatis mutandis* to the respondents when filing the opposing papers. I am afraid, I do not agree with his submissions.

[12] I indicated herein above the principle set out in the Republikansie that obligates the respondent to adhere to the dates and times for filing the opposing papers. If the respondent(s) fail to adhere to such times then he/she runs the risk of an order against him or her by default. Counsel was at pain to persuade me that the rule of abridgment of the rules-Rule 6(12)(a)- applies *mutatis mutandis.* In the absence of an application for condonation for the late filing of the respondent's opposing papers,(such application can be moved from the bar especially in any urgent applications), I am afraid the rule and the law espoused in Republikansei dictates that judgment by default may be entered. This, in my view, leave me with no option but to struck out the third respondent's answering affidavit. The issue to be determine now is the costs.

[13] It is trite law that costs follow the event. The applicants succeed with their application and they are therefore entitled to their costs. At the commencement of this matter, Mr Mphahlele placed on record the appointment of two counsel. Considering merits and demerits of this matter, I am of the view that this is not as complex as it would warrant the appointment of two counsel.

[14] In the result, I make the following order.

Order

14.1 The third respondent's answering affidavit filed on 23 April 2021 is Struck out with costs on party and party scale.

14.2 The Respondent's point in limine relating to non-compliance with Rule 41A is upheld.

14.3 The applicant's application is struck off of the roll with no order as to costs.

South African Legal Practice Council v Breedt (31869/2020) [2021] ZAGPPHC 258 (3 May 2021)

Attorney- name be struck from the roll of legal practitioners

[1] Introduction

This is the judgment in an application by the South African Legal Practice Council (LPC) for an order that the name of the first respondent, Peter Martinus Breedt be struck from the roll of legal practitioners. The second respondent is Mr Breedt's incorporated law firm, Peter M Breedt Inc.

[2] The role of the LPC

The role of the LPC is that of custodian of legal practitioners and overseer of their conduct. It does so in terms of the Legal Practice Act, 28 of 2014 (the LPA). The LPC is the successor of the Law Society of South Africa and its provincial societies. The custodian role and the LPC's function as amicus to the court has been set out in various judgments and it is not necessary to expand thereon for present purposes. See, inter alia Prokureursorde van Transvaal v Kleynhans **1995 (1) SA 839** (T) and Law Society of the Northern Provinces v Le Roux **202 (4) SA 500** (GNP). The current application is one in terms of section 44(1) of the LPA which affirms the power of this court to "*adjudicate upon and make orders in respect of matters concerning the conduct of a legal practitioner".* It must be read with section 31(1)(a) of the LPA which obliges the LPC "*to cancel the enrolment of a legal practitioner if the High Court orders that his or her name be struck off the Roll".*

[3] The suspension order

On 18 August 2020, the LPC applied to this court for an order that the first respondent be suspended from practice and that a *curator bonis* be appointed to take control of his practice. The respondents gave notice to abide such an order, which was granted on the said date by Raulinga, J together with certain ancillary relief.

[4] The inquiry

The determination of whether a practitioner is no longer fit and proper to practice as such and the exercise of the discretion regarding an appropriate sanction, involve a three-stage inquiry:

- The first inquiry is to determine whether the alleged offending conduct has been established on a preponderance of probabilities.
- The second determination is as to whether the practitioner is still fit and proper to continue to practice in view of those offences which have been determined in the first inquiry.
- The third inquiry is, whether in all the circumstances of a particular case, the sanction of striking off is the appropriate sanction or whether any other sanction should be imposed.

The offending conduct

5.1 In the affidavit filed on behalf of the LPC in support of the initial application for the suspension of the first respondent from practice, the following offences were identified (in similar fashion as in Malan (above) at [21], I shall merely list the offences as they are not really in dispute): a trust deficit of some R20 million was identified, the first respondent had practiced as an attorney without a Fidelity Fund Certificate for some time, the auditor's report for the period ending 28 February 2019 was flawed and could not be relied on, irregular transfers from the firm's trust banking accounts were made, the first respondent had effectively abdictated his control over the firm's trust account and generally failed to account to the firm's clients in respect of trust funds or delayed payment of trust funds to clients. A number of the provisions of the Code of Conduct for legal practitioners were also breached.

5.2 Shortly before the aforementioned suspension order, the respondents delivered an affidavit styled an "explanatory affidavit". In it, the first respondent stated: "*I furthermore confirm that I am aware of the trust shortage and do not contest the correctness thereof, nor the charges as laid against myself and the second respondent by the various complainants as attached to the founding affidavit".* The trust shortage was, without the furnishing of any particularity, ascribed to the conduct of an employee against whom the first respondent had laid criminal charges.

5.3 Prior to the hearing of the application for striking off, the LPC caused a further supplementary affidavit to be filed. This was done in order to inform the court of several additional complaints received against the respondents. The first is that of a Mr Lesetedi who was not paid the proceeds of a sale of immovable property after the respondents had attended to the transfer thereof. The second was from a Ms Ntlabathi. She was the purchaser of a property and had paid R 550 000.00 in total to the respondents. These funds are unaccounted for and neither did the transfer go through. The third compliant was from a Mr Matlala. His complaint related to transfer fees which he had paid in respect of a property transaction which had been cancelled and which had not been repaid to him. The fourth complaint was from a Mr Mngomezulu. This concerned the uncompleted administration of a deceased estate. A fifth complaint was lodged by a Ms Thito. She had not received the portion of her rates and taxed to which she was entitled to after the sale of her property, which refund had been paid to the respondents . A seventh complaint, of Mr and Mrs Makhajane also related to a property transaction. After payment of the purchase price, the sale never went through but the funds were no longer available in the respondents' trust account. The eighth complaint, of a Ms Rapadi, is for a loss in similar terms, but only for

the deposit and transfer fees and not the whole purchase price as in the case of the previous complaint.

5.4 Not only did these complaints result in a number of further contraventions of the Code of Conduct for legal practitioners and various provisions of the LPA, it also increased the exposure and liability of the Fidelity Fund and resulted in further prejudice to members of the public.

5.5 The respondents have neither answered nor delivered an "explanatory affidavit" in respect of these complaints (as they have previously done).

5.6 The determination is consequently that the offending conduct have been established on a balance of probabilities.

[6] Fit and proper

In the latest affidavit delivered on behalf of the LPC, its chairperson submitted, in view of the above facts, that the first respondent has made himself guilty of unprofessional, dishonourable and unworthy conduct and that he cannot be considered to be a fit and proper person to remain on the roll of attorneys. I agree. This submission is substantiated by the aforementioned facts.

[7] Sanction

In exercising the value judgment required for the imposition of an appropriate sanction, I take into account that the transgressions are numerous, they extend over a period of time, they impacted negatively on various parties, be they purchasers or sellers of properties, bondholders or beneficiaries of a deceased estate. The transgressions are all related to moneys and, in particular, trust funds. The trust placed in the first respondent as a legal practitioner has repeatedly been breached. The breaches involve greed and dishonesty, and, if they were not perpetrated by the first respondent but by a member of his staff, then he has displayed a reckless disregard or gross dereliction of duty in respect of monies which the public had entrusted to him. In those circumstances and where no mitigating factors have been placed before us, I am of the view that a striking off order would be the most appropriate sanction.

[8] Control and costs

8.1 The suspension order makes provision for the control over the files of the respondents by placing it in the hands of a curator. The provisions relating to the curator's powers should remain in place for the proper administration of those files in the interest of the public.

8.2 The provisions under which the LPC operate in matters such as this and precedent provide that costs, which should in this case follow the event, be ordered on the scale as between attorney and client.

[9] Order

The order should be as follows:

1. The name Peter Martinus Breedt is struck off the roll of legal practitioners and the applicant is ordered to adjust its records accordingly.
2. Paragraphs 3 to 13.5 of the order of 18 August 2020 remain in force.
3. The respondents are, jointly and severally, ordered to pay the costs of the application on the scale as between attorney and client.

Leloko Hartbeespoort Dam v Peppermans (838/2013) [2021] ZAGPPHC 307 (3 May 2021)

Security for costs-rule 47-lateness

[1] This is an application by the applicant / second defendant ("*Leloko*") against the respondent / plaintiff ("*Mr Peppermans*") in terms of rule 47 of the Uniform Rules of Court ("*the rules*") for security of costs. It is common cause that Mr Peppermans is a *peregrinus* of this court in that he approximately a month before the action to which this application is incidental was instituted, namely on 25 December 2012, relocated to Australia. Mr Peppermans owns no immovable property in the Republic of South Africa ("*the Republic*").

[2] I am not called upon to fix the amount for any security to be put. According to the parties, in the event of Leloko being successful, this aspect would be referred to the Registrar of this court for a determination.

BACKGROUND

[3] On 31 December 2011 Mr Peppermans accompanied by his two minor children, at the time respectively aged 5 and 7 years, attended a New Year's Eve party at Leloko Estate Hartbeespoort dam ("*the estate*"). On that occasion Mr Peppermans fell into a manhole on the property and sustained injuries as a result thereof. Mr Peppermans instituted the action during January 2013 against Project Prop (Pty) Ltd ("*Project Prop*") as first defendant. Project Prop is the developer of the estate. Leloko, the homeowners association of the estate, was cited as the second defendant.

[4] Mr Peppermans' claim is for damages in the amount of R1,235,000. The amount claimed constitutes alleged damages suffered by Mr Peppermans, made up of past hospital and medical expenses, estimated future hospital and medical expenses, past loss of earnings, future loss of earnings and general damages.

[5] Mr Peppermans' cause of action is based upon a duty of care as, according to Mr Peppermans, Leloko and Project Prop negligently failed to cover the open manhole and to ensure that the manhole was fenced off. They also failed to issue a warning to members of the public of the danger posed by the open manhole.

TEST TO BE APPLIED

[38] In the matter of **Magida v Minister of Police 1987 (1) SA 1 (A)**, also a judgment referred to and relied upon by both parties in their respective heads of argument and in argument, it was held at **14C to G** that:

"Notwithstanding the obsolescence of the *cautio juratoria* as security on oath we must bear in mind that our common law principles which underlie its granting are still applicable in our modern practice when a *peregrinus* in his answering affidavit deposes to his inability to furnish security for costs owing to his impecuniosity, since it must be left to the judicial discretion of the Court by having due regard to the particular circumstances of the case as well as considerations of equity and fairness to both the *incola* and the *peregrinus* to decide whether the latter should be compelled to furnish, or be absolved from furnishing, security for costs. Nor is there any justification for requiring the Court to exercise its discretion in favour of a *peregrinus* only sparingly. It follows that the following *dictum* in *Saker & Co Ltd v Grainger* **1937 AD 223** *per* De Wet JA at 227, viz: 'The principle underlying this practice is that in proceedings initiated by a *peregrinus* the Court is entitled to protect an *incola* to the fullest extent,' should be read subject to the qualification that it is only applicable *after* the Court, in the exercise of its judicial discretion in accordance with the principles hereinbefore stated, had come to the conclusion that the *peregrinus* should not be absolved from furnishing security for costs."

[39] This court is accordingly afforded a wide judicial discretion in considering whether or not an application for security of costs ought to be granted.

[40] It is stated in this regard by the author in **Van Loggerenberg, Erasmus: Superior Court Practice Revision Service 11, 2020 at D1-635** that:

"The factors which the court will consider in the exercise of its discretion to determine an application for security for costs are case-specific. No list of factors to be rigidly followed exists indicating which factors weigh more heavily than others. Some guidelines exist that may influence the court in the exercise of its discretion. These include whether the plaintiff's claim is made in good faith or whether it is *mala fide*, whether it can be concluded that plaintiff has a reasonable prospect of success and whether the application for security was used to stifle a genuine claim. A respondent resisting an application for security for costs has to provide documentation to support allegations of impecuniosity, and a failure to do so might lead to the inference that the allegations are unfounded and that undisclosed documentation might contradict them."

THE EXERCISE OF THIS COURT'S DISCRETION

[41] It is common cause that Mr Peppermans does have a business in South Africa and that he has means to pay. The application is therefore not opposed on the basis that Mr Peppermans cannot afford to pay the security sought. What is not common cause is what amount of income Mr Peppermans earns from this business in the Republic.

[42] Counsel on behalf of Mr Peppermans also submitted, with reference to the papers that I should take into account that Mr Peppermans owns an aircraft in the Republic and that he owns immovable property in Perth. He is therefore not a man whose address one does not know, who one will not be able to locate. She submitted that even if it may be more expensive to execute against him in Australia,

one could execute against him in Australia at the end of the day if necessary. I agree with this submission.

[43] The fact that the Minister of Police was able in the **Magida** matter to execute any costs order in the former Ciskei, was *inter alia* taken into account by that Court in not ordering Mr Magida to put up security for costs. Counsel for Mr Peppermans argued that the present situation can be distinguished in that it is much more difficult to execute in Australia than it was in those years to execute in the Ciskei. In my view this is not a valid argument. The fact remains that in the unlikely event of Leloko obtaining a cost order against Mr Peppermans, to use the words of Mr Peppermans' deponent, such an order is capable of being executed in Australia if needs be. That is if Leloko is not cable of executing against the income stream of Mr Peppermans' business in the Republic.

[44] In my view it is not decisive that detailed information regarding the profitability of that business is not before court. This is according to me at best, something that the Registrar ought to take into account if it is called upon to fix an amount for any security to be put up.

[45] It was agued on behalf of Leloko that it is not a foregone conclusion that Mr Peppermans would eventually be successful in proving his damages. In my view, however, it cannot be said on the papers that Mr Peppermans' claim is anything but made in good faith and that he has no reasonable prospect of success. Mr Peppermans may eventually not be able to prove all of his claims, but no case is made out that he will not be able to prove any damages. On a mere reading of the expert reports, it is clear that Mr Peppermans suffered considerable damages. In any event, Leloko make out no case that Mr Peppermans' claims are mala fide and that it will under the circumstances eventually be able to obtain a costs order against Mr Peppermans. The opinions of Mr Crutchfield do not suffice to cast doubt on Mr Peppermans' claims. No attempt is even made on the papers to qualify Mr Crutchfield as an expert capable to express opinions such as these.

[46] I also take the unexplained considerable delay in excess of six years in bringing the application into account in exercising my discretion against Leloko. Leloko does not even disclose when it became aware that Mr Peppermans relocated to Australia. On the papers before court, further alluded to on behalf of Leloko in the heads of argument and in argument before this Court, the main reason for Leloko only bringing the application at this late stage, appears to be Leloko's frustration with Mr Peppermans that he is not taking steps to further the quantum trial. It was in this regard submitted on behalf of Leloko at the hearing of this matter that an order for security of costs will "*light a proverbial fire under Mr Peppermans as dominus litis to proceed with the matter to finality"*.

[47] Further to this is the stated reason in the founding affidavit that Leloko is under the impression that Mr Peppermans has no case and knows it. (I pause to mention in this regard that the submission made in the heads of argument on behalf of Leloko that in view of Mr Peppermans' conduct it is clear that he cannot afford the litigation and that he presumably abandoned his action against the applicant and has no intention of proceeding with the trial, was correctly in my view not persisted with in argument before me). As I see it, the application is obviously brought at this late stage in an attempt by Leloko to bring this matter to a head.

[48] The above are no valid reasons in bringing an application for security of costs. These are in my view akin to bringing an application for security of costs in order to stifle a genuine claim.

[49] As I see the matter having due regard to the particular circumstances of the case as well as considerations of equity and fairness to both Leloko and Mr Peppermans, Mr Peppermans ought to be absolved from furnishing security for costs.

COSTS

[50] Counsel for Leloko requested that if I in the exercise of my discretion determine that Leloko should pay the costs of this application, I should nevertheless disallow the costs occasioned by the late filing of the supplementary affidavit, filed a day before the hearing. In my view the request is validly made.

[51] For the remainder, there is in my view no reason for costs not to follow the event.

[52] In the result, I make the following orders.

ORDER

1. The application for security for costs is dismissed.

2. The applicant is ordered to pay the respondent's costs, excluding the costs occasions be the late filing of the supplementary affidavit.

CMTI Consulting Proprietary Limited v King Pie City Ltd (Nabuvax Pty Ltd) and Another (19176/2019) [2021] ZAGPPHC 266 (5 May 2021)

Rescission of judgment- replacing the name of the Plaintiff, incorrectly cited .

[1] The Applicant, CMTI, seeks rescission of default judgment granted on 7 August 2019. Default judgment was sought by the Respondent with a combined summons and particulars of claim as King Pie Holdings (Pty) Ltd. However the court order is made out incorrectly to King Pie (Pty) Ltd with a different company's registration number, namely 'Nabuvax Pty Ltd.'

[2] In seeking rescission the Applicant seeks an order that the court order be corrected to replace King Pie (Pty) Ltd with King Pie Holdings (Pty) Ltd and therefore King Pie Holdings is joined as an intervening Respondent. The test for joinder is whether a party has a direct and substantial interest in the subject matter of litigation which may prejudice the party that has not been joined. In ***Gordon v Department of Health, Kwazulu-Natal*** it was held that "if an order or judgment cannot be sustained without necessarily prejudicing the interests of third parties that had not been joined, then those parties have a legal interest in the matter and must be joined."**[1]**

[3] In the matter at hand the error occurred not in determining the interested parties but at the stage of submission of the draft order when default judgment was granted. The draft order incorrectly cited the plaintiff (Respondent). No reasonable basis for the error is given by the Respondent, save to say that, it is a typographical / clerical error. The Respondent failed to take any steps

within a period of seven to eight months to correct the error and concedes that King Pie Holdings clearly has a direct and substantial interest in the relief that is being sought. Consequently, refusing joinder will have the impact of prejudice on the parties and further delay the proceedings. As a practical measure the joinder is confirmed and the order corrected. The Respondent will further be referred to as King Pie Holdings.

[4] It is trite that rescission of default judgment must establish in terms of Uniform Rule 31(2)(b) firstly, the reasons for absence or default. And secondly, the Applicant must satisfy the court of his grounds of defence to the main action by showing good cause in terms of the Uniform Rule or sufficient cause according to the common law which defence must have some prospect of success, establishing triable issues. According to ***Swart v ABSA Bank Ltd*** **[2]** good cause must be proved.

[5] The basis for rescission of judgment is the Applicant bears the onus of proving:

5.1 that there was no wilful default; and

5.2 that there is a *bona fide* defence to the Respondent's claim

13] The Respondent concedes that even though no specific time period was agreed upon, it is trite that in any commercial contract where no specific time period is agreed upon, the Court should consider a reasonable time period in the circumstances. It is submitted that a period of more than three years, by no stretch of the imagination, could not be considered as a reasonable time period. A reasonable time period can only be deducted by taking into account a variety of factors including a rational connection between the measure and the plan to achieve something. A haphazard conclusion cannot be made without a consideration of the relevant factors. These factors may well be triable issues.

[14] Additionally the Applicant did not provide the Respondent with a "*performance guarantee."* However, it is trite that throughout the correspondence exchanged between the parties, the Applicant repeatedly confirmed its commitment to deliver a fully functional machine thereby accepting such obligation.

[15] The issue related to utilising the services of Delphius Technologies (Pty) Ltd as a third party was also a factor for consideration. According to the Respondent the introducing of Delphius Technologies to them was indicative of the Applicant's lack of necessary expertise and skills and possible delays in the completion of the machine. This is a further issue that raises factual dispute where evidence led will in fact clear up whether the Applicant lacked the necessary expertise and skills to perform as agreed.

[14] The next issue raised is that the Applicant was prevented from completing the machine because the machine was collected by the Respondent on 11 December 2018 after demanding collection on 10 December 2018. The

Respondent threatened to lay criminal charges against the Applicant if the machine was not released.

[15] The Applicant contends that certain programming of the machine was outstanding and requested an opportunity to complete the programming and perform in terms of the agreement. The Respondent's view is that King Pie Holdings cannot be blamed for, after a period of three years, demanding performance and in the absence of the Applicant performing, cancelling the agreement and collecting the non-functioning machine as the Respondents had lost faith in the Applicant's abilities. As there are two viewpoints on this issue the leading of evidence relating to the technicalities and technology will reveal to what extend there was performance by the Applicant or not.

[16] In the result the Applicant makes out a bona fide case for rescission.

[17] The following order is made:

17.1 The Intervening Party is allowed to intervene as the Second Respondent.

17.2 The Court order granted on the 7 August 2019 be corrected by replacing the name of the Plaintiff, incorrectly cited as "King Pie (Pty) Ltd (Registration number: 2012/050518/07)" with the name of the Second Respondent 'King Pie Holdings (Pty) Ltd (Registration number: 1997/008676/07)" as Plaintiff.

17.3 The order granted by the honourable court on 7 August 2019 be and is hereby rescinded.

17.4 The Applicant is granted leave to defend the main action and deliver a plea within the prescribed days in accordance with the uniform rules of court.

17.5 Costs of this application are costs in the cause.

JV Gold Bridge (Pty) Ltd and Others v Kamonyaka Property Developments (Pty0 Ltd (35484/2020) [2021] ZAGPPHC 268 (5 May 2021)

Exceptions-rule 23-dismissed with costs

[1] This is an opposed motion were the excipients being the defendants in the main action raise an exception to the plaintiff's (respondent's) particulars of claim in

terms of Rule 23(1) of the Uniform Rules of Court. In particular they raise a lack of cause of action and/ or that the entire claim has prescribed.

[2] The excipients having noted the exception took no further steps to have the matter set down timeously for hearing within fifteen (15 days). The respondent took it upon itself to have the matter set down but complained of the excipients' failure to lodge an application for condonation because the exception had effectively lapsed. The respondent, in taking the step to set down the exception for hearing, has homogeneously conceded, accepted or re-instated the exception. On this premise the delay for setting down the exception is condoned and the matter proceeds without further delay to be argued on the merits.

[3] The parties henceforth will be referred to as in the main action as plaintiff and defendants.

[4] The plaintiff argued that raising prescription by way of exception is an incorrect procedure and in action proceedings should have been raised by way of a plea or a special plea. Conversely the defendants submit that a litigant cannot be denied an opportunity to raise an exception if no evidence needs to be lead, which ultimately will expedite the proceedings and will result in less costs being incurred as no evidence of witnesses will need to be tendered.

[5] In *Sanan v Eskom Holdings Limited*,**[1]** the court stated that it is the nature of the defence (merits) which is more important than the procedure adopted, be it raised by special plea or exception.

11] Hence on 11 March 2020, the plaintiff elected to terminate the loan agreement by virtue of the provisions of clause 6.1 of the loan agreement. The plaintiff notified the first, second and third defendants in writing that it claimed repayment of the total outstanding balance of the loan amount within 30-days from date of dispatch of the written notices.

[12] The plaintiff further adds that its claim did not prescribe because section 15(1) of the Prescription Act provides that the running of prescription is also interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt.**[5]**

[13] The last payment made by the first defendant was less than three years prior to the issuing of the summons and the last interest payment received from the first defendant was during March 2019. In terms of section 14(2) of the Prescription Act, if the running of prescription is interrupted as contemplated in section 14(1), prescription shall commence to run afresh from the day of which the interruption takes place.**[6]** In addition to the aforementioned interest payments, the second defendant repaid an amount of R2,000,000.00 in respect of the capital loan amount to the plaintiff on 29 June 2019. The third defendant unconditionally acknowledged in writing that the first defendant is indebted to the plaintiff in the total sum of R9,328,864.45 on 25 February 2020.

[14] The matter of *Road Accident Fund v Mothupi***[7]** held that an acknowledgement of liability for the purpose of section 14 of the Prescription Act is a matter of fact and not a matter of law.

[15] Further the test on exception is for the excipient to satisfy the court that the conclusion of law for which the plaintiff contends cannot be supported upon every interpretation that can be put upon the facts. In *Francis v Sharp and Others***[8]** it was held that an exception may be taken only when the vagueness and embarrassment strike at the root of the cause of action pleaded, i.e. if the other party will be seriously prejudiced if the allegations remain. No such submissions have been made that the defendants will be prejudiced. On the contrary, without the leading of evidence, the upholding of the exception will close the door to the plaintiff without being given the opportunity to lead evidence and this will result in serious prejudice for the plaintiff.

[16] In *Screening & Earthworks (Pty) Ltd and Another v Capital Outsourcing Group (Pty) Ltd: In re Capital Outsourcing Group (Pty) Ltd v Screening & Earthworks (Pty) Ltd & Another****[9]*** it was held that the exception rule cannot be used to attack the vagueness of a contract relied upon by a party, an exception is only concerned with pleadings. Hence the intention in a contract must be pleaded as a special plea and cannot be raised in an exception. When a debt is due in a contract it is determined with reference to the intention of the parties. Lack of a cause of action alternatively prescription must be pleaded. Evidence supporting the contentions can be tested and will be examined.

[17] For the defendants to succeed on striking out the plaintiff's claim they must show that the plaintiff's claim is bad in law. Similarly in *Belet Industries CC t/a Belet Cellular v MTN Service Provider (Pty) Ltd***[10]** it was held that the excipient must show that the claim does not bear the meaning contended for by the plaintiff. In this regard the plaintiff does rely on the agreements and conducts of the defendants to have its claims settled. Therefore the court may allow the question raised by an exception to stand over for the decision at the trial especially if it appears that the question may be interwoven with the evidence that will be led at the trial. In *South African National Parks v Ras***[11]** it was held that unless the excipient can satisfy the court that there is a real point of law or a real embarrassment, the exception should be dismissed.

[18] The submissions by both parties indicate that a 'clear and unequivocal intention' of the parties at the time of concluding the agreement is in dispute. A court may interpret provisions of an agreement but parties to an agreement do not interpret or speculate on their intended meaning but by the leading of evidence can reveal their intention at the time when the particular agreement was entered into.

[19] As a result the exception on the grounds advanced by the defendants cannot succeed.

ORDER

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

20.1 The late filing of the exception is condoned.

20.2 Raising of prescription by exception in the current circumstances is not an appropriate process and it should be raised by special plea.

20.3 The exception is dismissed with costs.

South African Legal Practice Council v Mashabela (31148/20) [2021] ZAGPPHC 303 (18 May 2021)

Attorney-name struck from roll

[1] The applicant, Legal Practice Council (The Council) brought an application to strike the name of Lucky Bonang Mashabela (The Respondent) from the roll of attorneys and on such terms and with such conditions as the Court may deem appropriate. The respondent did not deliver an answering affidavit to oppose this application.

[2] On the date for hearing of this application, the respondent, who appears in person, filed on Caseline the Fidelity Fund certificate for the year ending in 31 December 2020 together with two letters dated 10 March 2017 and 26 June 2017 addressed to one Ruby, and the attorneys for the Council Rooth & Wessels Inc, Lekgetho and Curators at the Law Society of the Northern Provinces. The respondent alleges that he was practising in 2020 while in possession of the Fidelity Fund certificate. It was because of this late filing of the certificate and the letters which led to the court allowing the applicant to file a supplementary affidavit on 11 March 2021.

Background of the case

[3] The facts of this case arise from the report filed by the chartered accountant and auditor Puseletso Hlogoana and the founding affidavit of Hlaleleni Kathleen Matolo-Dlepu the chairperson of the Legal Practice Council. It is alleged that the respondent, Mr Lucky Bonang Mashabela is a practising attorney in the Gauteng Province since 24 April 2017. He is conducting his practice under the name Mashabela (Bonang) Attorneys as a sole practitioner. The firm is situated at Suite 201, Second Floor, Bank Towers, No 190 Thabo Sehume Street, and Pretoria. He was mainly dealing with Road Accident Funds claims. Respondent is alleged to have contravened several provisions of the Legal Practice Act (The LPA), among others, section 84(1) by practising without a Fidelity Fund certificate and, Rule 54.14.8 of the LPA by having a trust deficit in his bookkeeping. He is also accused of contravention section 87(5)(a) and having committed an offence in terms of section 93(9) of the LPA which provides that:

"*Any person who—*

(a) refuses or fails to produce a book, document or any article in terms of section 37(2)(a) or (b) or 87(5);

(b) contravenes section 37(2)(c) or 87(6); or

(c) obstructs or hinders any person in the performance of his or her functions under those provisions, commits an offence

and is liable on conviction to a fine or to imprisonment for a period not exceeding one year".

[4] The Council also received complaints from the respondent's clients regarding their Road Accident Funds claims, in respect of which he failed to account and to pay them. Because of such complaints the Council instructed a Chartered Accountant and Auditor Puseletso Hlogoana (Hlogoana) to conduct an inspection of the respondent's accounting records and practice affairs and also to investigate the complainants. Hlogoana's investigation report which was filed reveals that the respondent was not co-operative during these investigations~~;~~ and that he failed to cooperate with the council in its inspection of his accounting records and practice affairs. He also failed to comply with the council's requests and to reply to its correspondence.

[5] On 20 April 2020 the Gauteng Provincial Office of the Council resolved that the attorneys be instructed to apply to court urgently for the suspension of the attorney Mr Lucky Bonang Mashabela in his practice as a legal practitioner and that the chairperson or any member of the executive committee be authorised to sign all the documents necessary to give effect to the resolution on behalf of the Council, pending the finalisation of the application.

Discussion

[27] The above facts are accepted as correct because they have not been disputed by the respondent. This facts clearly demonstrate the respondent‘s conduct in misappropriation of the trust fund to the disadvantage of his clients. The respondent admitted to using the trust money of Motlatsi Mashaba for himself when confronted by the investigator Hlogoana. The respondent then advised that he was going to secure a loan from his partner to repay the money in October 2019. However such money was never paid till to date. The respondent has done this to more than five of his clients. This led to trust fund deficits to the tune of R2 577 740.09 in January 2021. Because of these deficits the respondent kept on rolling the trust funds in order to hide the misappropriation of the clients trust monies.

[28] All the above clients whose third party claims paid up, were never updated of the progress, and to some he paid their claims in instalments thereby delaying the payment to others he did not pay their claims at all. .

[29] The respondent contravened several provisions of the LPA, the LPC rules and the code of conduct. He even failed to cooperate with the Council in these investigations. He failed to produce accounting records for inspection or to grant the Council access to those records.

[30] With regard to the issue brought by the Council that the respondent did not have the Fidelity Fund certificate when he was practising as an attorney. Respondent produced the Fidelity Fund certificate which was issued on the 5th of March 2020. It is clear that from January 2020 until the 4 March the respondent practised without a certificate. He did not dispute this. It is therefore accepted that the respondent contravened Section 84(1) and (2) of the LPA.

[31] A legal practitioner is a member of a learned, respected and honourable profession and, by entering it, a practitioner pledges himself or herself with total and unquestionable integrity to society at large to the courts, and to the profession. Only the highest standard of conduct and repute and good faith are consistent with membership of the legal profession which can indeed only function effectively if it inspire the unconditional confidence and trust of the public. The image and the standing of the legal profession are judged by the conduct and reputation of all legal practitioners and to maintain confidence and trust all legal practitioners must exhibit the qualities set out above at all times. The respondent lacked professionalism, integrity, and the public would lose confidence if he continues to practice as a legal practitioner.

[32] We have found the misconduct of the respondent proved on a preponderance of probabilities.

[33] Having regard to the undisputed numerous and varied contraventions of the LPA, LPC Rules and Code of conduct that have been indicated on the founding and supplementary affidavits, and weighing that against the standard required of a legal practitioner as outlined above, we hold the view that the respondent is not a fit and proper person to practise as an attorney

[34] The offending conduct complained of has been repeatedly done. More than five people have not been paid and no one knows where the money went to. It is accepted that the respondent had been covering his deficits by rolling the money over so that the misappropriation of the client's trust fund could never be detected. This takes a careful planning to do. Looking at the fact that so many of his clients had already fallen victims he intended for it to continue unabated. This was seen also from the two letters which he had written addressed to the Council when he wanted his files back and hailing all insulting words to the chairperson of the Council.

[35] The respondent's character shows a person who is unworthy to remain in the ranks of this honourable profession. The community must be protected from a practitioner like the respondent. Therefore, the Courts and the LPC have a duty to act in order to protect the public. The respondent should therefore be struck from the roll in order that his continued misconduct should be stopped.

[36] In the result, the following order is made

1. The respondents name is truck from the roll of legal practitioners of the High Court of South Africa (Gauteng Division) and the Legal Practice Council is directed to remove his made from the roll of attorneys.

Junkeeparsad v Solomon and Another (37003/2019; 37456/2019) [2021] ZAGPJHC 48 (7 May 2021)

Advocate's fees- I have referred in para 19 *supra* to the applicants' discussion with the respondent during October 2019 relating to the possibility of having their fees assessed by the Bar Council and the respondent's subsequent advise to them that it was not necessary since there was simply no dispute in regard to the rendering of the services as well as the quantum.

[1] This application is interlocutory to two main applications that have been instituted under case numbers 37003/19 (the Marimuthu application) and 37456/19 (the Isseri application), by two members of the Johannesburg Bar, Adv Richard Alan Solomon SC and Adv Arlette Mary MacManus (who are cited as the first and second applicants in both main applications) against the respondent, Mr Vishal Suresh Junkeeparsad, who is a practising attorney and the sole director of Vishal Junkeeparsad and Company Inc., Umhlanga, Durban, and cited as the respondent in each main application. The hearing of the main applications has been consolidated. I refer to the parties in this interlocutory application as they are referred to in the main applications. The respondent presently seeks condonation for his failure to have filed his answering affidavits in the main applications within the time fixed by an order of this court on 11 February 2020, and that he be granted leave to file such answering affidavits within 15 days of the date of the order made in this interlocutory application (the condonation application). Both applicants resist the relief which the respondent seeks.

[2] In the Marimuthu application the first applicant seeks payment in the amount of R1 653 880.00 plus interest and the second applicant seeks payment in the amount of R829 399.50 plus interest from the respondent personally, being outstanding fees owed to them as counsel in respect of legal services they rendered to the respondent's client, Mr Marimuthu, and members of his family, during the period February to July 2019. In the Isseri application the first applicant seeks payment in the amount of R1 016 640.85.00 plus interest and the second applicant seeks payment in the amount of R657 642.00 plus interest from the respondent personally, being outstanding fees owed to them as counsel in respect of legal

services rendered to the respondent's client, 'Dr Isseri and various corporate entities controlled by or through him and of which he is the controlling mind'.

[3] The respondent has known the first applicant for a continuous period since September 2015, although he had briefed him as counsel in a matter during 2011, and the second applicant from about 2009. She introduced the respondent to the first applicant. In his professional capacity as an attorney, the respondent has briefed the applicants extensively to act as counsel in various matters for his clients. In his founding affidavit in the condonation application, he states:

'For the past 4-5 years, the Applicants and my offices have been closely involved in several high value commercial litigation matters on behalf of the Firm's various clients totalling millions of Rand in litigation value. The Firm was supported by certain business individuals who were flamboyant income earners but also subject to complex legal difficulties. Furthermore, the Applicants also represented me in my personal matters with success, and despite the animosity that the Applicants presently express against me, the Applicants and I as a team during our tenure enjoyed both a cordial and professional working relationship'.

[4] Two such clients of the respondent's firm are Dr Isseri and Mr Marimuthu. In his founding affidavit the respondent says the following about them:

'a) Isseri was a client to the Firm for the period 2011 to 2019, he owns several businesses but primarily trades in step-down medical facilities in Johannesburg and Durban. The Second Applicant and the Firm have been representing Isseri since 2011 in matters across various provinces and the First Applicant has also represented Isseri since 2016. Isseri is an exceptionally controversial and flamboyant businessman who is always being litigated against on a regular basis.

b) Marimuthu was a client to the firm for the period 2014 to 2019, he too is a flamboyant businessman who is involved in road, building and civil construction for various government departments. The Applicants and the Firm have represented him since 2018. His primary difficulties lie in multiple claims from SARS over his various businesses and family members.'

The respondent further avers that at the first applicant's request he sent the offer to him in the morning on 12 August 2019 so that the Bar Council could be notified of the proposal. He avers that because the first applicant had told him what the purpose of the offer was, he did not respond to the second applicant's email dated 26 August 2019, and when he spoke to her the next day after she had send him the WhatsApp message on 16 September 2019, she told him that 'the message was purely a reporting medium for the Bar Council to show that the Applicants were following up with the proposal from the Firm'. However, once the applicants had caused the respondent's name to be put on the Bar Council's list of defaulting attorneys, had obtained permission from the Bar Council to act on behalf of one of the respondent's clients, Mr Siva Naidoo and his son, and had obtained permission from the Bar Council to institute legal proceedings against the respondent for payment of their fees, there was no reporting to the Bar Council required, other than when they got paid in order for the respondent's name to be removed from the Bar Council's list of defaulting attorneys.

[64] The respondent's averment that his firm's role was merely that of facilitating payment from Mr Marimuthu to the applicants in Mr Marimuthu's personal tax matter

is, as I have mentioned, in conflict with his version under oath in his founding affidavit in the sequestration application. Furthermore, in para 12 *supra* I referred to the discussion between the respondent and Ms Faber on 31 May 2019, and the agreement they reached as recorded in her email addressed to him on the same day, namely that the applicants should bill him directly. He also advised the second applicant that the applicants 'should continue to send all fee notes to [him or his firm]'.

[65] The respondent avers that he had discovered discrepancies in the applicants' billing and that it appears that certain amounts claimed by them are not totally correct. However, not once did the respondent dispute the quantum of the applicants' fees, their reasonableness or the fact that the professional services for which they have invoiced him or his firm had in fact been rendered. I have referred in para 19 *supra* to the applicants' discussion with the respondent during October 2019 relating to the possibility of having their fees assessed by the Bar Council and the respondent's subsequent advise to them that it was not necessary since there was simply no dispute in regard to the rendering of the services as well as the quantum. I have also referred to Mr Marimuthu's WhatsApp message addressed to Ms Faber on 28 July in para 14 *supra*, wherein he expressed his faith in and appreciation for the professional services rendered by the applicants and her in respect of his personal tax matter and his commitment to pay the fees in respect of their professional services. The applicants tendered to have their fees assessed in respect of their professional services rendered in respect of Dr Isseri, but Dr Isseri also declined the offer. I have referred to his email message addressed to the respondent on 22 October 2019 in para 18 *supra*, wherein he too expressed his appreciation for their professional services and that there was no need for him to complain about their fees, since their work was done diligently.

[66] I conclude, therefore, that the respondent has also not established strong prospects of success that could excuse his inadequate explanation for the delay. He has not shown good cause for an extension of the time fixed for the filing of his answering affidavits by the order of this court on 11 February 2020, or for condonation for his failure to have filed his answering affidavits in the main applications.

[67] Finally, the matter of costs. The applicants seek costs on a punitive scale, including the costs of two counsel whenever so employed. There is, in my view, no reason to depart from the general rules that costs should follow the event and that the successful party is awarded costs as between party and party. This is not one of those 'rare occasions' where an award of punitive costs is warranted. Furthermore, neither the factual nor the legal difficulties are such as to warrant the engagement of two counsel. (See *LAWSA* Vol 3 Part 2 Second Edition paras 292, 328 and 417.)

[68] In the result the following order is made:

The condonation application dated 21 July 2020 is dismissed with costs.

ALTECH RADIO HOLDINGS (PTY) LTD AND OTHERS v TSHWANE CITY 2021 (3) SA 25 (SCA)

Review — Grounds — Legality — Self-review — Municipality seeking to review its own decisions to award tender and to enter into agreements pursuant thereto — Delay in bringing review — Whether unreasonable and excusable.

In this matter Tshwane City Municipality sought a legality review of its own decisions. The facts were as follows. In June 2015 the Municipality, following a tender process, awarded a tender to first appellant (Altech) for construction of a fibre Internet network for the City (see [2] and [5]). Pursuant thereto, the City incorporated second appellant company (Thobela) which would contract with Altech to perform the construction and which would operate the network thereafter (see [5]). To this end in May 2016 the City concluded an agreement with Thobela for the construction and operation of the network (see [6]). Thereafter in August 2016 an agreement was entered into by the City, Absa Bank Ltd (supported by the Development Bank of Southern Africa) and Thobela under which Absa would loan sums to Thobela to meet its obligations to the City under its build and operate agreement with the City (see [7]).
Meanwhile, parallel to the conclusion of the loan agreement, and indeed the day before its signature, the municipal elections were held, and the DA came to take control of the City's governance from the ANC (see [11]).
Thereafter the DA appeared to set its sights on the project and in August 2017 the City instituted proceedings for review of its decisions to award the tender to Altech and to conclude the operations and loan agreements (see [12]).
That review was heard in May 2018 and in July 2019 the High Court set aside those decisions and declared the operations and loan agreements unenforceable (see [14]). In September it granted leave to appeal to the Supreme Court of Appeal (see [15]).
There the issue was whether the City's delay in bringing the review was unreasonable and, if it were, whether it could be condoned (see [19]).
The SCA found that it was indeed unreasonable and that it could not be condoned (see [71] – [72]). This on the following grounds:

- The length of the delay: by November 2016 all the facts supporting review were in the City s knowledge, yet it only proceeded in August 2017 (see [30]).
- The unsatisfactory explanation therefor that after the change of government time had been required to investigate the tender (see [22], [24] and [72]). This where most of the evidence in support of the review was known to the DA before the election (see [25]).
- The prejudice flowing from it: by January 2018 R610 million in costs had been incurred by Altech and Thobela and, by the time the review was heard in May 2018, 34% of the network had been built. Then after judgment in July 2019 the project was frozen, with what had been built unusable and the materials unsalveable for use in other projects (see [43], [67] and [72]).
- The City's unconscionable conduct in failing to warn the appellants of irregularities in the tender process or the susceptibility of their transactions to being impugned ([43], [45], [52] and [71] – [72]).
- The limited prospects of success of the review (see [53], [55], [61], [64] and [72]).

Appeal upheld, the order of the High Court set aside, and replaced with an order dismissing the City's application before it (see [77]).

KNOOP NO AND ANOTHER v GUPTA (EXECUTION) 2021 (3) SA 135 (SCA)

Appeal — Execution — Application to execute pending appeal — Requirements — Superior Courts Act 10 of 2013, s 18(1) and (3).

Appeal — Execution — Order for execution pending appeal — Appeal against — Automatic suspension of order for execution pending appeal — Whether court empowered to order that suspension would not operate — Court not empowered to do so — Such order a nullity — Superior Courts Act 10 of 2013, s 18(4).

What gave rise to the present matter was an order (the removal order) granted by the full court of the Gauteng Division of the High Court, Pretoria, removing the appellants (the appellant BRPs) as business rescue practitioners in respect of the companies under business rescue, Islandsite and Confident Concept, on the basis of their failure to perform their duties in terms of s 139(2)*(a)* of the Companies Act 71 of 2008, and the presence of a conflict of interest or lack of independence in terms of 139(2)*(e)*. The application resulting in such order had been instituted by the respondent, Ms Gupta (Gupta), a shareholder of the companies. In addition to granting the appellant BRPs leave to appeal against the removal order, the court granted the respondent leave to execute, in terms of s 18(1) and (3) of the Superior Courts Act 10 of 2013 (the SC Act). The appellant BRPs, as they were entitled to in terms of s 18(4)(ii) and (iii), lodged an extremely urgent appeal to the Supreme Court of Appeal against the execution order. This was the judgment in that matter.
Events subsequent to the granting of the execution order are of relevance. The directors of Islandsite and Confident Concept appointed new BRPs, Mr Tayob (who sought to intervene in these proceedings) and Mr Naidoo, who later purported to terminate business rescue proceedings in respect of Inslandsite and Confident Concept. The implication of the above, the respondent argued in the present matter, was that the appellants had no locus standi to appeal, because their removal and replacement meant that they lacked any official capacity and standing to pursue the appeals as BRPs. Further, the respondent contended that the substitute BRPs had withdrawn the appeals insofar as they were appeals by the BRPs of Islandsite and Confident Concept. Further, the respondent claimed that, in consequence of the termination of business rescue, the appeals had become moot.

The above conduct seemingly stood in conflict with s 18(4)(i) of the SC Act, which provided that the operation of the execution order itself was suspended pending the outcome of an urgent appeal against that order (see [29]). The respondent sought to justify the actions on the basis of the execution order itself, which provided, amongst others, that '*(a)ny present or future appeals, applications and petitions by any party relating to this judgment shall not suspend the operation of the order granted on the 13 December 2019* [ie the removal order]'. The High Court in granting such 'suspension order' sought to avoid what it termed the 'multiplicity of applications that would follow in view of the provisions of section 18(4)(iv)'. The court ruled it had an inherent right to prevent a toing and froing of litigants, and in line therewith it was entitled to make the order it did.

The SCA, before addressing the merits of the urgent appeal, considered too the validity of the full court's suspension order, and the consequences of nullity, should it be found that such order was invalid.

Held, that the full court's suspension order was invalid, for, inter alia, the following reasons:

- No such order was asked for in the application for leave to execute. None of the parties were called upon to address the court on this specific issue, and the court made the order mero motu. In the result it was granted without affording the appellants a hearing on the issue. (See [27].) Where an issue was not raised in the pleadings or affidavits in a case, and the order granted was one on which neither party had been heard, there was a breach of a fundamental constitutional right to a fair hearing (s 34).
- The order flew directly in the face of the statute that explicitly said that, pending an urgent appeal under s 18(4), the operation of an execution order was suspended (see [27]). The language of s 18(4)(iv) was explicit and allowed for no misunderstanding. The operation of an execution order was suspended pending the outcome of an urgent appeal against that order. That was the statutory position and a court could no more grant an order contrary to a statute than it could order a party to perform an illegal act. (See [29].)
- The inherent power of a court to regulate its own procedure could not be used to override the provisions of a statute directly governing the issue in question (see [27]).

Held, that the suspension order, being one that the full court had no power to make, was accordingly a nullity and could be disregarded (see [33]) – [34]). The nullity of the suspension order meant the following:

- The execution order was suspended pending this appeal, in terms of s 18(4)(iv) of the SC Act. The removal order was not yet effective.
- The appellants were not validly removed from office as BRPs.
- The directors of Islandsite and Confident Concept had not been entitled to act on the order for the removal of the appellants as BRPs in those two companies by nominating new BRPs, and the appointments of Mr Tayob and Mr Naidoo were invalid. (See [35] and [68].)
- The purported withdrawal of the appeals was invalid and of no effect (see [36]).
- The appellants retained locus standi (see [37]).
- The notices of termination of business rescue in terms of s 132(2)*(b)* of the Companies Act were invalid and of no force and effect (see [42] and [68]). In this regard, the assertion by the respondent that there needed to be an application to set aside the termination was incorrect. The claim was based on a misconception, ie that termination was an official act of the Companies and Intellectual Property Commission (CIPC). (See [39].) The CIPC had no role to play in the process following a company's entering voluntarily into business rescue, beyond receiving and maintaining in its record the information about the commencement and termination of business rescue. There was accordingly no public act by the CIPC that had legal efficacy and required to be set aside. Instead, there was an entirely private process involving the company, the BRP and all affected persons. (See [41].) In the present circumstances, the termination of business rescue proceedings was by two people who were not the duly appointed BRPs. In such circumstances the termination was invalid and void. (See [42].)

Held, as to the merits of the appeal, that the three requirements for making an execution order had not been met (see [50]): The existence of exceptional circumstances was not established (see [60]). In this regard, when dealing with someone's removal from office, be it a BRP or a liquidator in relation to a company, or a trustee or an executor, or some other office bearer, the mere fact that the court had held that they should no longer fill that office did not, in and of itself, constitute exceptional circumstances. There had to be something more in the circumstances of the particular case that made the immediate implementation of the removal order necessary. (See [47] and [55].) Further, no irreparable prejudice to the respondent was established. Nor was the onus discharged of showing that the BRPs would not suffer irreparable harm as a result of an execution order being granted. (See [65].)

Held, in conclusion, that the urgent appeal had to be upheld (see [66]), and order at [68] granted.

BELREX 95 CC v BARDAY 2021 (3) SA 178 (WCC)

Judgments and orders — Summary judgment — Application — Amended rule 32 — Defendant filing amended plea after commencement of application for summary judgment — Whether application for summary judgment can be granted in terms of amended rule 32 where defendant amending initial plea after application for summary judgment had commenced — Uniform Rules of Court, rule 32.

After the defendant, on 19 June 2020, had filed his plea to the plaintiff's summons, the latter filed an application for summary judgment, together with supporting affidavit, on 9 July 2020. The defendant *subsequently*, on 4 August 2020, *filed a notice of intention to amend his plea*, also raising a special plea. The defendant, on 7 August 2020, after the summary- judgment application had already been set down for hearing on 13 August 2020, filed his opposing affidavit, in which he essentially confirmed the contents of *his amended plea* and the grounds upon which he had based his special plea.
The court declined to make an order in respect of the summary judgment application (see [36]). In its reasoning for doing so, the court noted that the amended plea was not yet ripe for adjudication, given non-compliance with rule 28(2) (see [35]).

The court, however, noted that, even were the amended plea properly before court, it would be inappropriate for the matter to proceed to summary judgment. The particular facts and the recent changes to rule 32 presented the court with a predicament. The amended rule in subrule (2)*(b),* read with subrule 2*(a)*, obliged the plaintiff to, within 15 days after the delivery of the plea, deliver a notice of application for summary judgment, together with an affidavit in which it had to explain why the defence as pleaded did not raise an issue for trial. However, in terms of subrule (4), the plaintiff could adduce no further evidence otherwise than by this affidavit.

Accordingly, to proceed to summary judgment in circumstances such as the present — where the defendant had, after the commencement of the application for summary judgment, elected to amend its plea and base its opposing affidavit on such amended plea — would place the plaintiff at a disadvantage since he would not be allowed to adduce further evidence to explain why the defences as pleaded *in the*

amended plea did not raise any issue for trial (see [24] – [25] and [35]). On the other hand, a court could not simply ignore the amended plea and opposing affidavit; to do so would defeat the purpose of the amended rule, which required that the nature and grounds of the defence and the material facts relied upon in the affidavit should be in harmony with the allegations in the plea; it would also be manifestly unfair and unjust to the defendant, who had a right to amend his plea at any stage of the proceedings before judgment. (See [35].)
The court ruled that the defendant's notice of amendment should take effect in terms of rule 28(2) as of the date of this judgment, for the plaintiff to exercise its rights in terms of the rule (see [37]). The court further granted the plaintiff leave to bring a fresh application on the amended plea, should such an application for amendment be allowed (see [38]).

CHONGQING QINGXING INDUSTRY SA (PTY) LTD v YE AND OTHERS 2021 (3) SA 189 (GJ)

Judicial case management — Gauteng Division, Johannesburg — Digital case management and litigation system — Compliance with relevant Practice Manual and Practice Directives in Covid-19 environment and thereafter — Failure to comply — Application struck from roll.

The Covid-19 pandemic forced the justice system to implement digital solutions to facilitate the ongoing dispensation of justice. Fortunately, the two Gauteng Divisions (Pretoria and Johannesburg) had by this time already piloted an electronic case management and litigation system for opposed motions. While the need for virtual court hearings might diminish as the pandemic abated, the electronic case management and litigation system would likely remain in operation. (See [2] – [3].)
The system was set out in the Judge President's Consolidated Directive of 18 September 2020. It was not self-standing but had to be applied together with the Uniform Rules of Court, the divisions' Practice Manuals and other directives. Legal practitioners were obliged to adhere to the outlined procedures and, in particular, ensure that an application was ripe for hearing before it was enrolled on the opposed roll, and that it remained so. Non-compliance invited punitive costs orders. (See [7] – [8].)

To address the problem of delays caused by the late filing of heads of argument, the Practice Manual provided that legal practitioners could only apply for a date on the opposed roll after practice notes and heads of argument had been delivered by the parties in a properly indexed and paginated file. The existing requirement that matters had to be case-ready before the allocation of a date on the opposed motion roll was reinforced by the introduction of the electronic system. Matters in which an opposed motion date hearing was sought had to contain 'a full set of relevant pleadings and documents in the uploaded file'. * Such documents included heads of argument, practice notes, and the like. (See [12] – [13].)

To prevent electronic court files from continually evolving, legal practitioners had to play their part. To prevent them from slipping out-of-time documents into electronic files, 'freeze dates' were implemented and provision made for matters to be struck from the roll, with punitive costs orders where the judge established that documents were uploaded out of time without condonation having been granted. (See [16].)

By applying for an opposed date, practitioners represented to the registrar that the matter was ripe for hearing. As pointed out above, they had to ensure, as far as practically possible, that it remained so. Where the applicant itself took steps that rendered its own matter no longer ripe for hearing, it could hardly complain if its opposed application was struck from the roll. (See [25] – [26].)
In the present case the court proceeded to strike an opposed application from the roll because the applicant had failed in numerous respects to comply with the procedures outlined above (see [51] – [54] and [61]).

Democratic Alliance and others v Mkhwebane and another [2021] 2 All SA 337 (SCA)

Discovery of documents – Notice for production of documents – Failure to comply – Rule 35(12) of the Uniform Rules of Court provides for a party to proceedings to deliver a notice to any other party in whose pleadings or affidavits reference is made to any document or tape recording to produce such for inspection and to permit the making of a copy or transcription thereof – Court must consider whether reference is made to document in papers (including annexures) and that such document is relevant.

The second and third appellants were members of the first appellant (the “DA”), a political party.

In September 2016, the second appellant (“Ms Breytenbach”) conducted a press conference where she published a media statement by the DA on the subject of the nomination of the first respondent (“Ms Mkhwebane”) for the position of Public Protector. The DA made it clear that the party would not support the nomination, on grounds of the fitness of Ms Mkhwebane for the position. It was speculated that Ms Mkhwebane was on the payroll of the State Security Agency (“SSA”), and her explanation for accepting that role, amounting to a demotion, was suspicious. At the same press conference, the third appellant (“Mr Horn”), also made a statement about the possibility of Ms Mkhwebane having been on the payroll of the SSA whilst working as an immigration officer in China.

The second respondent was the office of the Public Protector. The respondents’ complaint was that the statements made about Ms Mkhwebane by the appellants were defamatory. Ms Mkhwebane denied that she had ever been on the payroll of the SSA. The respondents approached the High Court an order directing the appellants to retract the allegedly defamatory remarks concerning Ms Mkhwebane and to apologise publicly for their utterances.

Prior to filing their answering affidavit, the appellants filed a notice in terms of Uniform Rule 35(12), seeking the production by the respondents of seven documents to which they considered they were entitled. Five of the documents were furnished and the failure to furnish the remaining two led to the appellants bringing an interlocutory application in the court below in terms of rule 30A. That application was dismissed, and the court ordered the appellants to file an answering affidavit in the main case within 15 days of the order. It was held that Ms Mkhwebane did not refer to the requested documents in her founding affidavit, and that the documents

were in any event irrelevant to the proceedings at that stage. The present appeal lay against the two orders referred to.

Held – Rule 35(12) provides for a party to proceedings to deliver a notice to any other party in whose pleadings or affidavits reference is made to any document or tape recording to produce such for inspection and to permit the making of a copy or transcription thereof. Any party failing to comply with such notice shall not, save with the leave of the court, use such document or tape recording in such proceeding. The first step in the adjudication process is to consider whether reference is made to a document or tape recording. Direct or indirect reference to a document will suffice, subject to relevance. Reliance on a document by the party from whom the document or tape recording is sought is a primary indicator of relevance. The High Court wrongly implied that the appellants, in defending the main case, were limited to the evidence at their disposal when the impugned publication was made. A person defending a defamation claim on the grounds of truth and public benefit or fair comment is entitled, after the launching of proceedings, to gather further evidence to support those defences and to use the rules relating to the discovery and production of documents for that purpose. Documents not specifically mentioned in affidavits, but referred to in annexures to the affidavits also fall within the scope of the rule.

The Court found that one of the two documents requested was referred to by Ms Mkhwebane and was relevant, and therefore had to be produced. In the premises, the appeal was upheld.

Monteiro and another v Diedricks [2021] 2 All SA 405 (SCA)

Spoliation – Application for return of property – Mandament van spolie – Requirements – Party seeking remedy must, at the time of the dispossession, have been in possession of the property, and dispossessor must have wrongfully deprived him of possession without their consent – Order must be capable of being executed, and where property was no longer in possession of dispossessor, restoration not possible.

The respondent ("Diedricks") was in possession of a car, which he took to the second respondent ("Autoglen") for a routine maintenance service. The registered owner of the car ("Street Talk Trading") persuaded Autoglen not to hand the vehicle back to Diedricks, and to instead hand it to Street Talk Trading. Diedricks was a party to a vindicatory action in which Street Talk Trading claimed repossession of the vehicle on the basis of ownership. That action was pending before the High Court. He had given no instruction to nor authorised the release of the motor vehicle to Street Talk Trading or to its director ("Monteiro").

Alleging that Autoglen had unlawfully dispossessed him of the vehicle, Diedricks launched an urgent spoliation application.

Monteiro and Autoglen resisted the application, arguing that a *mandament van spolie* ought not to have been granted because Diedricks was not in possession of the motor vehicle when the spoliation occurred. It was submitted that he had, by delivering the vehicle to Autoglen for repairs, given up possession thereof. In relation to Autoglen, he was said to have consented to its possession. Autoglen could therefore not be said to have spoliated the property. In relation to Monteiro it was submitted that inasmuch as the vehicle was taken into the possession of Street Talk

Trading, Diedricks was not deprived of possession since it was then in the possession of Autoglen. On that basis, it was contended that Diedricks did not establish the first requisite for an order restoring possession, namely that he was deprived of possession.

The second point relied upon was that neither Autoglen nor Monteiro were in possession of the vehicle. Autoglen had passed possession on to Street Talk Trading and could therefore not restore it to the possession of Diedricks. As for Monteiro, he asserted that the vehicle had been sold by Street Talk to a third party.

Held – *Mandament van spolie* is a possessory remedy which is available to a person whose peaceful possession of a thing has been disturbed. It lies against the person who committed the dispossession. The *mandament* is not concerned with the underlying rights to claim possession of the property concerned. It seeks only to restore the *status quo ante*. It does so by mandatory order irrespective of the merits of any underlying dispute regarding the rights of the parties. Two requirements must be met in order to obtain the remedy. Firstly the party seeking the remedy must, at the time of the dispossession, have been in possession of the property. The second is that the dispossessor must have wrongfully deprived them of possession without their consent. In order to be an effective order, the order must be capable of being carried into effect by the party subject to the order.

The High Court order required Autoglen and/or Monteiro to restore possession of the vehicle to Diedricks. However, neither was in possession of the vehicle. On that basis, the appeal was upheld by the majority of the court.

In a dissenting judgment, a contrary view was expressed regarding the outcome of the appeal in relation to Monteiro. The view was that the High Court was correct to hold that Monteiro had unlawfully despoiled Diedricks of his possession of the vehicle, and to grant a spoliation order. The dissenting judge rejected as untenable, the defence that restoration was not possible as the vehicle was in the possession of a third party.

OB v LBDS [2021] 2 All SA 527 (WCC)

Jurisdiction – Section 2(1) of the Divorce Act 70 of 1979 – A court shall have jurisdiction in a divorce action if either of the parties is domiciled in the area of jurisdiction of the court on the date on which the action is instituted; or is ordinarily resident in the area of jurisdiction of the court on the said date and has been ordinarily resident in the country for a period of not less than one year immediately prior to that date – Facts supporting averment in particulars of claim that at the time divorce action was instituted, appellant was domiciled within the court's area of jurisdiction.

In 2017, the parties in this matter, both foreign nationals, entered into a civil union in terms of the Civil Union Act 17 of 2006, in which they married out of community of property by antenuptial contract with the incorporation of the accrual system.

Towards the end of 2018, the appellant sued for divorce, and sought to have a settlement agreement entered into by the parties to be incorporated in the divorce decree. The matter was enrolled on an unopposed basis in the motion court. The Court was not satisfied that it had jurisdiction to entertain the matter. It dismissed the

appellant's divorce action on the ground that the jurisdictional requirements contained in section 2(1) of the Divorce Act 70 of 1979 had not been met.

Based on the appellant's submissions, she and the respondent had lived in Caledon after their marriage. After the breakdown of the marriage, the respondent relocated and was currently living in Namibia. The appellant averred that she was permanently resident in Caledon from April 2018 until December 2018, and relocated back to Moscow, Russia (her country of origin) in December 2018.

The present appeal lay against the jurisdictional finding.

Held – Section 2(1) of the Divorce Act 70 of 1979 states that a court shall have jurisdiction in a divorce action if either of the parties is domiciled in the area of jurisdiction of the court on the date on which the action is instituted; or is ordinarily resident in the area of jurisdiction of the court on the said date and has been ordinarily resident in the country for a period of not less than one year immediately prior to that date.

In addressing the issue of jurisdiction, the court below focused on the meaning of "ordinarily resident" and ignored the issue of domicile. On appeal the court raised the issue of domicile as section 1(2) of the Divorce Act contains a deeming provision to the effect that a divorce action shall be deemed to be instituted on the date on which the summons is issued or the notice of motion is filed or the notice is delivered in terms of the rules of court.

The facts advanced by the appellant supported the averment in her particulars of claim that at the time the action was instituted on 7 November 2018 she was domiciled within the court's area of jurisdiction. The court *a quo* thus had the requisite jurisdiction to grant the decree of divorce. The appeal was upheld and the order appealed against was replaced with one granting the decree of divorce.

In a dissenting judgment, the view expressed was that the appellant had failed to establish as a matter of fact that she had adopted a domicile of choice in this country on the date on which the proceedings were instituted, and that the court *a quo* had the necessary jurisdiction to grant an order of divorce.

Sayed NO v Road Accident Fund and related matters [2021] 2 All SA 613 (GP)

Legal Practice – Attorneys of record – Withdrawal – Rule 16 of the Uniform Rules of Court providing that an attorney, when acting for a litigant, must place himself on record in accordance with the rule, and where the attorney ceases to act in the matter, he is duty-bound to deliver a notice of withdrawal as attorney of record – Where attorney remains as attorney of record, he must continue to fulfil his obligations.

In the various actions dealt with in the present judgment, various plaintiffs sued the Road Accident Fund ("RAF"), and a common feature in all of the matters was that the defendant's attorneys of record, who had previously been actively involved in the matter had at some point prior to the hearing of the matter, ceased playing any further role in the proceedings. Despite that, they failed to withdraw as attorney of record. At the hearing of each of the matters therefore, the defendant's attorneys were still formally on record but had failed to appear at the hearing and had played no active part in the proceedings for an extended period of time.

Held – In the handling of any matter which comes before any court, an attorney must at all times act with proper respect for that court so as not in any way to impair its authority and dignity. An attorney of record in litigation plays a pivotal role in the progress of litigation, the functioning of courts and the administration of justice. Setting out the duties incumbent on the attorney of record, the court held that such duties cannot be fulfilled where the attorney has washed his hands of the matter and is present in name only. The attorney owes duties, not only to his client, but to the court and, to his opponents and their clients.

Rule 16 of the Uniform Rules of Court provides that an attorney, when acting for a litigant, must place himself on record in accordance with the rule. Where that attorney ceases to act in the matter, he is similarly duty-bound to deliver a notice of withdrawal as attorney of record. Whatever the reasons for remaining on record may be, if the attorney adopts the position that he is entitled to remain as attorney of record, then he must continue to fulfil his obligations. On the facts of the present matters, the attorneys were either required to withdraw timeously or to continue to act in the matter (perhaps, at their own financial risk). They did neither.

The Court held the view that the defendant's attorneys of record in these matters were guilty of gross discourtesy and a neglect of their duties as officers of the court. It directed that this judgment be delivered to the offices of the Legal Practice Council, for it to consider an investigation into the conduct of the defendant's attorneys of record in all of the matters. It then addressed the merits in each case and made appropriate orders.

Ingosstrakh v Global Aviation Investments (Pty) Ltd [2021] ZASCA 69

Default judgment – appellant under bar – whether good cause shown for upliftment thereof.

Jurisdiction – where a foreign peregrinus defendant submits to jurisdiction of a South African court at the suit of a foreign peregrinus plaintiff, such submission and a ground of jurisdiction that links the court to the subject matter of the litigation, sufficient for a South African court to assume jurisdiction.

END-FOR NOW