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Costs — punitive costs — vexatious litigation and scurrilous remarks about judges may warrant punitive costs

On Friday, 18 June 2021 at 10h00, the Constitutional Court handed down judgment in an appeal against the order of the Supreme Court of Appeal, dismissing an application for leave to appeal against the judgment of the High Court of South Africa, Mpumalanga Division, Mbombela. The judgment of the High Court concerned an Anton Piller order, which was granted on the basis of an application predicated on allegations of corruption, theft and fraud in the Mawewe Communal Property Association (MCPA), as well as the failure of the Executive Committee of the MCPA to register and restore certain farms to the Mawewe Tribe.

The dispute in this matter commenced when the respondents, aggrieved by the manner in which the Executive Committee of the MCPA was running the MCPA, approached the High Court on an urgent basis in February 2020. They did so seeking an Anton Piller order and an interim interdict to regulate the governance of the affairs of the MCPA. The applications were heard *in camera*, and the orders were granted by the High Court. Consequently, the Committee was temporarily dissolved and three persons were appointed to take control of and investigate the affairs of the MCPA, and to report back to the High Court as to the allegations in question. In response to these orders, the applicants filed a reconsideration application which was heard on the return day of the *rule nisi*. At these proceedings, the High Court essentially just confirmed its earlier orders.

Dissatisfied with this outcome, the applicants sought leave to appeal against the orders of the High Court from the Full Court and, subsequently, the Supreme Court of Appeal. Leave was refused by both Courts.

The applicants then approached the Constitutional Court and submitted that the orders granted by the High Court were sought for illicit purposes, and were improperly and unlawfully granted. They argued that the High Court misdirected itself in granting the orders, and that section 25 of the Constitution and certain provisions of the Communal Property Associations Act No 28 of 1996 were implicated by the allegedly unlawful orders because the affairs of the MCPA affected property ownership. The respondents disputed these submissions and argued that the application was defective on several technical grounds, including that the orders granted by the High Court were not final in nature and were accordingly not appealable.

After considering the merits of the appeal on the papers, the Constitutional Court was satisfied that it bore no reasonable prospects of success, and accordingly falls to be dismissed. However, it considered it necessary to determine whether punitive costs were warranted in the instance, because the respondents sought punitive costs on the basis of certain allegations that the applicants repeated throughout their submissions. These allegations, in short, were that Roelofse AJ, the learned Judge in the High Court, had conducted himself improperly by failing to act independently. The applicants repeatedly made this submission with reference to Roelofse AJ's statement that the matter was heard "*in camera* in accordance with the Judge President's directive". These allegations were not made merely as passing remarks, but largely formed a basis for the applicants' application for leave to appeal to the Constitutional Court.

Before reaching a decision in this regard, the Constitutional Court called for written submissions on the issue of costs. The applicants submitted that, should the application fail, it ought to be shielded from costs by virtue of the *Biowatch* principle. Additionally, they argued that punitive costs are not warranted in the circumstances because the impugned submissions were made by them on the basis of factual statements. The respondents disagreed, and argued that the applicants had exhibited a scurrilous and reprehensible attitude towards Roelofse AJ and the courts, and accordingly deserved no mercy in relation to costs. The respondents also argued that it was this deplorable conduct that rendered a punitive costs award apposite in the circumstances.

The Constitutional Court, in a unanimous judgment penned by Khampepe J (Mogoeng CJ, Jafta J, Madlanga J, Majiedt J, Mhlantla J, Pillay AJ, Theron J, Tlaletsi AJ and Tshiqi J concurring) dismissed the application for leave to appeal, and granted a punitive costs award in favour of the respondents.

The Constitutional Court held that no genuine constitutional issue arose in this matter, which, in substance, concerned the validity of an Anton Piller order. In addition, the applicants were not seeking to assert a constitutional right against an organ of state, and the matter was plainly spurred by frivolous and vexatious litigation. For these reasons, the Constitutional Court held that the *Biowatch* principle could evidently not shield the applicants from costs. Thus, the Constitutional Court held that the applicants, as the unsuccessful litigants, were liable to bear the costs of the failed application. Having reached this conclusion, the only remaining question for the Constitutional Court to determine was whether a punitive costs award was appropriate.

The Constitutional Court held that the purposes of punitive costs, being an extraordinarily rare award, are to minimise the extent to which the successful litigant is out of pocket and to indicate the court's extreme opprobrium and disapproval of a party's conduct. Although punitive costs are rarely awarded, the Constitutional Court affirmed that existing jurisprudence indicates that they are appropriate when it is clear that a party has conducted itself in an indubitably vexatious and reprehensible manner. Moreover, it held that this matter was akin to the earlier matter of *Tjiroze v Appeal Board of the Financial Services Board* [2020] ZACC 18, ; 2020 JDR 1413 (CC); 2021 (1) BCLR 59 (CC) where an applicant frivolously abused court processes and defamed a member of the Judiciary, and was mulcted with a punitive costs award because he ought to have understood the impact and weight of his defamatory remarks against a Judicial Officer.

In applying the established principles on punitive costs to these facts, the Constitutional Court held that the applicants had, in effect, abused court processes by persisting with and basing its appeal on unmeritorious and scandalous allegations against Roelofse AJ and the Judge President. The Court held that this was particularly egregious in the light of a letter that was sent by the Judge President to the applicants, disposing of the baseless allegations and inviting the applicants to retract the allegations. The Court held that the applicants were being, at best, wilfully ignorant by persisting with their claims against Roelofse AJ despite the letter from the Judge President. In addition, their failure to mention the letter in their pleadings was regarded as tantamount to attempting to mislead the Court. Furthermore, the Constitutional Court held that it is incumbent upon a litigant to approach the Court with a bona fide, genuine case, and that it will not do for litigants to resort to unscrupulous tactics to succeed in the Constitutional Court, especially when such tactics involve unjustifiable attempts at bringing shame and disrepute upon Judicial Officers.

The Constitutional Court accordingly held that litigants who resort to the kind of tactics displayed in this matter must beware that they are unlikely to enjoy the Court's sympathies or be shown mercy in relation to costs, and that the only reasonable conclusion in the circumstances is that a punitive costs order is apposite. It accordingly dismissed the application for leave to appeal with costs to be paid by the first and second respondents on an attorney and client scale.

Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others (CCT 52/21) [2021] ZACC 18 (29 June 2021)

Rule of law — judicial integrity — vindicating the honour of courts

Contempt of court — urgent application — direct access — duty to comply with court orders — first respondent is in contempt of court-Appropriate sanction for crime of civil contempt — punitive sanction — unsuspended committal — punitive costs

On Tuesday, 29 June 2021 at 10h00, the Constitutional Court handed down judgment in an urgent application for direct access seeking an order declaring former President Jacob Gedleyihlekisa Zuma to be in contempt of court, and sentencing him to a period of two years' direct imprisonment.

In December 2020, in the matter of *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Jacob Gedleyihlekisa Zuma* [2021] ZACC 2 (*CCT 295/20*), the applicant, being the Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State, approached the Constitutional Court on an urgent basis for an order that would compel Mr Zuma's co-operation with the Commission's investigations and objectives. On 28 January 2021, the Constitutional Court handed down judgment in that matter, ordering Mr Zuma to file affidavits and attend the Commission to give evidence before it. Mr Zuma responded by releasing a public statement in which he alleged that the Commission and the Constitutional Court were victimising him. From 15 to 19 February 2021, Mr Zuma did not attend the Commission as ordered. Accordingly, the Chairperson of the Commission announced that it would launch contempt of court proceedings. On the same day, Mr Zuma published another statement in which he levelled serious criticisms against the Judiciary and confirmed that he would neither obey the Constitutional Court's order nor co-operate with the Commission.

The applicant proceeded to approach the Constitutional Court for direct access on an urgent basis, submitting that a court that grants an order retains jurisdiction to ensure its compliance. The applicant submitted that, considering Mr Zuma's former and current political position, his conduct constituted a particularly reprehensible attack on the rule of law and posed a serious risk that it would inspire others to similarly undermine the administration of justice. It was the applicant's case that Mr Zuma was guilty of the crime of contempt of court as he had failed to comply with the order made in *CCT 295/20*. Furthermore, that in ostensibly defending his contempt, Mr Zuma conducted a politically-motivated smear campaign against the Constitutional Court, the Commission and the Judiciary, which constituted an aggravating factor relevant to the determination of an appropriate sanction. The applicant submitted that, in such unprecedented circumstances, it was apposite for the Constitutional Court to respond on an urgent basis and that only a punitive sanction, in the form of an unsuspended order of imprisonment for a period of two years, would be appropriate.

Zuma did not oppose this application, nor did he file any submissions.The Helen Suzman Foundation applied to be admitted as amicus curiae. Its main submission was that an appropriate sanction in contempt proceedings must play the dual role of vindicating the dignity of the court as well as compelling compliance with the impugned order. And, to this end, it proposed several sanctions which contained both punitive and coercive elements. Its submissions were relevant to the question of sanction and were of assistance to the Court. Since it met the requirements to be admitted as amicus curiae in terms of the Rules of the Constitutional Court, the Helen Suzman Foundation was admitted.

The main judgment was penned by Khampepe ADCJ (Madlanga J, Majiedt J, Mhlantla J, Pillay AJ, Tlaletsi AJ and Tshiqi J concurring). The second judgment was penned by Theron J (Jafta J concurring).

Both judgments agreed that this matter engaged the Constitutional Court's jurisdiction and that the circumstances warranted granting direct access on an urgent basis. Contempt of court proceedings exist to protect the rule of law and the authority of the Judiciary, and any disregard of an order of the Constitutional Court requires its intervention. It was held that neither the public's vested interests, nor the ends of justice, would be served if the matter had been required to traverse the ordinary, and lengthy, appeals process. It was accordingly held to be in the interests of justice to grant direct access, and to do so on an urgent basis.

The main judgment held that there could be no doubt that Mr Zuma was in contempt of court. The Constitutional Court had handed down an order in *CCT 295/20*. This had been served on Mr Zuma, who had subsequently failed to depose to affidavits or appear and give evidence before the Commission, as he had been ordered to do. And, he had failed to present evidence to establish a reasonable doubt as to whether his non-compliance was wilful and mala fide.

In determining the appropriate sanction, the main judgment considered the differences between coercive orders, which use suspended imprisonment as a threat to compel compliance, and punitive orders of direct committal. The main judgment held that a coercive order would be both futile and inappropriate as Mr Zuma was resolute in his refusal to comply. The main judgment held that affording Mr Zuma another opportunity to attend the Commission would have no effect other than to prolong his defiance and to signal that impunity is to be enjoyed by those who defy court orders. It was held that, notwithstanding the importance of the work of the Commission, neither the Court's honour, nor the public's interest in Mr Zuma's testifying before the Commission, would be vindicated by a coercive order. In any event, the main judgment noted that the public has an equally important, if not more acute, interest in a functioning Judiciary than in Mr Zuma's testifying before the Commission. An additional deficiency with a coercive order, so the main judgment found, was that the punitive effect of it would only operate upon future non-compliance. In other words, it would wield no punitive power in respect of Mr Zuma's contemptuous conduct, already so worthy of rebuke.

Finding that the appropriate sanction was likely to be a punitive order of unsuspended committal, the Court was alive to the need to safeguard Mr Zuma's right not to be arbitrarily deprived of physical freedom, as enshrined in section 12 of the Constitution. The main judgment acknowledged that after conviction in a conventional criminal trial, it is a violation of an accused person's right to a fair trial under section 35 of the Constitution to proceed to impose a sentence without affording her or him an opportunity to say something in mitigation of sentence. Whereas the second judgment concluded that Mr Zuma ought to have been afforded an accused person's rights given that what the applicant sought was a punitive order, the main judgment found that this was not a conventional criminal trial and a contemnor in civil proceedings is not an accused person for the purposes of section 35. Notwithstanding this, the main judgment was acutely aware that contempt proceedings, although brought by civil process, have a criminal component. It found that section 12 imports the right to be afforded a fair procedure akin to that afforded by section 35. Thus, affording a contemnor an opportunity to say something in mitigation of sentence is important given that removing a person's freedom is a drastic step. Accordingly, directions were issued on 9 April 2021, in which Mr Zuma was invited to file an affidavit on an appropriate sanction and sentence in the event

that he be found guilty of contempt. The main difference between the procedure followed in this matter and that which is ordinarily followed in a criminal trial was that, since contempt proceedings deal with guilt and sentence in one process, the invitation was sent before the Court reached a decision on guilt.

In response to the directions, Mr Zuma did not file an affidavit but addressed a 21-page letter to the Chief Justice, in which he made further inflammatory statements intended to undermine the Court, portray himself as a victim of the law and evoke public sympathy. He also attempted to justify his contempt by stating that, by hearing this application while the outcome of his application for the review of the decision by the Chairperson of the Commission not to recuse himself was outstanding, the Constitutional Court had acted unconstitutionally. The main judgment held that this defence was unfounded since, had Mr Zuma not wanted to participate in the Commission hearings whilst his review application was pending, he should have sought an interim stay of proceedings, which he did not do. The main judgment emphasised that the Constitutional Court went to great lengths to safeguard Mr Zuma's rights. Consequently, there was no sound basis on which he could claim to have been treated unfairly or victimised.

Having found that Mr Zuma could not be described as an accused person as envisaged in section 35 and that a fair procedure had been followed to safeguard his right to freedom, the main judgment held that no section 36 limitations analysis arose in the circumstances.

The main judgment held that an unsuspended order of committal was further justified by certain exceptional features of this matter. First, Mr Zuma's scurrilous and unfounded attacks on the Judiciary and its members were intolerable and could not be met with impunity. Protecting courts from slanderous public statements, it was emphasised, has little to do with protecting the feelings and reputations of Judges, and everything to do with preserving their ability and power to perform their constitutional duties. Furthermore, the main judgment found that contempt is not the act of non-compliance with a court order alone, but encompasses the nature of the contempt, its extent and the surrounding circumstances. Thus, the Court was enjoined to take cognisance of the unique and scandalous features of the matter. It held that if these aspects were to be ignored, the Court would be adjudicating the matter with one eye closed, and declining to decide it without fear, as it is constitutionally mandated to do.

The main judgment further emphasised that Mr Zuma was no ordinary litigant, but was the former President of the Republic of South Africa, who continued to wield significant political influence and in whom lies a great deal of power to incite others to similarly defy court orders. Thus, if his conduct were to be met with impunity, he could do significant damage to the rule of law. The main judgment held that no person enjoys exclusion or exemption from the sovereignty of the laws of the Republic. And it would be antithetical to the value of accountability if those who once held high office were not bound by the law. The main judgment emphasised the existence of a heightened obligation on the President to conduct her or himself in a manner that accords with the Constitution. Although Mr Zuma was not President at the time of his contempt, his contumacy was all the more outrageous in light of the

position he once occupied. The main judgment further noted that it was not insignificant that Mr Zuma's contemptuous conduct related to his duty to account for his time in Office. Accordingly, it was disturbing that he who twice swore allegiance to the Republic, its laws and the Constitution, sought to ignore and undermine the rule of law altogether.

The main judgment concluded that the cumulative effect of these factors was that the only appropriate sanction was a direct, unsuspended order of imprisonment.

In determining the length of sentence, the main judgment held that the Court was enjoined to consider the circumstances; the nature of the breach; and the extent to which the breach was ongoing. In doing so, it held that quantifying the egregiousness of Mr Zuma's conduct was an impossible task, but that the focus had to be on what kind of sentence would demonstrate, generally, that orders made by a court must be obeyed, and, to Mr Zuma specifically, that his contumacy stood to be rebuked in the strongest of terms. The main judgment concluded that if, with impunity, litigants, especially those in positions like that of Mr Zuma, are allowed to decide which orders they wish to obey and those they wish to ignore, a constitutional crisis will be precipitated. The main judgment ordered an unsuspended sentence of imprisonment for a period of 15 months.

The applicant sought costs on a punitive scale. The Constitutional Court affirmed the principle that punitive costs are exceptional and are reserved for instances where a litigant has conducted themselves in an indubitably vexatious and reprehensible manner, deserving of extreme opprobrium. The Court held that it was without question that the extraordinary award of punitive costs was warranted. Costs were awarded on an attorney and client scale.

The second judgment, penned by Theron J (Jafta J concurring), agreed that Mr Zuma was in contempt of the order in *CCT 295/20* but concluded that it would be unconstitutional to grant an order of unsuspended committal in the context of motion proceedings if the committal is not aimed at coercing compliance with a court order.

After surveying our jurisprudence on civil contempt, the second judgment concluded the following. First, that civil contempt has dual remedial and punitive purposes, with the main purpose of civil contempt proceedings being the enforcement of a court order, and that it had found no case in which a punitive committal order (unconnected to coercing compliance) had been ordered. Secondly, that the Constitutional Court had yet to consider the constitutionality of punitive committal orders in the context of civil contempt proceedings but had concluded, in respect of criminal contempt of scandalising the court, that a summary contempt procedure intended purely for penal purposes is inconsistent with the fundamental rights protected by sections 12 and 35(3) of the Constitution because there was no interference in the judicial process or the administration of justice, which called for swift remedial action.

The second judgment considered whether a common law rule allowing a civil court to order a punitive sanction of committal with no paired remedial purpose constituted a justifiable limitation of the right to freedom and security of the person (section 12) and an accused's right to a fair trial (section 35(3)). The second judgment

emphasised, at the outset, that because constitutionality is determined objectively, it would be a mistake to fixate on Mr Zuma's conduct in these proceedings and that regard should instead be had to the position of contemnors in Mr Zuma's position.

The second judgment concluded that depriving a contemnor of liberty without a criminal trial limits section 12 of the Constitution and that there are a host of respects in which the civil contempt procedure falls short of the protections enshrined in section 35(3). First, although civil contempt proceedings are a hybrid of civil and criminal elements, and therefore must be conducted in a manner that is grounded in sections 12 and 35(3) of the Constitution, the adaptation of motion proceedings to reflect their hybrid status depends on a judicial officer's assessment of what seems fair in the circumstances. By contrast, the procedural rights in section 35(3) are peremptory. Secondly, civil contempt proceedings, especially when brought on an urgent basis (as they were in this case), limit the right to have adequate time to prepare a defence as enshrined in section 35(3)(b). Thirdly, the consequence of granting direct access in this matter was that the main judgment's committal order would be unappealable, which limits section 35(3)(o). Fourthly, the motion procedure limits the alleged contemnor's fundamental right to remain silent and to be presumed innocent to the extent that it requires the alleged contemnor to present her or his defence before the initiating party has made out a prima facie case against her. The second judgment concluded that these deficiencies amounted to a serious violation of constitutional rights when one has regard to the fact that sections 12 and 35(3) protect a profound and essential right to freedom, which is the bedrock of our constitutional order.

The second judgment concluded that in an open and democratic society based on human dignity, equality and freedom, litigants are not prosecuted criminally in civil court by their adversaries in circumstances where they are not afforded an opportunity to cure their contempt in order to avoid being deprived of their liberty. Although a contemnor faces a deprivation of liberty without a criminal trial when the committal order sought is coercive as well as when it is punitive and unsuspended, the second judgment explained that the limitation of rights inherent in the civil contempt procedure becomes unreasonable and unjustifiable when punitive committal is ordered, for two reasons. The first is that while civil contempt proceedings serve the legitimate purpose of providing successful litigants with a speedy and effective means of enforcing court orders, when the relief sought is singularly punitive and not linked to enforcement, this justification for limiting rights falls away. The second is that the limitation of rights is substantially tempered when the contemnor can avoid imprisonment by complying with the court order.

The second judgment agreed that the Constitutional Court must defend its orders and authority, but stressed that it can only do so within the bounds of the Constitution. It agreed that Mr Zuma's contempt exposed him to an order of committal, but concluded that the constitutionally compliant approach would have been either to make an order of coercive committal aimed at inducing Mr Zuma to comply with the Court's order (if the Commission's term has not come to an end by the time judgment is handed down) or an order referring the matter to the Director of Public Prosecutions for a decision on whether to prosecute Mr Zuma for contempt of court.

[1] It is indeed the lofty and lonely work of the Judiciary, impervious to public commentary and political rhetoric, to uphold, protect and apply the Constitution and

the law at any and all costs. The corollary duty borne by all members of South African society – lawyers, laypeople and politicians alike – is to respect and abide by the law, and court orders issued in terms of it, because unlike other arms of State, courts rely solely on the trust and confidence of the people to carry out their constitutionally mandated function. The matter before us has arisen because these important duties have been called into question, and the strength of the Judiciary is being tested. I pen this judgment in response to the precarious position in which this Court finds itself on account of a series of direct assaults, as well as calculated and insidious efforts launched by former President Jacob Gedleyihlekisa Zuma, to corrode its legitimacy and authority. It is disappointing, to say the least, that this Court must expend limited time and resources on defending itself against iniquitous attacks. However, we owe our allegiance to the Constitution alone, and accordingly have no choice but to respond as firmly as circumstances warrant when we find our ability to uphold it besieged.

Rex v Diedricks (865/2020) [2021] ZAFSHC 151 (7 June 2021):

Pleadings-leave to amend- leave to amend the separate claims contained in his counterclaim –granted

Condonation application for late filing-granted

Costs for condonation- such party should pay the costs of the application as well as that of the opposition- unless the opposition appears to be frivolous or vexatious.

[1] This is an opposed application in terms whereof the applicant, cited as defendant in the main action, seeks leave to amend his counterclaim consisting of three separate claims based on defamation. Applicant also seeks condonation for the late filing of his application for leave to amend which application is also opposed.

[2] The applicant is Charlton Michael Rex, a major male person and admitted advocate residing in Bloemfontein. He was represented in the proceedings before me by Adv P Nel of Pretoria, instructed by Jaco Roos Attorneys, Pretoria. The local attorneys of record are Honey Attorneys.

[3] The respondent is Kenneth Leonardo Diedricks, a major male person and admitted attorney residing in Johannesburg. The respondent was represented in the proceedings before me by Adv T Mosikili of Sandton, instructed by Masondo Malope Attorneys, Johannesburg. The local attorneys are Webbers Attorneys.

[4] The applicant seeks leave to amend the separate claims contained in his counterclaim in accordance with his notice of intention to amend dated 19 January 2021. He also seeks an order in terms whereof the respondent is directed to pay the costs of the application. To avoid confusion, I shall refer to the parties as cited in this application.

[5] The applicant served and filed an application for condonation on receipt of the heads of argument filed on behalf of Mr Mosikili on 14 May 2021. The following relief is sought in this application:

> "1. Condoning the applicants' (sic) late filing of the notice in terms of Rule 28 which was served on the respondent on 19 January 2021.

2. Should the Court find that applicant's counterclaim was struck for non-compliance with the Court order of 3 December 2020, that applicant's counterclaim be reinstated.

3. The applicant is to pay the costs of the application in event of it being unopposed and the respondent to pay the costs in the event of him opposing this application;"

[6] The application for condonation was served and filed on Tuesday, 18 May 2021. Just before the hearing on 20 May 2021 the respondent served and filed his answering affidavit to the application for condonation.

[21] Although I have my doubts in this regard, I am not prepared to find that applicant's attorney was *mala fide*. It is possible that she merely made a *bona fide* mistake and/or acted negligently. Another aspect that must be considered, although not raised by the applicant, is the fact that it took the court nearly three months to deliver judgment and then the applicant was expected to file an amended counterclaim within 10 days from the date of the order. This is in conflict with authorities allowing one month or 20 days. Both in *Group Five* and *Constantaras* a period of one month was allowed to amend the particular pleadings. In my experience a period of 20 days or one month is usually allowed. The High Court went in recess on Friday 11 December 2020 and it is common cause that numerous businesses across the country usually close down for the festive season. In the Free State many firms of attorneys close their doors during this period as well.

[22] Having considered the reasons why condonation is sought and the difficult period in which the applicant was expected to respond to the court order, I am satisfied that a proper case has been made out for condonation. It must be emphasised that the mere fact that the counterclaim was struck out does not mean that it evaporated in thin air. It still remained in the court file as reiterated in *Princeps* referred to with approval in *Constantaras* and *Ocean Echo*.**[18]**

[23] The defendant was entitled to file an amended counterclaim and an application in terms of rule 28 was not required. However, I also need to deal briefly with the merits of the application for amendment. I am satisfied that the applicant has pleaded all relevant *facta probanda* in order to rely on defamation pertaining to all three claims contained in the amended counterclaim. It is not necessary to set out the *facta probantia* in the counterclaim and/or to present evidence. This will be expected of the applicant during the hearing of the action. The counterclaim to be amended sets out the *facta probanda* with sufficient particularity and the respondent cannot be heard to complain that it is not possible to plead thereto.

[24] Defamation is defined as the wrongful, intentional publication of words or behaviour concerning another person which has the effect of injuring his status, good name or reputation.**[19]** Nothing more needs to be said in this regard than to refer to Harms' well-known *Amler's on Pleadings,**[20]** Le Roux and Others v Dey,**[21]** O' Keeffe v Argus Printing and Publishing Co Ltd & Another,**[22]** Khumalo and others v Holomisa,**[23]** Featherby v Zulu,**[24]*** as well as the right to human dignity embedded in s 10 of the Constitution – a right regarded by many as "perhaps the pre-eminent value" "that informs the interpretation of many, possibly all, other rights."**[25]** All the elements required in a claim for defamation have been appropriately pleaded in the amended counterclaim. Respondent knows exactly what is alleged against him. The object of pleadings has been achieved.**[26]** There is no issue of

vagueness. In my view the alleged remarks pertaining to applicant such as “fucking idiot,” “asshole,” “stupid,” that “he would threaten to shoot judges” and several other allegations as well the *innuendo* that he participated in fraud are clear indications of defamation. Notwithstanding the conclusion arrived at by my colleague to which I am not bound in dealing with the application for amendment, I am satisfied that the amendments will not cause any of the claims contained in the counterclaim to be excipiable. Therefore, the application for amendment should be granted.

[25] Applicant seeks an indulgence from the court, both in respect of the amendment as well as the condonation application. The general rule is that costs do not follow the event in such cases. Such party should pay the costs of the application as well as that of the opposition, unless the opposition appears to be frivolous or vexatious. Having considered the matter, I am satisfied that the applications were unreasonably opposed and should be labelled frivolous. I conclude, in exercising my discretion, that this is a suitable case where each party shall be ordered to pay his own costs pertaining to the matters at hand.

[26] 1. The late filing of applicant’s application for amendment is condoned.

2. The applicant is granted leave to amend his counterclaim in accordance with his notice of intention to amend dated 19 January 2021.

3. Each party shall be responsible for his own costs in respect of both applications.

Singwane v Medical Superentendent of the Matsulu Community Health Clinic (3261/2020, 1051/2021, 1063/2021, 299/2021, 300/2021, 579/2021, 581/2021) [2021] ZAMPMBHC 18 (22 June 2021)

PAJA-discussion of what application must look like-all applications are struck from the roll.

[1] This judgment concerns seven applications that were enrolled on the unopposed roll before me on 24 May 2021. I deal with all the applications in this judgment because the applications were all brought in terms of the provisions of section 78 of the Promotion of Access to Information Act, 2 of 2000 (“*PAIA”*). I reserved my judgment in the applications to have an opportunity to revisit the provisions of PAIA applications. This type of applications is often unopposed and dealt with on this court’s unopposed roll. Often several such applications are on the courts unopposed roll on motion days.

[2] This judgment will show that, despite the Legislature’s noble aim to provide a comprehensive procedure and system for access to information through PAIA, parties are already on a road to nowhere even before their applications reach the court. I hope that this judgment will cause the litigants and their legal practitioners to carefully consider the provisions of PAIA from the time the need for access to information arises.

[4] I commence this judgment with some remarks over PAIA. Thereafter I proceed to refer to the provisions of PAIA insofar as they are relevant for purposes of deciding the applications. Finally, I deal with each of the applications and set out in why they are wanting of the provisions of PAIA.

Remarks in respect of PAIA

[5] Twenty-four years since the commencement of the Constitution of the Republic of South Africa Act, 1996 ("*the Constitution"*), South Africans ought to know by now that access to information is a fundamental right. Section 32 of the Bill of Rights provides:

> "*Access to information.*
>
> *(1) Everyone has the right of access to- (a) any information held by the state; and any information that is held by another person and that is required for the exercise or protection of any rights.*
>
> *(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state."*

[6] In Brümmer v Minister for Social Development and Others**[3]** , the Constitutional Court explained the importance of the constitutional right of access to information held by the state as follows:

> "*The importance of this right . . . in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the State. Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency 'must be fostered by providing the public with timely, accessible and accurate information'.*
>
> *Apart from this, access to information is fundamental to the realisation of the rights guaranteed in the Bill of Rights. For example, access to information is crucial to the right to freedom of expression which includes freedom of the press and other media and freedom to receive or impart information or ideas. . . . Access to information is crucial to accurate reporting and thus to imparting accurate information to the public."(Citations omitted.)*

Discussion

[90] All the applications were brought under the provisions of section 78 of PAIA after the requests for access to information were not reacted to at all and no decision was given by the public and private bodies.

[91] The applicants for access to information requested from public bodies relied upon the deeming provisions in section 27 and 77(7)**[16]** of PAIA. The applicant for information held by the private body relied upon section 58**[17]** of PAIA.

[92] Rule 3(1) provides that an application under PAIA must be brought on notice of motion that must correspond substantially in accordance with the form set out in the Annexure to the Rules, addressed to the information officer or the head of a private body, as the case may be. Compliance with the Rule is set in peremptory terms. From this Rule, it is clear that:

a. Applications under section 78 of PAIA must be brought on notice of motion;

b. The notice of motion must substantially correspond with the Annexure to the Rules;

c. The application must be addressed to the information officer in the case of a request for information from a public body and in the case of a private body, the head of the private body;

[93] Save for the Prinsloo and Mdluli applications, none of the other applications substantially complied with the Annexure to the Rules in that:

a. The respective notices of motion did not include the words "IN TERMS OF THE **PROMOTION OF ACCESS TO INFORMATION ACT No. 2 OF 2000**" appearing in the Annexure; and

b. No reference is made to paragraph (iii) of the Annexure which sets out as follows:

"*In default of your complying with* **rule 3 (5)** *of the Promotion of Access to Information Rules, the applicant may request the clerk of the court or the registrar as the case may be, to place the application before the Court for an order in terms of section 82 (b) of PAIA."*

[94] I am of the view that the Rules' inclusion of the specific words "*IN TERMS OF THE* **PROMOTION OF ACCESS TO INFORMATION ACT No. 2 OF 2000***"* in the Annexure is for good reason. It is clearly intended to immediately make it clear to whomever the notice of motion is delivered to that the application pertains to access to information in terms of PAIA.

[95] With regards to the second defect identified above, the purpose of the inclusion of these words are important within the whole scheme of PAIA. **Rule 3(5)** provides as follows:

"*The information officer or head of a private body, as the case may be, must—*

(a) immediately after receipt of the application, notify, in writing, all other persons affected, of the application and attach a copy of the application to such notice; and

(b) within 15 days after receipt of the application—

(i) file with the clerk of the court or the registrar, as the case may be, two true copies of the request and the notification sent to the requester in terms of **section 25** *(1) (b) of PAIA;*

(ii) notify the applicant in writing that the requirements of **subparagraph (i)** *have been complied with; and*

(ii) serve on the applicant a true copy of the reasons, if they have not yet been provided.

[96] **Rule 3(5)** is cast in peremptory terms. It must be complied with, and the information officer of a public body or head of a private body must comply with its provisions. In addition, he or she must act immediately.

[97] Sub-rule 3(5)(a) serves to protect the interests of persons who may have an interest in the disclosure of the information. This is important because once they have notice of the application, they may want to exercise their rights to the extent that they have not already done so.**[18]**They may have no knowledge of the request and the notice of the application provided for in this sub-rule may be the first time they receive notice of the request.

[98] **Section 25** of PAIA provides for a decision on the request and notice thereof. Yet again, sub-rule 3(5)(a) serves important purposes. Clearly the purpose is to notify the court and the applicant of the decision on the request, and it gives notice thereof. In my view, it serves three purposes; Firstly, it gives the public or private body an opportunity to either consider or reconsider the request. It might nudge the bodies to react to the request if they have not already done so or to find the request if they have not already become aware of the request. Secondly, it serves to give notice of the decision if the bodies have not done so already or if the decision for some or other reason did not come to the notice of the applicant. Thirdly, it obliges the body concerned to serve the applicant with the reason/s if same has not yet been provided. For obvious reasons, service of the reason/s for the refusal of the request will inform the applicant's further prosecution of the matter.

[99] In terms of Sub-rule (6) of **Rule 3**, the applicant may request the clerk of the court or registrar to place the application before the court for an order in terms of **section 82** (*b*) of PAIA. In terms of **section 82(b)**, the court may order the information officer or relevant authority of a public body or the head of a private body to take such action or to refrain from taking such action as the court considers necessary within a period mentioned in the order. This would, in the context of sub-rule (6) of **Rule 3**, mean that the court may order compliance with the provisions of sub-rule (5).

[100] **Rule 3(1)** provides that all applications in terms of **section 78** of PAIA must be addressed to the information officer concerned. It therefore follows that in all PAIA applications, the relevant information officer must be cited. Who the relevant information officer is, is clearly defined under the definition of "information officer" in **section 1** of PAIA. It is not enough to simply direct the request or application or appeal to "the information officer". Each body has a post filled by a person designated as its information officer. So for instance, according to the definition, the information officer of the Mpumalanga Department of Health is the Head of the Department of Health.**[19]** That is the person to whom the request or the appeal or the application must be directed. The public body's information manual must show the identity of the person who must receive the request or appeal or address or the application and his/her contact details.

[101] Neither PAIA nor the Rules expressly state who should be cited as the respondent/s in the application. For a determination of that issue, the provisions of **sections 74(1)** and **78** read with **section 82** must be analysed.

[102] **Section 74** provides for a right of appeal by the requester to the relevant authority against a decision of the information officer of a public body referred to in paragraph (a) of the definition of "public body" in **section 1** of PAIA: to refuse a request for access; or taken in terms of **section 22**, **26**(1) or **29**(3). A third party may lodge an internal appeal against a decision of the information officer of a public body referred to in paragraph (a) of the definition of "public body" in **section 1** to grant a request for access.

[103] **Section 78(1)** and **78**(2) sets out the jurisdictional requirements for an approach court for relief in terms of **section 82.**

[104] In terms of **section 78(1)**, a requester or third party referred to in **section 74** may only apply to a court for appropriate relief in terms of **section 82** after that

requester or third party has exhausted the internal appeal procedure against a decision of the information officer of a public body provided for in **section 74.**

[105] In terms of the provisions of **section 78(2)** a requester: that has been unsuccessful in an internal appeal to the relevant authority of a public body; or is aggrieved by a decision of the relevant authority of a public body to disallow the late lodging of an internal appeal in terms of **section 75(2)**; or is aggrieved by a decision of the information officer of a public body referred to in paragraph (b) of the definition of "public body" in **section 1:** to refuse a request for access; or taken in terms of **section 22**, **26**(1) or **29**(3); or aggrieved by a decision of the head of a private body: to refuse a request for access; or taken in terms of **section 54**, **57**(1) or **60**. These requesters may, by way of an application, within 180 days apply to a court for appropriate relief in terms of **section 82.**

Conclusion

[127] I may have explored the relevant provisions of PAIA too extensively for purposes of deciding the applications. I purposefully did so. Litigants and their legal practitioners may find guidance in what is set out in this judgment when consideration is given launch and prosecute applications to court in terms of PAIA.

[128] I need not dismiss the applications. Rather, I have concluded that the applications should be struck from the roll due to their non-compliance with the procedures prescribed by PAIA. Due to the defects in the applications, they could not even proceed to the merits part of the enquiry. None of the respondents opposed the applications. No order of costs is made.

In the premises, the following order is made:

1. The applications under case numbers 3261/2020, 1051/2021, 1063/2021, 299/2021, 300/2021, 579/2021 and 581/2021 are struck from the roll.

2. No cost orders are made.

Mostert and Other v Nash and Others (56338/2019) [2021] ZAGPPHC 401 (11 June 2021)

Costs-jointly and severally-working thereof

[1] The applicants seek an order declaring that, properly interpreted, the cost order granted against the applicants and three other third parties was granted against them jointly and severally, and further that the applicants are absolved from liability for the cost order as a result of the first and second respondents abandoning their cost order against the three other parties. The application is opposed by the respondents.

[2] It is common cause that:

2.1 On 5 April 2017, Tuchten J handed down judgment in a matter involving the parties to the present application. In respect of costs, the judgment records:

" 104 As to costs: although the applicants sought in the notice of motion as originally framed an account from Mr Mostert, the curator and ALM Inc, counsel for the applicant's conceded that the duty to account was on these papers restricted

to the curator only. On that issue, therefore, Mr
Mostert and ALM Inc were successful. But the key issue in the case, on which
all the respondents except
the Sable Fund joined issue with the applicants, related to the question whether the remuneration agreement could survive scrutiny. On that issue the applicants were successful and thus substantially successful
in the case. The applicants sought no relief against the Sable Fund . On this basis, I shall order the respond ents other than the Sable Fund to pay the applicants' costs. All the parties used the services of two counsel and the papers and the issues involved certainly justified their employment**[1]**. "

2.2 The order in respect of costs records:

The first, second, fourth, fifth, sixth and seventh respondents must
pay the applicants' costs of suit in relation to this application, including the costs consequent upon the employment of both senior and junior counsel**[2]**.

2.3 The effect of this order on the parties to the present application is that the applicants, who were the first, second and fourth respondents, and the Financial Sector Conduct Authority ("Conduct Authority"), who at the time was the fifth, sixth and seventh respondents, were ordered to pay the costs of Nash and Midmacor, who were the applicants.

2.4 On 8 February 2019, Nash and Midmacor withdrew a pending appeal in the Supreme Court of Appeal involving the Conduct Authority . It was agreed that each party would bear their own costs in the matter withdrawn. This was subject to Nash and Midmacor agreeing to abandon the *aliquot* liability of the Conduct Authority in the Tuchten J costs order, which they did. The applicants launched the present application being aggrieved by the abandonment of the cost order.

[3] The issues to be determined by this court are:

3.1 Whether the court order by Tuchten J, in respect of costs, properly interpreted, was granted against the applicants and the three other parties "jointly and severally" (my emphasis); and

3.2 Whether the applicants are absolved from their liability for costs as a result of the first and second respondents abandoning the cost order against the three other parties.

[4] Regarding the first issue, Mr. Wasserman, appearing for the applicants, submitted that the cost order should be understood to mean jointly and severally. Mr. Wickins, for the first and second respondents supported that view. He further submitted that it was always the respondents understanding that the costs were granted on joint and several basis and that there was never a need for an order to clarify the cost order.

[5] Mr. Theron, representing the third respondent disputed that the cost order of Tuchten J caters for several liability of the respective parties. The third respondent is of the view that although the court has authority to clarify its order, the declaratory order sought by the applicants amount to a variation of the cost order of Tuchten J and the applicants have not made out a case for variation of the order.

[7] Rule 10 (4)(c) of the Uniform Rules of Court confirms that a "joint and several" cost order is a competent order in circumstances similar to the case at hand and it provides that:

"4....

(a)..

(b)...

(c) If judgment is given in favour of the plaintiff against more than
one of the defend ants)
the court may order those defendants against whom it gives judgment to pay the plaintiff's costs jointly and severally)
the one paying the order to be absolved) and that if one of
the unsuccessful defendants pays more than his pro-rata share of the costs of the plaintiff, he shall be entitled to recover from the other unsuccessful defendants their pro -rata share of such excess."

[9] As regards to the second issue, and in accordance with a proper interpretation of Rule 10 (4)(c), the abandonment of the cost liability of the three parties does not extinguish the entire cost liability. The applicants are excused from paying the pro-rata share of the three parties in whose favour the costs were abandoned. The applicants remain liable to pay their respective pro-rata share jointly and severally, the one paying the other to be absolved.

[10] It was certainly not the intention of the respondents to abandon the entire cost order. In my view, the abandonment of the cost order does not in any way prejudice the applicants to an extent that they would be expected to pay more than they would be required, had there been no abandonment.

[11] In the circumstances, I order that:

1. The application is dismissed;

2. The applicants, jointly and severally are to pay the first and second respondents' costs inclusive of costs of two Counsel if so employed.

First National Bank, A Division of First Rand Bank Limited v Antley Lighting (Pty) Ltd and Others (31890/2019) [2021] ZAGPPHC 421 (11 June 2021):

Rule 23(1) Exception-simple summons-lease contract not attached-summary judgment application where it was attached-therefore simple summons accepted-eexception dismissed

[1] This is an application in terms of Rule 23(1) of the Uniform Rules of Court brought by the second and third defendants. The application is opposed by the plaintiff.

[2] The defendants raised an exception to the plaintiff s simple summons citing two grounds. The second ground, as it appears in the notice of exception, was abandoned by both defendants during the hearing of this application. The only remaining ground of the defendants exception is stated in the notice of exception as follows:

"1. The basis of the first ground of exception is that the cause of action pleaded in the plaintiff's simple summons dated 10 May 2019, is discrepant from the one pleaded in the declaration.

2. The simple summons -

2.1 Is defective for want of compliance with Rule 17(2)(b) as it failed to disclose a cause of action;

2.2 Failed to disclose *a cause of action as it was of vital importance for the plaintiff to have attached the written deed of suretyship to the simple summons, taking into account that* its *cause of action* is *based on the aforementioned deed of suretyship."*

[3] The defendants' basic complaint is that the deed of suretyship was not attached to the simple summons and for that reason it was contended, by Mr. Coetzee appearing for the defendants that, the simple summons does not disclose a cause of action and does not comply with Rule 17(2)(b) of the Uniform Rules of Court.

[4] This application stems from the plaintiff 's action against, *inter alia,* second and third defendants which was commenced by way of a simple summons.

[5] The deed of suretyship was not annexed to the simple summons. The plaintiff applied for summary judgement which was granted against the first defendant but the second and third defendants were granted leave to defend the action. Thereafter, the plaintiff delivered a declaration with copies of the deed of suretyship ("annexures SJ2 and SJ3") annexed to it.

16] In *ABSA Bank Limited v Janse Van Rensburg & Others**[8]*** the full bench of the Western Cape Division held that, on
proper interpretation of Rule 17(2)(b) read with Form 9, it is necessary to attach a copy of the written agreement to the summons where the plaintiffs cause of action is based on such agreement.

['17] In *ABSA Bank Limited v Studdard and Another**[9]**,* Wepener J referred to the following remarks of Swain J in *Moosa v Hassam**[10]*** which deal with non-compliance with the requirements of Uniform Rule 6:

"In the present case
the respondents base their cause of action against the applicants upon a written ag reement. The written agreement is a vital link in the chain of respondents' cause of action against the applicants. In order
for the respondents' cause of action to be properly plead
ed, it is *necessary for the written agreement relied upon to be annexed to the particulars of claim. In the absences of the written agreement, the basis of the respondents' cause of action* does *not appear ex facie the pleadings**[11]**."*

Wepener J held that:

"if it is *correct that it* is *necessary for a*
plaintiff to attach the document to properly plead its cause of action, such would be c orrect not only for the purposes of Rule 18, but also for the purposes of
Rule 17 as, *the plaintiff would* disclose *no cause of action pursuant to the provisions of Rule 17 if it fails to attach the written agreement**[12]**."*

[18] I am in agreement with the views expressed by Wepener J, Swain J and the passage in Erasmus to the extent that the views relate to applications for summary judgement, default judgement, compliance with Rule 18(6) the list may not be exhaustive. However, in my view, where a simple summons has been met with a notice of intention to defend, the simple summons cannot be attacked for failing to have a copy of an agreement attached to it. The attack should be directed at the declaration which constitutes a pleading.

[19] In the present case, the cause of action relied upon is contained in the declaration which is materially similar to the one contained in the simple summons. A copy of the deed of suretyship agreement in respect of each defendant is attached to the declaration .

[20] Once a declaration is delivered, the defendants are expected to plead or file an exception to the declaration and not to the simple summons **[13]**.

[21] I am satisfied that the declaration contains annexures pertaining to the deed of suretyship and that the cause of action is consistent with the one raised in the simple summons. A declaration constitutes a pleading. The defendants should therefore be able to file a plea or an exception to the declaration if they so wish.

[22] I am therefore of the view that the exception raised by the defendants should be dismissed with costs.

[23] Mr. Jacobs submitted that costs should be on an attorney and client scale, largely because of the manner in which the defendants conducted themselves in this application. They withdrew their second ground of exception during the hearing of the application when they could have done so earlier. Mr. Jacobs argued further that the issues raised in the exception were not necessary having regard to the available authorities which Mr. Coetzee should have consulted.

[24] Mr. Coetzee submitted that the appropriate scale of cost should be on a party and party .

[25] It is trite
that the costs should follow the results. The Court has a discretion in awarding costs. In *Ferreira v Levin NO and Others**[14]*** the Constitutional Court stated that:

"The Supreme Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer and the second that the successful part y should, as a general rule, have his or her costs. Even this second principle is subject to the first. The second principle is subject to a large number of exceptions where the successful part y is deprived of his or her costs. Without attempting either comprehensiveness or complete analytical accuracy, depriving successful parties of their costs can depend on circumstances such as, for example, the conduct of parties, the conduct of their legal representatives, whether a part y achieves technical success only, the nature of litigants and the nature of proceedings. "

[26] An award of attorney - and - client costs will not be granted lightly as the courts look upon such orders with disfavour and is loath to penalise a person who has exercised a right to obtain a judicial decision on any complainant such party may have**[15]**.

[27] *The* list of grounds upon which a court may grant a punitive cost order on an attorney and client scale is not exhaustive. They include dishonesty, fraud, reckless and malicious or frivolous motives.

[28] I am not persuaded that the scale of costs sought by the plaintiff is justifiable in this case. *The* defendants did not commit any of the grounds listed above (para 27). *The* defendants' heads of argument are premised on case law researched by

Mr. *Coetzee. The* only issue is the interpretation of the views of the authorities *referred* to by either party.

[29] In the circumstances I make the following order:

1. The exception is dismissed;

2. The Second and Third defendants are to pay plaintiff's costs of application jointly and severally, the one paying the other to be absolved

G[....] v M[....] (22730/2017) [2021] ZAGPPHC 396 (15 June 2021)

Locus standi-curator bonis sues for divorce on hehalf of patient-needs Master's prior approval to institute action-will then have locus standi

[1] The crux in this matter is whether a curator *bonis* has the *locus standi* to institute divorce proceedings on behalf of an incapacitated person whose financial affairs and assets she/he has been appointed to manage; and if so, whether in terms of the court order granting the curator *bonis* the power to institute such proceedings, the curator *bonis* should have obtained the approval of the Master of the High Court ("the Master") before instituting the proceedings.

[2] The application was heard virtually, and not in open court, as provided for in this Division's Consolidated Directives re Court Operations during the National State of Disaster issued by the Judge President on 18 September 2020.

[3] The matter comes before me in the form of an exception. The respondent/plaintiff, D J M[…], in his capacity as *curator bonis* to W F M[…] ("the patient"), has instituted divorce proceedings against the excipient/defendant, L M[…] nee G[…], who is the wife of the patient.

[4] The excipient/defendant has in turn excepted to the respondent/plaintiff's amended particulars of claim on the ground that they lack the averments necessary to sustain a cause of action and are, bad in law in that:

4.1 the respondent/plaintiff lacks the necessary *locus standi* to institute the divorce proceedings on behalf of the patient, owing to the nature of the proceedings being too personal in nature;

4.2 the order which purportedly appointed the respondent/plaintiff as the patient's *curator bonis* has not been complied with as no averment is made in the amended particulars of claim that the respondent/plaintiff obtained the necessary approval from the Master to institute his action.

[5] The respondent/plaintiff submits, on the other hand, that the excipient/defendant's exception is irregular, baseless, and contrary to the prevailing Court Order as well as legislation in that when properly interpreted the Court Order firstly, grants the *curator bonis* the power to institute action on behalf of the patient even those actions that are patrimonial in nature; secondly, the *curator bonis* does not require the curator to seek the approval of the Master before instituting such proceedings.

47] Even if the claims the respondent/plaintiff contends are not matrimonial in nature but patrimonial, and ought to be entertained, were competent by a *curator bonis*, the respondent/plaintiff still lacks the necessary approval by the Master to

institute such proceedings in accordance with the Court Order. As such, all the claims, in that regard, remain excepiable.

[48] The court that granted that order appears to have been aware that the powers granted to the *curator bonis,* in this instance, were not powers that would naturally have been granted in terms of Uniform Rule 57, hence the court saw it fit that the institution of the legal proceedings be made subject to the Master's approval.

[49] I have to conclude, therefore, that the absence of the allegation of this essential element, that is, the allegation that the Master's written approval has been obtained, renders the particulars of claim excepiable.

CONCLUSION

[50] Normally the rules require that the respondent/plaintiff be given an opportunity to amend the particulars of claim but in this instance, the excipient/defendants submits that under the circumstances of this case it would be a futile exercise to grant the respondent/plaintiff leave to amend his particulars of claim as he would require the approval of the Master or the Master to rectify the *curator bonis'* actions. Apparently the said rectification has been sought and refused. This argument by the excipient/defendant has not been controverted by the respondent/plaintiff. In that sense I am also of the view that it will take the matter no further to grant leave to amend the particulars of claim. There appears to be no indication that the Master will rectify the action already taken by the respondent/plaintiff. As such the exception ought to be upheld and the respondent/plaintiff's claim be dismissed.

COSTS

[51] As regards costs, the excipient/defendant argues that as the claim specified the amended particulars of claim are bad in law and have not been authorised by the Master (and will not be ratified by the Master), the patient's estate ought not to be mulcted with the costs of the exception and/or the costs associated with the dismissal of the claims. The plaintiff ought to be ordered to pay such costs *de bonis propriis* for the institution of such reckless and unauthorised proceedings against the defendant.

[52] Nevertheless, the respondent/plaintiff has been partly successful in the matter as the first part of the exception has been found in his favour. Ordinarily in such circumstances, the costs would be shared between the two parties. What is a challenge in this matter is that the costs must be covered by the estate of both parties. I intend therefore not to make any order as to costs.

ORDER

[53] I, in the circumstances, make the following order:

1. The exception is upheld.

2. The respondent/plaintiff's claim is dismissed.

3. No cost order is made.

Van Heerden and Another v Hambsch (7408/2017) [2021] ZAGPPHC 375 (18 June 2021)

Uniform Rule 42(1)(a), alternatively, Uniform Rule 31(2)(b), alternatively, the common law, the setting aside of an order granted-*in casu* not granted

[1] The applicants seek on the basis of Uniform Rule 42(1)(a), alternatively, Uniform Rule 31(2)(b), alternatively, the common law, the setting aside of an order granted on 18 September 2018. The order sought to be rescinded was granted by agreement between the parties. The applicants further seek condonation for the late filing of this application.

[2] Rule 42(1)(a) provides that:

"A court may, in addition to any other powers it may have, *mero motu* or upon application of any party affected, rescind or vary:

(a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby".

[3] This means that the applicant has to show that the court in granting the default judgment had committed an error "in the sense of a mistake in a matter of law appearing on the proceedings of a Court of record. If the applicant can prove the error committed by the court, it is not necessary for him to explain his default.

[4] Rule 31(2)(b) provides that a defendant may within 20 days after he has knowledge of a judgment against him by default apply to court upon notice to the plaintiff to set aside such judgment, and the court may, upon good cause shown, set aside the default judgment on such terms as to it seems meet. In terms of Rule 31(2) (b) an applicant for rescission of a judgment must show good cause. This means that the applicant has to give a reasonable explanation for the default, must show that his application is bona fide, and be able to show that he has a bona fide defence to the respondent's claim which *prima facie* has some prospect of success.

[5] Under the common law, in order for the court to grant an order rescinding a previous order or judgment the applicant has to show sufficient cause. In *Chetty v Law Society, Transvaa* the court held that:

"But it is clear that in principle and in the long standing practice of our Courts two essential elements of "sufficient cause" for rescission of a judgment by default are:

(i) That the party seeking relief must present a reasonable and acceptable explanation for his default; and

(ii) That on the merits such party has a bona fide defence, which *prima facie* carries some prospect of success."

[11.5] a judgment cannot be said to have been granted erroneously in the light of a subsequently disclosed defence which was not known or raised at the time of default judgment; **[19]**

[11.6] the error may arise either in the process of seeking the judgment on the part of the applicant for default judgment or in the process of granting default judgment on the part of the court;**[20]** and

[11.7] the applicant for rescission is not required to show, over and above the error, that there is good cause for the rescission as contemplated in rule 31(2)(b).**[21]**

[21] In terms of Uniform Rules 42(1)(a) and 31(2)(B) I am satisfied that the order was not granted erroneously or was granted in the absence of the applicants.

[22] Further in *Chetty***[22]** (supra), the court stated that:

"As I have pointed out, however, the circumstances that there may be reasonable or even good prospects of success on the merits would satisfy only one of the essential requirements for rescission of a default judgment. It may be that in certain circumstances, when the question of the sufficiency or otherwise of a Defendant's explanation for his being in default is finely balanced, the circumstances that his proposed defence carries reasonable or good prospects of success on the merits might tip the scale in his favour in the application for rescission…"

[23] Taking into account my finding that because the underlying causa did not fall within the ambit of the NCA and that the settlement agreement which was made a court order does not qualify as a credit agreement under s 8(4)(f) of the NCA, I am of the view that the applicants have not shown that they have not shown that their defence has reasonable prospects of success and I find that they have not shown sufficient cause for the order to be rescinded.

[24] In view of my conclusion that the applicants have not shown sufficient cause for the rescission of the order of 18 September 2018, I am of the view that it is not necessary to deal with the issue of condonation for the late filing of this application.

[25] With regard to costs, I am of the view that the circumstances of this case do not justify the imposition of punitive costs.

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

'The application is dismissed with costs.'

Ishmail v G L Events Oasys Consortium and Another (19126/18) [2021] ZAGPPHC 384 (18 June 2021)

Rule 38 (3) read with Rule 38 (4), (5), (6) and (7)-evidence recorded by way of commission-court has inherent jurisdiction to hear any matter before it, as a general power to control its own procedures so as to prevent an injustice-It has to be used to ensure convenience and fairness in legal proceedings, prevent steps being taken that would render judicial proceedings ineffective.

50. In light of the above I accordingly make the following order:

50.1 The Applicant is authorised and directed to lead evidence, as Plaintiff, to record the evidence in terms of the provisions of Rule 38 (3) read with Rule 38 (4) (5) (6) (7) before an advocate of at least ten (10) years' experience to be agreed upon by the parties within thirty (30) days from date

1. This is an opposed Rule 38 (3) read with Rule 38 (4), (5), (6) and (7). This application has been heard in a virtual hearing via Microsoft Teams.

2. The purpose of the application is to have the evidence of the Applicant recorded by way of commission in the main action. The Plaintiff is the Applicant in this application. The Applicant is said to be 89 years old, suffers from leukemia and is in a state of ill -health.

3. For the sake convenience the Plaintiff will be addressed as the Applicant in this application.

4. The Second Respondent is opposing the application.

5. The application is to have the Applicant (Zoolakha Ishmail) record her evidence on commission as provided for in Rule 38.

6. The reasons advanced for the application is due to old age and ill- health of the Applicant. The Applicant is diagnosed with blood cancer as per the report of Dr DJM Frantzen, attached to the application.

7. The Applicant's evidence is relevant in the main action between the parties.

ISSUES

8. The main issue is whether or not it is necessary for the Applicant to record her evidence on commission at her trial during the time when Court proceedings are conducted through Microsoft Teams due to Covid- 19 pandemic.
31. Plasket J in Plascon v Tsotsi**[1]**, the Court held that wherever the inherent jurisdiction of the Court is in issue, the court has a discretion whether or not to invoke it. This court has a discretion whether to invoke its inherent jurisdiction or not.

a. In ***Bremer Vulkan Schiffbau and Maschinenfabrik v South India Corpn*****[2]**, the Court described the Courts' inherent jurisdiction to hear any matter before it, as a general power to control its own procedures so as to prevent an injustice. It has to be used to ensure convenience and fairness in legal proceedings, prevent steps being taken that would render judicial proceedings ineffective, prevent abuses of process and act in aid of superior courts and in aid or control of inferior courts and tribunals.

32. In ***Chandra v Canadian Broadcasting Corporation and others*****[3]**, the Court dealt with Rule 1.08(1) of the Rules of Civil Procedure, R.R.O, 1990 regulation 194 which permits trial evidence by telephone or video conferencing, where facilities are available at the Court or are provided by a party.

33. The witnesses at the trial of any action shall be examined *viva voce*, but a court may at any time, for sufficient reason, order that all or any of the evidence to be adduced at any trial be given on affidavit or that the affidavit of any witness be read at the hearing, on such terms and conditions as to it may seem meet: Provided that where it appears to the court that any other party reasonably requires the attendance of a witness for cross-examination, and such witness can be produced, the evidence of such witness shall not be given on affidavit**[4]**.

34. Rule 39 (20) provides that "*If it appears convenient to do so, the court may at any time make any order with regard to the conduct of the trial as to it seems meet, and thereby vary any procedure laid down by this rule".*

35. Section 173 of the Constitution provides that …. *High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice".*

36. In **Salojee Development 1965 (2) SA 135(A) at 140,** Steyn CJ [as he then was], remarked: "This Court has on a number of occasions demonstrated its reluctance to penalize a litigant on account of the conduct of his attorney.

APPLICATION OF THE LAW

37. I am of the considered view that the Applicant took long to apply for a trial date. The submission by Counsel for the Applicant that applying for a preferential trial date is going to take too long is not correct and misplaced.

38. The time spent by the Applicant making a Rule 38 application should have been spent bringing the action to speed and applying for a trial date. The Rule 38 application may have been more costly than applying for a preferential date.

39. I agree with Counsel for the Second Respondent that the Applicant is dragging her feet to finalize the matter.

40. At the same time the Applicant is elderly and sickly and left this matter in the hands of his legal team to do something about it. In my view, there is not much that the Appellant could have done herself as a person.

41 In addition, the use of video conferencing, zoom and Micro soft teams in our Courts have become the new normal. One can say that the Rule 38 application may not have been necessary.

42. However, it is not known how long this practice of using video conferencing, zoom and or Microsoft teams is going to last. It is also not known how long this Covid- 19 pandemic is going to be around.

43. It is a fact that presently the use of video conferencing/zoom and or Microsoft teams is the new normal, things may change if the world is able to rid itself of the virus. Whether the world can rid itself of the Covid -19 virus is a scientific debate and is beyond the scope of this judgment.

44. However, if by the time the trial start things have changed and the Applicant is expected to appear in Court in person, this may be cumbersome for her. This statement is informed by her age and medical report. It is true that a person of her age suffers from old age illnesses.

45. Besides the question of whether to conduct proceedings virtually or physically falls within the discretion of the presiding judge. It will be the prerogative of the judge presiding over the trial whether or not to conduct the trial virtually or physically.

46. Courts have to be accommodating of the needs of litigants where possible. Courts must adapt to the requirements of the times we live in and circumstances upon which the Courts adjudicate.

47. As mentioned above, the High Court has the inherent power to protect and regulate its own process, develop the common law taking into account the interest of justice.

48. I am of the view that although the Applicant dragged her feet to finalize the matter, this Court can still accommodate her request. This is based on her age and state of ill-health, not forgetting *ubuntu.* Since ***S v Makwanyane*****:** (CCT3/94) **[1995] ZACC 3**; **1995 (6) BCLR 665**, *ubuntu* has become an integral part of the constitutional values and principles that inform interpretation of the Bill of Rights and other areas of law. Basically *ubuntu* means "I am because you are" or "humanity towards others".

49. This Court has inherent jurisdiction to hear any matter before it, as a general power to control its own procedures so as to prevent an injustice. It has to be used to ensure convenience and fairness in legal proceedings, prevent steps being taken that would render judicial proceedings ineffective.

50. In light of the above I accordingly make the following order:

50.1 The Applicant is authorised and directed to lead evidence, as Plaintiff, to record the evidence in terms of the provisions of Rule 38 (3) read with Rule 38 (4) (5) (6) (7) before an advocate of at least ten (10) years' experience to be agreed upon by the parties within thirty (30) days from date of this order, alternatively to be appointed by the Chairperson of the Pretoria Bar Council within thirty (30) days from the date of this order.

50.2 The Respondents are entitled and authorised to have a legal representative present when the Applicant gives evidence.

50.3 The Respondents will be entitled and authorised to have legal representatives in attendance at all material stages;

50.4 The Applicant shall ensure that a bundle of documents, agreed to by the Respondents shall be delivered to the Respondents and the Advocate before whom evidence is going to be led.

50.5 No order as to costs with regard to the opposed Rule 38 interlocutory application because it was necessary for parties to ventilate issues.

50.6 Costs with regard to the commissioning of evidence be reserved.

Ingosstrakh v Global Aviation Investments (Pty) Ltd and Others (934/2019) [2021] ZASCA 69 (4 June 2021)

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.

[1] This appeal concerns a decision of the court a quo, the Gauteng Division of the High Court, dismissing, respectively, the respondents' application for default judgment and the appellant's (Ingosstrakh) application for condonation of the late filing of its plea. In the court a quo, the respondents, Global Aviation Investments (Pty) Ltd; Global Aviation Investments Group (Pty) Ltd; and Global Aviation Operations (Pty) Ltd, were the applicants and Ingosstrakh the respondent. For the sake of convenience, I refer to the respondents collectively as 'Global', except where it is necessary to identify one of them specifically.

[2] The dispute arises from a written insurance policy (the policy) concluded in October 2012 between Global and associated companies, on the one hand, and Ingosstrakh, on the other. Ingosstrakh is a Russian company, with its registered address in Moscow. In terms of the policy, Ingosstrakh undertook to indemnify Global against all risks of loss or damage occasioned to certain specified aircraft, whilst in flight, taxiing or on the ground.

[3] Among the insured aircraft, was Global's MD82 aircraft with registration marks ZS-TOG (the aircraft), which was insured for the agreed sum of US $2 500 000. The policy provided, among other things, that in the event the cost of repair to damage caused to the aircraft exceed 75% of the insured value of the aircraft, Global would be entitled to regard the aircraft as a constructive total loss (CTL), and Ingosstrakh would be obliged to pay Global the full insured value of US$2 500 000. I shall return to the relevant clause of the policy.

[4] On 13 November 2012, whilst the policy was of full effect, the aircraft could not take-off from OR Tambo International Airport in Johannesburg, as the pilot received a cockpit warning of a landing gear anomaly. Both engines of the aircraft had ingested non-organic foreign matter while under full power, causing severe damage to the aircraft. The damage caused by the incident to the aircraft constituted a risk insured against in terms of the policy. Global declared the aircraft to be a CTL in terms of the policy. It notified Ingosstrakh of the incident and demanded payment of US $2 500 000. Ingosstrakh refused to pay on the basis that the aircraft was not a total loss.

[5] Consequently, on 15 August 2014 Global launched an application against Ingosstrakh seeking an order declaring Ingosstrakh to be liable to indemnify it in terms of the policy following the incident on 13 November 2012, and for payment of US $2 500 000. Ingosstrakh opposed the application. The application was eventually dismissed on 25 May 2015 on the basis that there were material disputes of fact on the papers. Although Global applied for leave to appeal that order, there is no clarity as to the status of that application.

[6] In terms of the policy, notices on Ingosstrakh were to be served on Steve Slatter Insurance Brokers (Pty) Ltd (Slatter) in Durban, South Africa. Thus, before Global issued summons against Ingosstrakh, it sought, and obtained, an order on 8 September 2015 in the court a quo authorising service of the summons on Ingosstrakh, care of Slatter.

On appeal from: Gauteng Division of the High Court, Johannesburg (Moshidi J sitting as court of first instance):

1 The appeal is dismissed with costs, including costs of two counsel where so employed.

2 The cross-appeal is upheld with costs, including costs of two counsel where so employed.

3 The order of the high court is set aside and replaced with the following:

a) Default judgment is granted against the respondent in favour of the applicants in the sum of US$ 2 500 000;

b) Interest on the above amount at the prescribed rate from 13 November 2012 to date of payment;

c) Costs of the suit.

Kunene and Others v Minister of Police (260/2020) [2021] ZASCA 76 (10 June 2021)

Settlements-Rescission of compromise agreements made orders of court – State Attorney's ostensible authority – State Attorney conceding merits and tendering quantum against the Minister of Police – grounds for rescission of compromise agreements under common law are only fraud, *justus error* or any other just cause – compromise agreements must also be grounded on the principles of legality and the rule of law which outweigh ostensible authority - where the conduct of the State Attorney results in the subversion of the administration of justice – court orders embodying underlying compromise agreements rescinded.

[1] This case concerns the rescission of two court orders granted consequent to settlement agreements concluded by the State Attorney on behalf of the respondent, the Minister of Police (the Minister), and the first appellant's legal representatives. In terms of the first order, granted on 6 February 2017 by the Gauteng Division of the High Court, Johannesburg per Tsoka ADJP, the Minister was directed to compensate the first appellant, Mr Ayanda Irvin Kunene (Mr Kunene), for all the proved and/or agreed damages arising from an unlawful assault on him by members of the South African Police Service (SAPS) on 7 August 2013. The second order, granted by the same court (Matojane J) on 2 March 2018, directed the Minister to pay R34 077 000 as damages suffered by Mr Kunene as a result of the unlawful arrest, detention and assault on him by the police.

[2] The Minister then approached the high court in July 2019 seeking an order to rescind both court orders on the basis that the State Attorney had no authority to conclude the underlying settlement agreements. The matter came before Keightley J. This appeal is against her judgment, in terms of which she rescinded the two court orders. The appeal is with the leave of the high court.

[3] The facts which form the background to the dispute are largely common cause. On 7 August 2013 Mr Kunene was shot by members of SAPS near

Pick and Pay, along Mabalane Street, Senaoane in Soweto. As a result of the incident, he sustained serious injuries which rendered him a paraplegic. In September 2015, he issued summons against the Minister, claiming damages in the amount of R39 million. The summons was served on the State Attorney's office, Johannesburg. At that time, Mr Kgosi Gustav Lekabe, (Mr Lekabe) the second appellant, was the Head of that office. He allocated the matter to Mr Dovhani Mphephu, (Mr Mphephu) one of the attorneys employed in that office.

[4] In a letter dated 13 October 2015, Mr Mphephu informed SAPS' Legal Division about the action. On 20 October 2015, Colonel Charlene Blackman Britz (Colonel Britz) of SAPS, responded as follows:

'1.4 The South African Police Service accepts full liability for legal costs in this matter. However, should the defence entail the necessity to appoint a correspondent or to brief counsel, please liaise with this office about the nature and tariff of fees of the correspondent/counsel prior to appointing them in order to obtain the written requisite authorization from this Department in terms of Treasury Regulation 12.2.1**[1]**

1.5 In the interim, proof of quantum, if outstanding, must be obtained from the Plaintiff and forwarded to this office for a decision regarding the fairness and reasonableness of the claim.'

Colonel Britz then requested that SAPS be kept informed, well in advance, of the developments in the matter, including, the dates of consultation and trial dates, and that they be provided with copies of all the pleadings. That, however, never happened. Instead, the Minister's plea (which included a special plea) was drafted and filed by the State Attorney, without consultation with any member of the SAPS.

[5] During the days preceding the trial date, Mr Mphephu suggested to Mr Kunene's attorneys that the case was not ready for trial and that it should be postponed; a suggestion that was firmly rejected by the latter. On the morning of 6 February 2017, the matter served before Tsoka ADJP for trial. Mr Lekabe appeared on behalf of the Minister. Mr Kunene's attorneys moved two interlocutory applications, which were opposed by Mr Lekabe. In the first application Mr Kunene sought an order for separation of the merits from the quantum, in terms of Uniform Court Rule 33(4). The second application was for condonation of Mr Kunene's non-compliance with s 3 of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002. Both applications were granted.

There was also no credible challenge to the contention that Mr Mphephu had no authority to appoint counsel and to make concessions of the kind made in this case. In fact, Mr Kajee's version that he was requested by Mr Lekabe to attend court on 6 February 2017, disproves Mr Lekabe's assertion that Mr Mphephu tendered the concessions and concluded the settlement agreement. The recordal of Mr Lekabe's name on the court orders also firmly disproved his version. The high court's finding that it was Mr Lekabe rather than Mr Mphephu who represented the Minister in court on that day cannot be faulted. Mr Lekabe's dishonourable attempt to shift the blame to Mr Mphephu for the misrepresentations made to Mr Kunene's attorneys and to court was correctly rejected by the high court.

[47] The high court thus correctly concluded that Mr Lekabe did not act in good faith and was intent on subverting the law and his client's interests. Such fraudulent conduct is inimical to the rule of law and cannot form a legitimate basis for the Minister's liability. No public servant has authority to subvert the constitutional principles on which the very idea of public confidence is founded.

Costs

[48] Mr Lekabe and Mr Kajee were aggrieved by the personal costs order granted on a punitive scale of attorney and client by the high court against them. They made much of the reference by the high court to statements attributed to them in an application brought by the Johannesburg Society of Advocates against Mr Kajee for his disbarment. Therein, Mokgoatlheng and Modiba JJ made uncomplimentary findings against Mr Kajee. The complaint was that the personal costs orders granted by the high court against them in this case resulted from its improper consideration of the remarks made by the two judges.

[49] It is trite that costs are ordinarily granted against a legal representative in exceptional circumstances. In *Stainbank v South African Apartheid Museum at Freedom Park and Another*,[19] the Constitutional Court held:

'Although the courts have the power to award costs from a legal practitioner's own pocket, costs will only be awarded on this basis *where a practitioner has acted inappropriately in a reasonably egregious manner.* However, there does not appear to be a set threshold where an exact standard of conduct will warrant this award of costs. Generally, it remains within judicial discretion. Conduct seen as unreasonable, wilfully disruptive or negligent may constitute conduct that may attract an order of costs *de bonis propriis*.' (Emphasis added.)

[50] The dishonourable conduct by the second and third appellants in this case is described above, and justified the costs orders granted by the high court. That the high court viewed their conduct, comprising of lies and abuse of State funds, as egregious, is clear from its judgment. There is no demonstrable error in the exercise of its discretion.

[51] In the result, the following order issues.

The appeal is dismissed with costs against the second and third appellants; on an attorney and client scale, which include the costs of two counsel where so employed.

Van Heerden & Brummer Inc v Bath (356/2020) [2021] ZASCA 80 (11 June 2021)

Prescription Act 68 of 1969 – firm of attorneys sued for damages arising out of drafting of an ante-nuptial contract subsequently found to be invalid – date of commencement of the running of prescription – meaning of the expression 'debt is

due' – s 12(3) requires knowledge of the identity of the debtor and facts necessary to institute action – knowledge of legal conclusion not required by s 12(3).

[1] This appeal originates from an action instituted by the respondent, Mr Harry Bath, against the appellant, Van Heerden and Brummer Incorporated, a firm of attorneys, in the Gauteng Division of the High Court: Pretoria (the high court), for damages in respect of a breach of mandate and professional negligence arising out of drafting an antenuptial contract subsequently found to be invalid by the court. In the proceeding before the high court, the appellant, who was the first defendant, raised a special plea of prescription. The high court (Van der Schyff J) made an order in terms of rule 33(4) of the Uniform Rules of Court, in terms of which the special plea of prescription was decided separately from the other issues raised by the parties. After hearing evidence, the high court dismissed the special plea. This appeal is against that order, with leave having been granted by the high court.

[2] The appeal turns primarily on the interpretation of s 12(1) of the Prescription Act 68 of 1969 (the Act) and in particular, the phrase 'debt is due'. The question to be determined is therefore, whether the high court correctly found that the respondent's claim had not become prescribed at the time the summons was served on 2 February 2017.

[3] What follows are the material facts which are necessary for the determination of the sole issue before us which are largely common cause, or not seriously disputed. On 21 October 2005, the respondent gave the appellant a mandate to draft an antenuptial contract in contemplation of his marriage to his now ex-wife, Mrs Juanita Bath. Ms Nunes, the Notary Public employed by the appellant at that time, and who does not feature in this appeal, drafted the antenuptial contract which was subsequently registered in the Deeds Office on 9 November 2005.

[4] During February 2010, the respondent instituted divorce proceedings against his ex-wife. Mr Brummer, an attorney and a director of the appellant and Ms Hartman, who served as counsel, represented the respondent in the divorce action. Mrs Bath defended the divorce action. In her amended plea and counterclaim, she alleged that the antenuptial contract was void for vagueness. The divorce action came before Louw J in the Gauteng Division of the High Court, Pretoria. Pursuant to the agreement between the parties, the validity of the antenuptial contract was determined first as a separate issue. In a judgment delivered on 3 September 2012, Louw J held that the antenuptial contract was *void ab initio* due to vagueness, and that the marriage between the parties was in community of property.

[5] Dissatisfied with the outcome, the respondent was, on 22 November 2012, granted leave to appeal to this Court. The appeal was heard on 24 February 2014, and subsequently dismissed on 24 March 2014. Thereafter, a decree of divorce was granted on 13 October 2015 incorporating a deed of settlement in terms of which, the respondent and his ex-wife agreed, *inter alia*, to appoint a liquidator to distribute their joint estate, arising from the erstwhile marriage in community.

[6] On 24 January 2017 the respondent instituted the current action for damages against the appellant and Ms Nunes and, on 2 February 2017, the summons was served on them. No relief was sought against Ms Nunes who was cited purely out of caution as the second defendant. Thus, the second defendant took no part in this litigation both in the high court and this Court. In this action, the respondent asserted that the appellant had negligently breached its mandate because the Notary Public employed by it failed to draft a valid antenuptial contract. According to the respondent, the net result of this was that he became liable to pay his ex-wife substantially more money than would have been payable had the antenuptial contract been valid.

On appeal from: In the Gauteng Division of the High Court, Pretoria (Van der Schyff J sitting as court of first instance):

1 The appeal is upheld with costs.

2 The order of the high court is set aside and replaced with the following:

'2.1 The first defendant's special plea is upheld with costs.

2.2 The plaintiff's claim against the defendant is dismissed with costs.'

Bisschoff & Others v Welbeplan Boerdery (Pty) Ltd (815/2016) [2021] ZASCA 81 (15 June 2021)

Spoliation-*Mandament van spolie* – termination of permission to enter upon leased land – in letter cancelling agreements – not unlawful deprivation of possession – does not amount to spoliation.

[1] The appellants own a number of farms in the North West Province, utilised collectively for the production of maize and sunflower. In 2015 they concluded a number of agreements with the Welbeplan Boerdery (Pty) Ltd represented by Mr Gerhard Olivier, in terms of which they sold some 14 portions of the farms to the company. Each agreement was subject to a suspensive condition that the respondent obtain finance to pay the purchase price. The parties agreed that in the event of the suspensive condition not being fulfilled within the period stipulated in the agreements, those agreements would be regarded as contracts of lease for one season, ie 12 months. In the interim the respondent was granted access to the farms for the purpose of cultivating certain portions of the land.

[2] The suspensive condition was not fulfilled because the respondent failed to obtain the necessary finance. The sale agreements were therefore regarded as lease agreements, each for periods of 12 months. Subsequently the respondent breached the lease agreements. The appellants' attorneys sent two letters, both dated 1 February 2016, to the respondent's attorneys in which they were informed that all agreements between the parties had been cancelled and that the respondent should not trespass upon the land (the letters). Based solely on what was stated in

the letters, the respondent obtained a spoliation order as a matter of urgency together with costs in North West High Court, Mahikeng (the high court). The high court refused leave to appeal, which was granted by this Court.

[3] Before addressing the question whether the respondent had made out a case for a spoliation order, it is necessary to briefly deal with a contention by its counsel that the order sought by the appellants would have no practical effect within the meaning of **s 16(2)***(a)* of the **Superior Courts Act 10 of 2013**.**[1]** We were informed that after the spoliation order had been issued, the respondent's sole director and deponent, Mr Gerhard Olivier, did not return to the land; that he had no intention of doing so; and that the respondent's right of possession was the subject of ongoing litigation. It was therefore submitted that the appeal was moot and concerned only costs – the appeal would have no practical result and the appellants were seeking to avoid payment of the costs order which the high court had granted against them.

[4] These submissions are however unsound. The spoliation order issued by the high court remains extant and there is nothing preventing the respondent from enforcing it, should it so wish. Secondly, the appellant's case is that the high court's judgment is wrong in principle and unless the appeal is heard, it would remain as an authoritative, binding precedent in that province. The appellant's criticism of the high court's judgment, more specifically that a letter of demand instructing a possessor of land not to return to it does not constitute an act of spoliation, must therefore be addressed. In this regard it is noteworthy that in *Three Musketeers Properties*,**[2]** a case similar to the present one, the Supreme Court of Namibia has held that a threat embodied in a letter to disturb possession, does not constitute an act of spoliation.

[5] Turning then to the merits of the appeal. The requirements for the *mandament van spolie* are trite: (a) peaceful and undisturbed possession of a thing; and (b) unlawful deprivation of such possession.**[3]** The *mandament van spolie* is rooted in the rule of law and its main purpose is to preserve public order by preventing persons from taking the law into their own hands.**[4]**

[6] It was common cause that when the letters were written the respondent was in possession of various portions of the land and that crops had been cultivated on them. Thus, the only issue in this appeal is whether the respondent was unlawfully deprived of its possession of the land. The *mandament van spolie* is a possessory remedy, aimed at the restoration (return) of possession where a party is unlawfully deprived of its prior peaceful and undisturbed possession of property.**[5]** What constitutes spoliation or unlawful possession must be determined on the facts.**[6]**

[20] The high court erred in its interpretation and application of the requirement of unlawful deprivation of possession for a spoliation order. In the process it extended the scope of the *mandament* beyond its intended purpose, scope and limits. Its order, if allowed to stand, would mean that a strongly worded letter threatening deprivation of possession, or a threat to approach a court to restrain possession, would found an application for the *mandament van spolie*. That is not the law.

[21] In the result the following order is made.1. The appeal is upheld with costs.2. The order of the court a quo is set aside and replaced with the following order:‘The application is dismissed with costs.’

Malema v Rawula (139/2020) [2021] ZASCA 88 (23 June 2021):

Applications – application for declaratory order that published statements defamatory – defence of justification – truth and public interest – sustainable foundation in papers – declarator sought and interdict not justified – appeal dismissed.

[1] The appellant, Mr Julius Sello Malema, is the President of the Economic Freedom Fighters (EFF), the third largest political party in South Africa, and a Member of Parliament (MP). The Deputy President of the EFF is Mr Floyd Shivambu, also an MP. The respondent is a former member of the EFF who resigned from the party in April 2019. He served on its highest decision-making body, the Central Command Team (CCT), represented it in Parliament and was the National Chairperson of the EFF’s National Disciplinary Committee (NDC).

[2] On 5 April 2019 the respondent posted a statement on his Facebook page entitled, ‘EFF REMAINS A FINANCIAL FISHING NET FOR THE PAIR, AN ANTITHESIS OF EVERYTHING IT [PURPORTS TO BE]. I AM NOW UNLEASHED, WHO CARES?’. I shall refer to the statement as the Facebook post.

[3] On 18 April 2019 the appellant applied to the Eastern Cape Division of the High Court, Port Elizabeth (the high court), for an order declaring that the Facebook post was unlawful and defamatory; restraining the respondent from publishing any further defamatory statements; and directing him to pay damages in the sum of R1 million. The high court dismissed the application. The appeal is with its leave.

[4] The respondent appeared in person at the hearing of the appeal, as he had done in the high court. He indicated that he did not wish to address this Court and would abide by its decision.

[96] The nature of evidence bearing on the question whether a respondent acted reasonably in publishing defamatory material, or whether the respondent honestly though mistakenly believed that the defamatory material was true and in the public interest, is qualitatively different from evidence bearing on the question whether the defamatory material was in fact true and in the public interest. Evidence of the sources of information known to a respondent at the time of publication might be inadmissible to prove the truth of the information but might be highly relevant to the question whether the respondent had a reasonable basis for publishing or an honest belief that the allegations were true. For the latter purposes, it would also be relevant to know whether the respondent took reasonable steps to verify his or her sources, and it is in these respects that this Court in *Manuel* criticised the EFF.

[97] In the present case, however, we are not concerned with reasonable publication or a defence of absence of *animus iniuriandi*. We are dealing with an objective enquiry: were the defamatory allegations true or not? The enquiries which the respondent made or should have made do not bear on that question. Either he has or has not adduced admissible evidence that the defamatory allegations are true. In the respects I have identified, the respondent did not produce such admissible evidence.

[98] In the circumstances, while the respondent put up a 'colourable defence, based on evidence' to justify saying that the appellant conducted himself in an unlawful and undemocratic way, he did not in my opinion do so in relation to the allegations that the appellant was corrupt, stole money and was of base moral character. It follows that I would have upheld the appeal in part. Since this is a minority judgment, there is little point in considering how his partial success would have affected costs in this Court and in the high court.

Lewis Stores (Pty) Ltd v Summit Financial Partners (Pty) Ltd and Others (314/2020) [2021] ZASCA 91 (25 June 2021)

National Credit Act 34 of 2005 – section 141(1)*(b)* – power of National Consumer Tribunal to grant leave to refer a complaint directly to it when National Credit Regulator has issued a notice of non-referral – nature of proceeding – section does not require formal application nor public hearing – factors to be considered by Tribunal – Tribunal has wide discretion – decision to grant leave to refer directly not appealable in terms of section 148(2).

[1] This appeal concerns the interpretation and application of the National Credit Act (NCA),**[1]** and in particular s 141(1)*(b)***[2]** and s 148(2)*(b)***[3]** thereof. The first respondent, Summit Financial Partners (Pty) Ltd (Summit), a registered alternative dispute resolution agent and debt counsellor, lodged a complaint (the complaint) against the appellant, Lewis Stores (Pty) Ltd (Lewis), with the third respondent, the National Credit Regulator (the Regulator), in terms of s 136 of the NCA. The Regulator accepted the complaint and, after investigating the allegations, it issued a certificate of non-referral, purportedly in terms of s 139(1)*(a)* of the NCA.**[4]** Summit sought leave to refer the complaint directly to the second respondent, the National Consumer Tribunal (the Tribunal), in terms of s 141(1)*(b)* of the NCA, which Lewis resisted. The Tribunal granted leave**[5]** and Lewis appealed against the ruling, without success, to the High Court, Pretoria, in terms of s 148(2) of the NCA. The appeal to this Court is with leave of the high court.

[2] Lewis is a national retailer in furniture and electrical appliances. On 16 September 2016 Summit lodged the complaint with the Regulator, alleging that Lewis had repeatedly engaged in a prohibited practice under the NCA, in breach of s 102 thereof, by raising compulsory and unreasonable delivery charges in respect of goods sold.

[3] In an application for leave to refer the complaint directly to the Tribunal, Summit contended that the referral was justified as the complaint raised issues of great importance to the parties and the public, which deal with the interpretation of

the NCA, and that it enjoyed reasonable prospects of success. Lewis, on the other hand, denied that Summit had demonstrated good prospects of success. It contended further that Summit had no interest of its own in the outcome of the matter and it enjoyed no mandate from any of Lewis's customers. In the high court Summit contended, without success, that the decision of the Tribunal was not appealable. The high court nevertheless dismissed the appeal.

[4] In this Court three issues arose. Firstly, whether a decision of the Tribunal to permit a direct referral to it in terms of s 141(1)*(b)* of the NCA is appealable in terms of s 148(2) of the NCA; secondly, what test should the Tribunal have applied in assessing the application; and thirdly, whether Summit had satisfied the test.

[5] Section 48(2)*(b)* of the NCA provides that:

(2) '… a participant in a hearing before a full panel of the Tribunal may –

…

(*b*) appeal to the High Court against the decision of the Tribunal in that matter, other than a decision in terms of section 138… .'**[6]**

[6] Lewis contended that it had participated in a hearing before the full panel of the Tribunal and it was therefore entitled to appeal against its decision. Summit, on the other hand, contended that on a proper construction of the provisions of the NCA the proceedings before the Tribunal did not involve 'a hearing' as contemplated in s 148(2)*(b)*; and, that the grant of leave to refer directly did not constitute 'a decision' that is susceptible to appeal. The argument involves the interpretation of the NCA, a task which this court has described as 'a particularly trying exercise'**[7]**.

Standard Bank of SA Ltd and Others v Thobejane and Others; Standard Bank of SA Ltd v Gqirana N O and Another (38/2019; 47/2019; 999/2019) [2021] ZASCA 92 (25 June 2021)

Jurisdiction-A court is obliged by law to hear any matter that falls within its jurisdiction and has no power to exercise a discretion to decline to hear such a matter on the ground that another court has concurrent jurisdiction.

[1] This appeal concerns two matters, one decided in the Gauteng Division of the High Court, Pretoria (the Gauteng Court) and the other in the Eastern Cape Division of the High Court, Grahamstown (the Eastern Cape Court) dealing with jurisdictional issues. The essence of this matter is whether a High Court may properly refuse to hear a matter over which it has jurisdiction where another court has concurrent jurisdiction in either of two circumstances: when a High Court and a Magistrates' Court both have jurisdiction in respect of the same proceedings, and when the main seat of a Division of a High Court and a local seat both have jurisdiction in respect of the same proceedings.

Background and facts

[2] The context in which these matters came to be heard, and the orders which were given, were unusual. Before both courts, there were applications by several banks, the applicants a quo and the present appellants, against debtors who had either taken up mortgages or had purchased motor vehicles on credit and had defaulted on repayment. As is usual, and in accordance with established practice, in

the absence of any notices of intention to oppose from the defendants, the applications were enrolled in the Unopposed Motion Court where orders were sought for repayment of the outstanding indebtedness and for leave to specially execute on the mortgaged residential properties. At no stage did the debtors cited as defendants in the court a quo, participate in the hearing.

[3] At the instance of the respective Judges-President several of such cases were placed before a full court of each Division. As appears from the judgments, the trigger was apparently twofold. First there was a concern that the rolls of the High Court were being congested by matters which could have been heard in the Magistrates' Court. In Gauteng there was a concern about matters that could have been heard in the local seat in Johannesburg clogging-up the roll in the main seat in Pretoria. Second, there was a belief that impecunious debtors were suffering prejudice because they would, should they wish to oppose a claim, have to travel to a High Court when a Magistrates' Court was supposedly nearby and more convenient to attend. Also, were a debtor to wish to resist a claim, legal costs would be less in the Magistrates' Court than in the High Court. In the light of these considerations was it appropriate for a plaintiff to sue out of a court other than that closest to the defendant?

[4] Having collected the cases to be heard by the respective full courts, the Judges President formulated a number of questions for them to answer. Four questions were posed to the Gauteng Court. The questions were thus:

(i)Why should the High Court entertain matters that fall within the jurisdiction of the Magistrate's Court?

[ii] Is the High Court obliged to entertain matters that fall within the jurisdiction of the Magistrate's Court purely on the basis that the High Court may have concurrent jurisdiction?

[iii] Is the Provincial Division (sic) of the High Court obliged to entertain matters that fall within the jurisdiction of a Local Division (sic) on the basis that the Provincial Division (sic) has concurrent jurisdiction; **[1]**

[iv] Is there not an obligation on financial institutions to consider the cost implication and access to justice of financially distressed people when a particular forum is considered?'

Only questions 1, 2 and 4 were posed to the Eastern Cape Court.

[5] The courts a quo sought assistance from several *amici curiae*. Although it is not entirely clear whether the *amici* approached the debtors to supply any evidence, the position is clear that no debtor did so. The only source of facts were the applications filed by the banks for the judgments by default and the additional affidavits filed by the banks after the several matters had been, pursuant to the directives of the Judges-President, referred to the full courts. These additional affidavits addressed the questions posed and explained why the choice of the High Court as the appropriate forum was premised on several practical considerations. In essence, these considerations were that litigation in the High Courts was quicker and more efficient, and moreover, could often, also be cheaper in the long run. It was also alleged that legal assistance to indigent litigants was usually more accessible at the seat of a High Court than at Magistrates' Courts. These allegations of fact and explanations of motive were unrebutted and were never challenged.

[6] Different answers to the posed questions were given by each of the courts a quo. Appeals against each of the orders were lodged by the banks. The answers given by each court appear from the conclusions stated and orders given, which are set out below.

80] There are other indications in the NCA which demonstrate incompatibility with an ouster of the High Court's jurisdiction and strengthen the conclusion that no such inference of an ouster can be drawn. For instance, s 130(1) states:

'Subject to subsection (2), a credit provider may approach the court for an order to enforce a credit agreement only if, at that time, the consumer is in default and has been in default under that credit agreement for at least 20 business days and. . . .'

There is no qualification to which 'court' reference is made, the word 'court' being undefined in the NCA. This provision can only be understood to refer to any court with competent jurisdiction and therefore includes both the High Court and the Magistrates' Court.

[81] Sometimes, however, the NCA is specific about the Magistrates' Court being the exclusive forum to make certain decisions. In those instances, the NCA expressly stipulates the Magistrates' Court to the exclusion of any other court. For example: s 86(9) provides that if 'a debt counsellor rejects an application as contemplated in subsection (7)*(a)*, the consumer, with leave of the Magistrate's Court, may apply directly to the Magistrate's Court, in the prescribed manner and form, for an order contemplated in subsection (7)*(c)*'; s 87 provides that if 'a debt counsellor makes a proposal to the Magistrates' Court in terms of section 86(8)*(b)*, or a consumer applies to the Magistrates' Court in terms of section 86(9), the Magistrate's Court must conduct . . .'; s 127(8)*(a)* provides that if a debtor 'fails to pay an amount demanded in terms of subsection (7) within 10 business days after receiving a demand notice, the credit provider may commence proceedings in terms of the Magistrates' Courts Act for judgment enforcing the credit agreement'; and s 162 provides that '[d]espite anything to the contrary contained in any other law, a Magistrate's Court has jurisdiction to impose any penalty provided for in section 161'.

[82] By implication in the last example, the High Court has such a power, and s 162 exists to confer a like power on the Magistrates' Court to impose such penalties too, an example of the need to authorise power to the Magistrates' Court by statute, as contemplated in s 170 of the Constitution. If the NCA had intended to impliedly oust the jurisdiction of the High Court, and to vest exclusive jurisdiction in the Magistrates' Court, these provisions, which do indeed reserve particular decisions for that court, would be odd, if not superfluous.

[83] The foundation of the Eastern Cape Court's thesis was that a constitutional value was somehow thwarted if the Magistrates' Court was not assigned primacy of jurisdiction in NCA matters and this justified an interpretation that, so it held, would promote those values. The articulation of this thesis was at a high level of generality. Reference was made to a 'balancing of fairness' and to examining the NCA through the 'prism of the Constitution'. In this, the approach was an echo of approach of the Gauteng Court in *Thobejane* and a repetition of the analysis in respect of that judgment is unnecessary.

[84] Paradoxically, having held that the High Court's jurisdiction was excluded because it would otherwise violate constitutional values, the court found that the

High Court was somehow nevertheless vested with a form of residual jurisdiction to hear exceptional cases. This thesis too must falter on grounds of incoherence. Fish cannot sometimes be fowl.

[85] The majority judgment of the Eastern Cape Court is wrong. So too, in my view, is the minority judgment which holds, on grounds similar to the Gauteng Court, that in all cases in which a Magistrates' Court has jurisdiction, a High Court's jurisdiction is ousted.

[86] In the result, in my view, the NCA cannot have the effect as found by the court a quo. Accordingly, the decision in *Gqirana* cannot be sustained and the appeal must succeed. The answers to the questions posed to the Court will be set out in the order below.

Heathrow Property Holdings No 33 CC and Others v Manhattan Place Body Corporate and Others (7235/2017) [2021] ZAWCHC 109 (1 June 2021):

Jurisdiction- Community Schemes Ombud Services Act ('the CSOS Act'- disputes pertaining to community schemes such as sectional title schemes fall within the ambit and purview of the CSOS Act, they are in the first instance to be referred to the Ombud for resolution

1. I have before me an application which was launched as a matter of urgency in October last year, in which certain declaratory relief is principally sought in relation to the application of a conduct rule which was adopted by a body corporate in a sectional title scheme, and the installation by it of a biometric security/access control system. It raises important questions about the jurisdiction which has been afforded to courts and adjudicators in terms of the Community Schemes Ombud Services Act**[1]** ('the CSOS Act'), which is one of two statutes**[2]** which were introduced in 2011 in relation to sectional title schemes, following a major legislative overhaul of the regulatory scheme which had been introduced some 25 years earlier by means of the **Sectional Titles Act 95 of 1986**.

The facts

2. The applicants are the owners of 3 loft apartments in Manhattan Place, a 10 storey mixed-use sectional title scheme which was established in January 1998 and which is housed in a building located at the junction of Buitengracht and Bree Streets in the centre of Cape Town.

3. The scheme's sectional title plan provides for a hotel which is operated from the 2nd floor (which houses the reception, bar and restaurant), the 5th floor (conference centre, restaurant and administrative offices) and the 6th to 8th floors (hotel suites), office and commercial units (on the 3rd and 4th floors) and 37 residential units in the form of loft apartments (on the 9th and 10th floors). Some 80% of the total units in the scheme are owned by a trust. The hotel is accessed via an entrance on Bree Street and the owners of the commercial and loft units access their properties via an entrance in Buitengracht Street. Ten of the loft units are in a rental pool which is run by the hotel.

4. The units which are owned by the applicants are not included in this arrangement. They were purchased in terms of deeds of sale which expressly

acknowledged that whilst certain residential units would be sold subject to the condition that the purchasers thereof would offer them for use to the hotel in terms of a rental pool agreement that they would be required to enter into, the remaining sections in the residential, office and commercial areas were to be 'exclusively' used by the purchasers thereof as residential apartments, offices or commercial enterprises. Owners of such non-rental pool residential units were however entitled to enter into individual rentals with the hotel on an *ad hoc* basis.

5. Thus, as the respondents being the body corporate and its trustees point out, in the main the scheme envisaged that residential loft units would predominantly not be subjected to short-term rental use by outside parties, and would primarily be occupied and used by their purchasers or their long-term tenants.

6. Short-term rental use was primarily intended to occur in respect of the 10 hotel suite units which fell into the rental pool agreement and which constitute roughly 25% of the total number of residential units, and such occasional use as might occur by the hotel on an *ad hoc* basis, from time to time, in respect of the remaining units.

Conclusion

61. In the result, I am of the view that where disputes pertaining to community schemes such as sectional title schemes fall within the ambit and purview of the CSOS Act, they are in the first instance to be referred to the Ombud for resolution in accordance with the conciliative and adjudicatory processes established by the Act, and a court is not only entitled to decline to entertain such matters as a forum of first instance, but may in fact be obliged to do so, save in exceptional circumstances. Such matters will not be matters which are properly before the High Court, and on the strength of the principle which was endorsed in *Standard Credit* (and a number of courts thereafter, including the Constitutional Court in *Agri Wire)*, it is accordingly entitled to decline to hear them, even if no abuse of process is involved. In this regard, as far as the High Court is concerned the processes which have been provided for the resolution of disputes in terms of the CSOS Act are in my view tantamount to 'internal remedies' (to borrow a term from the Promotion of Administrative Justice Act**[48]**), which must ordinarily first be exhausted before the High Court may be approached for relief.

62. What will constitute exceptional circumstances entitling a litigant to approach the High Court directly will have to be determined on a case-by-case basis.**[49]**

63. In each instance a litigant will have to make out good cause for why a dispute which can and should be heard by an adjudicator in terms of the Act should nonetheless be heard by the Court instead. In this regard, in my view convenience will not constitute an exceptional circumstance and as was held in *Gqirana* **[50]** neither, ordinarily, will an alleged inefficiency or delay in the conciliative or adjudicatory processes or mechanisms which have been provided for by the CSOS.**[51]**

64. Of course, where for example the constitutionality or legal validity or status of a particular statutory power or a provision in the Act is challenged or is in

issue, a litigant would obviously be entitled to approach the Court for the appropriate relief (as a forum of first instance or as an appellate tribunal, as the case may be). So too, in certain instances it is conceivable that the High Court may be approached in the first instance, as a review court.

65. The applicants submit that were I to decline to entertain the application I should transfer it to the Ombud for adjudication in the exercise of the Court's inherent and constitutional power to regulate its process, and in such an event I should not mulct the applicants and should direct that the costs should be costs in the cause.

66. In my view, given that this is not only a matter which should not have been brought before this Court and should have been taken to the Ombud, but is also one which constitutes an abuse of process (for the reasons outlined in paras 20-28 above), the appropriate order to make is one striking the matter from the roll, with costs, on the scale as between attorney and client.

Guardrisk Premium Finance (Pty) Limited v Buphe Management (Pty) Limited (39696/2019) [2021] ZAGPJHC 75 (3 June 2021)

Applications-affidavit not commissioned and therefore did not serve as evidence

1. The applicant seeks the winding-up of the respondent in terms of section 344(f) as read with section 345(1)(a) and (c) of the Companies Act, 1973.

2. The applicant contends that it is a creditor of the respondent and that the respondent is deemed to be unable to pay its debts.

3. It is unnecessary to detail the nature of the indebtedness due by the respondent to the applicant as the respondent has on its own version, on at least two occasions, admitted an indebtedness to the applicant in a sum of R706 198.11. Suffice it to state that the indebtedness arose from the applicant providing a financing solution to the respondent in respect of short-term insurance premiums which the respondent collects from its clients on a monthly basis.

4. The applicant contends that the respondent is deemed to be unable to pay its debts because the respondent has for three weeks after service upon it in June 2019 of a demand in terms of section 345(1)(a) neglected to pay the sum reflected in the demand, or to secure or compound for it to the reasonable satisfaction of the creditor and that in any event it has been proven to the satisfaction of the court that the respondent is unable to pay its debts. The respondent disputes this, contending that it *bona fide* disputed the indebtedness on reasonable grounds (more particularly that the amount claimed in the demand of R933, 483.90 is incorrect) and, as developed in argument before me, the respondent's failure to pay its admitted indebtedness is reflective of an unwillingness rather than an inability to pay its debts.

5. It is appropriate to describe certain developments that took place in court before argument commenced on the merits of the application.

6. The applicant previously in June 2020 launched an interlocutory application to compel the respondent to deliver its heads of argument and practice note so that the matter could proceed on an opposed basis. This is because the respondent had not done what is required of its procedurally to enable the matter to be enrolled for hearing. The respondent did then belatedly deliver heads of argument.

7. The applicant proceeded to enrol the matter and it came before Meyer J on 26 November 2020 on an opposed basis. The matter was again postponed that day, with the respondent to pay the costs occasioned by the postponement on the opposed attorney and client scale. The court order expressly provides in paragraph 3 that "*it is recorded that this is the second time that the Respondent's attorneys of record withdrew at the eleventh hour before the hearing of the application*".

44. I am satisfied that such evidence as is before the court does not rebut the presumption of the respondent's inability to pay its debts but to the contrary demonstrates that the respondent is unable to pay its debts Accordingly, upon a consideration of all the affidavits I am satisfied that the applicant has *prima facie* established on a balance of probabilities its entitlement to a provisional winding up order.

45. In doing so, I did not consider the respondent's replying affidavit, which was not commissioned and therefore did not serve as evidence. The applicant's counsel confirmed that no reliance can be placed upon the replying affidavit.

Blendrite (Pty) Ltd and Another v Moonisami and Another (227/2020) [2021] ZASCA 77 (10 June 2021)

Spoliation – access to server and use of email address of director terminated – neither servitutal use nor use as an incident of possession of corporeal property – not *quasi*-possession for which *mandament van spolie* available.

[1] The first appellant (Blendrite) has two listed directors, the first respondent (Mr Moonisami) and the second appellant (Dr Palani). Disputes have arisen between them. These prompted Mr Moonisami to launch an application (the liquidation application) to liquidate the appellant (Blendrite). The basis of the liquidation application is that, due to the deadlock between the two listed directors, it is just and equitable that Blendrite be wound up by the court. The liquidation application is opposed and not yet finalised. The second respondent (Global) is a web hosting entity which hosts the server and email addresses of Blendrite.

[2] It is common ground that Mr Moonisami and Dr Palani jointly funded the formation of Blendrite in 2008. The former functioned as the managing director and the latter as the financial director until the disputes arose. Dr Palani claims that Mr Moonisami has resigned as a director of Blendrite. This, too, is contested and remains unresolved. At a factual level, Dr Palani is in control of Blendrite. By letter dated 11 July 2019, an attorney purporting to represent Blendrite wrote to one Greg Lock, the managing director of Global. The letter stated that Mr Moonisami had resigned as a director of Blendrite and instructed Global to terminate the 'email and

company network/server access' of Mr Moonisami with immediate effect. Global did so on 17 July 2019.

[3] As a result, Mr Moonisami approached the KwaZulu-Natal Division of the High Court, Durban by way of an urgent application. The relief sought by Mr Moonisami was spoliatory in nature, seeking a *rule nisi* with interim relief as follows:

'That [Global] be and is hereby directed to *ante omnia* restore [Mr Moonisami's] access to the email and company network/server in respect of Blendrite [. . .] forthwith.'

The case made out by Mr Moonisami was that he was in peaceful and undisturbed possession of his access to Blendrite's internet server and his email address **kc@blendrite.co.za** and that he had been denied this access by Global.

[4] Only Blendrite and Dr Palani opposed the application. After various adjournments it was heard as an opposed motion for final relief by Chetty J. He granted the relief mentioned above as well as a punitive costs order against those opposing. An application by Blendrite and Dr Palani for leave to appeal was dismissed with costs. The present appeal is with the leave of this court. As with the application in the high court, Global takes no part in the appeal.

[5] The *mandament van spolie* remedy relates to possession. Possession is:

'[M]ost commonly defined as the combination of a factual situation and of a mental state consisting in the factual control or detention of a thing (*corpus*) coupled with the will to possess the thing (*animus possidendi*).'**[1]**

In *Nino Bonino v De Lange*,**[2]** Innes CJ explained the nature of spoliation:

'[S]poliation is any illicit deprivation of another of the right of possession which he has, whether in regard to movable or immovable property or even in regard to a legal right.'

The remedy is a possessory suit based on the maxim *spoliatus ante omnia restituendus est*. In simple terms, this means that possession must be restored to the dispossessed person before enquiring into anything else.

The crisp issue in both the court of first instance and on appeal in the present matter is thus whether the prior access to an email address and company network and/or server amounted to *quasi*-possession of an incorporeal which qualified for protection by a spoliation order. The case most closely resembling the present one is this Court's decision in *Telkom SA v Xsinet (Pty) Ltd*.**[18]** In that matter, the appellant disconnected the respondent's telephone and bandwidth systems when a dispute arose as to whether the respondent owed money for a service. This Court held that the receipt of the telecommunications service arose from a personal right in contract. The use of the bandwidth and telephone service was not an incident of possession of the premises from which the respondent operated. The appeal against the soliation order succeeded and the order was set aside.

[20] In the present matter, the prior use of the email address and server was not an incident of possession of movable or immovable property on the part of the respondent. This was not even alleged. The respondent did not possess any movable or immovable property in relation to his erstwhile use of the server or email address. Any entitlement to use the server and email address is wrapped up in the contested issue of whether the respondent remains a director of Blendrite and might relate to the terms of his contract of employment. It is a personal right enforceable, if at all, against Blendrite. I can see no basis for distinguishing the present matter from that of *Telkom*, by which we are bound unless we are of the view that it is clearly wrong and requires to be set right. For the reasons aforesaid that decision is consonant with prior jurisprudence and correct. The respondent's prior use did not amount to *quasi*-possession of incorporeal property. It is therefore not protectable by way of the *mandament*. As such, the court of first instance erred in granting spoliatory relief. The appeal must succeed and the order of the court of first instance, based on spoliatory relief, set aside.

[21] In the result:

1 The appeal is upheld with costs, including the costs of two counsel where so employed.

2 The order of the High Court is set aside and substituted with an order dismissing the application with costs, including the costs of two counsel, where so employed.

AM AND ANOTHER v MEC FOR HEALTH, WESTERN CAPE 2021 (3) SA 337 (SCA)

Evidence — Expert evidence — Furnishing — General principles restated.

Evidence — Expert evidence — Summary under rule 36(9)*(b)* — Desirable that Rules Board reconsider rule to require experts to prepare and deliver reports in own words and to include (i) statement recognising that report furnished for assistance of court and (ii) statement of truth.

Medicine — Medical negligence — Diagnosis and treatment of child presenting with head injury — Whether examination conducted sufficient — Decision to discharge — Adequacy of discharge instructions to parent.

Medicine — Medical negligence — Pre-trial conference and judicial management — Proper use of rules 37 and 37A of Uniform Rules to clarify and narrow issues — Witness statements — Duty of parties to prepare agreed bundle of academic articles together with executive summary of their contents — Rule 37A(10)*(e)*, rule 37A(11)*(c)*.

Medicine — Medical negligence — Proof — Evidence as to normal or usual practice — If accepted, constituting strong evidence that practice followed on occasion in question.

Medicine — Medical negligence — Proof — Expert evidence — Correct approach to — Requirements for admission — Duties of expert witnesses — Direct evidence of event preferable to ex post facto reconstruction by expert, especially where basis scant.

In the afternoon of 23 August 2011 the appellants' 6-year-old son, J, suffered a head injury when he tripped and fell at home. Shortly after 18h00 his father, M, took him to

the trauma unit at the Red Cross Memorial Hospital, Rondebosch, Cape Town (the hospital), which fell under the authority of the respondent MEC. A trauma nurse determined that J's vital signs were normal. At this point he was walking, alert and responsive. At about 18h15 the duty registrar, Dr H, after a routine examination and palpitation, noted that J had suffered a minor head injury, a 'bump'. Having been discharged by Dr H, J was taken home and put to bed. That night at about 03h30, M, unable to wake J, called the hospital. He was told that if J was still sleeping deeply at his normal waking time (06h30), he should be brought back to the hospital.
Shortly thereafter, J wet the bed and vomited. The appellants rushed him back to the hospital, arriving at around 08h00. A CT scan revealed that J had a linear fracture of the scalp accompanied by the rupture of an artery, resulting in an extradural haematoma (see [3]). The ensuing pressure on his brain caused J's injury. An emergency craniotomy was performed but it was too late: J was left with cerebral palsy and spastic quadriplegia.
The appellants, acting in their own capacity and on behalf of their son, instituted a medical negligence action in the Western Cape High Court. Binns-Ward J rejected the allegations of negligence levelled against Dr H and dismissed the suit.
The main issue in the present appeal to the Supreme Court of Appeal was whether Dr H had been negligent in failing to order a CT scan, which, it was agreed, she ought to have done had the bump felt 'boggy' (fluctuant). In her testimony Dr H stated that, though she had no specific recollection of how it felt, she believed it had been firm, not boggy. She relied to a large extent on her written of that evening. They stated the presence and location of the bump, that the patient was alert and awake, that his pupils were equal and reactive to light, that he had congruent eye movements, and that there was no 'other neurology'. In her testimony she relied on her normal or usual practice in such cases, which was to order a CT scan if a head injury felt boggy (see [7]). The appellants contended that even if the evidence as to whether the swelling was boggy or firm was evenly balanced, Dr H ought on various grounds to have foreseen the possibility that J's skull was fractured and kept J for observation for another hour.
Three doctors were called as expert witnesses, two on behalf of the appellants and one on behalf of the MEC. The former expressed conclusions contrary to Dr H's diagnosis on the basis that her were not as complete as they thought desirable. They eventually argued that Dr H had negligently diagnosed J with a minor injury. (See [22] – [23]). But Binns-Ward J accepted Dr H's evidence that she had conducted a proper examination of J's injury and that the bump was not boggy.
In the SCA, the majority judgment — written by Wallis JA — addressed, in addition to the factual issue of the alleged fluctuance of the injury, the parties' failure to make proper use of rules 37 (pre-trial conference) and 37A (judicial case management) of the Uniform Rules of Court.
Along with the primary factual dispute outlined above, two alternative arguments were made on behalf of the appellants. The first was that Dr H should have suspected a skull fracture and not have discharged J when she did but kept him for further observation. Ancillary to this was the question of whether Dr H negligently departed from the hospital's guidelines for head injury assessment. The second alternative argument was that the advice Dr H gave to M in regard to the monitoring of J's condition was inadequate and that he should have been told to wake him every two hours.
Held per Wallis JA (Swain JA, Mokgohloa JA and Dlodlo JA concurring)
As to the role of expert witnesses and the expert evidence presented

If expert witnesses give evidence based on their own inferences, the inferences must be reasonably supported by the facts; they cannot be tenuous. And the facts themselves must be admitted or proven, not matters of speculation. Experts may also provide the court with general knowledge concerning their discipline to enable the court to understand the issues. (See [17], [21].)

These requirements were disregarded in various respects: there was no endeavour to clarify the facts known to Dr H or the facts about her diagnosis or treatment of J. Medical literature was used selectively to bolster arguments and not for the purpose of informing the court of the current approach to the clinical assessment of head injuries in children and the range of accepted medical views. There was no endeavour to provide proper expert summaries as required by rule 36(9)*(b)*. The original summaries — which were based on a misunderstanding of Dr H's * and thus defective — were silent on bogginess, as were the particulars of claim and the further particulars for trial. No revised summaries were filed when the error was discovered. Hence the eventual argument that Dr H had negligently diagnosed J with a minor injury proceeded on a basis that was not pleaded; was not reflected in the expert summaries; was not debated at the pre-trial meetings between the experts; was referred to in passing during counsel's opening address; and first emerged, fully formed, in expert evidence on the fourth day of the trial. (See [22] – [23], [38] – [40].)

A proper use of rules 37 and 37A would have avoided many of these problems and enabled the trial to proceed and finish in 3 – 4 days instead of 10 days spread over three months. To narrow the issues, witness statements should have been obtained from M and Dr H, as intended in rule 37(10)*(e)*. (See [24].)

The instructions on the facts given to the experts should have been disclosed, and, where necessary, clarifications sought to enable proper instructions to be given. An agreed bundle of academic articles should have been prepared together with an executive summary of their contents and the issues should have been clearly defined in terms of rule 37A(11)*(c)*. (See [25].)

While rule 36(9) was innovative when introduced in 1963, times have moved on and the preparation of expert summaries by lawyers, who often have only a tenuous grasp of the real issues in a case, frequently causes problems. It would be desirable for the Rules Board to reconsider the rule to require the experts to prepare and deliver their reports in their own words and to include both a statement recognising that the report was furnished for the assistance of the court and a statement of truth. (See [26].)

As to whether the bump on J's head was fluctuant

Dr H's failure to describe the bump in detail did not mean that it was boggy. On the contrary, it was evidence that it was not boggy, for otherwise she would have recorded it. (See [32].) The absence of a clear statement of opinion by the experts that when J was examined, the swelling would on palpation have been fluctuant and that a reasonably competent member of the medical profession would have ordered a CT, meant that the expert evidence — which bore all the hallmarks of an attempt to justify opinions when the initial basis for them proved untenable — had to be approached with caution (see [44]).

Dr H's evidence as to her usual practice was strong evidence that it was followed. Her evidence of the examination and diagnosis of J was, moreover, direct evidence, whereas the opinion of appellants' expert was a reconstruction of what he thought might have happened, based on speculation and conjecture. In those circumstances the trial judge's finding that he could not reject Dr H's evidence and that the onus of

proof was not discharged could not be faulted. The main ground of appeal would therefore fail. (See [58] – [59].)

As to whether J should have been kept in hospital for further observation

Nothing supported the appellants' contentions that Dr H's treatment of J was deficient or that further exploration would have altered Dr H's diagnosis or her decision that J had suffered a minor injury and could safely be discharged (see [69]). A departure from hospital guidelines would not establish negligence unless what actually occurred departed from the standard of care that a reasonable and respected body of medical opinion would regard as acceptable treatment by a trauma doctor situated as was Dr H. (See [74].)

The process of assessment and examination followed generally at the hospital, and followed in this case by Dr H, complied with accepted clinical practice here and internationally. She could not be faulted for doing so. It was accordingly not necessary to deal with the separate question whether, if J had been kept at the hospital, his condition would have deteriorated, giving rise to concern resulting in further investigation. (See [82].)

The adequacy of the discharge instructions

While a haematoma first develops slowly, at some point the pressure on the brain shoots up and what had been a slow progression becomes a disaster. The sudden decline meant that it was difficult at any stage to tell whether there was an extradural haematoma. So, even had his parents awakened J during that night, they would not have known whether to take J back to hospital. Therefore, the appellants failed to prove that a warning about drowsiness or an instruction to wake him at intervals would, on a balance of probabilities, have meant that J would have been taken back to hospital, diagnosed with an extradural haematoma and undergone remedial surgery before suffering the injuries he did.

The appeal would therefore fail. While what happened to J was a tragedy and his parents deserve every sympathy for what they have suffered as a result, medical science has not advanced to the stage of diagnostic infallibility, and there will be cases where, notwithstanding the best efforts of the medical profession, a tragedy like this occurs. Sympathy was not a ground for imposing legal liability in this or any case.

Held per Molemela JA dissenting: A reasonable medical practitioner in Dr H's position would not have discharged J before further observation (see [150]). If J had been reassessed within an hour of Dr H's examination, as indicated by hospital guidelines, his condition would have triggered a referral for a CT scan, which in turn would have revealed the extent of his injuries when there was still scope for intervention (see [156] – [157], [160]). Dr H failed to apply the degree of professional skill and diligence expected of doctors when examining a child presenting at the emergency unit of a children's hospital with a head injury (see [158]). Since all the elements of a delictual claim were satisfied, the appeal should be upheld.

DEMOCRATIC ALLIANCE AND OTHERS v MKHWEBANE AND ANOTHER 2021 (3) SA 403 (SCA)

Discovery and inspection — Production of documents — Notice to produce documents — Ambit — Documents to which 'reference is made' in pleadings or affidavits — Includes documents directly or indirectly referred to in annexures —

Excludes documents referred to by process of inference — Supposition not enough — Uniform Rules of Court, rule 35(12).

Discovery and inspection — Production of documents — Notice to produce documents — Ambit — Production of documents to which 'reference is made' in pleadings or affidavits — Relevance — Ambit limited by relevance — Manner of assessing relevance in relation to rule 35(12) — Uniform Rules of Court, rule 35(12).

The present judgment dealt with an appeal to the Supreme Court of Appeal against the Western Cape High Court's decision to dismiss an interlocutory application brought by the first appellant, the Democratic Alliance (the DA), and the second appellant, Ms Glynnis Breytenbach, in terms of rule 30A of the Uniform Rules of Court to compel the production of two documents sought in terms of rule 35(12). In the main application, the first respondent, Advocate Busisiwe Mkhwebane, the present Public Protector (Mkhwebane), and the second respondent, the office of the Public Protector, had sought an order directing the appellants to retract defamatory remarks concerning Mkhwebane made at a press conference called by Breytenbach in her capacity as a member of the DA to address Mkhwebane's nomination as Public Protector, and for them to apologise.

Mkhwebane, in her founding affidavit, addressed a key purportedly defamatory claim made in the press conference, the intended meaning of which, she claimed, was that, for a period prior to her nomination as Public Protector, she had operated as a spy in China under the employ of the State Security Agency (SSA). Mkhwebane, in answer to this, claimed that she was in fact deployed by *the Department of Home Affairs* in China as an immigration councillor, and was not on the payroll of the SSA. It was only later, she submitted in the affidavit, once she had returned from China, that she was appointed by the SSA as an analyst; in this regard she attached a copy of *the appointment letter* as annexure PPSA5. PPSA5, inter alia, informed Mkhwebane that 'your *application for the . . . post* has been approved', and requested her to confirm, using the attached appendix A, whether she was amenable to the offer made in the appointment letter. Premised on the above, the appellants requested the production under rule 35(12) of Mkhwebane's application for the post of analyst with the SSA, as well as her acceptance of the offer as per appendix A. When the respondents had refused the request, the appellants brought the application in the court a quo to compel production of the two items, and were unsuccessful in their claim; hence the present appeal.

The appellants made the request for production of the two documents under rule 35(12), which provided that '(a)ny party to any proceeding may at any time before the hearing thereof deliver a notice . . . to any other party in whose pleadings or affidavits *reference is made* to any document or tape recording to produce such document or tape recording for his inspection'. Whether the appellants were entitled to compel production of the two documents in question formed the focus of the appeal. Central to deciding this question was whether 'reference' had been made to the two documents for the purposes of rule 35(12). Further, whether the items were 'relevant' to the extent that relevance was a requirement for production of documents under the rule.

Held, that documents in respect of which there was a direct or indirect reference in an affidavit *or its annexures*, that were relevant, and which were not privileged, and were in the possession of that party from which they were requested, had to be produced. Relevance was assessed in relation to rule 35(12), not on the basis of issues that had crystallised, as they would have had pleadings closed or all the

affidavits filed, but rather on the basis of issues that might arise in relation to what had thus far been stated in the pleadings or affidavits and possible grounds of opposition that might be raised, and on the basis that they would better enable the party seeking production to assess his or her position and that they might assist in asserting such a defence or defences. What would not pass muster was where the party seeking production sought to deduce the existence of a document through a process of extended reasoning or inference. Supposition was not enough. (See [28] and [41].)
Held, that, within the meaning of the expression in rule 35(12), there was a clear 'reference' to Mkhwebane's application for appointment as an analyst in annexure PPSA5 (see [43]). Furthermore, Mkhwebane's application for appointment was also relevant (see [44]), having evidential value and being able to assist with respect to the appellants' defences, of truth in the public interest and fair comment, by providing details of the time line of Mkhwebane's employment history with the SSA (see [41], [42] and [44]). (The SCA was, however, unpersuaded that there had been a reference within the meaning of rule 35(12) to the letter of acceptance mentioned in PPSA5.)
Held, accordingly, that the appeal should be upheld, and that the respondents should produce Mkhwebane's application for the post of analyst with the SSA (see [49]).

CONOMIC FREEDOM FIGHTERS AND OTHERS v MANUEL 2021 (3) SA 425 (SCA)

Defamation — Defences — Reasonable publication — Whether available to non-media defendants.

Defamation — Damages — Whether claim may be brought in motion proceedings.

In this matter second applicant (Mr Ndlozi), the spokesperson of first applicant (the Economic Freedom Fighters (EFF)), made a statement on its behalf concerning first respondent (Mr Manuel). The statement was published on the widely subscribed Twitter accounts of both the party and its leader, the third respondent (Mr Malema) (see [2] and [5]).

Considering the statements defamatory, Mr Manuel demanded an apology and a retraction, but both were refused. Manuel then instituted motion proceedings for a declarator that the statement was false and defamatory and that its publication was unlawful. As relief he sought its removal from the Twitter accounts; a retraction and apology; an interdict of future publication; damages of R500 000; and costs on the attorney and client scale. In the alternative he sought a declarator that the respondents were jointly and severally liable for damages, and that quantification be referred to oral evidence (see [3]).

The High Court granted relief in the following terms: it declared the statements defamatory and false and that their publication was and continued to be unlawful. It ordered removal of the statements within 24 hours from all respondents' media platforms, including the EFF and Mr Malema's Twitter accounts, and that respondents within 24 hours publish on those platforms an unconditional retraction and apology. It also interdicted the respondents making further similar statements and granted damages of R500 000. Lastly it ordered payment of costs on the attorney – client scale.

The High Court refused leave to appeal against its order, after which the applicants applied for leave directly from the Supreme Court of Appeal (see [4]). In dismissing the application in the main and upholding it in part (see [133]), the SCA pointed out the following:

- that the granting of leave to appeal depended on the merits of Mr Manuel's case and the applicants' defence (see [26]);
- that the High Court's finding that the statements were defamatory had been correct (see [35]);
- that the High Court had correctly rejected the defences of truth and public interest and fair comment (see [37] and [39]);
- that the High Court had, however, erred in extending the defence of reasonable publication to non-media defendants because this development had been insufficiently motivated, was based in misconstruction of precedent, and would have adverse consequences (see [26], [40], [62] and [65] – [66]);
- that, regardless of the nature of the defence (whether it rebutted intention or wrongfulness), it should fail because the applicants' failure to check the veracity of the statements supplied by their source was unreasonable, and, along with the applicants' later behaviour, was consistent with animus iniurandi (see [68], [81], [84] and [86]). Therefore, in this respect (the dismissal of the defence), the High Court had been correct, and, in the light of this and the findings as to truth and public interest and fair comment, leave to appeal against would be refused (see [86]);
- so, too, would leave to appeal be refused in respect of the declarator and interdict: damages would be an unsatisfactory substitute for the latter in the circumstances of the applicants' obduracy and the harm the statement was doing to an organ of state concerned (see [89]).
- However, in respect of the award of damages on motion, leave should be granted: established procedure in claims for unliquidated damages was that they be brought by action, and any development of that procedure to allow such claim to be brought on motion had been inadequately motivated (see [27], [92], [108] and [111]). The ramifications of any such development required careful consideration (see [113]).
- As for the alternative relief sought — referral of the quantum of damages to oral evidence — such was appropriate in the circumstance of the limited material in the affidavits going to quantum and the High Court's brief reasoning thereon (see [114], [116] and [119]).
- Insofar as the issue of retraction and apology was concerned, this was inextricably entwined with the question of damages, and it was only appropriate that this issue too be referred to oral evidence (see [130]).
- Lastly, the award of punitive costs was indeed justified against the backdrop of the applicants' obduracy when faced with the untruthfulness of the statement (see [82] – [84] and [131]).

The SCA ordered that the application for leave to appeal against the declarators that the statements were defamatory and their publication unlawful, and the order interdicting publication of like statements, be dismissed. It ordered in addition that the application for leave to appeal against the orders to retract the statements, apologise, and to pay damages of R500 000 be granted, and the appeals upheld, and the High Court order substituted to refer determining of the quantum of damages to oral evidence, and in conjunction with that, the issue of whether an order of retraction and apology should be made.

MONTEIRO AND ANOTHER v DIEDRICKS 2021 (3) SA 482 (SCA)

Spoliation — Mandament van spolie — When available — Order requiring restoration of possession must be capable of being carried into effect.

Spoliation — Mandament van spolie — Defences — Impossibility of restoration — Property no longer in hands of spoliator — Discussion.

The present matter dealt primarily with the question whether, in an application for a *mandament van spolie*, a court could order a party to restore possession of goods of which it was not in possession. The background is as follows. The respondent, Mr Diedricks, delivered the BMW motor vehicle of which he was in possession to the second appellant, Autoglen, for a routine maintenance service. When Diedricks returned later that day to collect the vehicle, Autoglen declined to release it, on the basis of instructions received from the first appellant, Mr Monteiro, a director of the company Street Talk Trading. Street Talk Trading was the owner of the vehicle, and was at the time engaged in a vindicatory action against Mr Diedricks, claiming repossession of the vehicle on the basis of ownership. Autoglen retained possession until the following day when, in compliance with Mr Monteiro's request, it handed the vehicle to Street Talk Trading, which sold it that very same day to a third party. Mr Diedricks launched an urgent spoliation application in the High Court, citing Autoglen and Monteiro, as well as BMW SA, as respondents. Diedricks sought relief only from Autoglen, an order that it restore possession of the vehicle to him. The basis of Diedrick's claim was that Autoglen had unlawfully dispossessed him of the vehicle of which he had been in peaceful and undisturbed possession, entitling him to recourse to the *mandament van spolie*. Diedricks ultimately abandoned relief against Autoglen, seeking instead an order against Monteiro. The court granted an order, however, that possession of the vehicle be restored to the applicant immediately by Monteiro, as well as by Autoglen. The present is the appeal to the Supreme Court of Appeal against such decision.

Before the SCA, Monteiro and Autoglen opposed the relief on two grounds. Firstly, they argued that a *mandament van spolie* ought not to have been granted because Diedricks was not, as a matter of fact and law, in possession of the motor vehicle when the spoliation occurred, as he had delivered the vehicle to Autoglen thereby giving up possession of it. Secondly, they argued that neither of them was in possession of the motor vehicle and could therefore not restore it: from the perspective of Autoglen, it had passed possession to Street Talk Trading; from that of Monteiro, Street Talk Trading had in turn sold the vehicle to a third party. The majority decision disposed of the appeal on the basis of this second point.
Held, as per the majority (Goosen AJA (with Dambuza and Plasket JJA concurring)), that there were contrary views in case law as to the availability, in principle, of the *mandament* where the spoliator was no longer in possession of the spoliated property (see [19] – [20]). However, it was unnecessary for the court to enter upon the terrain of such controversy. That was so because the *mandament* by its nature may involve either mandatory elements, such as the delivery of movable property, or prohibitory elements, as in the case where a party was restrained from preventing certain steps being taken to restore possession. Where the order could not be

carried into effect, it could not, competently, be granted. Whether the order could be carried into effect was a question of fact to be determined by the court asked to grant an order. (See [21].)

Held, that it was impossible for Autoglen and Monteiro to, in law or fact, give effect to the order that was sought (see [28], [29] and [31]). Neither was in possession of the motor vehicle (see [27]) (it could be accepted that Monteiro, acting in his capacity as a director, caused Street Talk Trading to take possession of the motor vehicle from Autoglen, immediately after which Street Talk Trading sold it on to a third party (see [25])). Autoglen could not be expected to intervene in a contractual relationship to which it was not a party (see [28]). On the other hand, Monteiro could not be compelled to take steps to restore possession without Street Talk Trading, the entity which took possession of the motor vehicle and disposed of it to a third party, being compelled, by a court order, to forbear such steps or to take them itself. Street Talk Trading was not joined in the proceedings. (See [28].)

Held, accordingly, that the order against both Autoglen and Monteiro was not one that competently could be made. The appeal therefore had to succeed (see [33]). Writing for the minority, Schippers J (with Mabindla-Boqwana AJA concurring), disagreed with the majority finding in respect of Monteiro. His critical points were the following. Firstly, Monteiro had, by his own actions, despoiled Diedricks of his possession of his vehicle, and could be viewed as co-spoliator with Street Talk Trading: being the driving force behind the removal of the vehicle, having himself ordered and executed the act of spoliation from start to finish (see [53] and [56]). While it was his view that Monteiro had not exercised possession of the vehicle *on behalf of* Street Talk Trading, it would have been immaterial if he had (see [53]). Secondly, and contrary to the view of the majority, restoration of the vehicle by Monteiro was possible. Transfer of possession to a third party did not imply that restoration would always per se be impossible. Where a third party had acquired possession, a spoliation order could still be granted, unless the spoliator proved that it was impossible for him/her to give effect to the order (see [60]). Monteiro had failed to prove such impossibility (see [62]). He merely asserted, without evidence, that the vehicle had been sold to a third party (see [63]); he further failed to allege that it was impossible for him to restore possession of the vehicle; neither did he adduce any evidence of steps he had taken to do so (see [65]).

Plasket JA, who concurred with the majority, in a separate judgment set out why he disagreed with Schippers JA's reasoning. Broadly speaking, he held that Monteiro, at all times, was strictly acting in a representative capacity on behalf of Street Talk Trading (see [77]), and in such circumstances liability could be visited upon Monteiro (see [83]). He held, furthermore, that it was indeed impossible for Monteiro to restore possession of the vehicle, its having been established on the evidence that the vehicle had been sold and was no longer in possession of Street Talk Trading (see [88]).

SAYED NO v ROAD ACCIDENT FUND 2021 (3) SA 538 (GP)

Legal practitioner — Attorney — Rights and duties — Duties — Of attorney ceasing to act — Duty to formally withdraw as attorney of record by delivering notice of withdrawal — Uniform Rules of Court, rule 16(4).

Practice — Attorney of record — Withdrawal — Notice of withdrawal — When required — Uniform Rules of Court, rule 16(4).

The present judgment of the High Court, Gauteng Division, Pretoria, concerned various actions for damages against the Road Accident Fund, as defendant. In respect of each of the matters, the defendant's attorneys of record, who had previously been actively involved, had at some point prior to the hearing stopped playing any further role in proceedings, *but without withdrawing*. Their lack of involvement meant that some of the matters had proceeded on an unopposed basis; in others settlement had been reached after the plaintiffs, through their attorneys, had engaged directly with the defendant through its claims handlers. As a result of these attorneys' approach, the plaintiffs' attorneys had had difficulties in eliciting responses from the defendant directly to letters they addressed to it. Further, it had become impossible to comply with the practice directives of the court requiring a pre-trial conference between the parties and a joint practice note to be filed. Before dealing with the merits of the various claims, the court directly addressed the defendant's attorneys' conduct. That will form the focus of this headnote.
The court stressed that an attorney, should they wish to cease to act on behalf of a party in any proceedings, had a duty to formally withdraw from proceedings by delivering a notice of withdrawal as attorney of record (see [12] and [16]). Such a duty was one an attorney owed not only to their client, but also to the court, as well as to their opponents and their clients (see [9]). The court considered the position of attorneys who ceased to involve themselves in proceedings, yet refused to withdraw in order to preserve commercial relationships with their client (see [16] – [18]). An attorney who acted in such a manner was guilty of unprofessional conduct (see [17]), the court held, further stressing that an attorney's ethical obligations always outweighed matters of financial or commercial expediency (see [17]). Whatever the reasons for remaining on record may be, if the attorneys adopted the position that they were entitled to remain as attorneys of record, then they had to continue to fulfil their obligations. They could not both approbate and reprobate.

It was established prima facie, the court held, that the defendant's attorneys, in acting in the manner they had, were guilty of gross discourtesy and a neglect of their duties as officers of the court. (The court declined to make a conclusive finding in this regard, not having before it an explanation for the attorneys' behaviour.) (See [22] and [23].) The court directed that the judgment be delivered to the officers of the Legal Practice Council for it to consider an investigation into the conduct of the defendant's attorneys of record (see [24]).

ESAU AND OTHERS v MINISTER OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS AND OTHERS 2021 (3) SA 593 (SCA)

State — Duties — Disaster management — Covid-19 lockdown — Lawfulness of National Coronavirus Command Council's establishment and its policy decisions — Consistency of level 4 regulations with ss 26 and 27 of DMA — Procedural fairness and rationality of level 4 regulations — Whether level 4 regulations reasonable and

justifiable limitations of fundamental rights — Disaster Management Act 57 of 2002, ss 26 and 27.

After a national disaster has been declared — as it was on 15 March 2020 in response to the Covid-19 pandemic — the designated Minister may, in terms of s 27(2) of the Disaster Management Act 57 of 2002 (the DMA), 'make regulations or issue directions or authorise the issue of directions' concerning a range of issues. On the same day that the national disaster was declared, the National Coronavirus Command Council (the NCCC) was established. The first regulations were promulgated three days later. On 25 March 2020 regulations were promulgated to implement a 'lockdown', defined in the regulations as 'the restriction of movement of persons' (see [25]).

More amendments to the lockdown regulations followed, and on 29 April 2020 a set of regulations was promulgated to give effect to a lower level of lockdown (the level 4 regulations). These, and the lawfulness of the NCCC's establishment, and the constitutionality of its policy decision to move the country from level 5 to level 4 — allegedly given effect to by the designated Minister, the COGTA Minister, when she made the level 4 regulations — were unsuccessfully challenged in the High Court.

The applicants' complaints against the level 4 regulations were that they infringed constitutional rights to human dignity, freedom and security of the person, freedom of movement, and freedom of trade, occupation and profession; that they did not augment existing legislation (as required by s 26(2)*(b)* of the DMA) but purported to amend legislation, so that the COGTA Minister strayed beyond the purposes permitted in terms of s 27(2); and that lack of public participation (affording members of the public only a two-day period within which to make representations) rendered them procedurally unfair/and or irrational.

This case concerned their appeal to the Supreme Court of Appeal, which held as follows:

The lawfulness of the NCCC's establishment and its policy decisions

The NCCC was a Cabinet committee, and the Cabinet may function through committees. Decisions taken by Cabinet committees were binding on the entire Cabinet as much as decisions taken by the entire Cabinet in a Cabinet meeting. The NCCC's policy decision was therefore a valid decision of the Cabinet.

The mere fact that the impugned conduct involved the formulation or adoption of a policy did not necessarily mean that it was not justiciable. If the application of a policy infringed or threatened rights, it may be challenged on review. Here the decision-making process was completed when the COGTA Minister made the level 4 regulations, giving effect to the policy decision taken by the NCCC. It was those regulations that impacted on the rights of people, not the prior policy decision. And, even if the review of the policy decision were to succeed, the adverse impact on rights brought about by the subsequent regulations would continue — ie it would have no practical effect. When the NCCC took a policy decision that was given legal effect to by the COGTA Minister, it was legally entitled to do so; in any event, that policy decision was moot and therefore not justiciable. The High Court therefore correctly dismissed these challenges. (See [46], [50] – [52], [57] and [158].)

The consistency of the level 4 regulations with ss 26 and 27 of the DMA

In motion proceedings, applicants were required to make out their case in their founding affidavit and may not make out their case in reply. This challenge was not raised in the founding affidavit, but only in the replying affidavit, with the result that the respondents had no opportunity to answer them. As the challenge was not

properly raised, there was no reason to consider the merits, and it was correctly dismissed. (See [60].)

The procedural fairness of the level 4 regulations

Section 4 of the Promotion of Administrative Justice Act (PAJA) applied to the making of subordinate legislation. Whatever the procedure chosen by the administrator, in order for it to be fair, it must comply with the requirements of s 3 of PAJA. The procedure chosen must ensure that adequate notice of the intended administrative action was given to members of the public, and that they were given an adequate opportunity to be heard. Sufficient detail had been given by the COGTA Minister to enable members of the public to make meaningful representations on the content of the level 4 regulations. As to whether sufficient time had been afforded for representations, within this context, the COGTA Minister was required to assess the urgency of the matter, and to calibrate the procedure adopted by her, including the time to be allowed for the making of representations, to the degree of urgency. When the nature of the process was viewed holistically in the context of the DMA, the circumstances prevailing in respect of this particular disaster, the lockdown regulations that had been in force, and the intention to ameliorate some of the economic and social harshness of the lockdown regulations, I am of the view that the two-day period afforded to members of the public within which to make representations was reasonable. It could not therefore be said that by restricting members of the public to two days within which to make representations, the COGTA Minister acted in a procedurally unfair manner. The level 4 regulations were therefore made in a procedurally fair manner; and the COGTA Minister did apply her mind to them (See [91], [95], [97], [100], [104] and [158].)

The procedural rationality of the level 4 regulations

If wrong in aforesaid finding that regulation-making constituted administrative action, it nevertheless constituted executive action, which, while not required to be procedurally fair, must meet the standard of procedural rationality. The experience of people who endured the strict lockdown was highly relevant to the COGTA Minister's decision-making in respect of the content of the regulations. She could not rationally have taken decisions on the content of those regulations without having afforded members of the public an opportunity to make representations — as she did. For the same reasons given in relation to the procedural fairness of the regulation-making process in terms of s 4 of PAJA, the procedure was also rational. (See [101] – [103] and [158].)

The infringement of fundamental constitutional rights

The seriousness and the magnitude of the threat to life brought about by the pandemic cannot be exaggerated. The specific movement and economic-activity regulations that were challenged were, with two exceptions, reasonable and justifiable limitations of fundamental rights. The purpose of the limitation of the fundamental right to freedom of movement and of trade, occupation and profession was the protection of the health and lives of the entire populace in the face of a pandemic that had cost thousands of lives and has infected hundreds of thousands of people. In these circumstances, the broad-based limitation of everyone's fundamental right to freedom of movement and of trade, occupation and profession was a rational response for the purposes articulated by the COGTA Minister when she provided for the initial lockdown. By ameliorating the harshness of the lockdown and moving to level 4, the COGTA Minister sought to strike a balance 'between saving lives and saving livelihoods'. For the most part the means chosen — and the

limitation of rights that those choices brought about — were objectively rational. (See [132], [140] – [141] and [158].)

SPECIAL INVESTIGATION UNIT v MEC FOR HEALTH, EASTERN CAPE AND ANOTHER 2021 (1) SACR 645 (ECM)

Special investigating units — Powers of — Application to be joined as party in completed civil proceedings in claim for medical negligence.

The applicant, the Special Investigating Unit established in terms of the Special Investigating Units and Tribunals Act 75 of 1996, applied to be joined as a party in proceedings in the High Court which had resulted in an award of damages for medical negligence to the second respondent. The respondents had agreed to the settlement of the claim in an amount of R9 million and the court had made an order that the first respondent pay the second respondent the remainder of the amount owing, namely an amount of R6,4 million. The applicant was not a party to those proceedings. It relied for its locus standi on the proclamation dated 12 July 2019 relating to the investigation of maladministration in connection with the affairs of the office of the State Attorney and any unlawful act or irregularity committed by employees or officials of that office or any other person or entity. It alleged that the state attorney had mishandled the trial action on both the issue of liability and quantum, which entitled the applicant to seek rescission of the judgment. The maladministration referred to related to the failure to call an expert witness who would have been an essential witness for the case. The applicant therefore wanted an order which would effectively reopen the case for purposes of leading further evidence.
Held, that the state attorney was not involved in the conduct of the trial and therefore any maladministration alleged on the part of the state attorney could not be attributed to the conduct of the trial. Given the indubitable scourge of corruption and the hue and cry of society to stamp it out in all spheres of government, it could not be denied that the work of entities like the applicant was laudable. There might be merit in the suspicion of corruption in the handling of medical-negligence cases, especially in the Eastern Cape; however, cases were decided on fact and not on suspicion, and the court was not persuaded that the proclamation authorised the applicant to endeavour to reopen cases already concluded. If it did so, it was ultra vires the powers of the President. (See [20] – [21].)

IN RE DETENTION OF CANDIDATE ATTORNEY IN COURT CELLS 2021 (1) SACR 655 (ECG)

Contempt of court — What constitutes — Refusal by candidate attorney employed by Legal Aid South Africa to represent accused for whom she had no instructions and had specific instructions from her manager not to represent accused — Magistrate regarding her conduct as disrespectful and ordering that she be detained in court cells — Serious invasion of candidate attorney's right to liberty and dignity not countenanced by provisions of s 108 of Magistrates' Courts Act 32 of 1944 or s 178(2) of Criminal Procedure Act 51 of 1977.

This matter was sent on review by a senior magistrate because of a potential miscarriage of justice by another magistrate who had demanded that a candidate attorney, employed by Legal Aid South Africa, represent an accused for whom she had no instructions and who felt obliged to obey the instruction of her manager that she was not to deal with the matter because she was at court only to represent an accused in her own part-heard matter. The magistrate refused her permission to withdraw from the case and, when the candidate attorney refused to represent the accused, the magistrate requested that the court orderly take her to the cells for her disrespect of the court.
Held, that it appeared that the magistrate was annoyed and frustrated that the trial could not be concluded and wrongly regarded the candidate attorney's conduct as disrespectful. However, if the magistrate had the provisions of s 108 of the Magistrates' Courts Act 32 of 1944 or s 178(2) of the Criminal Procedure Act 51 of 1977 in mind at the time she made her order, with proper consideration she would have realised that the candidate attorney's conduct was not what was envisaged in either of those provisions and she was in any event required to warn her of her intention to proceed in terms of the statutory provision she had in mind, in order to give the candidate attorney an opportunity to address her with specific reference to such provision, but had not done so. This was a serious invasion of the candidate attorney's right to liberty and dignity, and the experience must have been frightening, shocking and humiliating for her. The proceedings were accordingly set aside.

The proceedings on 29 October 2020 in the Magistrates' Court, Port Alfred, during the matter of *S v Ndiyana*, whereby the magistrate decided that Ms N December was disrespectful to the court, and the order for the detention of Ms December in the court cells, are reviewed and set aside.

Helen Suzman Foundation v McBride and others [2021] 2 All SA 727 (SCA)

Civil Procedure – Appeal by amicus curiae – Role of amicus – Court highlighting importance of amici playing their rightful role while their participation is kept within appropriate bounds – Where amicus departed from the basis on which it had sought to be admitted and attempted to broaden the scope of the challenge, court ruling such attempt impermissible.

Safety and Security – Renewal of contract of executive director of Independent Police Investigative Directorate – Interpretation of section 6(3)(b) of Independent Police Investigative Directorate Act 1 of 2011 – Appointment of executive director of Independent Police Investigative Directorate not renewable by incumbent but by the Parliamentary Committee on Policing.

The first respondent (“Mr McBride”) was the executive director of the Independent Police Investigative Directorate (“IPID”), appointed to that position on 1 March 2014, in terms of section 6 of the Independent Police Investigative Directorate Act 1 of 2011 (the “Act”). That section provides for the appointment of the executive director of IPID, and for the renewal of the incumbent’s tenure after the expiry of the first five years in office. Shortly before Mr McBride’s five-year term of office ended, he engaged the Minister about its renewal and was informed that his contract would not be renewed. He challenged the Minister’s right to unilaterally make such a decision, and

demanded that the matter be referred to the Parliamentary Committee on Policing (the "PCP") for its decision.

After discussions appeared to be futile, Mr McBride approached the High Court for relief. In his founding affidavit, he accepted that he had no right to be re-appointed, but wished to ensure that the proper process in relation to his possible re-appointment or rejection thereof, be followed. Before the matter was heard, the appellant (the "HSF") successfully applied to the court below to be admitted as an *amicus*. It stated that its aim was to show that neither of the parties' interpretation of section 6(3)(b) of the Act was correct. It sought to advance an alternative interpretation to the effect that the appointment of the Executive Director of IPID was renewable at his instance and not at the instance of either of the respondents.

After the admission of the *amici*, the main parties settled the matter and the settlement agreement was made an order of court. The HSF obtained leave to appeal from the present Court.

Held – The central issue in the appeal was whether section 6(3) of the Act could be construed in the way that the HSF contended.

The interpretation eventually agreed upon by Mr McBride, the PCP and the Minister was that the power to extend the incumbent's tenure for a second term was vested in the PCP. However, the HSF contended that the incumbent had an unfettered option to continue in office for a second term. The foundation of the HSF's interpretation of section 6(3) was that because the PCP having the power to renew undermined IPID's independence, it was necessary to interpret the section in a different way that was purportedly constitutionally compatible. The court referred to a series of cases which served to refute that premise. It held that there was no need for the HSF's type of interpretation in order to save section 6(3) from constitutional invalidity because the PCP's powers were not in conflict with IPID's independence. In any event, the said interpretation was untenable and could lead to absurd results.

Commenting on the role of an *amicus*, the court highlighted the importance of *amici* playing their rightful role while their participation is kept within appropriate bounds. In this case, the HSF departed from the basis on which it had sought to be admitted and attempted to broaden the scope of the challenge to include the lack of guidelines in the processes of the PCP. That was impermissible.

The appeal was dismissed.

National Credit Regulator v Getbucks (Pty) Ltd and another [2021] 2 All SA 747 (SCA)

Consumer – Fees charged by credit providers – National Credit Act 34 of 2005, Regulation 44 – Validity of Regulation 44 which prescribes maximum monthly service fees which a credit provider may charge a consumer – Requirements for promulgation of Regulation – Non-compliance with requirements of National Credit Act 34 of 2005 rendering Regulation invalid and National Credit Regulator thus not entitled to rely thereon in proceedings for deregistration of credit provider.

The appellant, the National Credit Regulator (the "NCR") claimed that the first respondent ("Getbucks") had overcharged fees and was thus non-compliant with

regulation 44 (the “regulation”) promulgated under the National Credit Act 34 of 2005. The regulation prescribes maximum monthly service fees which a credit provider may charge a consumer.

Upon the NCR approaching the National Credit Tribunal to cancel the registration of Getbucks, the latter applied to the High Court for a declaration that the regulation was *ultra vires* and/or void and that the NCR could not prosecute Getbucks in the Tribunal for an alleged contravention of the regulation. The court declared that the NCR was barred from prosecuting Getbucks or seeking any relief against it before the National Consumer Tribunal in respect of any alleged contravention of regulation 44 prior to its subsequent review and amendment.

Although the regulation was reviewed and amended prior to the date of judgment, the unamended regulation was operative when the application was brought, and it therefore remained relevant as to whether Getbucks was subject to deregistration for non-compliance or not.

Held – The first question was whether the regulation was promulgated pursuant to section 171 of the National Credit Act or under section 11 of Schedule 3 to the Act. The NCR contended that it was promulgated under section 171, while Getbucks contended that it was promulgated under section 11. If under section 171, the proposed regulation had to be published and comment from interested and affected parties called for, with no period specified for the submission of comments. If under section 11, a period of 30 business days had to be allowed for comments to be submitted. It was common cause that the advertised closing date for submissions was 27 business days after publication – which was short of the minimum period of 30 business days specified in section 11.

The regulation came into effect on 1 June 2006, on the same day as the Act. The NCR came into being at the same time as the regulation came into effect. The regulation dealt with matters regulated by section 105(1) of the Act, which requires that the regulation be made after consultation with the NCR. Factually, it was clear that prior to 1 June 2006, the Minister could not have consulted the NCR in order to satisfy the requirements of section 105(1). The procedural requirement of prior consultation in section 105(1) was thus breached, and section 171 could not have been the basis on which the regulation was promulgated.

The regulation could also not have been promulgated under section 11, which required a period of at least 30 business days for the submission of comments. That requirement was not complied with.

The promulgation of the regulation was thus *ultra vires* the power of the Minister and was not validly promulgated.

The appeal was dismissed with costs.

African Transformation Movement v Speaker of the National Assembly and others [2021] 2 All SA 757 (WCC)

Constitutional and Administrative law – Speaker of National Assembly – Vote in motion of no confidence against President – Refusal by Speaker of the National Assembly to hold vote by secret ballot – Review application – Whether decision falling within

exclusive jurisdiction of Constitutional Court in terms of section 167(4)(e) of the Constitution – Where cause of complaint related to procedural path to the vote and did not involve constitutional obligations, matter not falling within exclusive jurisdiction provision.

The applicant sought to review and set aside a decision of the first respondent, the Speaker of the National Assembly, in declining the applicant's request to hold voting by secret ballot in a motion of no confidence against the South African President.

Raising a preliminary point, the Speaker contended that the present Court lacked jurisdiction to hear the application. It was argued that the Speaker's mandate is constitutional, and that the decision not to hold a vote by secret ballot involved a constitutional obligation to allow members of Parliament to vote in a certain way. The contention therefore, was that it was the Constitutional Court which had exclusive jurisdiction in the matter in terms of section 167(4)(e) of the Constitution.

Held – Jurisdiction is determined on the basis of pleadings and not the substantive merits of the case. The pleadings contain the legal basis under which the applicant has chosen to invoke the court's competence. A determination of whether the present Court had jurisdiction to consider the matter lay in a proper interpretation of sections 102(2) and 167(4)(e) of the Constitution. Section 102 deals with a vote of no confidence in the President by the National Assembly.

It is incumbent upon a party invoking the jurisdictional exclusivity in terms of section 167(4)(e) to establish that there was a failure by parliament to fulfil a constitutional obligation. The applicant's cause of complaint related to the procedural path to the vote and did not involve the President's constitutional obligations.

Similarly, section 102(2) does not clothe a member of Parliament with a constitutional obligation envisaged in section 167(4)(e) to perform a specific act or function which would trigger the Constitutional Court's exclusive jurisdiction. Instead, it confers power on the assembly to pass a motion of no confidence in the President if the majority of members support the motion.

It was concluded that the present Court had jurisdiction to grant orders in terms of section 102(2).

The Court then turned to consider whether the Speaker's decision was unlawful and fell to be reviewed and set aside.

The decision whether to vote by open or secret ballot lay with the Speaker. The courts can only interfere if the Speaker did not apply her mind to her decision. The Court found the Speaker's decision to have been based on sound reasons. She also provided the applicant with the reasons for her decision.

Finding the decision to have been unimpeachable, the court dismissed the application for review.

Cotty and others v Registrar of the Council for Medical Schemes and others [2021] 2 All SA 793 (GP)

Pharmaceutical and Health – Council for Medical Schemes – Appeal Committee – Effect of lodging of appeal – Whether the lodging of an appeal in terms of section 50(3) of the Medical Schemes Act 131 of 1998 suspends the decision which is the

subject of that appeal, pending a decision by the Appeals Board – Ordinary common law principle that administrative appeal in terms of section 50(3), timeously taken, suspends the decision which is the subject of the appeal.

The third respondent ("Discovery") and fourth respondent ("Medshield") refused to approve applications by the relevant applicants for the funding of treatment of certain conditions. Complaints to the first respondent (the "Registrar") were dismissed, and the applicants appealed against such dismissals to the Appeal Committee of the Council for Medical Schemes (the "Council") in terms of section 48 of the Medical Schemes Act 131 of 1998. The Appeal Committee's finding in favour of the applicants, led to Discovery and Medshield invoking section 50 of the Act and appealing against such rulings to the Appeal Board of the Council. The schemes then contended that the decisions of the Appeal Committee had been suspended by their appeals and they accordingly did not comply with the rulings made by the Appeal Committee.

In the present application, the question raised was whether the lodging of an appeal in terms of section 50(3) of the Act suspends the decision which is the subject of that appeal, pending a decision by the Appeals Board.

Held – The dispute turned on the correct interpretation, effect and application of section 50 of the Act. The Court referred to case law setting out the correct approach to statutory interpretation.

In terms of the Act, where a member is not entitled to payment in terms of its rules, the medical scheme is precluded from effecting payment to that member. That remains so notwithstanding a decision by the Council in terms of section 48(8). It is only following an order by the Appeal Board in terms of section 50(16)(b) that the decision be implemented, that the medical scheme may give effect to such decision. Section 50 establishes and sets out the powers of the Appeal Board. In terms of section 50(3), any person aggrieved by a decision of either the Registrar acting with the concurrence of the Council or by a decision of the Council may within 60 days of such decision and upon payment of a prescribed fee, appeal against such decision to the Appeal Board.

Section 50 does not expressly state whether the lodging of an appeal in terms of section 50(3) does, or does not, suspend the decision which is the subject of the appeal. In the case of court orders, the effect at common law of noting an appeal is to suspend the operation of the decision appealed against. The issue in this case was whether the common law principle applies to administrative decisions. The Court concluded that there was nothing in the Act that displaced the common law principle that the administrative appeal (timeously taken) suspends the decision which is the subject of the appeal. The ordinary common law principle was thus applicable and an appeal in terms of section 50(3) suspends a decision by the Council in terms of section 48(8).

The application was dismissed.

Democratic Alliance v Brummer [2021] 2 All SA 818 (WCC)

Civil Procedure – Special defence – Defence of res judicata applicable where a matter has already been decided, is available where a dispute was between the same parties, for the same relief or on the same cause – Where the relief and cause of action is not absolutely identified, the defence of issue estoppel may be raised – Unjust and

inequitable to uphold defence of issue estoppel where litigant was prevented from litigating his cause of action to finality.

The respondent ("Brummer") joined the appellant political party (the "DA") in 2000. He subsequently served as a councillor for more than a decade. On 13 August 2012, the DA confirmed termination of Brummer's membership of the party, alleging that he had failed to pay his dues to the party. The termination of membership was based on a clause in the DA's Federal Constitution, which provided for membership to cease when a member was in default with the payment of any compulsory public representative contribution for a period of 2 months after having been notified in writing that he is in arrears, and still fails to make good on the arrears.

Upon Brummer's position becoming vacant, the Independent Electoral Commission (the "IEC") was statutorily required to advertise that vacancy. Following such advertisement, Brummer applied to interdict the IEC from filling the post and to procure the reinstatement of his membership. By the time the matter came before court, the vacancy had already been filled by the IEC. Brummer attempted to challenge the constitutionality of the relevant clause in the DA constitution, but the court refused to entertain the belatedly raised point. The application was dismissed in September 2012.

In 2014, Brummer commenced action proceedings against the DA for damages founded in contract, alternatively delict and in the further alternative, for constitutional damages. The basis of Brummer's claims in the action was that the DA had unlawfully terminated his membership.

Just a week before the trial was due to commence, the DA sought to introduce for the first time a special plea of issue estoppel and then insisted upon that issue being determined separately and *in limine* at the trial. The dismissal of the special plea led to the present appeal.

Held – Defence of issue estoppel has taken root in our law as a subsidiary of the principle of *res judicata*. *The* plea of *res judicata* – that the matter has already been decided – was available where the dispute was between the same parties, for the same relief or on the same cause. The requirements have been relaxed over the years and where there is not an absolute identity of the relief and the cause of action, the attenuated defence has become known as issue estoppel.

A party seeking to rely on the defence of *res judicata* must allege and prove all the elements underlying the defence. The DA relied on the September 2012 judgment as constituting *res judicata* in respect of the claims for damages subsequently launched by Brummer. The present Court stated that the factual issue, which arose in this matter, was the termination of Brummer's membership through the application by the DA of the clause in its constitution. That termination afforded Brummer various causes of action. However, he was denied the opportunity to place his case before the court. His having been prevented from litigating his cause of action in relation to damages to finality meant that it would be unjust and inequitable to uphold the special plea of issue estoppel. The majority of the court dismissed the appeal.

Road Accident Fund v Legal Practice Council and others (Pretoria Attorneys Association and another as *amici curiae*) [2021] 2 All SA 886 (GP)

Civil Procedure – Execution against Road Accident Fund – Application by Fund for suspension of all writs of execution and attachments based on court orders already granted against it or settlements already reached with successful claimants entitled to payment of compensation for damages flowing from road accidents for limited period – Court finding that exceptional circumstances existed, taking into account the interests of justice, for the exercise of its inherent common law and constitutional power to order a temporary suspension for a limited period of 180 days.

Civil Procedure – Jurisdiction – Causae continentia principle allows a court to assume jurisdiction in respect of a defendant who is otherwise not amenable to that jurisdiction on any of the recognised grounds of jurisdiction – Section 21(2) of the Superior Courts Act 10 of 2013 encompassing causae continentia principle.

The applicant, the Road Accident Fund ("RAF"), is constitutionally enjoined to pay reasonable compensation in respect of loss or damage resulting from bodily injury or the death of any person caused by or arising from the driving of a motor vehicle. Section 21(1) and (2)(a) of the Road Accident Fund Act 56 of 1996 provides that no claim for compensation in respect of loss or damage resulting from bodily injury or the death of any person caused by or arising from the driving of a motor vehicle shall lie against the owner or driver of a motor vehicle or against the employer of the driver, unless the RAF or an agent is unable to pay any compensation.

In an attempt to stabilise its precarious financial position and imminent implosion and to prevent a constitutional crisis, the fund sought an order – either in terms of rule 45A of the Uniform Rules of Court or the common law or section 173 of the Constitution of the Republic of South Africa, 1996 – suspending all writs of execution and attachments based on court orders already granted against it or settlements already reached with claimants entitled to the payment of compensation for damages resulting from bodily injury or death caused by road accidents that are regulated by the RAF Act in terms of a court order or settlement reached with the RAF (successful claimants) for a period of 180 days. That would enable it to make payment of the oldest claims first by date of court order or date of settlement agreement *a priore tempore*.

Held – A preliminary issue raised was that of non-joinder of other interested parties. However, the court found that the steps taken by the RAF to notify as many parties of its application as possible were adequate.

A second preliminary point related to the present Court's jurisdiction. The RAF instituted its application in Pretoria since most of the warrants of execution were issued out of the offices of the registrars in Gauteng and most of the attachments of the RAF's movable property occurred in Gauteng. The RAF contended that the *causae continentia* principle (the doctrine of cohesion of a cause of action) and section 21(2) of the Superior Courts Act 10 of 2013 applied, which principle extends the jurisdiction of a particular division of the High Court. The *causae continentia* principle, which allows a court to assume jurisdiction in respect of a defendant who is otherwise not amenable to that jurisdiction on any of the recognised grounds of jurisdiction, is now enshrined in section 21(2) of the Superior Courts Act. The Court thus confirmed its jurisdiction in the matter.

Acknowledging the precarious financial position of the RAF and the administrative problems besetting it, the Court found that exceptional circumstances existed, taking into account the interests of justice, for the exercise of the court's inherent common law and constitutional power to order a temporary suspension for a limited period of 180 days of all writs of execution and attachments against the RAF based on court orders already granted or settlements already reached in terms of the RAF Act, which are not older than 180 days as from the date of the court order or date of the settlement reached.

END-FOR NOW