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Prescription- Rule 28 notice- interrupts prescription,-was served and filed on 23 July 2020. It follows that although the amendment raises a new cause of action, it has not prescribed. Even if I am incorrect on this aspect, it raises a triable issue which is better suited to a trial court to make a finding on after hearing and evaluating the evidence lead. Lategan N.O. and Others v NG White Farm Properties (Pty) Ltd and Others (1766/2017) [2021] ZANCHC 31 (23 July 2021)

Prescription — Extinctive prescription — Constitutional obligation of municipality to pay statutory water use charges — Whether amounting to 'debt' prescribing after three years — Prescription Act 68 of 1969, s 11*(d)*. MINISTER OF WATER AND SANITATION v AMATHOLE DISTRICT MUNICIPALITY 2021 (4) SA 252 (ECG)

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Grindrod Bank Limited v Craig Sutherland Steel (3999/2020p) [2021] ZAKZPHC 41 (9 July 2021)
Applications-counter application-requirements

[1] The applicant approached the court for entry of judgment in its favour, as against the respondent, in amount of R20,000,000.00 plus interest thereon together with costs on attorney and client scale. It is common cause that the respondent is indebted to the applicant. The amount claimed had been loaned to Willmeg Investments (Pty) Limited (hereinafter "Willmeg"), a company of which the respondent is the sole director. When the loan agreement was concluded, Willmeg was represented by the respondent and the employees of Willmeg**[2]**. On the same day (the 23rd of August 2018), the respondent, acting in his personal capacity, concluded a guarantee with the applicant in terms of which he undertook to settle Willmeg's indebtedness to the applicant to the limited amount of R20,000,000.00**[3]**. In reply to the applicant's claim, the respondent lodged a counter application seeking an order for a stay of proceedings pending institution of an action for rectification of the terms of the guarantee. At the hearing of the opposed application it was agreed that the main issue for determination is the question whether disputes of fact exist that warrant referral of the matter either for the hearing of oral evidence or for trial.

[3] It is not in dispute that the respondent placed his signature on both documents relied upon by the applicant, namely, the loan agreement and the guarantee. The purported dispute is narrowed *to* two issues only, namely, the amount claimed and the question whether the contents of the guarantee reflect the true intention of the parties.

[4] The well-known test in relation to disputes of fact was laid down by the Appellate Division in *Plascon-Evans**[4]*** as follows:

> "It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavit which had been admitted by the respondent, justify such an order. The power of the court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by the respondent of a fact alleged by the applicant may not be such as to raise a real, genuine bona fide dispute of facts**[5]**. If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)(g) of the Uniform Rules of Court**[6]**, and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks**[7]**. Moreover, there may be exceptions to this general rule, as, for example, where the allegations of denials of the respondent are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers."

In *Whiteman**[8]*** the SCA remarked as follows:

> "[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purported to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirements because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied."

[5] In his answer the respondent placed into dispute the amount reflected in the statement of balance presented by the applicant, without providing even a single shred of evidence in support of his denial. A certificate of balance presented by the applicant, reflects the amount owed by the respondent to the applicant as at 1 June 2020, to be R20,426,326.35 together with interest thereon**[9]**. On the 31st of March 2020, Willmeg, represented by Mr Paul Mc Cabe, forwarded an email to the applicant stating: 'with regards to the above-mentioned loan, kindly grant us relief of interest payments for the months of April 2020 to June 2020, to be capitalized with the original loan capital of R20,000,000.00'. Considering financial constraints caused by the prevailing covid-19 pandemic, the applicant allowed Willmeg's request and on the 3rd April 2020, forwarded a letter to Willmeg, amending payment terms as follows:

> "Where the bank has agreed to deferred payments under the facility, the interest and fees accrued over this period (1 April 2020 to 30 June 2020) will be capitalized on the facility. To allow for any interest capitalization resulting from this amendment, the facility limit shall be increased to R20,500,000.00. From 1 July 2020 the existing repayment terms will resume**[10]**."

This letter which reflects the amount owed to the applicant as at the 1st of July 2020 to be R20,500,000.00, was duly signed by the respondent on the 3rd of April 2020. It is worthy to be noted that the said letter, together with signatures thereon, comprises only two pages. For the respondent to now allege that the amount reflected in the certificate of balance is in dispute, is in my view farfetched and unworthy to be believed. I might just add that when responding specifically to an allegation pertaining to the amount contained in the certificate of balance together with the interest thereon, the respondent stated in para 67 of his answering affidavit:

> "AD PARA 28 THEREOF
>
> 67. The allegations are accepted".

In light of the above, I am not persuaded that a dispute exists with regards to the amount reflected in the applicant's certificate of balance. In any event, the only sum claimed by the applicant is the amount of R20,000,000.00 as reflected in the guarantee; not the entire amount reflected in the certificate of balance.

I am satisfied that the applicant succeeded in proving its claim against the respondent and for that reason I make the following order.

Order.

1. Judgment is entered for the applicant against the respondent, in the amount of R20,000,000.00 plus interest thereon at the prime interest rate of (currently 7.25%) plus 5%, calculated daily and compounded monthly, from 1 June 2020 to date of payment, both days inclusive.

2. The respondent is to pay the costs of the application on attorney and client scale.

3. The respondent's counter application is dismissed with costs.

Lategan N.O. and Others v NG White Farm Properties (Pty) Ltd and Others (1766/2017) [2021] ZANCHC 31 (23 July 2021):
Pleadings-amendment-objection based on introducing new cause of action

Prescription- Rule 28 notice- interrupts prescription,-was served and filed on 23 July 2020. It follows that although the amendment raises a new cause of action, it has not prescribed. Even if I am incorrect on this aspect, it raises a triable issue which is better suited to a trial court to make a finding on after hearing and evaluating the evidence lead.

[1] The Plaintiffs seek leave to further amend their particulars of claim. The First Defendant opposes the amendment only in relation to the introduction of the proposed enrichment claim.

[2] The Plaintiffs are the trustees for the time being of the Elnathan 2011 Trust and the First Defendant is NG White Farm Properties (Pty) Ltd. The second to fourth defendants are the trustees for the time being of the Swellendam Trust and the Fifth Defendant is the Registrar of Deeds. Only the First Defendant defended the main action and has opposed this application.

[3] On 23 July 2020, the Plaintiffs delivered a notice of intention to amend their particulars of claim. The notice of intention to amend contained a number of proposed amendments. The proposed amendment in issue is the conditional claim based on enrichment. It is prudent to deal with the background of this matter before setting out the details of the proposed amendment and objection thereto.

BACKGROUND:

[4] On 07 November 2012 and at Pretoria, the Plaintiffs and First Defendant entered into a written deed of sale for the purchase of Erf 588, a Portion of Erf 187, Vaalharts Settlement measuring 91.485 hectares ("the property'). In terms of clause 1 of the deed of sale, the parties agreed that the Plaintiffs would pay the First Defendant the purchase price on date of registration of the transfer of the property, but no later than two months prior to the expiry of the lease agreement in respect of the property concluded between the First Defendant and a certain JDL Trust. The lease agreement expired on 31 December 2016. The Plaintiffs would also provide the First Defendant with approved bank guarantees for the full purchase price six months prior to the expiry of said lease agreement (i.e. 30 June 2016).

[5] According to the First Defendant, the Plaintiffs were not registered as VAT vendors at the time of the conclusion of the deed of sale. The sale was thus

subject to VAT. The purchase price was thus R9 120 000.00 being R8 000 000.00 plus VAT at 14%.

[6] In terms of clause 4 of the deed of sale, the Plaintiffs would take possession of the property on date of registration.

[7] The First Defendant alleges that the Plaintiffs breached the agreement by failing to provide the guarantees on or before 30 June 2016, failing to provide the guarantees for the full purchase price, failing to provide guarantees for the purchase price by 31 October 2016 and failing to pay the purchase price or any portion thereof by 31 October 2016 or at all thereafter.

THE OBJECTION TO THE AMENDMENT:

[13] In its notice of objection to the proposed amendment, the First Defendant stated that:

> 13.1 The proposed claim is not the same or part of the relief originally or currently claimed by the Plaintiffs;
>
> 13.2 The proposed claim arose more than three years before the Plaintiff's Rule 28 notice in circumstances where: the proposed claim is for expenses allegedly incurred by the Plaintiff in planting and caring for pecan nut trees on the First Defendant's property; the proposed claim would, therefore, have fallen due when the pecan nut trees were planted; and the Plaintiff planted the pecan nut trees more than three years before the Rule 28 notice; and consequently
>
> 13.3 The Plaintiffs' proposed amendment seeks to introduce a new cause of action in respect of a claim which has already prescribed in terms of **section 1 1** of the **Prescription Act, 68 of 1969**.

[14] The Plaintiffs contend that it occupies the 8 hectare portion of the property with the express or tacit consent of the First Defendant; alternatively that it took occupation and control of said portion in the bona fide but mistaken belief that it had the First Defendant's express or tact consent to occupy. The First Defendant denies that the Plaintiffs were ever lawful or bona fide occupiers of the property and deny ever granting the Plaintiffs consent to occupy or use the property. The First Defendant was unaware that the Plaintiffs had occupied the 8-hectare portions Additionally, the First Defendant disputed the Plaintiffs' right to occupation in an eviction application which was served on the JDL Trust. It appears that the First to Third Plaintiff in the present proceedings are also the trustees of the JDL Trust. In the founding affidavit of the eviction application, it was stated that:

> *"I confirm that the Elnathan 2011 Trust and its trustees have no right to possession of the property — Even if the aforesaid dispute is decided in their favour, clause 4 of the agreement of sale stipulates that they are only entitled to occupation on date of registration of transfer of the property in their names. I will accordingly investigate this allegation by their attorneys and, if found to be true, will cause eviction proceedings to be instituted against them as well."*

That application was served on 02 October 2017 and the eviction application against JDL Trust granted. However, the Plaintiffs were not cited as parties in that application and no eviction order sought, nor granted, against the Plaintiffs.

[15] The Plaintiffs allege that prescription will begin to run against lawful and/or bona fide occupiers when legal proceedings are taken to terminate occupation. In causa on 17 October 2017 when the First Defendant filed its counterclaim seeking to eject the Plaintiffs from the property based on the *rei vindicatio*. The First Defendant states that prescription begins to run when the improvements are made because the increase in the owner's estate occurs at this stage. Consequently, legal proceedings to terminate occupation is not a prerequisite.

THE ISSUES:

[16] There are two issues to be determined in this application. The first is whether the

First Defendant has relied on grounds of objection outside of that which was set out in its notice of objection. The second is whether the proposed amendment seeks to introduce a new cause of action which has prescribed,

RULE 28(3):

[17] Rule 28(3) of the Uniform Rules of Court provide:

> *"Any objection to a proposed amendment shall clearly and concisely state the grounds upon which the objection is founded'*

[18] A party cannot be allowed to rely on grounds of objection not raised in the notice of objection.**[1]** Mr Van Der Walt, for the Plaintiffs, contend that the First Defendant is limited to what is contained the notice of objection, viz that the proposed amendment introduces a new cause of action which has prescribed. The grounds outside of the notice of objection are facts alleged in the answering affidavit. The first issue raised by the First Defendant is whether the Plaintiffs were lawful or bona fide occupiers of the 8-hectare portion of the property. The second contention is when the First Defendants took issue with the Plaintiffs' occupation and control of the 8-hectare portion.

[19] A formal notice of motion proceedings in terms of Rule 6 was not envisioned for the Rule 28 process.**[2]** In this matter, however, this is the route the parties had followed. The facts alleged by the First Defendant stem from an answering affidavit which was filed in response to the Plaintiffs founding affidavit. In my view, all of the factual disputes raised by the First Defendant directly relate to the grounds of objection. There are no new grounds of objection raised by these facts. They are so closely intertwined with the grounds of objection that they do not appear to be separate therefrom. This is what distinguishes this matter from Squid Packers (Pty) Ltd v Robberg Trawlers (Pty) Ltd**[3]**. The purpose of Rule 28(3) is for the party who wishes to amend to know the basis upon which the objection to the proposed amendment is based. The filing of an answering affidavit in this matter formed part of that basis and did not detract from, alter, nor was it distinguishable from the stance taken in the grounds of objection. The facts were used in support of the objection that the proposed amendment is based on a new cause of action which has prescribed. It is my finding that the First Defendant did not raise new grounds of objection.

NEW CAUSE OF ACTION.

[20] The Plaintiffs assert that the enrichment claim does not introduce a new cause of action because they had raised it in their plea in reconvention. The plea in

reconvention raised a lien as a defence for the planting and caring for the pecan nut trees. Alien can only be raised as a defence and does not constitute a cause of action as was stated by the Appeal Court in Brooklyn House Furnishers (Pty) Ltd v Knoetze & Sons**[4]**. Thus, irrespective of whether the enrichment claim is conditional, it does constitute a new cause of action.

PRESCRIPTION:

[21] **Section 12(3)** of the **Prescription Act, 68 of 1969** states.

> *"A debt shall not be deemed to be due until the creditor has knowledge Q/ the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired il by exercising reasonable care."*

[22] In the matter of Gericke v Sack**[5]**, the Appellate Division held that a party who alleges that a debt has prescribed bears the onus to prove such allegation. The First Defendant has to prove the date upon which prescription began to run and when it was completed. In other words, the date upon which the Plaintiffs knew the facts from which the debt arose; alternatively the date upon which the creditor is deemed to have knowledge of such facts. Prescription is interrupted when notice is given in terms of rules of Court to amend a summons**[6]**.

[23] Counsel for the parties are ad idem that prescription begins to run against lawful or bona fide possessors or occupiers when they become aware that they are not the owners of, or entitled to occupy the property. The question is when this awareness was within the knowledge of the Plaintiffs in order to determine whether the matter has prescribed. Mr Van Der Walt argued that the Plaintiffs became aware of the facts on 07 October 2017 when the First Defendant filed its counterclaim. Mr Nel, for the First Defendant, countered that the Plaintiffs were aware that they were not lawful or bona fide possessors since November 2012 when the pecan nut trees were planted. An alternative date would be 02 October 2017 when the First Defendant sought the eviction of the JDL Trust, who have the same trustees as the Plaintiffs.

[24] In support of his argument, Mr Van Der Walt sought to rely on the matter of Meyer's Trustees v Malan**[7]**. This decision, which was followed in a number of matters**[8]**, stated that enrichment claims of possessors or occupiers in respect of improvements do not arise until the owner of the immoveable property asserts his rights to the immoveable property or makes a demand in respect thereof, which is incompatible with the continued possession or occupation of such immoveable property. This matter came under heavy criticism in the Appeal Court in the matter of Nortje en 'n Ander v Pool, N0**[9]**. The criticism stems from the dissenting judgment by Ogilvie Thompson JA and the dissenting judgment of Rumpff AR. Ogilvie Thompson JA refers to**[10]** the sound criticism by Prof De Vos**[11]** of the Malan matter. This criticism is that a bona fide possessor need not wait for the true owner to take steps to evict him in order to claim compensation. The bona fide possessor may at any time after he discovers that he is not the true owner of the land take steps to claim compensation. Additionally, Rumpff AR held**[12]**:

> *"Na my mening is dit, wat die reg betr€f, onnodig vir die eisers om te wag tot 'n formele versteuring deur die eksekuieur, en wal diefeite betrej; is dit onrealisties om van hulle te venvag om voori te gaan met ontginning terwyl*

hulle nou wee/ dat die kontrak ongeldig is, en, danksy die weiering van die eksekuteur tot legalisasie van die kontrak, hulle enige moment kan verwag om in hul bedrywigheid gestop te word."

[25] Although not bound by the minority decision above, I accept the reasoning by

Ogilvie Thompson JA and Rumpff AR. Consequently, I do not agree with Mr Van Der Watt that the Plaintiffs first had to take action against the Plaintiffs before they could raise an enrichment claim

[26] In a majority decision by the Full Court of this Division, Lakka v Beukes and Another**[13]**, the Court held:

"[68] The further argument by Mr Jankowitz is that since a lien is accessory to a main obligation, in this case the claim for enrichment against the Visagies, the lien is extinguished when the main obligation prescribes. Since the first respondent has attached proof of improvements done over the period 2010 to 2015, the argument is that the enrichment claim had prescribed and that the lien could therefore not be invoked.

[69] To succeed with such an argument, the appellant would have to show (hat during the period 2010 to 2015, the first respondent had knowledge of the facts to sustain an enrichment claim against the Visagies. The evidence however shows that the first respondent effected the repairs for the benefit of herself and her family while under the impression that she would become the registered owner of the property'. There could have been no question of an enrichment claim at that stage. The earliest an enrichment claim could have become due is after the property had been sold to the appellant and the first respondent had become aware of the facts from which the claim arose in terms of **s12(3)** *of the* **Prescription Act No. 68 0/1969***."*

[27] When did the Plaintiffs, exercising reasonable care, come to know that they are not in lawful occupation of the property? The argument by Mr Nel is that the Plaintiffs knew that they could not occupy the immoveable property prior to registration. They knew from the onset at November 2012 that they could not be in lawful occupation of the property. The size of the entire immoveable property is 91.485 hectares. The Plaintiffs case js that since 2012 they occupied an 8hectare portion thereof in terms of a verbal agreement. The First Defendant disputed this verbal agreement for the first time some 05 years later in October 2017. In the eviction papers relating to JDL Trust, the First Defendant said it would investigate the claims by the Plaintiffs and launch eviction proceedings if they were occupying the 8-hectare portion. What transpired, however, was not eviction proceedings, but a Counterclaim filed on 09 December 2019. However, I am not convinced that this was the first date upon which the Plaintiffs became aware of their unlawful occupation of the property. Although not a party to the eviction proceedings against JDL, as the trustees in both the JDL Trust and Elnathan 2011 Trust, the Plaintiffs were privy to the First Defendant's dispute of their unlawful occupation.

[28] Having found that the Plaintiffs did not need to wait for the First Defendant to take action to lodge an enrichment claim, it follows that by exercising reasonable care, the Plaintiffs should have been aware that they could not be in occupation of the 8-hectare portion by 07 October 2017. Nevertheless, the **Rule 28** notice, which

interrupts prescription, was served and filed on 23 July 2020. It follows that although the amendment raises a new cause of action, it has not prescribed. Even if I am incorrect on this aspect, it raises a triable issue which is better suited to a trial court to make a finding on after hearing and evaluating the evidence lead.

[29] There is no reason why costs should not follow the result. Although both counsel sought punitive cost orders, I am not satisfied that the conduct by either party warrants a punitive cost order.

[30] In the premise, the following order is made:

1 The Piaintiffs are granted leave to amend their particulars of claim in accordance with their notice of intention of amend as qualified in terms of paragraph 31.2.1 and 32.2.23 of their replying affidavit;

2 The costs of the application are to be borne by the First Defendant.

Dey Street Properties (Pty) Ltd v Salentias Travel and Hospitality CC (25461/21) [2021] ZAGPPHC 462 (15 July 2021):

Rule 41(3) provides for postponement by agreement. By providing for postponement by agreement, it is implied that a party cannot unilaterally postpone a matter. Where the opposing party's consent cannot be obtained, it is left to the court to decide whether a matter will, on application, be postponed. The same logic applies to removal after a matter has been enrolled for hearing. An applicant as *dominus litis* is bound to the date determined by it, in the notice of motion, for the matter to be heard.

[1] The application was enrolled to be heard in the urgent motion court on 13 July 2021. The applicant filed a notice of removal from the urgent roll, on 9 July 2021. It is indicated in the notice of removal that the applicant would set the matter down on the urgent roll on 20 July 2021. The respondent vehemently opposed the removal of the matter from the roll and insisted that the matter be argued before the court. For reasons elucidated below, I ordered that the matter be removed from the roll. I reserved judgment regarding the appropriate costs order.

Background

[1] The merits of the application are of no concern in determining an appropriate costs order. The applicant issued its notice of motion on 24 May 2021, and the papers were served on the respondent on the same day. The respondent was called upon to file its intention to oppose the application within 5 days of receipt of the notice of motion and the answering affidavit within 15 days thereafter. The respondent's notice of intention to oppose is dated 1 June 2021. It was emailed to the applicant and served on 8 June 2021. The respondent avers that its answering affidavit was delivered to the applicant on 28 June 2021. The applicant states that the respondent's answering affidavit was delivered on 6 July 2021. The answering affidavit filed on the electronic CaseLine's file was only commissioned on 6 July 2021. The respondent evidently considers the emailing of an unsigned copy of the answering affidavit as the delivery thereof. It is common cause that the answering affidavit with annexures exceeds 300 pages. After receiving this voluminous

answering affidavit, the applicant unilaterally served the notice of removal from the urgent roll, on 9 July 2021. During argument applicant's counsel persisted that the matter was not before the court.

[2] The applicant submitted that it justifiably removed the matter from the roll of the urgent court. The applicant was entitled to reply to the answering affidavit. It afforded the respondent the benefit of the time periods prescribed in Rule 6(5) and was entitled to sufficient time to prepare its replying affidavit. After the late filing of the answering affidavit, the applicant was afforded one and a half court days, or at most two and a half days according to the respondent, to file a replying affidavit. The delay was solely attributed to the late filing of the respondent's answering affidavit. This resulted in the matter not being ripe for hearing by 12h00 on the Thursday preceding 13 July 2021. The applicant subsequently served a notice of removal as it was, in its view, the appropriate and sensible course of action in the circumstances. The applicant seeks that the respondent is ordered to carry the wasted costs occasioned by the objection to the removal on a punitive scale.

[3] Counsel for the respondent submitted that the respondent did not consent to remove the matter from the roll. The respondent sought that the matter be dealt with on 13 July 2021 by either striking the application from the roll or dismissing it. Counsel submitted that the avenues open to the applicant were either to withdraw the application and reissue, or to object to the late filing of the answering affidavit and to seek that such late filing not be condoned, or to approach the court with a request to postpone the application. It was, however, not entitled to remove the matter from the roll unilaterally. Counsel referred the court to *Jojwana v Regional Court Magistrate and Another* **2019 (6) SA 524** (ECM), and *RNS Investments and Another v Mathole* 2018 JDR 1537 (GP) as authority for its submissions. Applicant's counsel submitted that these cases were distinguishable from the current matter in that *Jojwana* deals with Rule 31 of the Magistrate's Courts' rules. In *RNS Investment*, the respondent filed a notice of removal from the roll. Counsel contended that the applicant as *dominus litis* was entitled to remove the matter from the roll to enrol it again on the roll, of the urgent court in the following week.

[4] I agree with the applicant that it is inconceivable that the respondent could expect it to file a replying affidavit in the two and a half days before the roll closed after the respondent was not only provided with sufficient time to file its answering affidavit but then filed its answering affidavit late. However, I have to agree with the respondent that the applicant was not entitled to remove the matter from the roll unilaterally. The way in which the notice of removal is phrased is indicative that the applicant does not intend to withdraw the application but to effectively postpone it. *Jojwana* might have Rule 31 as its subject matter, but the same reasoning can be applied to Rule 41 of the Uniform Rules of Court. Rule 41(3) provides that:

'If in any proceedings a settlement or an agreement to postpone or withdraw is reached, it shall be the duty of the attorney for the plaintiff or applicant immediately to inform the registrar accordingly.'

[5] Rule 41(3) provides for postponement by agreement. By providing for postponement by agreement, it is implied that a party cannot unilaterally postpone a matter. Where the opposing party's consent cannot be obtained, it is left to the court to decide whether a matter will, on application, be postponed. The same logic applies to removal after a matter has been enrolled for hearing. An applicant

as *dominus litis* is bound to the date determined by it, in the notice of motion, for the matter to be heard.

[6] This is, however, not the end of the inquiry relating to which party is to be held liable for the wasted costs. Both parties are in the wrong - the applicant for unilaterally removing the matter from the roll, and the respondent for insisting on arguing the matter despite the late filing of the answering affidavit being at the root of the applicant's decision to remove, amidst circumstances where the respondent had more than ample time to deliver its answering affidavit. As the applicant correctly stated, there is no cogent reason for insisting on the enrolment and hearing of the application this week. Except for the interest in finalising the litigation, respondent's counsel could not indicate how the respondent would be prejudiced if the matter was removed, less so if the respondent agreed to the removal. It is evident that the relationship between the parties is, to say the least, acrimonious. It might be that the respondent's legal representative received instructions to oppose the removal of the application. It might be that the acrimony spilled over to strain the relationship between the parties' respective legal representatives. Be that as it may, the urgent court is not the playing field for a cat-and-mouse game between litigants. Even if the respondent regarded the applicant's unilateral removal of the matter from the roll as an irregular step, and took issue with the arrogance inherent to such a step, it should have realised objectively that the applicant would in all probabilities succeed with an application for removal since the matter was not ripe for hearing and the applicant gave notice of a future date on which the matter would be set down for hearing. If the applicant issued the application and provided the respondent with a very short timeframe to oppose and answer, or if the answering affidavit was file timeously, the outcome would have been different. Every matter is decided on its own facts.

Order

In the result, the following order is granted:

1. The matter is removed from the roll.

2. The respondent is ordered to pay the wasted costs.

Wyn Sun 666 (Pty) Ltd and Another v Minister of Police and Others (33441/21) [2021] ZAGPPHC 470 (20 July 2021):

Spoliation- applicants were unlawfully deprived of possession of the goods by SAPS

[1] This is an application based on the *mandament van spolie*. The parties are *ad idem* that the application turns on the question as to whether the applicants were unlawfully deprived of possession of the goods, to which I shall refer later in this judgment, in that the respondents unlawfully seized and removed the said goods. In light of the factual dispute regarding the dates on which the respective articles were seized by the respondents (SAPS), it is necessary to deal with the parties' respective versions separately.

The applicants' version

[2] Both applicants are in the business of purchasing, processing, and selling various grades of scrap metal. Both are authorised and registered to conduct such business in terms of the Second Hand Goods Act, 6 of 2009. The applicants are also involved in the transportation and hiring of plant and yellow equipment as well as bin

and container hiring across the country. These businesses are conducted from the same premises. A third company, Brass Investments (Pty) Ltd, also conducts a separate business from the same premises.

[3] The applicants aver that the matter is inherently urgent. The applicants utilise the articles that were seized daily to run their respective businesses. Without these articles, the applicants cannot generate their monthly income and will be left destitute and unable to pay their staff and creditors. They submit that the Criminal Procedure Act, 51 of 1977 (the 'CPA') provides that the applicants may obtain and then retain the seized articles and make them available to the court if and when required.

[4] It the applicants's case that the SAPS raided their business premises on 12 May 2021. They unlawfully and without any warrant seized and removed the following goods on 12 May 2021:

i. 2019 Ford Transit Custom vehicle with registration no. HZ 34 FH GP;

ii. 2019 Mercedes-Benz Actros vehicle with registration no. JB 95 JF GP

iii. Slidelifter with registration no. DX 36 JW GP;

iv. 2021 UD Quon vehicle with registration no. JV 99 ML GP;

v. 12m Flatdeck trailer, registration no. DC 74 DG GP;

vi. 2021 UD Quon vehicle with registration no. JV 99 MM GP

vii. A skeletal trailer;

viii. 3-ton Manhand forklift;

ix. 4 x 6m containers;

x. Driver logbooks and delivery notes from each of the trucks described above;

xi. 2 x 2019 Apple iMac 21inc computer;

xii. 2020 Apple 1Mac 27inc computer;

[5] The deponent to the founding affidavit, her daughter, and three truck drivers employed by the applicants were arrested. They were charged and appeared in the Magistrate's Court on 14 May 2021. Some of them were released on bail on 17 and 24 May 2021. On 18 May 2021, the respondents allegedly removed 'other articles', listed in the founding affidavit as files, documents, and surveillance equipment. The respondents allege that the goods were removed pursuant to a search and seizure warrant, dated 17 May 2021. The applicants however, say that the warrant was 'belatedly' obtained and that the respondents continued to remove articles beyond the warrant's scope. The applicants claim that documentation was removed that was not referred to in the annexure to the warrant. On 18 May 2021, the warrant was presented, but the respondents failed to provide the affidavit made in support thereof. CCT video footage was downloaded on 18, 19, and 20 May 2021.

In *Room Hire Co (Pty) Ltd v Jeppe street Mansions (Pty) Ltd,* ***[3]*** the court explained that a bare denial of an applicant's material averments cannot be regarded as sufficient to defeat an applicant's right to secure relief by motion proceedings in appropriate cases. In *Soffiantini v Mould,* ***[4]*** the court held that a court must follow a 'robust, common-sense approach' when considering a dispute on motion.

[16] From the supporting documentation filed on CaseLine, it is evident that the computers were indeed seized on 12 May 2021. This is evident from an extract of the SAP 13 logbook, filed by the respondents. There is, however, no supporting SAPS 13 logbook entry regarding the goods listed under paragraph 4(i)-(x) above. The respondents were aware of the factual dispute as to whether the articles listed in paragraph 4(i)-(x) above, were seized on 12 May 2021 or 18 May 2021. They were in the position to lay the dispute to rest by merely annexing a copy of the SAP 13 logbook reflecting the date on which the goods were received in custody at the SAP premises. They failed to do so and merely rely on a bare denial. A court is obliged to adjudicate an application on the papers before it. I accordingly hold that no *bona fide* dispute of fact has arisen regarding the date on which the said goods were seized, and I accept that the goods were seized on 12 May 2021 without a valid warrant, as alleged by the applicants.

[17] Section 20 of the CPA empowers the state to seize anything which is concerned in, or is on reasonable grounds believed to be concerned with the commission or suspected commission of an offence, which may afford evidence of the commission or suspected commission of an offence, or which is intended to be used or is on reasonable grounds believed to be intended to be used in the commissioning of an offence. However, this power is subject to the *proviso* that the seizure must be done in accordance with the provisions of chapter 2 of the CPA. Section 21 of the CPA limits the seemingly broad power of the state by providing that an article referred to in s 20, shall be seized only by virtue of a search warrant, subject to ss 22, 24, and 25 of the CPA. Section 22 of the CPA is the first of the exclusionary provisions. Section 22 empowers a police official to seize an item if the person concerned consents to the search for and seizure of the item, if the person who may consent to the search of the premises and container consents to the search and seizure, or if the police official on reasonable grounds believes that a search warrant will be issued to him under s 21(1)(a) if he applies for such warrant, and that the delay in obtaining such warrant would defeat the object of the search. It is evident from the facts leading up to the seizure of the articles that reasonable grounds existed for the police officials to believe that a warrant would be issued. However, with the exception of the computers, the respondents did not make out a case in the affidavit that the delay that would follow if they first had to obtain a warrant would thwart their investigation. The respondents also do not explain why they did not obtain the necessary warrants before the s 252A operation was conducted, in light of the fact that their investigations already commenced almost 10 days prior.

[18] Even if the respondent is given the benefit of the doubt, and it is accepted that a valid warrant was obtained to seize the items listed under paragraph 4(i)-(x), the respondents still face a dilemma. With the exception of item (x) none of the items are identified in Annexure B of the warrant as articles that could be seized in terms of the warrant. The respondents' submission that the seizure of goods listed in paragraph 4(i)-(ix) was permitted in terms of Annexure B of the warrant is not supported by a reading of Annexure B. Irrespective as to whether the articles were used in the commissioning of a crime, the respondents are to follow the provisions of the CPA if they want to seize the articles lawfully. As stated above, the respondents failed to refute the allegation that the items listed in 4(i)-(x) were seized on 18 May 2021 after the warrant was obtained. This means that although the warrant

authorises the seizure of the truck logbooks, the seizure thereof prior to the warrant being obtained remains unlawful.

[19] As far as the seizure of the computers are concerned, I am of the view that the seizure thereof meets the requirements of s 22 of the CPA. The respondents indicate that the computers were seized for fear that information contained on the computers would be wiped if not seized during the operation. The submission is also made that the computers were used in the commissioning of fraudulent and corrupt activities. As such, the computers fall within the description of s 20 of the CPA, and the respondents met the requirements stated in s 22 of the CPA. Where goods were lawfully seized a court other than the court presiding over the criminal matter should be hesitant to order its return to an accused where criminal proceedings are pending, if it is empowered at all to do so. The CPA regulates the procedure for the disposal of articles after seizure. Section 34(6) of the CPA provides that if the circumstances require, the judge or judicial officer presiding at the criminal proceedings may make any order regarding the disposal of the asset, inclusive of returning it to the person from whom it was seized.

[20] As far as costs are considered, the applicants are substantially successful in obtaining the relief sought. In the result, they are entitled to the costs of the application.

Order

In the result, the following order is granted:

1. The application is dealt with on a basis of urgency and non-compliance with the Uniform Rules of Court are condoned;

2. The respondents are directed to restore the first and second applicants' possession of the following goods:

2.1. 2019 Ford Transit Custom vehicle with registration no. HZ 34 FH GP;

2.2. 2019 Mercedes-Benz Actros vehicle with registration no. JB 95 JF GP

2.3. Slidelifter with registration no. DX 36 JW GP;

2.4. 2021 UD Quon vehicle with registration no. JV 99 ML GP;

2.5. 12m Flatdeck trailer, registration no. DC 74 DG GP;

2.6. 2021 UD Quon vehicle with registration no. JV 99 MM GP

2.7. A skeletal trailer;

2.8. 3 ton Manhand forklift;

2.9. 4 x 6m containers, with the exception of the containers containing allegedly stolen train and wagon wheels;

2.10. Driver logbooks and delivery notes from each of the trucks described above;

2.11. All documentation seized on 18 May 2021 that are not listed in Annexure B of the search and seizure warrant dated 17 May 2021.

3. The respondents are to pay the costs of the application jointly and severally, the one to pay the other to be absolved.

Firstrand Bank Limited v Mbana and Another (43962/2019) [2021] ZAGPJHC 68 (20 July 2021):

Exception to particulars of claim – plaintiff contends that particulars of claim do not disclose a cause of action – cause of action alleged to be unlawful and a contravention of the National Credit Act – exceptions dismissed

[1]. The defendants except to the particulars of plaintiff's claim on a number of grounds, all of which allege that the particulars do not disclose a cause of action. Some, if not all of the grounds of exception are of an overly technical nature.

[2]. So, for example, the first ground is to the effect that, in terms of the National Credit Act, Act 34 of 2005 ('the NCA'), the plaintiff is only entitled to claim from the defendants 'payment of the default amount' – that is the amount of the arrears – and not the total amount outstanding on the bond. This means that the statutory demands in terms of s 129 of the NCA, so the defendants contend, were also defective.

[3]. Additionally, so the defendants contend s 129(1)(b), read with section 129(3) of the NCA, provide that any legal proceedings to enforce the credit agreement (unlike the present legal proceedings) must be such as to enable the defendants to 'remedy a default'. Therefore, so the contention goes, in law the plaintiff is therefore not entitled to claim the full outstanding amount against the defendants.

[4]. There is no merit in this contention.

[5]. Secondly, the defendants except to the particulars of claim on the ground that a clause in the Home Loan Agreement, which requires the plaintiff to draw in writing to the notice of the defendants the default, and to enforce the agreement by claiming the amount of the default, only entitles the plaintiff to claim the arrears and not the full amount.

[6]. This ground of exception is based on a particular interpretation of the contract. This interpretation does not accord with the agreement and a proper interpretation of the agreement. In any event, a particular interpretation of the contract can never be a ground for an exception especially if the agreement is open to another interpretation, which supports a cause of action. Accordingly, this ground of exception is void of any merit.

[7]. The third ground of objection is directed at the balance outstanding and the fact that, according to the certificate of balance, which certified that the outstanding balance was accelerated as and at 7 November 2019, from which date interest would be running. The arrears, so the defendants aver, cannot be increasing after this date. In addition to this point making little sense to me, I am of the view that there is no merit in the contention that it is a valid ground of exception.

[8]. A brief overview of the applicable general principles is necessary before I consider the exception raised by the defendants and the grounds on which they are based. These general principles, as gleaned from the case law, can be summarised as follows.

[9]. In considering an exception that a pleading does not sustain a cause of action, the court will accept, as true, the allegations pleaded by the plaintiff to assess whether they disclose a cause of action. The object of an exception is not to embarrass one's opponent or to take advantage of a technical flaw, but to dispose of

the case or a portion thereof in an expeditious manner, or to protect oneself against an embarrassment which is so serious as to merit the costs even of an exception.

[10]. The purpose of an exception is to raise a substantive question of law which may have the effect of settling the dispute between the parties. If the exception is not taken for that purpose, an excipient should make out a very clear case before it would be allowed to succeed. An excipient who alleges that a pleading does not disclose a cause of action or a defence must establish that, upon any construction of the pleading, no cause of action or defence is disclosed.

[11]. An over-technical approach should be avoided because it destroys the usefulness of the exception procedure, which is to weed out cases without legal merit. Pleadings must be read as a whole and an exception cannot be taken to a paragraph or a part of a pleading that is not self-contained. Minor blemishes and insignificant embarrassments caused by a pleading can and should be cured by further particulars.

[12]. Having said the aforegoing, however, exceptions are to be dealt with sensibly since they provide a useful mechanism to weed out cases without legal merit. An over-technical approach destroys their utility and insofar as interpretational issues may arise, the mere notional possibility that evidence of surrounding circumstances may influence the issue should not necessarily operate to debar the Court from deciding an issue on exception.

[13]. Where, however, an exception is based upon the fact that a pleading is vague and embarrassing, the ‘every reasonable interpretation’ approach highlighted above does not apply, and an exception may be taken to protect one's self against embarrassment.

[14]. In sum, the exception raised by the defendants is based on the proposition that the acceleration clause relied upon by the plaintiff to claim the whole amount outstanding in terms of the loan is unlawful as it offends and falls foul of the NCA. As I have already indicated, in my view, this submission is misplaced for the simple reason that a reading of the NCA as a whole and of the individual parts do not support this legal conclusion. Nowhere in the NCA is it provided that an accelerated clause in a Credit Agreement is prohibited. In that regard, a superficial consideration of the Act alludes to certain provisions and outlaws same – not so of acceleration clauses.

[15]. Therefore, on the basis of a proper interpretation of the NCA, I am not persuaded that the grounds of exception are valid. Importantly, one should also consider the provisions of the Home Loan Agreement itself, which supports the plaintiff’s a cause of action.

[16]. Accordingly, the exception to the particulars of plaintiff’s claim should be dismissed.

Nedbank Limited v Niemann (4132/2019) [2021] ZAGPJHC 99 (26 July 2021):

National Credit Act 34 of 2005 (“the NCA”), and the extent to which section 129 (1) (a) shields the consumer from the enforcement of a credit agreement while that action is taken.

1 This matter concerns the scope of action available to a consumer on receipt of a notice under section 129 (1) (a) of the National Credit Act 34 of 2005 (“the NCA”), and the extent to which section 129 (1) (a) shields the consumer from the enforcement of a credit agreement while that action is taken.

Mr. Niemann’s dispute with Nedbank

2 The plaintiff (“Nedbank”) seeks summary judgment against the defendant (“Mr. Niemann”) in an action on an instalment sale agreement (“the agreement”) for the purchase of a caravan (described in the papers as an “Afrispoor Cheetah”). Nedbank alleges that Mr. Niemann is R31 898.09 in arrears and that it has cancelled the agreement in response to Mr. Niemann’s breach of his repayment obligations.

3 The parties agree that this application falls to be determined in terms of Rule 32 of the Uniform Rules of Court as it read before its amendment on 1 July 2019 (See *Raumix Aggregates (Pty) Ltd v Richter Sand CC, and Similar Matters* **2020 (1) SA 623** (GJ)).

4 In its particulars of claim, Nedbank seeks “confirmation” that the agreement has been cancelled, return of the caravan, an order declaring that Mr. Niemann has forfeited “all monies” so far paid to Nedbank, leave to apply for what Nedbank describes as “damages to be calculated in accordance with section 127 (5) – (9) of the NCA”, interest on the damages and costs on the attorney and client scale.

5 Mr. Minnaar, who appeared for Nedbank, accepted that only the claims for cancellation of the agreement, the return of the caravan and costs could properly form the subject of summary judgment proceedings, and asked only for that relief.

6 Mr. Niemann resists summary judgment. His reasons for doing so are set out in two affidavits drafted without the assistance of a legal representative. Mr. Niemann was represented by Mr. Shaw at the hearing. But Mr. Shaw did not draft or settle the affidavits resisting summary judgment.

7 Mr. Niemann is accordingly a lay pleader. That being so, I am enjoined to construe his affidavits generously, in the light most favourable to him (*Xinwa v Volkswagen of South Africa (Pty) Ltd* **[2003] ZACC 7**; **2003 (4) SA 390** (CC), para 13).

I do not think that this case is that easy. It seems to me that the fact of Mr. Niemann’s default is the beginning of the enquiry in this case, not the end.

18 Once Mr. Niemann fell into arrears, Nedbank was required, by section 129 (1) of the NCA, to draw the default to Mr. Niemann’s attention in writing and propose that he “refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the

intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date".

19 Section 130 (3) (c) (ii) (bb) forbids a court from enforcing a credit agreement if it is established that Mr. Niemann has "agreed to a proposal made in terms of section 129 (1) (a) and acted in good faith in fulfilment of that agreement".

20 The proposals referred to in section 129 (1) (a) are the credit provider's proposal that the dispute be referred "to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction with the intent that the parties resolve any dispute under the agreement" and the proposal that the parties "develop and agree on a plan to bring the payments under the agreement up to date".

21 I do not think that there is any reasonable interpretation of Mr. Niemann's conduct in this case other than that he seeks the referral of the matter to the banking ombudsman. There is nothing on the papers that suggests that Mr. Niemann has taken this stance in bad faith. I would be slow, in any event, to draw an inference of this nature about Mr. Niemann's conduct on the papers in summary judgment proceedings, especially since not a word is said in Nedbank's particulars of claim about what it must have known was Mr. Niemann's desire to have the ombudsman consider the dispute he had raised. Nedbank's particulars of claim make various standard form allegations about the delivery of the section 129 notice, but are silent on Mr. Niemann's attempts to activate the ombudsman. Nedbank must have appreciated that these efforts are material to whether section 129 (1) (a) has been engaged on the facts of this case.

22 In these circumstances, there is a genuine prospect that Mr. Niemann will be able to demonstrate at trial that sections 129 and 130 of the NCA have not been complied with. If he can demonstrate that, Nedbank's claim will not succeed, at least until the ombudsman has been able to consider and resolve any dispute about the settlement amount due on the agreement.

23 In resisting this conclusion, Mr. Minnaar advanced two further arguments which it is necessary for me to address. First, Mr. Minnaar said that sections 129 and 130 of the NCA cannot prevent the enforcement of a credit agreement where there is no dispute that a consumer is in default, does not take issue with the nature and extent of the default alleged, and does not respond to the credit provider's proposal that a plan to bring the arrears up-to-date be developed.

24 However, I do not think the text of section 129 (1) (a) can sustain such an interpretation. The statutorily mandated proposal a credit provider must make is not limited to the agreement of a plan to eliminate the arrears. Section 129 (1) (a) makes quite clear that the credit provider must propose either that the consumer refers a dispute under the agreement to an appropriate body or that a plan to eliminate the arrears be developed. In response, the consumer may do either or both of these things. It is

accordingly clear that the declaration of a dispute on the agreement that does not directly concern the nature and extent of a consumer's arrears will prevent the enforcement of the credit agreement, so long as the dispute is declared in good faith, and the consumer pursues the resolution of the dispute in good faith.

25 In any event, the resolution of the dispute about the settlement amount due, and its payment, would likely clear Mr. Niemann's arrears. In that sense, I cannot conclude that the dispute Mr. Niemann has raised is entirely distinct from the nature and extent of his default on the agreement.

26 Mr. Minnaar's second argument relies on the assertion that it was Mr. Niemann's duty to actually refer his dispute to the banking ombudsman, after Nedbank rejected his complaint, and that his failure to allege in his affidavits that he had escalated the matter to the banking ombudsman at that point means that there is no bar to the enforcement of the agreement.

27 Mr. Minnaar is correct to point out that Mr. Niemann does not tell us whether he referred the matter to the banking ombudsman after Nedbank rebuffed his complaint. However, I do not think that this automatically means that I can be "satisfied", as section 130 (3) (c) (ii) (bb) requires me to be before I can grant summary judgment, that Mr. Niemann has not responded to the section 129 notice by agreeing to Nedbank's proposal that he refer his dispute to the banking ombudsman.

28 Section 130 (3) (c) (ii) (bb) does not require a consumer to have actually referred a dispute under the agreement to a dispute resolution body. It states simply that a court may not determine a matter if a credit provider has approached it despite a consumer having "agreed" to a proposal made in terms of section 129 (1) (a).

29 What counts as having "agreed" to the proposal? It seems to me that agreement to a proposal to refer a matter in the manner envisaged in section 129 (1) (a) covers a much wider range of potential conduct on the part of Mr. Niemann than him having actually referred the matter to the ombudsman himself.

30 I must construe Mr. Niemann's affidavit generously. The least that seems to me to require is an acceptance, at least *prima facie*, that there is a dispute suitable for referral to the banking ombudsman, that Mr. Niemann has attempted to refer the dispute once, only for the dispute to be referred back to Nedbank, and that Mr. Niemann may well have taken steps to refer the dispute again, or at least conducted himself in a manner that left Nedbank in no doubt that he has agreed to do so.

31 The factual nature and legal consequences of Mr. Niemann's actions seem to me to be matters for trial.

32 In all of these circumstances, it seems to me that Mr. Niemann has succeeded in outlining a *bona fide* defence that could succeed at trial.

Simply put, that defence is that he has agreed to Nedbank's proposal that the dispute be referred to an appropriate body in terms of section 129 (1) (a) of the NCA, and that he has acted in good faith in attempting to bring about that result.

33 Accordingly, I refuse the application for summary judgment. Mr. Niemann is granted leave to defend the action, and I direct that costs in this application be costs in the trial.

Ethekwini Municipality v Crimson Clover Trading 17 (Pty) Ltd t/a Island Hotel (280/2020) [2021] ZASCA 96 (1 July 2021):

Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 – failure to show good cause for delay – order set aside -appeal against an order granting condonation for failure to serve notice in terms of **s 3(2)** of the

[1] The pertinent issue in this appeal is whether condonation ought to have been granted to the respondent, Crimson Clover Trading 17 (Pty) Ltd t/a Island Hotel, for its failure to serve on the appellant, Ethekwini Municipality, a notice in terms of s 3(2) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 (the Act). The notice serves to notify the appellant, within six months of the debt becoming due, of the facts giving rise to the debt and such further particulars of the debt as are in the respondent's knowledge.

[2] On 8 May 2016, the Island Hotel, owned by the respondent and situated on a spur of land bordered by the Isipingo Estuary and the Isipingo Riverfront, was flooded and extensively damaged. Santam Limited (Santam), the insurer of the respondent, instructed loss adjustors to determine the cause of the incident. On 24 May 2016, the loss adjustors advised Santam that there was a possible recovery action, but they were not certain against whom the action lay. During September 2016, the respondent instructed its attorneys to pursue a claim for damages, who in turn, instructed consulting engineers to investigate the cause of the flooding. By 4 October 2016, the respondent had formed a prima facie view that the flooding was caused by the height of the sand berm at the mouth of the Isipingo River, which prevented the storm water from entering the sea. As will appear below, the respondent formed the view that a claim was to be instituted against the appellant.

[3] On 14 December 2016, the respondent submitted to the appellant a request in terms of the Promotion of Access to Information Act 2 of 2000 (the PAIA), seeking documentation relating to the management and/or maintenance of the Isipingo River and the Isipingo River Mouth and estuary. The appellant furnished the requested information by 24 April 2017.

[4] On 19 July 2017, the respondent served on the appellant a notice in terms of s 3(2). By then it had ascertained that the cause of the flooding was attributable to the Isipingo River mouth being blocked by the said sand bar. The respondent held a

view that the appellant was responsible for excavation of the sand bar. The appellant advised the respondent that estuarine management, including the breaching of berms or sand bars in estuaries for the protection of the riparian property owners against flooding, were functions falling exclusively within the purview of the provincial government in terms of part A of Schedule 4 of the Constitution. In support of this stance, the appellant furnished the respondent with a copy of the judgment of this Court in *Abbott v Overstrand Municipality and Others* **[2016] ZASCA 68.**

[5] On 12 September 2018, the respondent launched its application for condonation for failure to serve the appellant with the s 3(2) notice within the prescribed period of six months. The appellant opposed the application on the basis that the respondent had failed to give an explanation for the delay, and to show good cause. The appellant also complained that the respondent's cause of action had changed over time. In support of that complaint, the appellant pointed out that in the s 3(2) notice the respondent had relied on the failure by the appellant to excavate the sand bar at the Isipingo Estuary mouth, whereas in the condonation application, the respondent relied on the failure by the appellant to ensure that the storm water management system was functioning as it was designed to.

[6] The application served before D Pillay J. The learned judge noted that there was a considerable and unexplained delay by the respondent. Despite this, the court granted the respondent condonation for the late service of its s 3(2) notice. It found that the appellant, as a public authority, had to ensure that there was a functioning storm water drainage system and that the judgment in *Macsteel Service Centre SA (Pty) Ltd v eThekwini Municipality*,**[1]** which was relied upon by the respondent, made it clear that there was a storm water drainage problem in Isipingo. The high court also found that an order in favour of the respondent was in the public interest as the appellant had to fix the storm water problem. The high court found that the respondent had shown good cause and that prima facie, there were good prospects of success on the merits. It accepted that there would be prejudice to the appellant due to non-availability of witnesses, but this, the court reasoned, would be ameliorated by the availability of records. Aggrieved by this outcome, the appellant appeals, with the leave of the high court, against the judgment, on the basis that the respondent failed to satisfy the statutory requirements for the court to exercise its discretion to grant condonation in terms of s 3(2).

[20] The high court failed to deal with the prospects of success, save to accept that the court in *Macsteel***[9]** made it clear that there was a storm water drainage problem in the area of Isipingo, where the hotel is located. The high court therefore found that 'the prospects of success are prima facie fair'. This was an untenable conclusion, given that the cause of action lacked supporting evidence. This stands in contradiction to the *dicta* of this Court in *Mulaudzi*,**[10]** where it held that:

'[T]he court is bound to make an assessment of an applicant's prospects of success as one of the factors relevant to the exercise of its discretion, unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation obviously unworthy of consideration.'**[11]**

[21] Section 3(3) provides that the debt does not arise until the creditor has knowledge of the identity of the organ of state and the facts giving rise to the debt. It reads further that 'a creditor must be regarded as having acquired such knowledge as soon as he or she or it could have acquired it by exercising reasonable care'. I should highlight the provisions of s 3(3)*(a)* that refer to the deemed knowledge of the debtor and the cause of action. The section determines when the creditor must lodge the notice with the State organ. It gives the creditor reasonable latitude to determine when they have deemed knowledge of the cause of action and the debtor. Nothing precludes the creditor from explaining that during the prescribed six-month period, they were not yet in a position to identify the facts with reasonable certainty or to identify the debtor. I highlight this as it appears in this matter that the respondent was confused as to when they could be deemed to have knowledge of the debtor and the cause of action. Although this line of argument could have been of assistance to the respondent, it was not pleaded.

[22] The unexplained delay in the delivery of the notice and the change in the cause of action deprived the appellant of the opportunity to investigate the matter timeously, thereby prejudicing the appellant. The administration of justice requires that such matters be dealt with expeditiously and efficiently.

[23] On an assessment of all the facts, I am not satisfied that the respondent should have been granted condonation by the high court. The high court having found that condonation should have been granted, correctly determined that there should be no order as to costs. However, as we have found that it should not have granted the order, costs should follow the result.

[24] Accordingly, the following order is made:

1 The appeal is upheld with costs including costs of two counsel.

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

'The application for condonation is dismissed with costs, including costs of two counsel, where so employed.'

Brentmark (Pty) Ltd and Another v Puma Energy South Africa (Pty) Ltd (22235/19) [2021] ZAWCHC 127 (5 July 2021):

Exceptions- Is it wrongful for a party (A) who has contracted with another party (B) to cause pure economic loss to a non-contracting party (C) through conduct that constitutes a breach of the contract between A and B? That, in general terms, is the question that must be answered in this exception taken by the defendant ("Puma") to a delictual claim brought against it by the second plaintiff ("OK") for damages for pure economic loss.

[1] [2] The subject of the dispute is a service station and adjoining convenience store at 51 Durban Road, Mowbray, located on premises owned by

Mowbray Caledonian Court (Pty) Ltd ("Caledonian"). The service station was operated by the first plaintiff ("Brentmark"), which sold petroleum products supplied to it by Puma, while the convenience store was operated by OK. As might be expected, there is a suite of written agreements in place that govern the relationships between the parties. The content of the various agreements is uncontroversial and can be dealt with briefly.

BACKGROUND

[3] As of June 2015, the premises were being leased from Caledonian by Brent Oil (Pty) ("Brent Oil"), for purposes of conducting a service station and convenience store business thereon. On 19 June 2015 Brentmark concluded a binding agreement of sub-lease with Brent Oil, with a view to Brentmark conducting a similar business on the premises. The duration of the sub-lease was to be 9 years and 11 months. For the sake of convenience, this will be referred to as "the Brentmark sub-lease".

[4] It was an express term of the Brentmark sub-lease that it was subject to a further agreement, to be concluded between Brentmark and Brent Oil, for the supply of petroleum products by the latter to Brentmark. That condition was fulfilled on 19 June 2015, when those parties also concluded a so-called "dealer agreement", to which further reference will be made later.

[5] The shareholding in both Brentmark and OK was held in equal shares by the Saman Trust and LMT Investments (Pty) Ltd. While the particulars of claim do not reflect who the guiding minds of the two plaintiffs were, the equal shareholding in each company suggests a material degree of commercial interest between the two entities trading on the premises. Further, the Brentmark sub-lease records that it was represented in the conclusion of that agreement by Mr. Andrew Bradley, and Brent Oil by Mr. Phillip Robinson, and in the particulars of claim it is alleged that the same persons represented the parties to the dealer agreement.

[87] In the language of the more recent formulations of the criterion for wrongfulness: in cases of pure economic loss the question will always be whether considerations of public or legal policy dictate that delictual liability should be extended to loss resulting from the conduct at issue. **Thus understood, it is hard to think of any reason why the fact that the loss was caused by dishonest (as opposed to *bona fide* negligent) conduct, should be ignored in deciding the question. We do not say that dishonest conduct will always be wrongful for the purposes of imposing liability, but it is difficult to think of an example where it will not be so.**

[88] In our view, speaking generally, **the fact that a defendant's conduct was deliberate and dishonest strongly suggests that liability for it should follow in damages,** even where a public tender is being awarded. In *Olitzki* and *Steenkamp* the cost to the public purse of imposing liability for lost profit and for out-of-pocket expenses when officials innocently bungled the process was among the considerations that limited liability. We think the opposite applies where deliberately dishonest conduct is at issue: the cost to the public of exempting a fraudulent perpetrator from liability for fraud would be too high.

[89] These considerations would indicate that liability should follow even if the plaintiff's case were based on dishonesty on the part of the State Tender Board itself. But that is not the case before us, and this constitutes a further problem for

the province's argument. This case does not concern the direct liability of the tender-awarding authority itself: it concerns government's vicarious liability for its employees' conduct. The province's argument is therefore misconceived, since it starts from the wrong premise and therefore inevitably arrives at the wrong conclusion. The plaintiff's case is that defendants are vicariously liable for the wrongful conduct of Louw and Scholtz. Once we have decided the issue of vicarious liability in favour of the plaintiff, as we have, the only remaining question in the context of wrongfulness is whether Louw and Scholtz, public employees in charge of a tender process, should themselves be exempt from the consequences of their own dishonest conduct. The issue in *Olitzki* and *Steenkamp* – whether loss resulting from conduct by the tender-awarding authority itself should be visited with delictual liability – does not arise. For present purposes the question about wrongfulness is no different than if Scholtz and Louw themselves were the defendants.

[90] Thus understood the question is: is there any conceivable consideration of public or legal policy that dictates that Louw and Scholtz (and, vicariously, their employer) should enjoy immunity against liability for their fraudulent conduct? We can think of none. The fact that the fraud was committed in the course of a public-tender process cannot, in our view, serve to immunise the wrongdoers (or those vicariously liable for their conduct) from its consequences. And we find no suggestion in *Olitzki* and *Steenkamp* that the tender process itself must provide government institutions with a shield that protects them against vicarious liability for the fraudulent conduct of their servants. The wrongfulness issue therefore cannot shield the defendants.' (Emphasis added; internal references otherwise omitted.)

CONCLUSION

[112] In my view, the alleged conduct of Puma falls short of 'the standards of decency and fairness that informs the substantive law of contract' and does not measure up to the behaviour to be expected of a party in its position. Right-minded persons would, in my view, deprecate the manner in which Puma failed to uphold its contractual and common law obligations.

[113] On the basis of the aforegoing considerations, I am satisfied that OK has made sufficient allegations in its particulars of claim (as sought to be amended) to justify its contention that Puma's conduct was wrongful in the circumstances. It follows that its claim against Puma for damages for pure economic loss are sustainable in law and that the exception thereto falls to be dismissed.

[114] As regards OK's application to amend its particulars of claim, I am satisfied, in light of what I have found, that the amendment does not render the particulars of claim objectionable and it must accordingly be granted.

[115] On the issue of costs, there is no debate that costs should follow the result in relation to the exception. As far as the costs of the amendment are concerned, I agree with the submission by counsel for Puma that fairness dictates that each party should bear its own costs.

ACCORDINGLY, IT IS ORDERED THAT:

A. The exception is dismissed.

B. The plaintiffs are granted leave to amend their particulars of claim in the manner set forth in their notice of amendment dated 21 August 2020 and served on 4 September 2020.

C. The defendant shall pay the plaintiffs' costs in respect of the exception.

D. Each party shall bear its own costs in respect of the aforesaid notice of amendment.

Fareed Moosa & Associates Inc v Taxing Master, Western Cape High Court and Others (12607/20) [2021] ZAWCHC 134 (12 July 2021):

Uniform Rule 70(3B) permit any document or note pertaining to any item appearing on a bill of costs, be excluded from inspection in taxation proceedings. Put differently, may legal professional or litigation privilege be invoked as a ground to exclude certain documents from inspection by a costs debtor.

[1] The central question in this matter is whether Uniform Rule 70(3B) permit any document or note pertaining to any item appearing on a bill of costs, be excluded from inspection in taxation proceedings. Put differently, may legal professional or litigation privilege be invoked as a ground to exclude certain documents from inspection by a costs debtor. The Taxing Master did not file a Notice of Opposition nor a Notice to Abide. Second and Third Respondent opposed the action. In this judgment, the Second and Third Respondents are therefore collectively referred to as "*Respondents"* where necessary.

[2] This matter has its genesis in a matrimonial dispute. Applicant represents the Plaintiff in the matrimonial action, in which Second Respondent is the Defendant. Second Defendant opposes the matrimonial action and is represented by the Third Respondent. On 30 October 2019, following proceedings relating to a Rule 43 and Rule 30 application, Sher J granted the following order:

> "*3. That the applicant's' attorneys in the rule 43 application shall be liable de bonis propriis for the costs of both the rule 30 application as well as the Rule 43 application, on the scale as between attorney and own client."*

[3] On 5 February 2020 the Third Respondent sent a bill of costs to the Applicant demanding payment in the sum of R421 313,00. The Applicant refused payment on the basis that the quantum was exorbitant and unreasonable. Applicant pointed out that considering the papers filed and submissions made in the relevant matters, it was highly improbable that the Second Respondent could have incurred legal costs in the sum of R 421 313,00.

[4] On 26 February 2020, and pursuant to Uniform Rule 70(3B), Third Respondent served a bill of costs and a Notice of Intention to Tax the bill on the Applicant, which stated as follows:

"*You may inspect the documents or notes pertaining to any item on the Bill of Costs (excluding documents or items which are privileged and/or confidential … for a period of ten (10) days after receipt of this notice".*

[5] Third Respondent indicated that most of the 387 items "*is correspondence between client and attorney and/or client and counsel and as such are privileged and/or confidential."* On 27 February 2020, Third Respondent requested the Applicant to indicate which of the 387 items on the bill of costs will be the subject of their inspection. The Applicant objected to Respondents' intention to refuse inspection of certain documents and notes pertaining to certain items on the bill of costs. They recorded their view that privilege and confidentiality cannot be asserted for purposes of a Rule 70 inspection. The Applicant insisted that the denial of access to such privileged documents tantamount to "*a denial of an effective right of inspection."*

[6] On 6 March 2020, Third Respondent replied and insisted that the right of privilege between attorney and client pending finalization of the main action is valid and enforceable. They expressed the view that the objective of inspection is to determine if a particular item on the bill exists and whether the item may be allowed, and that the content and relevance of the item is not open for inspection. Third Respondent emphasized that Rule 70(2) provides that the Taxing Master may call for the relevant supporting documents if necessary. They accordingly undertook to provide any item to the Taxing Master for determination, including items protected by attorney-client privilege. Third Respondent subsequently provided a list of 163 items in respect of which their client invoked litigation privilege. According to Third Respondent they had consented to inspection of the remaining 224 items without any restrictions.

[27] When issues are raised which falls outside the scope of the Taxing Master's authority, those issues must first be referred to a Court of law for adjudication. (See: **Berman & Fialkov v Lumb (supra)** at paragraph 23). Third Respondent conceded that the Taxing Master lacks jurisdiction to decide whether attorney-client privilege exists in relation to any item on the bill. Consequently, it is common cause that the determination of issues relating to attorney-client privilege does not fall within the scope and powers of the Taxing Master. In **Competition Commission v Arcelormittal SA (Ltd) and Others 2013 (5) SA 538** (SCA) at paragraph 21 the Supreme Court of Appeal held that litigation privilege has two components. First, the document must have been obtained or brought into existence for the purposes of a litigant's submission to a legal advisor for legal advice; and second, that the litigation was pending or contemplated as likely at the time. Litigation privilege protects communication between a litigant or his/her legal adviser and third parties if such communications are made for the purpose of pending or contemplated litigation.

[28] In **Zuma v National Director of Public Prosecutions** 2009 (1) CC at [184] the Constitutional Court stated that "…*It is now generally accepted that these communications should be protected in order to facilitate the proper functioning of an*

adversarial system of justice, because it encourages full and frank disclosure between advisors and clients. This in turn promotes fairness in litigation …"
The privilege belongs to a litigant, not the legal advisor, and may be waived only by the litigant. In **A Company and Others v Commission, South African Revenue Service 2014 (4) SA 549** (WCC) the Court held that fee notes are not ordinarily of such a nature that it would be directly related to the performance of an attorney's professional duties as legal advisor to a client, but it is conceivable that attorneys fee notes might contain references to legal advice sought. The test was whether upon an objective assessment, the references disclose the content, and not just the existence of privileged material.

[29] The grounds of privilege must be stated with sufficient clarity for a Court to determine whether the document falls within the grounds of privilege. In this matter the list of items over which the client invoked his right of privilege have not been contextualized. Consequently, the Court is not in the position to apply the test as enunciated in **A Company and Others v Commission, South African Revenue Service (supra),** to determine whether any of the undisclosed documents and notes are entitled to be protected by the shield of privilege. Third Respondent also failed to justify the redaction of the remaining items in terms of which no privilege was initially claimed. It appears that the caveat in respect of 163 items on the bill is incompatible with the clear and unambiguous language of Rule 70, having regard to the contextual and purposive interpretation thereof. The Taxation regime envisages a transparent process, and Rule 70 does not provide any mechanisms to shield any bill from scrutiny or to conduct a taxation under the veil of secrecy.

[30] In my view, the Third Respondent should not have requested the Taxing Master to enroll the matter in circumstances where they invoked attorney-client privilege in respect of 163 items. They indicated that they did not require the Taxing Master to determine whether the items were privileged, but merely to assess whether the costs incurred were necessary or proper. However, the crux of this matter does not concern the Taxing Master's discretion to tax a bill of costs in terms of the provisions of Rule 70, but rather, whether any item on the bill should be protected by privilege. The inference is incontrovertible that at all material times the Third Respondent was alive to the fact that the Taxing Master was not empowered to determine the legal question of attorney-client privilege, and a legal dispute regarding privilege and the confidentiality of documents were likely to arise. Consequently, Third Respondent must have been aware that the Taxing Master was legally handicapped to determine 163 items on the bill of costs because it triggered the legal question of privilege. However, the Court will accept the reasoning and approach adopted by the Respondents were *bona fide*, in order to preserve and protect the interests of Second Respondent.

[31] The Respondents contended that the Applicant should have brought an application in terms of Rule 30 if they considered the setting down of the taxation as an irregular step, instead of launching interdict proceedings. In my view it is highly probable that such an application would also have been opposed by the

Respondents. In any event, even if the Respondents are correct in invoking the provisions of Rule 30, it does not bar the Applicant from utilizing a different remedy at their disposal. I do not deem the remedy and approach adopted by the Applicants as extraordinary. The Taxing Master had already enrolled the matter. Consequently, an application for an interim interdict to prevent the Taxing Master from proceeding with the taxation does not seem inappropriate or unreasonable in the circumstances.

[32] The aim of an interim interdict is essentially to preserve or restore the status *quo ante* pending the final determination of the rights of the parties. The Applicant was granted such relief in Part A, and I am satisfied that the Applicant had made out a proper case for the granting of an interdict. Therefore, the order granted by Magona AJ was justified. Both Respondents opposed the application in Part A. Applicant enjoyed a measure of success in this regard and is accordingly entitled to the costs thereof.

[33] I am satisfied that the Applicant will be severely prejudiced should the bill of costs be taxed in circumstances where they are denied a fair opportunity to inspect certain items in respect of the bill as contended for by the Respondents. Allowing the taxation of a bill of costs under these circumstances would be oppressive, render the statutory protected right to inspection nugatory and purely cosmetic, and undermine the objectives of inspection of a bill of costs as envisaged in Rule 70. The Respondents had expressed their intention to make available a copy of all the relevant documentation at the hearing of the matter for purposes of a "*judicial peek".* However, such an undertaking does not nullify on the Applicant's procedural right to inspection in terms of Uniform Rule 70(3B).

[34] At the hearing of this matter, it was evident that the parties are embroiled in extremely acrimonious divorce proceedings. The bill of costs in interlocutory Rule 43 and Rule 30 proceedings amounts to the sum of R421 313, 00. Apparently, the Plaintiff in the divorce action currently has an outstanding amount of R400 000, 00 in respect of legal fees. The record also refers to a costs estimation of legal fees in the sum of R946 000, 00. The parties would be well advised to settle their disputes amicably in order to preserve their estate for the benefit of both parties.

[35] In respect of the merits of this matter, both parties have invoked important legal rights in justifying the position that they contend for. Notwithstanding any criticisms in respect of the litigation privilege defense raised by the Respondents, it evident that in the final analysis, the Court must strike a balance between the Second Respondent's purported right to privilege and the Applicant's right of inspection. I am accordingly of the view that the interests of justice dictate that the only manner to protect the interests of both parties, is to direct that the taxation of the

bill of costs be deferred until conclusion of the main hearing. With regard to costs, after careful consideration of all the relevant facts of this matter, I am satisfied that it would be just and equitable if no costs order is granted in this matter.

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

(a) The Taxation of the Bill of Costs arising from the Order granted by Sher J on 30 October 2019 is hereby stayed pending final determination of all legal proceedings relating to the main action issued under case number 1215/2019;

(b) In the alternative to paragraph (a), the Taxation of the Bill of Costs arising from the Order granted by Sher J on 30 October 2019 is stayed until such time as and when the Third Respondent had waived his right to privilege in respect of all the items as set out in the relevant Bill of Costs to be submitted for taxation;

(c) The inspection held in terms of Uniform Rule 70(3) (B) (a) on 17 and 18 March 2020 in relation to the relevant Bill of Costs is set aside;

(d) The enrolment of the relevant Bill of Costs for taxation is set aside;

(e) The interim interdict granted on 12 October 2020 is discharged;

(f) Second and Third Respondent shall pay the Applicant's costs in respect of Part A of this application jointly and severally, the one paying, the other to be absolved;

(g) There shall be no order as to costs.

Prag N.O and Another v Trustees for the time being of the Mitchell's Plain Industrial Enterprises Sectional Title Scheme Body Corporate and Others (A260/2020) [2021] ZAWCHC 132 (16 July 2021)

Appeal- Community Schemes Ombud Services Act (the 'CSOS Act')- relief which was sought fell outside of his statutory jurisdiction.

1. This is a statutory appeal in terms of the against the decision of an adjudicator, whereby he dismissed an application by the Harprag Trust for an order that the body corporate of the Mitchell's Plain Industrial Enterprises sectional title scheme should pay to it the sum of R 455 757.65, in lieu of damages which were allegedly sustained by the Trust pursuant to a fire which occurred in a sectional title unit which it owns, together with a further claim for payment of the sum of R 22 942.50 for lost rental which it allegedly suffered as a result of the fire.

2. The adjudicator dismissed the application in *limine* on the grounds that the relief which was sought fell outside of his statutory jurisdiction.

The factual background

3. The appellants are the trustees of the Harprag Trust, which owns unit 6 in the scheme i.e an individual section demarcated as such on the sectional plan, together with an undivided *pro rata* share in the common property. As such, the Trust is a member of the scheme's body corporate and was previously represented thereon by the first appellant, as a trustee.

4. On 18 July 2019 a fire broke out in the section (which was being utilized by a tenant for commercial purposes at the time), which resulted in its total destruction. The Trust submitted a claim for the repairs of the damage which had been sustained to the scheme's insurers, but it was repudiated.

5. The insurers had settled a previous claim which had been submitted by the Trust pursuant to a fire which had occurred in the section 2 years earlier, in July 2017.

6. In September 2017 the insurers advised the body corporate that pending the filing of valid electrical and fire equipment certificates of compliance by all the owners of units in the scheme, insurance cover for damage caused by fire would be suspended.

7. On 21 November 2017 the scheme's managing agents requested the Trust to provide the required certificates of compliance by no later than the end of the month and warned that in the event of a failure to do so any future claim in respect of fire damage might be declined. In the absence of any response, on 12 April 2018 a further request for the certificates to be submitted was sent to the Trust, which was also not acceded to.

8. Pursuant to an inspection which was conducted by fire protection experts, early in April 2019 the managing agents provided the body corporate with a quote in the amount of R 128 337.834 for work which needed to be done in order to render the scheme compliant, in accordance with fire regulations. However, the trustees of the body corporate declined to give their approval thereto and were still reluctant to do so even after the second fire on 18 July

2019, and the Trust only filed an electrical certificate of compliance in respect of its unit in August 2019.

In the first place, and as I have previously pointed out, as a matter of law the Trust as the owner of section 6 is responsible for maintaining it, and guarding it against the risk of harm, and it would ordinarily have to bear the consequences of any failure on its part to do so and any loss which may be sustained as a result of damage, unless it was insured. And in this regard the reason why the section was not insured was that the Trust failed to provide valid and up to date certificates of compliance to the body corporate, so that it could discharge its statutory duty. In such circumstances it could hardly be fair or correct for an order to issue effectively directing the body corporate to bear the loss which came about as a result of the Trust's own remissness. To make such an order would be to shift the responsibility for, and the cost of the loss pertaining to an individually owned section, to the other owners of sections in the scheme. This would not only go against a long-standing principle of the common law of ownership but would encourage delinquency on the part of individual owners in a sectional title scheme, who could look to other members of the scheme for recompense in the event of any loss they suffered in respect of their individually owned sections, due to their own neglect or failures.

26. In second place, and as previously pointed out, in the affidavit**[16]** which he filed in support of the appeal**[17]** first appellant alleged that the basis for the Trust's claim was that the body corporate had negligently failed to comply with its statutory 'duty of care' to ensure that the buildings in the scheme were properly insured, which resulted in damages being suffered by the Trust. It is trite that in referring to a 'duty of care' the appellant was using terminology which is more appropriately used in English tort cases, where wrongfulness and *culpa* ie fault are conflated. In our law we speak of a legal duty, which pertains to wrongfulness, and which is determined by the expectations and norms of the community's *boni mores,* to which a further ingredient of *culpa* in the form of negligence is added, before liability will ensue. Be that as it may, in argument before us appellant's counsel conceded that, framed as it was, the appellants' claim essentially constituted a delictual claim for damages.

27. In my view it was never intended that such a claim could be adjudicated upon by the Ombud in terms of the CSOS Act, which is aimed**[18]** at resolving disputes in regard to the administration of a community scheme between persons (which by definition**[19]** include not only individual members of a scheme but also any association ie any structure which is responsible for its administration), who have a material interest therein.**[20]**

28. If one considers the terms of the CSOS Act as a whole, and the kinds of matters in respect of which an adjudicator can make orders in terms of s 39 of the Act, they either concern regulatory/governance issues **[21]** pertaining to the administration of a sectional title scheme, or behavioural issues **[22]** pertaining to the conduct of members of the scheme *inter se* (which commonly would cover so-called nuisance or neighbour disputes). It was clearly not intended that the Ombud would have the power to adjudicate on delictual claims for damages, which involve weighty considerations

pertaining to wrongfulness (which depend on prevailing societal norms and public policy) and fault, and the quantification and determination of the quantum of any damages which may have been sustained pursuant thereto, which are matters which are best left for judicial officers and Courts.

29. In addition, to allow the Trust to proceed in terms of s 39(6)(b)(ii) would allow it to claim delictual damages without showing any fault on the part of the body corporate, in circumstances where it was the one at fault, and where it was responsible for being unable to claim any compensation by way of an indemnification in terms of the scheme's insurance policy. Had this been a delictual claim which required determination in a Court it would have been defeated on these grounds i.e on the basis that it had not been shown that the body corporate had been at fault and that its conduct, as opposed to that of the Trust, had caused the loss which had been suffered. This too could never have been intended by the law-maker, and to allow a claim in such circumstances would subvert the basis and principles of delictual claims for damages.

Conclusion

30. In the circumstances the adjudicator was correct in holding that he did not have jurisdiction to entertain the dispute, and the appeal must fail.

31. As far as costs are concerned second and third respondents (the Ombud and the adjudicator) filed a notice to abide when the appeal was lodged, and the body corporate (first respondent) indicated that it was opposing it.

32. Shortly before the matter was due to be heard in February, it belatedly sought a postponement so that it could file an affidavit in answer to that which had been filed by the appellants in support of the appeal. The basis for its application was that an answering affidavit could not be filed as the chairman and then only trustee of the body corporate had resigned, and a replacement had only been appointed late in January 2021, at which time it was resolved that a special levy needed to be imposed in order to raise the necessary funds for the body corporate's legal fees. After hearing argument, the postponement was granted and it was directed that the body corporate was to be liable for the wasted costs which were occasioned thereby.

33. On 10 May 2021, after it had filed its answering affidavit, the body corporate filed a notice to abide, as the appellants had indicated that in the event of the appeal succeeding and the adjudicator's order being set aside they would move for an Order that the matter be remitted to the adjudicator for reconsideration, and would not seek an Order granting them the substantive relief which they had sought.

34. In the circumstances it would in my view be fair and proper to direct that there should be no order as to costs.

35. In the result I would simply make an Order dismissing the appeal.

Stellenbosch University Law Clinic and Others v Lifestyle Direct Group International (Pty) Ltd and Others (16262/2019) [2021] ZAWCHC 133 (21 July 2021)

Class action- aggrieved consumers for the losses allegedly incurred as a consequence of a fraudulent scheme implemented by the respondents-allowed

1. The applicants seek the certification by this Court of an "opt-out" class action to be instituted against the respondents in which they will seek to undo certain agreements which the respondents allegedly concluded with a multitude of consumers, to reverse various transactions concluded pursuant to such agreements and to compensate aggrieved consumers for the losses allegedly incurred as a consequence of a fraudulent scheme implemented by the respondents. The applicants also seek to interdict the respondents from conducting such scheme pending the final determination of the class action.

2. The applicants contend that the respondents are not registered credit-providers but that they nevertheless lure unsuspecting consumers with promises of loans and loan-finding services. Then, it is said that, although the respondents are not registered legal practitioners, they purport to charge consumers for legal advice. It is said that in the process, the respondents conduct an unlawful scam, firstly, by inviting online applications for financial assistance and then by making use of the information and personal details supplied by consumers making such applications to dupe them into concluding unwanted fixed-term contracts for legal assistance in which so-called "subscription fees" are then debited from the consumers' bank accounts.

3. In short, say the applicants, the respondents are wily confidence tricksters who exploit the informality of the internet and the financial straits in which poor consumers find themselves to perpetrate an array of frauds against innocent and vulnerable persons on a daily basis. In summary, say the applicants, consumers are duped into believing that they are applying for a much-needed cash loan while in fact they receive no money and end up paying a monthly instalment for legal "services" which they never sought, nor receive. They seek to bring an end to this sorry state of affairs through the mechanism of a class action, and in the interim, through the imposition of an interdict *pendent lite*.

4. After the launch of the application for a class action on 13 September 2019, there were two applications by non-parties to the suit. Firstly, on 19 December 2019, Legalwise South Africa (Pty) Ltd, under Rule 12 of the Uniform Rules, sought leave to intervene as the tenth applicant in the proceedings. Secondly, on 21 February 2020, the Payments Association of South Africa ("PASA") applied to be admitted to the proceedings as *amicus curiae.*

5. The matter was originally enrolled for hearing over 2 days in April 2020 but had to be postponed due to the Covid 19 pandemic. It eventually came before this Court on 8 and 9 March 2021 when a virtual hearing was conducted. Advs.J.G.Dickerson SC and L.C.Kelly, the respondents by Adv. P-S.Bothma, PASA by Adv. A.M.Price and Legalwise by Adv.N.Mayosi, represented the applicants. The Court is indebted to counsel for their heads of argument which have greatly assisted in the preparation of this judgment.

IN LIMINE ISSUES

6. The respondents oppose Legalwise's application for joinder as a co-applicant and that procedural issue will thus need to be determined in the course of this judgment.

IN THE RESULT, THE FOLLOWING ORDERS ARE MADE:

A. AMICUS CURIAE

The application for admission as *amicus curiae* by the Payments Association of South Africa is granted, with no order as to costs.

B. JOINDER APPLICATION

1. The application by Legalwise South Africa (Pty) Ltd to be joined as an applicant in this matter is refused.

2. Legalwise South Africa (Pty) Ltd is to bear the wasted costs occasioned to the First to Nineteenth Respondents by their opposition to the joinder application.

C. CLASS CERTIFICATION

1. The following persons shall constitute a class for purposes of the class action described in paragraph 0 below ("the class"):

   1.1 All persons who have had any moneys debited from their bank accounts and / or who have been harassed and / or threatened in connection with any demand for or collection of payment by the respondents at any time from 1 May 2015 to date on the basis of them having concluded purported agreements with the respondents by submitting an application on one of the websites listed in Annexure "A" hereto.

2. It is declared that the applicants may act as representatives of the class in an action claiming the relief set out in the particulars of claim attached to the applicants' supplementary affidavit dated 11 November 2019 (as may be amended from time to time) ('the class action').

3. The applicants are declared to have the requisite legal standing to bring the class action on behalf of the class.

4. The applicants are granted leave to pursue the class action on the basis that any members of the class who do not wish to be bound by the outcome of the class action may opt out thereof as contemplated in paragraph 5 below.

5. The members of the class shall be bound by the outcome of the class action unless they give notice of their election to opt out thereof to Stellenbosch University Law Clinic ('the Law Clinic'), in the manner described in annexure "B", by not later than 1 October 2021.

6. The members of the class are to be notified of this action by way of the notice attached hereto as annexure “B”, with the notice to be publicised by the respondents within 1 month from the date of this order, which notice must be publicised as follows:

6.1 by mail to each person on the respondents’ customer databases at their last known address by the respondents;

6.2 by email to each person on the respondents’ customer databases at their last known email address by the respondents;

6.3 by SMS to each person on the respondents’ customer databases at their last known cell phone number by the respondents;

6.4 by publication in one edition per week of the most widely circulated daily newspaper in each province of the Republic for four weeks following the granting of this order;

6.5 by having the notice read out over: (1) an English-language radio station with the highest listenership in each province of the Republic and (2) a radio station broadcasting in the language most widely spoken in each province of the Republic, other than English, which readings must take place at least once a day for four weeks following the granting of this order;

6.6 by publication of the notice on: (1) the Law Clinic’s webpage and Facebook pages, as well as on the home page of each website operated by any of the respondents or their proxies and associates and (2) keeping such notice there for a period of eight weeks from the date of the granting of this order; and

6.7 by publication of the notice on the Facebook group page ‘Action Against Lifestyle Legal, Loan Hub SA and other Scams’, where it must be kept for at least eight weeks from the date of this order.

7. The respondents are ordered to pay the costs of the aforesaid notifications jointly and severally and are to report to the Law Clinic and this Court within 1 week from the date on which they have complied with paragraph 6 above.

8. The respondents are ordered to furnish the Law Clinic with the last known physical address, email address and telephone / cell phone numbers of each person on the respondents’ customer databases.

9. The parties are granted leave to approach this Court for a variation or amplification of this order in respect of the notifications, on duly amplified papers, if any party deems it necessary.

10. The respondents shall file reports with this Court detailing their compliance with paragraph 5 within 8 weeks of the granting of this order.

11. A special master shall be appointed on such terms as the trial court deems appropriate.

12. It is recorded that the first to eighteenth respondents have furnished to the Court an undertaking that, pending the final determination of the class action as aforesaid, they will desist from directly or indirectly (whether themselves or through any other natural or juristic person):

12.1 operating the websites listed in annexure “A” (save for the publication of the notice referred to in paragraph 5 above) or websites with substantially similar content;

12.2 conducting the same, or substantially similar business(es), conducted by the respondents and described in the papers filed of record in order to market financial and/or legal services or conclude any agreement in respect such;

12.3 debiting the bank accounts of any persons in terms of any agreement allegedly concluded through the listed websites or any website with similar content referred to in paragraph 12.2 above;

12.4 making demands for or collecting payment from consumers for services allegedly provided in terms of any agreement allegedly concluded through the listed websites or any website referred to in paragraph 12.2 above;

12.5 harassing and/or threatening any person in connection with any demand for, or collection of payment, in terms of any agreement allegedly concluded with any of the respondents through the listed websites or any website referred to in paragraph 12.2 above;

12.6 proceeding with the de-registration of any of the respondent companies;

12.7 destroying, removing, expunging or altering any of the company’s records, including but not limited to: share registers, share certificates, minutes of directors and shareholder meetings, minutes and resolutions of shareholder meetings, bank statements, databases (whether electronic or hardcopy), contracts with any members of the class, financial statements, management accounts, correspondence and the referral of any debts for debt collection.

13. The first to eighteenth respondents shall pay the applicants’ costs of suit relating to this application jointly and severally, the one paying the other(s) to be absolved, which costs will include the costs of two counsel where employed. Such costs shall include all reserved costs in respect of all previous set downs and scheduled hearings.

MEC, DEPARTMENT OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS v MAPHANGA 2021 (4) SA 131 (SCA)

Court — Abuse of process — Vexatious proceedings — Common law and Act — Requirements for order prohibiting institution of proceedings under Act — Court's inherent common-law power to stop proceedings constituting abuse of its process — Legal proceedings vexatious and abuse of process if obviously unsustainable as certainty — Stringent onus on applicant seeking such relief — Vexatious Proceedings Act 3 of 1956, s 2(1)*(b)*.

The appellant MEC's application for an order that the respondent, Mr Maphanga, not be permitted to institute proceedings against her, her department or any past or present member of the public service (except with leave of the court), was dismissed in the Pietermaritzburg High Court. The MEC argued that s 2(1)*(b)* of the Vexatious Proceedings Act 3 of 1956 * or, alternatively, the common law, entitled her to the relief claimed. She also sought declaratory relief stating that all Mr Maphanga's claims arising from his employment in the public service had been finally determined and had prescribed.
It appeared that Mr Maphanga had brought two sets of legal proceedings against the applicant arising from his broad dissatisfaction with the MEC's department and its predecessors. These included review and appeal proceedings launched in the Labour Courts; a delictual action in the High Court for damages relating to the sale in execution of his property (in which he alleged that the Department was involved); and a complaint in the General Public Service Sectoral Bargaining Council concerning severance pay from the Department. The High Court ruled that the MEC had failed to establish vexatious conduct on the part of Mr Maphanga, either under the Act or the common law. It also refused to grant the declaratory order.
In an appeal to the Supreme Court of Appeal, the MEC argued that the High Court (i) had overlooked, for the purposes of s 2(1)*(b)*, that Mr Maphanga had instituted five different legal proceedings, including the disputes referred to the Bargaining Council, against her; and (ii) had misconstrued the powers and discretion conferred on courts by the common law (as codified in s 173 of the Constitution) to address abuses of court process. During the hearing of the appeal reliance on s 2(1)*(b)* was, however, abandoned, with the matter proceeding on the court's common-law jurisdiction.
Held
While it was true that the MEC could not rely on s 2(1)*(b)* (see below), this did not entitle her to directly invoke the Constitution to enforce her rights without first relying on the Act (see [10]). Section 2(1)*(b)* was enacted to end persistent and ungrounded litigation in the *courts*, so that the first question was whether the procedures employed by Mr Maphanga were instituted in courts (see [12] – [13]). While the Bargaining Council was not a court for the purposes of the Act, the Labour Courts and High Court were, so the issue became whether the proceedings there were persistent and without reasonable cause (see [18] – [19]). The Labour Court proceedings multiplied merely because Mr Maphanga failed to correctly identify the correct forum in which to vindicate his claim while the High Court proceedings were based on an entirely different cause of action, so that it could not be said that there was a persistent or repetitive institution of proceedings by Mr Maphanga (see [21]). Nor could it be said that the High Court or Labour Court proceedings were instituted without reasonable grounds (see [22] – [23]). The MEC therefore failed to establish a right to relief under s 2(1)*(b)*.

To succeed in an application under the court's inherent power to stop frivolous and vexatious proceedings it had to be shown that the respondent had habitually and persistently instituted vexatious legal proceedings without reasonable grounds. Proceedings were vexatious and an abuse of process if they were obviously unsustainable as a certainty and not merely on a preponderance of probability, and this requirement applied to all litigation that amounted to an abuse of process (see [25]). Courts had to proceed cautiously and could only in clear cases make orders prohibiting proceedings between the same parties on the same cause of action and on the same subject-matter. Orders had to be crafted to meet only the immediate requirements of the particular case and there was no power to impose a general prohibition that would curtail plaintiff's right to litigate. The MEC's contention, that there were no limits on the kinds of order that could be granted in terms of the court's common-law powers, was wrong (see [27]).
Since it could not be said that Mr Maphanga had habitually and persistently instituted legal proceedings against the MEC or that any of his claims were obviously unsustainable, no case had been made out under the common law either (see [28]). The declaratory relief was correctly refused by the High Court. It was impossible to say that Mr Maphanga's claims had all prescribed or to decide whether they had been resolved (see [30]). Appeal dismissed.

SOUTH AFRICAN LEGAL PRACTICE COUNCIL v ALVES AND OTHERS 2021 (4) SA 158 (SCA)

Legal practitioner — Attorney — Enrolment as advocate — While Legal Practice Council may convert enrolment without recourse to High Court, this not detracting from High Court's jurisdiction to order Council to enrol practitioner as advocate if properly qualified as such — Council may not set higher standard than that set for admission by High Court — Legal Practice Act 28 of 2014, s 32, s 115.

Section 115 of the Legal Practice Act 28 of 2014 (the LPA) provides that 'any person who, immediately before [the coming into operation of the LPA on 1 November 2018] was entitled to be admitted or enrolled as an advocate . . . [may], after that date, be admitted and enrolled as such in terms of [the LPA]'. Section 32 empowers the Legal Practice Council (LPC) to convert an enrolment from one form of practice to another without recourse to the High Court (attorney to advocate or vice versa).
The issue here was whether the first respondent, an admitted attorney, was entitled to rely on s 115 of the LPA for enrolment as advocate. The LPC refused her application for conversion under s 32 because she did not complete a trial advocacy programme as required by the LPC's rules. She was one of a group of attorneys who had obtained a conversion order against the LPC in the Cape High Court. In an appeal to the Supreme Court of Appeal the LPC argued that the LPA had placed the conversion of enrolment in its hands and that the High Court accordingly lacked jurisdiction to make the order it did.
Held
Section 115 preserved the rights of those who qualified for admission and enrolment prior to the LPA to be admitted and enrolled under the LPA, and s 115 may be relied on ad infinitum by any person who qualified prior to the commencement of the LPA (see [17] – [18]).

While s 32 of the LPA empowered the LPC to convert an enrolment from one form of practice to another without recourse to the High Court, the High Court was not precluded from admitting and authorising the enrolment as advocate of a practitioner who previously practised as an attorney, provided that he or she was properly qualified, in which case there was no basis for the exercise of powers by the LPC under s 32: the conversion was in effect done by the High Court under the preservation provision. The LPC may not demand that an attorney seeking to convert his or her enrolment to advocate first attain a greater qualification than that set by the LPA for admission by the High Court (see [23]). Appeal dismissed.

MINISTER OF WATER AND SANITATION v AMATHOLE DISTRICT MUNICIPALITY 2021 (4) SA 252 (ECG)

Constitutional law — Duties of state — Constitutional obligation of municipality to pay statutory water use charges — Extinctive prescription — Whether amounting to 'debt' prescribing after three years — Prescription Act 68 of 1969, s 11*(d)*.

Prescription — Extinctive prescription — Constitutional obligation of municipality to pay statutory water use charges — Whether amounting to 'debt' prescribing after three years — Prescription Act 68 of 1969, s 11*(d)*.

The Minister, in an action against the defendant municipality for structural and other relief, had sought a declaratory order that the municipality's failure to pay off arrear statutory water use charges, dating back to 2003, threatened constitutionally protected rights to water (s 27(1)) and was otherwise inconsistent with the Constitution.

An exception to the Minister's particulars of claim, that it was barred by the principle of subsidiarity from relying directly on the Constitution, was dismissed by Stretch J in a separate written judgment. The present judgment concerned the Minister's opposed exception against the municipality's special plea and its plea. These raised issues of whether water use charges constituted a debt for the purposes of the Prescription Act 68 of 1969; and if not, whether the constitutional obligations of the municipality as pleaded by the Minister were, nonetheless, subject to the Prescription Act, so that those obligations which arose more than three years before the issue of summons had thus prescribed.

Held

Stretch J, in dismissing the exception, held that the claim was not based on a statutorily enforceable series of debts owed by the defendant to the plaintiff, but that the plaintiff's cause of action amounted to an enforcement of the defendant's constitutional obligations. The first issue was therefore res judicata (see [13]).

The municipality's role, powers, responsibilities and duties to give effect to the right to water as set forth in the Constitution and the subordinate water legislation promulgated in terms of the Constitution, could not amount to 'debts' for the purposes of the Prescription Act, as this would lead to an undermining of the very purpose of such a right created under the Constitution. Were a state entity such as the defendant able to claim that its obligations in this regard prescribe after a period of three years, the progressive realisation of rights could never be achieved. And, even if the debts arising from the subordinate legislation have prescribed, the court could still consider prescribed debts in fashioning just and equitable relief under s

172(1)*(b)*. It followed that exception to the special plea, and to those parts of the plea raising the question of prescription, would be upheld.

MINERAL SANDS RESOURCES (PTY) LTD AND ANOTHER v REDELL AND OTHERS AND TWO RELATED CASES 2021 (4) SA 268 (WCC)

Defamation — Defences — Strategic litigation against public participation (SLAPP) defence — May in principle be raised where suit not genuine and brought to intimidate or silence opponent.

Court — Abuse of process — Strategic litigation against public participation (SLAPP) — Suit aimed at intimidation and silencing of opponents in public- interest issue — Clear abuse of process — Absence of anti-SLAPP legislation in South Africa should not be permitted to defeat interests of justice — Exception to SLAPP-type defence dismissed.

This was an interlocutory judgment on exceptions to two special pleas. The defendants, three journalists and three environmental attorneys, raised the special pleas to a series of defamation suits by Australian mining company Mineral Commodities Ltd and its local subsidiary (collectively, MCL).
MCL's case was that public statements by the defendants criticising the environmental impact of its mining and excavating operations on the Eastern Cape Wild Coast were defamatory. In total the damages sought from the defendants amounted to R14,25 million. In the alternative MCL sought a public apology.
In the remaining special plea the defendants argued that the suits were an abuse of process and violated the constitutional right to freedom of expression. They alleged that they were brought for the ulterior purposes of (i) discouraging, censoring, intimidating and silencing the defendants; and (ii) intimidating and silencing members of civil society, the public and the media in relation to public criticism of MCL.
The plea introduced a novel (for South Africa) 'strategic litigation against public participation' (SLAPP) defence (see [1]). The term SLAPP, coined by academics in the United States, referred to typically meritless or exaggerated lawsuits brought by powerful companies to intimidate civil- society advocates, human rights activists, journalists, academics, and the like, acting in the public interest. The aim was to litigate them into silence and drain their resources (see [39]). In the US anti-SLAPP statutes were enacted to provide a quick, effective and inexpensive mechanism to discourage such suits (see [45]).
In South Africa statutory protection against abuse of process is limited to the Vexatious Proceedings Act 3 of 1956, on which the present defendants did not rely because its protection could not be obtained by filing a plea of abuse of process (it required an application) (see [11]). For their SLAPP defences they relied instead on the court's inherent and common-law power to strike out abusive claims (see [12]).
MCL argued as follows (see [10]): The defendants were impermissibly relying only on its motives in bringing the actions. Doing so to the exclusion of the merits of its claims was legally unsound. The defendants' arguments amounted to a request that the court shut its doors on it without having regard to the merits of its claims. Since the special plea — being focused on motive — lacked the averments required to sustain the defence, it was excipiable.
Held

The signature elements of SLAPP suits were the use of the legal system, usually disguised as an ordinary civil claim, but designed to discourage others from speaking out on issues of public importance, and exploiting the inequality of finances and human resources available to large corporations, as compared to their targets. They were designed to turn the justice system into a weapon to intimidate people who were exercising their constitutional rights, to restrain public interest in advocacy and activism, and to convert matters of public interest into technical private-law disputes. The main purpose was to punish or retaliate against citizens who spoke out against the plaintiffs (see [39] – [40]). And they did not have to be successful to have their intended effect: prolonging the proceedings and shifting the debate out of the public domain to the courts could fulfil the intended objective (see [43]).
Here, MCL was claiming inexplicably exorbitant amounts for damages, which the defendants could ill afford. It had instituted the proceedings while aware that there was no realistic prospect of recovering the sums. The suit was initiated against the defendants because they spoke out and assumed a specific position in respect of the plaintiffs' mining operations (see [62]). It matched the DNA of a SLAPP suit, which were an abuse of process and inconsistent with our constitutional values. Corporations should not be allowed to weaponise our legal system against the ordinary citizens and activists in order to intimidate and silence them.
In the absence of specific legislative mechanisms to deal with SLAPP suits, courts had limited powers to cure the symptoms of SLAPP. However, the interests of justice should not be compromised due to a lacuna or the lack of legislative framework (see [65]). Exception accordingly dismissed

MUKANDA v SOUTH AFRICAN LEGAL PRACTICE COUNCIL 2021 (4) SA 292 (GP)

Appeal — Leave to appeal — Against costs order — Whether granted — While court not precluded from considering appeal directed only at costs, it will not grant leave unless applicant able to satisfy court of existence of exceptional circumstances such as court's improper exercise of discretion in granting costs order — Superior Courts Act 10 of 2013, s 16(2)*(a)*(ii), s 17(1)*(a)* and s 17(1)*(b)*.

Though rarely granted, courts are not precluded from considering appeals directed exclusively at costs orders. But a court may do so only if the applicant can satisfy the court that an appeal court would reasonably find that exceptional circumstances, such as improper exercise of the court's discretion in granting the costs order, existed. This is apparent from applicable precedent and ss 16(2)*(a)*(ii) (exceptional circumstances), 17(1)*(a)* (reasonable prospect of success or other compelling reason) and 17(1)*(b)* (exclusion of decisions falling in ambit of s 16(2)*(a)*) of the Superior Courts Act 10 of 2013.

NEDBANK LTD v MZIZI AND RELATED CASES 2021 (4) SA 297 (GJ)

Mortgage — Foreclosure — Judicial execution — Sale in execution — Residential property — Reserve price — Determination by court — Independent verification required — Bank valuation not sufficient — Uniform Rules of Court, rule 46A.

An internal bank valuation is not, in absence of independent verification, sufficient to establish the appropriate reserve value in an application for sale in execution of residential property under Uniform Rule of Court 46A(9). To satisfy the court as to the appropriate reserve value, independent valuations should be obtained or further information as to value be used in addition to the bank's valuation. In all instances, the valuation should be proven by an affidavit of a person who has actually conducted the valuation him- or herself and who is properly qualified in this respect.

Bobroff and another v National Director of Public Prosecutions [2021] 3 All SA 1 (SCA)

Criminal law and procedure – Organised crime – Forfeiture order – Proceeds of unlawful activity – Court finding on balance of probabilities that funds deposited into foreign bank accounts were proceeds of unlawful activities and that such funds were liable to forfeiture.

Criminal law and procedure – Organised crime – Theft, fraud and money laundering – Forfeiture order – Jurisdiction where money located in foreign country – Court must establish whether a recognised jurisdictional ground is present, and if such ground is established, it must be decided whether an effective judgment can be given.

On 28 July 2017 the High Court granted an *ex parte* application for a preservation order, in terms of section 38 of the Prevention of Organised Crime Act 121 of 1998, in respect of credit balances and interest accrued and held in two accounts in Israel in the name of the first appellant ("Ronald Bobroff") at the Bank Discount ("BD"), and the second appellant ("Darren Bobroff") at the Bank Mizrahi Tefahot ("BMT"), respectively. The National Director of Public Prosecutions ("NDPP") contended that the credits held in those Israeli bank accounts were proceeds of unlawful activities as defined in the Act. The Bobroffs, who were temporarily resident in Australia, opposed the granting of a forfeiture order, arguing that the NDPP had failed to establish that the credit balances constituted proceeds of unlawful activities. The High Court granted an order declaring the credit balances and interest forfeit to the State, in terms of section 50 of the Act, leading to the present appeal.

The Bobroffs were prominent attorneys practising as directors of the firm Ronald Bobroff and Partners Incorporated in Johannesburg. The firm practiced predominantly in the field of personal injury litigation, often acting on contingency. In 2010, allegations began to surface that the firm had charged clients inflated fees exceeding the maximum permitted in terms of the Contingency Fees Act 66 of 1997. Further allegations of impropriety led to a police investigation culminating in warrants of arrest being issued against the Bobroffs. Before the warrants could be executed, the Bobroffs departed for Australia. The South African Police Service ("SAPS") caused a Red Notice to be circulated through Interpol.

The South African authorities were alerted to the bank accounts referred to above when the Israeli police requested assistance in their investigation into suspected crimes of money laundering, which had allegedly been committed by the Bobroffs in Israel.

Held – The first issue was whether the High Court had jurisdiction to grant a forfeiture order in terms of the Prevention of Organised Crime Act in respect of property held in Israel by the Bobroffs, who were currently resident in Australia. The

determination of jurisdiction involves a two stage inquiry: it must first be established whether the court is competent to take cognisance of the particular case (that is, whether a recognised jurisdictional ground is present). Second, if a jurisdictional ground is established, it must be decided whether an effective judgment can be given. Taking into account the forfeiture provisions in the Act and the provisions of the International Co-operation in Criminal Matters Act 75 of 1996, the court held that enlisting international assistance in the enforcement of a forfeiture order in respect of property held in another country was catered for. Therefore, the first leg of the jurisdictional enquiry was determined in favour of the NDPP.

As the mechanism for the enforcement of a forfeiture order in respect of property in a foreign State is provided for in section 19 of the International Co-operation in Criminal Matters Act, the second leg was also fulfilled.

On the merits, the Court was satisfied, on a balance of probabilities, that the offences alleged to have been committed by the Bobroffs, were established. Extensive evidence was adduced regarding the channelling of large sums of money from the Bobroffs' firm to accounts in Israel. The source of that money was not explained. On a balance of probabilities, the funds deposited into the bank accounts were proceeds of the unlawful activities and the money had been laundered to disguise its origin and identity prior to their deposit in the Israeli bank accounts. Of the credits in the BD account, USD 256 217,84 and AUSD 284 785,32 were not shown to be proceeds of unlawful activity and were excluded from the ambit of the forfeiture order. Other than that, the appeal was dismissed.

Eksteen v Road Accident Fund [2021] 3 All SA 46 (SCA)

Civil Procedure – Road Accident Fund (Transitional Provisions) Act 15 of 2012, section 2(1)(e)(ii) – A third party who has, prior to the Act coming into operation, instituted an action against the Fund in a Magistrate's Court, may withdraw the action and, within 60 days of such withdrawal, institute an action in a High Court with appropriate jurisdiction over the matter provided that no special plea in respect of prescription may be raised during that period – Institution of action in High Court without withdrawing earlier action in Magistrate's Court – Special plea of prescription should not have been upheld in court a quo as the 60-day period would only begin to run once the first action had actually been withdrawn.

Civil Procedure – Road Accident Fund (Transitional Provisions) Act 15 of 2012, section 2(1)(e)(ii) – Interpretation of – Principle of statutory interpretation that effect must be given to the object or purpose of the legislation being interpreted – Social legislation must be interpreted in a manner that would afford the widest possible protection and compensation to third parties against loss and damages arising out of the negligent driving of motor vehicles to the extent that the language used in the provision could reasonably bear.

The Road Accident Fund (Transitional Provisions) Act 15 of 2012 came into effect as a result of a Constitutional Court decision which declared sections 18(1)(a)(i), 18(1)(b) and 18(2) of the Road Accident Fund Act 56 of 1996 inconsistent with the Constitution and invalid. Those provisions capped to R25 000 various claims of certain categories of claimants.

The appellant instituted an action in the Free State Division of the High Court, Bloemfontein, for damages arising out of a collision that had occurred on 18 June 2003. This action was instituted pursuant to the provisions of section 2(1)(e)(ii) of the Road Accident Fund (Transitional Provisions) Act 15 of 2012. Without withdrawing that action, and on 19 October 2016, he instituted another action against the RAF, in the Free State Division of the High Court for damages he suffered as a result of a motor vehicle collision.

The fund defended the action and delivered two special pleas and a main plea disputing liability. The first special plea was one of *lis alibi pendens*. It was pleaded that the appellant had instituted an action in the Bloemfontein Magistrate's Court based on the same cause of action which was still pending. The second special plea was that the appellant's claim had prescribed, as the action was instituted five years after the collision, contrary to the provisions of the Road Accident Fund Act.

The Court expressed a *prima facie* view that a plaintiff who elects to prosecute and institute an action in the High Court, to enjoy the protection of the section against prescription, must first withdraw the Magistrate's Court action and institute an action in the High Court within 60 days. However, the court did not decide the dispute, as its *prima facie* view differed with an earlier decision of that division on the same issue and with other divisions. It referred the matter to the Full Bench for a final decision. The Full Bench found in favour of the RAF and upheld the special pleas. That led to the present appeal.

Held – In the majority judgment that the special plea of *lis alibi pendens* was correctly upheld, and the appeal in that regard was dismissed.

The remaining question turned on the interpretation of section 2(1)(e)(ii) of the Road Accident Fund (Transitional Provisions) Act. It is a well-established principle of statutory interpretation that effect must be given to the object or purpose of the legislation being interpreted. As the legislation under consideration here was what has been described as "social legislation", the court had to interpret such legislation in a manner that would afford the widest possible protection and compensation to third parties against loss and damages arising out of the negligent driving of motor vehicles to the extent that the language used in the provision could reasonably bear.

Section (2)(1)(e)(ii) states that "A third party who has prior to this Act coming into operation- (ii) instituted an action against the Fund in a Magistrate's Court, may withdraw the action and, within 60 days of such withdrawal, institute an action in a High Court with appropriate jurisdiction over the matter: Provided that no special plea in respect of prescription may be raised during that period".

Since the Road Accident Fund (Transitional Provisions) Act took effect, a third party, who wishes to claim damages for non-pecuniary loss in excess of R25 000 – which is the amount to which the claim is as a general rule limited - may do so provided two prerequisites have been met. First, the third party must submit a serious injury assessment report as contemplated in regulation 3(1)(a) of the Road Accident Fund Regulations. Second, the fund must determine in accordance with regulation 3(3)(c) and (d) that the third party suffered serious injury. Once those two prerequisites have been met, the provisions of section 2(1)(e)(ii) would be triggered. Accordingly, a third party who had, prior to the Act coming into effect, already instituted an action in a Magistrate's Court, had an election, to withdraw such action

and, within 60 days of such withdrawal, institute an action in a division of the High Court with appropriate jurisdiction over the matter.

As the appellant instituted his High Court action without having first withdrawn the action pending in the Magistrate's Court, the question was whether the High Court action had, in light thereof, truly become prescribed. The 60-day period would begin to run once the first action had actually been withdrawn. As the facts in an agreed statement by the parties were inadequately stated, the Full Bench should have declined to decide the special plea of prescription. The appeal was thus upheld in part.

Impact Financial Consultants CC and another v Bam NO and others
[2021] 3 All SA 83 (SCA)

Financial Planning and Investments – Advice by financial services provider – Complaints to Ombud for Financial Services – Alleged negligence – Jurisdiction of Ombud – Failure by Ombud to address defence that the financial product in respect of which financial services provider had furnished advice was not a financial product as defined by the Financial Advisory and Intermediary Services Act 37 of 2002, rendering the advice furnished not regulated by the Act and depriving the Ombud of jurisdiction to determine complaints– Failure to determine nature of financial product which was the subject of the advice furnished constituting a fundamental error on the part of the Ombud in that her jurisdiction had not been established.

The first applicant ("Impact Consultants") was a registered financial services provider in which the second applicant ("Mr Calitz") held a 90% membership interest. Mr Calitz was a duly registered financial services provider who rendered such services as a member of Impact Consultants.

The first respondent was the Ombud for Financial Services.

The third to twentieth respondents (the "respondents") each lodged a complaint with the Ombud in relation to advice furnished to them by Mr Calitz to them regarding investments which each had made. Mr Calitz had furnished the respondents with advice regarding an investment in a trust (the "RVAF Trust") described as a hedge fund and managed by Abante Capital. Each of the respondents invested funds as advised. The collapse and resulting liquidation of Abante Capital and the RVAF Trust saw the respondents suffering capital losses on their investments. Complaints were lodged against Mr Calitz and Impact Consultants with the Ombud, alleging that Mr Calitz had negligently failed to comply with his obligations as a financial services provider, as set out in the General Code of Conduct for Authorised Financial Service Providers and Representatives (the "Code").

Mr Calitz denied that he was negligent in any respect or that any negligence that was established, had caused the losses suffered by the respondents. He raised a further defence that the financial product in respect of which he had furnished advice was not a financial product as defined by the Financial Advisory and Intermediary Services Act 37 of 2002 (the "FAIS Act"), and accordingly that the advice he had furnished was not regulated by the Act. The Ombud, so he contended, accordingly lacked jurisdiction to determine the complaints against him and Impact Consultants.

The Ombud found that Mr Calitz, acting on behalf of Impact Consultants, had negligently breached the statutory duties owed to his clients, leading to the losses complained of. Impact Consultants and Mr Calitz were held jointly and severally liable for the losses incurred. Applications for leave to appeal against each of the determinations were made to the Ombud but were refused. An application for leave to appeal was directed to the second respondent as chairperson of the appeal board of the Financial Services Board, but was unsuccessful. That led to a review application in the High Court, in which the applicants sought an order reviewing and setting aside the second respondent's decision. The present appeal was against the dismissal of the review application.

Held – The Ombud did not deal with the challenge to her jurisdiction, namely that the financial product in which the investment was promoted, was not a financial product as defined by the FAIS Act. Although the product was described as a hedge fund, the true nature of the investment product and whether it was an investment product at all, remained unknown. It was thus not possible to ascertain whether the investment that was the subject of the compliant was a financial product as defined in the Act. The failure to determine the nature of the financial product which was the subject of the advice furnished by Mr Calitz, constituted a fundamental error on the part of the Ombud in that her jurisdiction had not been established.

Leave to appeal was granted and the appeal was upheld. The second respondent's refusal of leave to appeal and the Ombud's determinations were set aside. The respondents' complaints were remitted to the first respondent for determination in accordance with the provisions of the FAIS Act.

Motus Corporation (Pty) Ltd t/a Zambezi Multi Franchise and another v Wentzel [2021] 3 All SA 98 (SCA)

Consumer – Purchase of vehicle – Defects in vehicle – Claim for refund of purchase price – Entitlement to refund in terms of section 56(3) of the Consumer Protection Act 68 of 2008 – To obtain refund remedy, consumer having to show that seller repaired defective parts; and that within three months after the repairs, the defects had not been remedied or that a further failure was discovered – Where requirements of section 56(3) not met, consumer not entitled to refund.

In the High Court, the respondent ("Ms Wentzel") claimed to be entitled to cancel a credit agreement between herself and the first appellant ("Renault") from whom she had purchased a vehicle. She tendered the return of the vehicle against the refund of the purchase price on the ground that Renault had, in breach of sections 49(1)(b), 55(2)(b) and (c), 56(2)(a) and (b) and 56(3) of the Consumer Protection Act 68 of 2008 (the "Act"), sold her a brand new vehicle that was woefully defective.

Ms Wentzel had obtained finance for the vehicle from a finance company ("MFC"), which settled her indebtedness to Renault. MFC was then the owner of the vehicle and was entitled to retain ownership of the vehicle until all obligations and repayments to MFC were fulfilled by Ms Wentzel. In terms of an instalment sale agreement, Ms Wentzel was obliged to collect the vehicle from Renault and to confirm acknowledgement of delivery on MFC's behalf. She was also required to

inspect the vehicle for any defects before collecting it, and, if any defect was found, to decline delivery of the vehicle and inform MFC immediately of that fact.

According to Ms Wentzel, defects in the vehicle were in evidence from the outset. As the number of faults began multiplying, she contacted the Motor Vehicle Ombudsman of South Africa ("MIOSA") for assistance.

MIOSA's delay in investigating the complaints against Renault, led to Ms Wentzel approaching the court *a quo*, which dismissed Renault's defences and found in Ms Wentzel's favour. The present appeal ensued.

Renault submitted that Ms Wentzel's application to the High Court was premature, because she had not exhausted her remedies in terms of section 69(d) of the Act, more particularly because MIOSA, to which she had referred her complaints on 21 February 2018, had not yet rendered a decision, when she commenced the present proceedings.

Held – The issue was whether Ms Wentzel had made out a case in terms of sections 56(2) and (3) of the Act for the refund of the purchase consideration paid to Renault in respect of the vehicle. The related issues were whether the vehicle had defects; whether such defects were resolved by Renault; and whether there were any further complaints received by Renault from Ms Wentzel, subsequent to the repairs undertaken by Renault.

The court did not need to address Renault's submission regarding section 69(d) as the point was abandoned in argument. However, the court did state that section 69(d), against the backdrop of section 34 of the Constitution and the guarantee of the right of access to courts, should not lightly be read as excluding the right of consumers to approach the court in order to obtain redress.

Turning to the substance of the dispute, the court noted that the parties offered mutually destructive factual versions. On Ms Wentzel's version, the defects were never resolved by Renault. Renault's version was that all of the complaints raised by Ms Wentzel on the specified dates were resolved and no further complaints regarding the vehicle were thereafter brought to its attention. There was no basis upon which that evidence could be rejected on the papers, and significantly, disputes of fact cannot be resolved on the papers in motion proceedings.

In any event, Ms Wentzel was not entitled to claim a refund of the purchase price before all events stipulated in section 56(3) had taken place. To obtain the refund remedy she had to show, first, that Renault repaired the defective parts; secondly, that within three months after the repairs, the defects had not been remedied or that a further failure was discovered. She failed to show that the requirements of section 56(3) were satisfied and that she was entitled to a refund of the purchase price.

The appeal was upheld.

Zuma v Democratic Alliance and a related matter [2021] 3 All SA 149 (SCA)

This is the appeal from the Gauteng Division, Pretoria, against the finding of Meyer J (Ledwaba DJP and Kubushi J concurring) (sitting as a court of first instance) in the case of Democratic Alliance v President of the Republic of South Africa and others and a related matter reported at [2019] 1 All SA 681 (GP) – Ed.

Constitutional and Administrative Law – Payment of legal fees of former President – Review of decision taken by State Attorney in the exercise of her discretion under section 3(3) of the State Attorney Act 56 of 1957 to fund former President's legal costs – Alleged delay in seeking review – No delay where funding was ongoing and relief claimed was directed not only at the setting aside of a single past act, but also the ongoing conduct.

Constitutional and Administrative Law – Payment of legal fees of former President – State Attorney's services – Whether State Attorney was authorised by either section 3(1) or 3(3) of the Act to appoint and pay private attorneys to represent former President – Section 3(1) and 3(3) provides only for the provision of services by the State Attorney, and do not authorise the State Attorney to outsource its functions to a private attorney at State expense.

In June 2005, the National Director of Public Prosecutions ("NDPP") indicted Mr Zuma on two counts of corruption (the "2005 indictment"). In August 2006, a firm of attorneys ("Hulley Incorporated") submitted a request on behalf of Mr Zuma to the State Attorney (the "2006 request") for legal assistance at the State's expense in the criminal case. The criminal trial was subsequently struck from the roll.

On 27 December 2007, the then acting NDPP announced that Mr Zuma would be indicted on two counts of corruption, twelve of fraud and one each of racketeering, money laundering and tax evasion (the "2007 indictment"). Mr Zuma brought an application to review the decision to indict him, which application succeeded. However, that decision was later overturned. On 26 September 2008, Hulley Incorporated submitted yet a further request on behalf of Mr Zuma to the State Attorney (the "2008 request") for legal assistance at State expense. A decision was then taken in 2009, to discontinue Mr Zuma's prosecution (the discontinuation decision). The Democratic Alliance (the "DA"), the official opposition in the National Parliament, brought proceedings to review and set aside the discontinuation decision. Mr Zuma and the NDPP, having made common cause in the proceedings, initiated a range of procedural challenges. In the meanwhile, on 9 May 2009, Mr Zuma was inaugurated as President of the country. On 29 April 2016, the High Court set aside the discontinuation decision, and in October 2017, the present Court dismissed an appeal by Mr Zuma and the NDPP against the order of the High Court. The 2007 indictment was thus revived, and in March 2018, the NDPP announced that the charges against Mr Zuma would be reinstated.

Since the 2017 decision, the DA had sought to obtain clarity from the Presidency as to the extent of the payments made by the State toward Mr Zuma's legal costs, as also, the basis for those payments. The requests were initially ignored by the Presidency. In March 2018, the Economic Freedom Fighters political party (the "EFF") was informed that the State had spent R15,3 million on Mr Zuma's legal costs, pursuant to a decision taken by the State Attorney in the exercise of her discretion under section 3(3) of the State Attorney Act 56 of 1957 (the "Act").

Both the DA and the EFF successfully applied to the High Court for the review and setting aside of the decision to pay Mr Zuma's legal fees and each of the related payments; and for an order directing Mr Zuma to pay back the money.

On appeal, Mr Zuma contended that the court was wrong to hold that the DA and EFF had brought their applications within a reasonable time; that section 3 of the Act did not authorise the State Attorney to fund private legal costs at all, including for Mr Zuma; and that it was just and equitable to require Mr Zuma to pay back the money.

Held – DA and EFF had no idea what the scale and extent of the funding of Mr Zuma's legal costs were until after March 2018. Moreover, such funding was ongoing. As the relief claimed was directed not only at the setting aside of a single past act, but also the ongoing conduct, it could not be said that there was any delay.

Mr Zuma argued that the State Attorney was authorised by either section 3(1) or 3(3) of the Act to appoint and pay private attorneys to represent him. However, neither section authorises the State to cover private legal costs. They provide only for the provision of services by the State Attorney, and do not authorise the State Attorney to outsource its functions to a private attorney, at State expense as occurred in Mr Zuma's case.

Finally, it was held that no grounds existed for interfering with the High Court's ruling that it was just and equitable to require Mr Zuma to
Appeal was dismissed.

Department of Environmental Affairs, Forestry and Fisheries v Xulu and Partners Incorporated and others; *In re*: Department of Agriculture, Forestry and Fisheries and others [2021] 3 All SA 166 (WCC)

Civil Procedure – Court orders – Non-compliance – Contempt of court application – Standard of proof must be applied in accordance with the consequences of the remedies sought.

Civil Procedure – Court orders – Non-compliance – Contempt of court application – The requirements for contempt are the existence of an order; service of the order on the contemnor or bringing it to his notice; non-compliance with the order; and that the non-compliance is wilful or mala fide.

On 6 June 2019, the first respondent ("BXI"), a firm of attorneys, obtained an order by consent for payment of its invoices for legal services rendered in favour of the Department of Agriculture, Forestry and Fisheries ("DAFF"). BXI subsequently levied execution when the DAFF failed to pay in terms of a settlement agreement which was made an order of court, and writs of execution were issued. In August 2019, the DAFF applied to have the writs of execution and attachment of money suspended pending the determination of relief in the second part of the application. The service level agreement purportedly concluded between the DAFF and BXI, the settlement agreement, the order of 6 June 2019 and the writs were set aside, declared invalid and reviewed. Most of the DAFF's functions were transferred to the second applicant (the "DEA"), and the latter was joined to the proceedings without objection.

In the present application, the DEA sought to hold BXI and the fifth respondent ("Mr Xulu"), its principal member and director, in contempt of six court orders granted by the Western Cape High Court.

Held – Civil contempt, which lay at the heart of this matter, is the crime of disrespect to the court and the rule of law. Section 165(5) of the Constitution makes orders of court binding on all persons and Organs of State to whom it applies.

The standard of proof must be applied in accordance with the consequences of the remedies sought. If the relief applied for is a declaratory order, *mandamus*, structural interdict or similar civil remedy where the contemnor's right to freedom and security is not deprived, then the civil standard of proof on a balance of probabilities applies. Where the civil contempt remedies of committal to prison or the imposition of a fine are sought, which impact on the contemnor's freedom and security of person, then the criminal standard of proof beyond reasonable doubt applies.

The requirements for contempt are the existence of an order; service of the order on the contemnor or bringing it to his notice; non-compliance with the order; and that the non-compliance is wilful or *mala fide*.

It was undisputed that the six orders had been granted and brought to the attention of BXI and Mr Xulu. Considering each order, the court found that either BXI or Mr Xulu was in contempt of each one, and that such contempt was wilful and *mala fide*. They were ordered to pay a fine of R30 000 jointly and severally, the one paying the other to be absolved. Failing compliance, Mr Xulu was to be sentenced to 30 days' imprisonment.

South African Fruit and Vegetable Canners Association and another v Impumelelo Agri Business Solutions (Pty) Ltd and others (Perishable Products Export Control Board as *amicus curiae*) [2021] 3 All SA 242 (GP)

Agriculture and Animals – Agricultural products – Control over sale, export and import – Inspection fees of assignee appointed in terms of Agricultural Product Standards Act 19 of 1990 – Determination of fees – Failure by assignee to provide owner of agricultural products with sufficient information to enable them to submit meaningful comments rendering determination of fees reviewable.

Constitutional and Administrative Law – Judicial review – Duty on applicant, in terms of section 7(2)(a) of the Promotion of Administrative Justice Act 3 of 2000, to first exhaust internal remedies – The internal remedy must in fact, be available, effective and adequate for duty to arise.

The applicants took issue with the inspection fees determined by the first respondent in terms of the Agricultural Product Standards Act 19 of 1990 which provides for control over the sale, export and import of certain agricultural and other related products, and for matters connected therewith. It was contended by the applicants that the determination of the inspection fees was done in a manner that offended the prescript of the Promotion of Administrative Justice Act 3 of 2000, and stood to be reviewed and set aside. The applicants further argued that it should not be permissible for the first respondent to be able to unilaterally determine, publish and impose the inspection fees payable to it in terms of the Agricultural Product Standards Act.

On 16 January 2018, the applicants obtained an interdict restraining the respondents from imposing the final inspection fees until finalisation of the present

review proceedings – or the date on which the first respondent demonstrated that it had adhered to the principle of just administrative action, and that it had sufficiently consulted with the relevant stakeholders. The first respondent's publishing of the inspection fees after the interdict was issued led to the applicants' contention that such publication was in violation of the court order of 16 January 2018 and contrary to the provisions of just administrative action. In Part A of their application, the applicants sought an interim interdict to restrain and prevent the first respondent from, *inter alia*, levying any inspection fees pending the determination of Part B of the review application.

Held – The respondents' preliminary point that the applicants had failed to exhaust internal remedies prior to proceeding with the review application was based on section 7(2)(a) of the Promotion of Administrative Justice Act which states that no court shall review an administrative action unless internal remedies provided for in any other law had first been exhausted. In order for the respondents to rely on section 7(2)(a), the appeal in section 10(1) of the Agricultural Product Standards Act must in fact, be available, effective and adequate in order to count as an existing internal remedy. The appeal procedure prescribed at the time of launching the present proceedings did not present an effective remedy to afford redress to the applicants, and accordingly did not constitute an internal remedy that the applicants had to exhaust. The point was thus dismissed.

In terms of the Agricultural Product Standards Act, the Minister can designate any person, undertaking, body, institution, association or board having particular knowledge of the product concerned as an assignee in terms of that product. The first respondent was appointed as an assignee with effect from 9 December 2016 in respect of regulated agricultural products destined for sale in the local market. The Act does not make inspections mandatory, and must in fact be requested. The assignee has no recourse against the State for any of the services it renders or expenses it incurs in terms of the Act, and its fees are the responsibility of the owner of the regulated product. The applicants in this case challenged the manner in which the first respondent's fees were determined.

The first respondent had published two notices calling for comments on the proposed inspection fees. The court upheld the applicants' contentions that they had not received sufficient information to enable them to submit meaningful comments, and that the first respondent had not considered the comments which it did receive. The determination of the final inspection fees therefore fell to be reviewed and set aside. Further arguments by the applicant, alleging violations of several constitutional provisions were rejected by the court.

Van der Merwe NO and others v Drenched Boxing (Pty) Ltd and others
[2021] 3 All SA 281 (WCC)

Civil Procedure – Final interdict – Requirements – Applicants must establish a clear right; an injury actually committed or reasonably apprehended; and the absence of similar protection by any other ordinary remedy.

Civil Procedure – Final interdict – Requirement that the injury be a continuing one – Factual dispute around efficacy of noise abatement measures taken by neighbour resulting in applicants not establishing entitlement to final relief.

Civil Procedure – Motion proceedings – Disputes of fact – Where, in motion proceedings, disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the latter, justify such order – A final interdict may be granted on application if no bona fide dispute of fact exists.

Property – Neighbours – Common law on neighbours' nuisance – Complaint of noise emanating from neighbouring premises – Applicants' right to use and enjoyment of their property to be balanced against respondents' right to conduct their business – No general or absolute right to prevent respondents from amplifying sound or voices, it having to be proved that the amplification sought to be prevented constituted a nuisance.

The first and second applicants were a married couple who lived on the second floor of a building in Cape Town. The second applicant ("Ms Broekmann") also ran a law firm on the same premises.

In August 2020, the second respondent, took occupation of premises in the same building, approximately one metre from the premises occupied by the first two applicants, and operated a gym on those premises. The noise emanating from the gym was a source of disturbance to the applicants who alleged that they were woken up by the noise emanating from the gym on about 6 days a week. Ms Broekmann stated that the noise emanating from the gym classes also affected the running of her practice, as well as her times of study.

When complaints to the respondents yielded no results, the applicants obtaining an interim order which was to operate as a rule *nisi*, preventing the first and second respondents from amplifying any music, undertaking any noise amplification at the gym, and in any other manner creating or causing any noise nuisance at their premises. In the present proceedings, the applicants sought confirmation of the interim interdict.

Held – For a final interdict, the applicants had to establish a clear right; an injury actually committed or reasonably apprehended; and the absence of similar protection by any other ordinary remedy.

The Court confirmed that motion proceedings cannot be used to resolve factual issues, and that it is generally undesirable to try to decide an application upon affidavit where the material facts are in dispute. Thus, a final interdict may be granted on application if no *bona fide* dispute of fact exists. Where, in motion proceedings, disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the latter, justify such order. The court bears a duty to examine alleged disputes of fact and determine whether in truth there is a real issue of fact that cannot be satisfactorily resolved without the aid of oral evidence.

To establish their clear right to an interdict, the applicants relied on the common law on neighbours' nuisance, and in the alternative, the Noise Control Regulations. The question was whether the gym was being operated in a way which resulted in an unreasonable interference with the right of the applicants to use their premises. The

applicants' right to use and enjoyment of their property had to be balanced against the respondents' right to conduct their business. There was no general or absolute right to prevent the respondents from amplifying sound or voices, and it had to be proved that the amplification sought to be prevented constituted a nuisance.

A court will not grant an interdict restraining an act that has already been committed – the injury must be a continuing one. There was a dispute of fact on the question of whether the noise still constituted a nuisance. The respondents stated that they took measures, on the advice of acoustic engineers, to alleviate the nuisance. The applicants disputed the efficacy of those measures. The dispute was material to whether the applicants continued to suffer injury, and whether or not they were entitled to final relief. The court was not satisfied that the applicants had established the element of a continuing injury.

Finally, the applicants' failure to comply with the mechanisms contained in the Noise Control Regulations for dealing with complaints meant that an available alternative remedy had not been utilised.

As the requirements for a final interdict had not been satisfied, the application was dismissed, and the rule *nisi* discharged.

END-FOR NOW