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

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Further particulars-party dissatisfied-party fails in application to compel-The First Respondent's reply to the Plaintiff's request contains a simple "Yes" answer to several questions. Most of the questions were however responded to by stating that the particulars constitute evidence and/or are not strictly necessary to prepare for trial. The Second Respondent's reply follows the line taken by the First Respondent namely that the particulars are a matter of evidence or not strictly necessary. These lines of opposition were followed in the application to compel.

[1] During the pre-trial stage litigants are often spoiled for choice, presented with a wide range of procedures to choose from to ensure that they are ready for trial (or at least as ready as reasonably can be expected). Unfortunately, the various pre-trial procedures are not always utilised for the intended and/or correct purposes. And even seasoned attorneys and counsel occasionally confuse the nature and purpose of the respective rules and procedures. Where litigants had already established battle lines, often over years, their respective legal teams often join the fray, eager to advance their respective

clients' interests, in the process losing sight of established practices and legal principles, as well as common sense.

[2] In this application it is a request for further particulars that presents as an additional source of conflict between parties that had been at each other's throats for a number of years.

[3] In the main action between the parties the Applicants are cited in their representative capacities as the current trustees of the Alette Blignaut Trust, claiming damages on behalf of the Trust. I will refer to the four Applicants herein further as "***the Plaintiffs***" for the sake of convenience. Two of the four defendants in the main action are relevant in this interlocutory application to compel, namely the First and the Second Defendant (cited as First and Second Respondents in the application). Both are erstwhile trustees of the Trust. For purposes of this application and for ease of reference I will herein refer to them simply as "***the Respondents***".

[4] As long ago as December 2016 the Plaintiffs issued summons against the Defendants,**[1]** alleging inter alia that the Respondents acted unlawfully and *ultra vires*, causing damages to the Trust's estate. Pleas were filed during March 2017. A Request for Further Particulars dated 27 June 2018 was delivered by the Plaintiffs, directed at only two of the defendants, namely the two Respondents. The First Respondent's response was delivered on 23 July 2018 and the Second Respondent's two days later. After considerable time the Plaintiffs decided that they are not satisfied with the responses received and that the Respondents should furnish better particulars, thus the application to compel. The interlocutory application to compel was issued on 18 May 2021, almost three years after the Respondents delivered their responses to the Request for Further Particulars.

RESPONSES TO REQUEST FOR FURTHER PARTICULARS

[5] The First Respondent's reply to the Plaintiff's request contains a simple "Yes" answer to several questions. Most of the questions were however responded to by stating that the particulars constitute evidence and/or are not strictly necessary to prepare for trial. The Second Respondent's reply follows the line taken by the First Respondent namely that the particulars are a matter of evidence or not strictly necessary. These lines of opposition were followed in the application to compel.

INTERLOCUTORY APPLICATION TO COMPEL

[6] In a judicial pre-trial conference held on 6 August 2018 counsel for the Plaintiff indicated that his instructions were that the matter was ready for trial. No prejudice was recorded. Reference was made to the Further Particulars requested and the responses received. No indication was given at the time that the Plaintiffs were dissatisfied with the responses.

[7] During oral argument before me, counsel for the Plaintiffs indicated that it was only during more recent consultations with experts that the Plaintiffs and their legal team came to realise that they need more and/or further particulars in order to prepare for trial. The consultations allegedly revealed a dilemma, worded by counsel as: "How are we going to prove to what extent the Respondents acted unlawfully?" The submissions in this regard are similar to averments made in the Replying Affidavit.

[8] It is the case for the Plaintiffs that they are (i) "*severely prejudiced and impaired*" by the "*unreasonable manner*" in which the Respondents expect them to "*come to Court*" and (ii) that the Respondents are "*obliged to answer to defences not disclosed or known*" to the Plaintiffs. This theme was further expounded on during the oral arguments and it was submitted that the Plaintiffs should not have to wait for the opportunity to cross-examine the Respondents at trial to then receive responses to the enquiries contained in the Request for Further Particulars. According to counsel this will result in delays as a postponement will then become necessary to allow the Plaintiffs an opportunity to investigate information provided during cross-examination.

[9] The application to compel is opposed by the Respondents on the basis that (i) the parties have since agreed to curtail the issues in dispute between them by means of the exchange of a list of admissions, (ii) the Plaintiffs request particularities which they are not entitled to in terms of the mechanism of Rule 21, (iii) copies of all the documents discovered by the Plaintiffs have been requested by the Respondents. The Plaintiffs, so the argument goes, are abusing the Rule 21(4) process. Counsel for the Respondents were at pains to stress that the Respondents are eager to curtail the disputes between the parties but need the discovered documents and list of required admissions to do so.**[7]** Further submissions related to the inordinate delay in launching the application to compel.

The Plaintiffs assert that the Respondents' "*repeated refusal*" to answer the questions listed in the Request for Further Particulars "*is unlawful, obstructive and not in the interests of justice*".**[20]** Unlawful it is definitely not, unless the Plaintiffs here again refers to duties the Respondents had as trustees and their alleged failure to comply with those duties. The lawfulness of the Respondents' actions or omissions is the essential question which the trial court will be adjudicating.

[34] It was argued that it is in the interests of justice that possible delays in the trial should be avoided and that the *court* will be prejudiced should unnecessary time be wasted as a result of postponements. The argument was further stretched to include the submission that it is also in the *court's* interests to compel the Respondents to provide more details of their defences to the Plaintiffs' allegations. The Plaintiffs insist that the questions contained in the Request for Further Particulars, "*if asked for the first time in cross-examination may illicit* (sic) *answers that will result in a further remand of the case*".**[21]** This was repeatedly submitted during oral argument. I have not been convinced that this presents as prejudice, or at least as so prejudicial that the Respondents should be ordered to supply further and better particulars. Should that situation arise during the trial, the judicial officer presiding over the trial will deal with it. No adjudication of the present application to compel can circumvent situations arising during a trial. Considering the considerable delay since the issuing of summons until now,**[22]** with the action still not enrolled for trial, any possible postponement during the trial itself will pale into insignificance.

[35] The argument that the Respondents' failure to provide full responses to the request is against the interests of justice, does not convince me. The Plaintiff

decided to take to Respondents to court following alleged breaches in their duties as trustees.**[23]** The Plaintiffs carry the burden to proof their allegations. They cannot complain should the Respondents fail to assist in proving the allegations against them. Clearly the Plaintiffs had information in their possession prior to issuing summons leading them to believe that the Respondents are liable to the Trust for specific breaches in their fiduciary duties. The request for further particulars attempted to elicit proof of the allegations, or at least information from which unlawful and unbecoming conduct may then be inferred (from the Plaintiffs' point of view). As such, the particulars requested are not strictly necessary to prepare for trial but amount to an attempt to obtain evidence; alternatively put, an improper attempt to obtain information from the Respondents which they then want to use as proof of their own averments as set out in the Particulars of Claim.

[36] The Plaintiff should do its own preparation for the trial and search for its own evidence, without expecting other parties to assist. In fact, it may be argued that in as far as such preparation relate to fact finding, it should have been done *prior* to issuing summons. Surely the Plaintiffs did not issue summons on a whim but based on information / evidence indicating that there is a case for the Respondents to answer. It appears non-sensical to still be looking for proof five years after the claim was instituted. The Plaintiffs even went so far as to request particulars relating to a person named Johan Du Preez who is not referred to tin the pleadings in the main action. During oral argument it became evident that Du Preez featured in the earlier removal application.

[37] In its application papers the Plaintiffs proceeded to argue its case as if I am to adjudicate the disputes between the parties *now*.**[24]** A similar attempt was made during oral argumenta before me. That is an improper approach. The Founding Affidavit is worded in a manner that may have enticed the Respondents into responses on the merits of the claim. The Respondents were alive to this and correctly, in my view, did not respond on the merits. In an application to compel the issues germane to the trial action are not decided or ruled on. To reiterate: that is what the trial is ear-marked for.

[38] I have a discretion whether to order the Respondents to furnish further particulars.**[25]** Considering all the aspects dealt with above, there are sufficient indicators that it would be just and proper to exercise that discretion against the Plaintiffs. In the premises, the application stands to be dismissed as the particulars insisted upon do not fall within the parameters of Rule 21 and are not strictly necessary to prepare for trial.

[39] In my view the Plaintiffs are not unduly prejudiced or hampered in their trial preparation through the Respondents' failure to respond more fully to the Request for Further Particulars. The particulars requested may be relevant to the disputes between the parties but are not strictly necessary for trial *preparation*.

[40] There is no reason why costs should not follow success. The Plaintiffs are to pay the costs of the application.

[41] The Respondents request a punitive cost order based on the Trusts' alleged abuse of the relevant pre-trial procedures. It is specifically averred that the failure to abide by the agreement relating to admissions concluded at the virtual pre-trial meeting of September 2020, justifies such an order. The parties did not keep minutes of the virtual meeting. The parties' affidavits reveal slight and/or nuanced differences regarding the exact nature and extent of the agreement reached. A list of required admissions has since been delivered (as agreed upon), albeit late.

[42] The issue of costs always falls within the discretion of the Court. The Plaintiffs' belated compliance with the pre-trial agreement does not present sufficient reason for a punitive cost order.

[43] The contents of the Founding and Replying Affidavits do however raise a question whether a punitive cost order may not be appropriate in any event. It firstly contains paragraphs dealing with issues not relevant to the present application to compel. Secondly, a large number of paragraphs, especially in the Replying Affidavit, contain allegations that present as scandalous and/or vexatious.**[27]** To use the phrasing in the Second Respondent's Heads of Argument, the Plaintiffs "bad-mouthed" the Respondents throughout the application papers.

[44] The Plaintiffs make no secret of their contempt for the Respondents. This coloured the application papers but, unfortunately, also the submissions presented in the Heads of Argument as well as during oral argument. It is common knowledge that affidavits and heads of argument are not drafted by the litigants themselves but by their legal representatives on their behalf. I will accept here that the tone of the application papers and submissions were not necessarily chosen by the Plaintiffs themselves. In the premises, I am not convinced that the Plaintiffs should be ordered to pay costs on a punitive scale.

[45] In the premises, the following order is made:

The application is dismissed with costs.

Sand Savers (Pty) Ltd and Another v The Standard Bank of SA Ltd (7531/2019) [2021] ZALMPPHC 46 (16 August 2021)

Rescission application in terms of Rule 42(1) of the Uniform Rules of Court (Rules)- Even if condonation for late filing of their rescission application is granted, the applicants have no prospects of success in their rescission application. The applicants' condonation application stand to fail on the basis that the explanation for the delay is not adequate and further that they do not have prospects of success in their rescission application. There is no need for me to deal with the merits of the applicants' rescission application.

[1] The respondent had issued combined summons against the applicants. The summons was served on the applicants by the sheriff of court by way of

affixing on the principal door of the premises. The applicants failed to enter an appearance to defend, and the respondent proceeded to obtain a default judgment against the applicants on 19th May 2020.

[2] The applicants have brought a rescission application in terms of Rule 42(1) of the Uniform Rules of Court (Rules) seeking an order to rescind the default judgment granted against them. The applicants' founding affidavit has been deposed by the second applicant in his capacity as the director of the first applicant. The applicants in their rescission application have also included a condonation application. The applicants' application was served on the respondent on 9th October 2020. The respondent is opposing the applicants' condonation and rescission application. The second applicant in the main action has been joined to the proceedings in his capacity as a surety to the first applicant.

[3] On condonation application, the second applicant avers that on 19th May 2020 he was in court even though he did not file any opposing papers, and that he had knowledge of the default judgment on 19th May 2020. It is the applicants' contention that because of the strict lockdown regulations, they could not give proper instructions to their legal representatives to launch their rescission application. The second applicant submit that he only managed to consult his legal representatives on 15th July 2020.

[4] On prospects of success the applicants have stated that the agreement between them and the respondent was specific. That the respondent had loaned them money for the purchase of an earth moving vehicle for use in their business, and that they were supposed to pay back the loan from the proceeds generated from the said vehicle. According to the applicants, they fell into arrears regarding payment of the loan when the vehicle broke down, and as a result of that they could not generate income. That they have telephonically notified the respondent about their situation. The applicants concluded by stating that they have made a good case for the default order of 19th May 2020 to be rescinded.

[5] The respondent in its answering affidavit has stated that the applicants have filed their rescission application five months after the order was granted. That the basis upon which the applicants are seeking condonation for late filing of their rescission application have no merit.

[6] On the merits of the application, the respondent has submitted that the applicants through their attorneys have written a letter to the respondents' attorneys acknowledging that they are in breach of the agreement and that the first applicant had made the last payment during September 2019; that they were aware that a default order has been granted against the applicants; that they were aware that the agreement has been cancelled and it does not exist any longer; and that the applicants have acknowledged that they owe the respondent money and wanted to enter into a new payment arrangement plan.

[15] In the result I make the following order

15.1 The applicants' condonation application is dismissed with costs on party and party scale

SA Transit Services CC v iCollege Pty Ltd (38592/2020) [2021] ZAGPPHC 490 (2 August 2021)

Notice of Bar-condonation and upliftment- In order to be granted condonation and/or to uplift the bar a full and proper explanation for the delay during this period ought to have been set out in the applicant's founding affidavit, but the applicant failed to do so.

[1] The applicant, SA Transit Services CC, has approached court in terms of Uniform Rule 27, wherein it seeks an order to have the notice of bar served on it by the respondent, iCollege (Pty) Ltd, uplifted and for the condonation for the late filing of its plea in the main action.

[2] This court has directed that the application be determined on the papers filed on Caselines without oral hearing as provided for in this Division's Consolidated Directives re Court Operations during the National State of Disaster issued by the Judge President on 18 September 2020.

FACTUAL BACKGROUND

[3] The respondent in this matter (the plaintiff in the main action) instituted action against the applicant (the defendant in the main action) on 14 August 2020 wherein payment was sought in the amount of R1 201 120.00 on the grounds that the applicant was contractually liable without set-off or deduction based on a written agreement between the parties.

[4] The applicant proceeded to file a notice of intention to defend the action on 5 October 2020. In terms of the Uniform Rules of Court, the applicant was obliged to deliver its plea within twenty (20) days after filing its notice of intention to defend, being on 03 November 2020. The applicant failed to take any further steps after filing the notice of intention to defend. On 16 November 2020, that is, two (2) weeks later, the respondent served its notice of bar by email calling upon the applicant to file its plea. The aforesaid notice provided the applicant with a further five (5) days, that is, until 23 November 2020, to deliver its plea to the respondent's claim.

[5] On 17 November 2020, that is after receipt of the notice of bar, the applicant's legal representative requested an indulgence of a further period of fifteen (15) days in which to serve the plea. It is, however, the plaintiff's contention that it never granted such indulgence.

[6] The applicant filed the plea by way of formal service on the plaintiff's attorneys of record on 07 January 2021. The respondent contends that the applicant having failed to file its plea timeously was consequently *ipso facto* barred from pleading and that the plea filed was invalid.

44] The most important period is that between the 16 November 2020 and the 23 November 2020 when the applicant was placed under bar, for once the period of five (5) days provided by the Notice of Bar expired, the applicant became *ipso facto* barred and could no longer be able to file its plea. The negotiation with the respondent to be allowed to file the plea later and its filing of the plea after that, was of no consequence. The applicant was barred and had to apply to court for leave to file the plea out of time. In order to be granted condonation and/or to uplift the bar a

full and proper explanation for the delay during this period ought to have been set out in the applicant's founding affidavit, but the applicant failed to do so.

[45] The explanation tendered by the applicant, as such, does not cover the whole period of the delay and is inadequate for purposes of this application. The result is that on the basis of the unexplained periods alone, the applicant has failed to set out good cause and the application should fail.

[46] The applicant has, also, not bothered to set out other requirements to show good cause except an attempt to explain the requirement of delay. The court in *Van Aswegen v Kruger*,**[12]** held that the requirement of a *bona fide* defence in Rule 27 applications: *"would be adequately satisfied where the defendant avers that he has a bona fide defence, and he makes averments which if proved would constitute a defence."* This, the applicant failed to do. The fact that the applicant had already filed a plea does not absolve it of the obligation to aver in its founding papers that it has a *bona fide* defence and to make averments which if proved would constitute a defence.

[47] In addition, the applicant has failed to satisfy the requirement of *bona-fides.* Nothing is proffered about this requirement in the applicant's founding papers.

[48] The issues raised by the applicant in its supplementary heads of argument does not take its case any further. The issues are in fact irrelevant for the purposes of determining whether condonation in the circumstances of this matter should be granted. As already stated, the authorities are clear: among the facts usually relevant are the degree of lateness, the explanation therefore, the prospects of success, and the importance of the case.

COSTS

[48] As is trite, costs follow the successful party. The respondent as the successful party is, therefore, entitled to be awarded costs.

ORDER In the circumstances, the following order is granted:

1. The application is dismissed.

2. The applicant is ordered to pay the costs of this application.

Khabu and Others v Matlosana City Council and Another (56948/2014) [2021] ZAGPPHC 502 (4 August 2021)

Cost order- reconsidering of a cost order granted by this court on 21 February 2021. For the reasons advanced in respect of the secret offer of settlement and in exercising my discretion in terms of Rule 10(4)(b)(ii), I deem it fair and reasonable that the Municipality be held liable for Ndlovu's costs on a party and party scale.

[1] This is an application for the reconsidering of a cost order granted by this court on 21 February 2021.

[2] The action instituted by the plaintiffs was for the payment of damages suffered as a result of the death of Tshehla Famen Khabu ("the deceased") that was caused by the caving in of a trench during excavation work carried out on the behest of the first defendant ("the Municipality"). The second respondent, Ndlovu Plant Hire CC ("Ndlovu") was cited as the third defendant in the action in its capacity as the employer of the excavator operator who dug the trench.

[3] By agreement between the parties the issues pertaining to merits and quantum were separated and the trial proceeded only on the question of merits.

[4] In the judgment handed down on 21 February 2021, this court made the following order:

"*1. The first defendant is held liable for the plaintiffs' agreed or proven damages.*

2. The first defendant is ordered to pay the plaintiffs' costs.

3. The claim against the third defendant is dismissed with costs."

[5] The relief claimed herein is directed at the aforesaid order and is two-fold:

[5.1] it firstly pertains to the scale of costs from the date on which the plaintiffs made an offer of settlement to the Municipality; and

[5.2] secondly to costs in respect of the second respondent.

[6] The relief is premised on the findings contained in the judgment of 21 February 2021 and the judgment should be read together with this judgment.

[7] Only the Municipality opposes the relief claimed herein and for ease of reference the plaintiffs and the Municipality will be referred to as "the parties".

Issue in dispute

[8] The parties are *ad idem* that this court may reconsider the cost order on the principle of a secret common-law offer to settle. The principle entails that a party that has made a reasonable offer of settlement prior to the trial, which was not accepted, may apply that it be reimbursed for the costs it had incurred thereafter.

[9] *In casu* the plaintiffs made a secret offer of settlement to the Municipality on 21 September 2020, more than a month before the trial.

[10] The offer entailed that the plaintiffs were prepared to accept 85% of their proven or agreed damages.

[11] The offer was not accepted, which resulted, after four days of trial, in the order that the Municipality is 100% liable for the plaintiff's proven or agreed damages.

[12] In view of the aforesaid common cause facts, the only issue in dispute is whether the principle should be applied in the present matter.

Submissions by parties and discussion

Secret offer of settlement

[13] Prior to considering the submissions by the parties, it is apposite to note that the relief claimed by the plaintiffs, although couched in normal "punitive" cost order terms is not in the true sense punitive, but rather aimed at reducing the irrecoverable costs (costs over and above costs on a party and party scale) that the plaintiffs had to incur due to the Municipality's alleged failure to probably consider the secret offer made by the plaintiffs.

[14] The underlying principle being that considerations of public policy encourage settlements and discourages costly litigation.

[15] It is for this reason that the plaintiffs, in support of the relief, rely on the principle enunciated in *Singh and Another v Ebrahim* (413/09) **[2010] ZASCA 145** (26 November 2010) at paragraph [89], to wit:

"*...A party who thinks an offer ambiguous (…) is obliged to explore and clarify the matter rather than to litigate. If he fails to take a simple and elementary precaution to ensure that avoidable litigation is avoided, he cannot complain of an adverse cost order if the outcome of the trial is against him.*"

[16] Although the *Singh* matter pertains to an offer made by a defendant in terms of Rule 34(1), I agree with Mr De Waal SC, counsel for the plaintiffs, that the principle applies equally in circumstances where a plaintiff has made a reasonable offer to avoid the unnecessary incurring of costs associated with litigation.

[17] In *AD and Another v MEC Health and Social Development, Western Cape Provincial Government* **2017 (5) SA 134** WCC, the following factors were

taken into account when reconsidering a cost order in circumstances where a secret offer was made:

[17.1] whether the defendant has engaged in reasonable attempts to settle;

[17.2] whether the plaintiff was offering a fair discount based on a realistic assessment of the case rather than holding out for the best conceivable outcome;

[17.3] whether the plaintiff allowed the defendant a reasonable time to consider the offer;

[17.4] the extent of the difference between the amount of the offer and the amount of the ward;

[17.5] the nature of the proceedings and the resources of the litigants.

[18] *In casu* the Municipality did not engage the plaintiffs in an attempt to settle at all. Save for the fact that the offer was not accepted, there is no evidence to indicate that the Municipality responded with a counter or any other sort of offer. It simply did nothing.

[19] In an attempt to explain its inaction, the Municipality in its answering affidavit submits that the plaintiffs did not, at the time that the offer was made, have a "meritorious" case. This submission is according to the Municipality borne out by the "*lengthy issues"* that had to be determined at trial.

[20] The Municipality's liability for the damages suffered by the plaintiffs as a result of the demise of the deceased was based on a wrongful and negligent act. Wrongfulness entailed that the Municipality had a legal duty to act and failed to do so.

[21] The evidence established that the Municipality, as the "*contractor"* in terms of the regulations applicable to excavations, had a legal duty to ensure that the excavation was done in a safe manner.

[22] According to the evidence of Mr Van Schalkwyk ("Van Schalkwyk"), the owner of Ndlovu, Mr Breedt ("Breedt"), an employee of the Municipality was fully appraised and accepted the Municipality's duty in this respect.

[23] Breedt, although available at court, was not called to testify to dispel this evidence of Van Schalkwyk. In the premises, this court must accept that the Municipality was aware that it had a legal duty to prevent harm to befall the plaintiffs.

[24] As far as negligence is concerned, the expert, Mr Du Preez's evidence, set out in detail, the safety precautions that have to be taken when one embarks on the type of excavation that was done. The fact that the Municipality did not take the safety precautions should have been common cause. A summary of Mr Du Preez's evidence was in the Municipality's possession prior to the trial and at least when the offer of settlement was made.

[25] During trial Mr Du Preez's evidence was not seriously disputed nor was contradicting evidence of another expert tendered. It remains unclear why the Municipality did not admit that the excavation was done in an unsafe manner.

[26] Be that as it may, the Municipality, at least when it received the offer, should have known that the excavation was not safe.

[27] There was conflicting evidence in respect of the lowering of the deceased into the unsafe trench.

[28] The plaintiffs' witness, Mr Nkhuku ("Nkhuku"), testified that their employer, Mr Van Schalkwyk, instructed the deceased to get into the scoop of the arm of the excavator for purposes of being lowered into the trench.

[29] Mr Van Schalkwyk denied this allegation in the strongest terms and I found that the deceased decided on his own volition to be lowered into the trench.

[30] As set out *supra* it was not denied that Breedt was in charge of the excavation, which entailed that he provided instructions to the operator of the excavator where and how deep to dig. Breedt had the duty to ensure that the excavation was done in a safe manner.

[31] Notwithstanding the aforesaid, Breedt allowed the deceased to be lowered into the unsafe trench. Due to the unsafe manner in which the trench was excavated, a wall of the trench caved in, which led to the deceased being buried under the sand and to his ultimate demise.

[32] This evidence was available to the Municipality and as set out *supra* the Municipality did not tender any evidence to deny its liability.

[33] In the result, the Municipality should have engaged with the plaintiff in respect of a possible settlement of the matter.

[34] The 85% offer was in the circumstances patently fair and if accepted, would have saved the Municipality 15% of the amount of damages that still needs to be determined.

[35] The offer was made a month before trial and afforded the Municipality more than enough time to carefully consider the offer in view of the evidence available at the time.

[36] The consequences of the Municipality's failure to do so was echoed in the *Singh* matter *supra*, to wit: "*If he* [it] *fails to take a simple and elementary precaution to ensure that avoidable litigation is avoided, he cannot complain of an adverse cost order if the outcome of the trial is against him* [it]."

[37] The nature of the proceedings is a claim in delict against a State institution. The difference in resources of the litigants is self-evident.

[38] Mrs Khabu the first plaintiff, is the widow of the deceased and the second and third plaintiffs are his children. The deceased was the breadwinner of the family and the financial hardship that befell the plaintiffs due to his untimely death is unimaginable.

[39] On the other hand, the Municipality has the resources to collect revenue through taxes, levies and the like.

[40] In the answering affidavit filed on behalf of the Municipality, the Municipality bemoaned the dire financial straits it was in. Firstly, this should have been all the more reason for the Municipality to seriously consider and accept the offer in the prevailing circumstances.

[41] Secondly and as stated *supra*, the Municipality has the means to generate revenue. The fact that the revenue is not properly managed, should not prejudice the plaintiffs. This is eminently a matter where justice and public policy demands that the Municipality should be held liable for the unnecessary costs occasioned by its failure to accept a patently reasonable offer. Such an order will follow.

Costs of Ndlovu Plant Hire CC

[42] The plaintiffs rely on the provisions of Rule 10(4)(b)(ii) for the relief claimed in respect of the costs of Ndlovu. The rule provides that the court may order an unsuccessful defendant to pay the costs of a successful defendant. The Municipality alleged that the plaintiffs' damages were caused by the wrongful and negligent conduct of the excavator operator. The plaintiffs joined Ndlovu as a defendant in the action and based their claim against Ndlovu on its vicarious liability for the conduct of the excavator operator.

[43] Due to the control Breedt had over the excavator operator's conduct, I found that Ndlovu was not vicariously liable for the conduct of the operator of the excavator.

[44] For the reasons advanced in respect of the secret offer of settlement and in exercising my discretion in terms of Rule 10(4)(b)(ii), I deem it fair and reasonable that the Municipality be held liable for Ndlovu's costs on a party and party scale.

[45] The plaintiffs' prayed for an order that the costs of this application also be awarded on an attorney own client scale for the same reasons advanced in respect of the secret offer of settlement. Should the court award party and party scale costs, the plaintiffs will be responsible for the costs over and above the party and party scale costs.

[46] The necessity to bring this application, furthermore, flows from the fact that the Municipality did not act reasonably when it received the plaintiffs' secret offer of settlement.

[47] In the result and in the exercise of my discretion in this regard, a cost order as prayed for will follow.

ORDER

[48] In the premises, I grant the following order:

1. The plaintiffs' application for reconsideration of the costs is granted.
2. Paragraphs 2 and 3 of the order granted on 1 February 2021 relating to costs and related aspects are replaced with the order set out below:

"*1. The First Defendant is declared to be liable for the plaintiffs' taxed or agreed party and party costs of the separated issue pertaining to liability on the High Court scale up to 21 September 2020 and thereafter on the scale as between attorney and own client, which costs shall include, but not necessarily be limited to the following and subject to the discretion of the taxing master where such a discretion exists, the following:*

1.1 The fees consequent upon employment of senior counsel, including the full day fees for 2, 3, 4 and 5 November 2020 and 7 December 2020;

1.2 The fees and costs of heads of argument prepared by counsel;

1.3 The costs of obtaining an expert engineer's report and any addenda thereto from Mr W du Preez, a civil engineer, the costs of his attendance at consultations in preparation for trial and his qualifying and reservation fees consequent upon his attendance at the trial (not limited only to the day on which he testified);

1.4 The travelling and subsistence expenses, if any, of all witnesses who were present at court on 2 and 3 November 2020;

1.5 The costs of employing an interpreter on 2 and 3 November 2020;

1.6 The costs, fees and expenses consequent upon, pertaining to or flowing from the joinder of the erstwhile second defendant and the third defendant (which costs shall be considered to be costs in the cause for purposes of the judgment of Hattingh AJ of 8 March 2018 and which shall include the reserved costs of the plaintiffs' opposed application to amend to introduce the issue of vicarious liability of the defendants pursuant to their notice in terms of Rule 28(1) of 15 April 2020);

1.7 The reserved costs, if any, of the trial set down for 27 May 2020.

2. *The first, second and third plaintiffs and Mr Thamsanqa ("Jomo") Nkhukhu are declared necessary witnesses.*

3. *The first defendant shall pay the third defendant's taxed or agreed party and party costs of the separated issue pertaining to liability on the High Court scale (including the reserved costs, if any, of the trial set down for 27 May 2020 but excluding the reserved costs of the plaintiffs' opposed application to amend to introduce the issue of vicarious liability of the defendants pursuant to their notice in terms of rule 28(1) of 15 April 2020).*

4. *The first defendant shall pay the plaintiffs' taxed or agreed attorney and own client costs of this opposed application on the High Court scale which shall include, but not be limited to, the full day fee of senior counsel for 17 June 2021 and preparation of heads of argument."*

Schleyer and Another v Marschall (2020/819) [2021] ZAGPPHC 540 (19 August 2021):

Security for costs- *peregrinus*, resident in Germany- court is thus vested with a discretion to determine whether or not to order security for costs on consideration of the particular facts of the case.It is neither in accordance with modern commercial needs, nor just and equitable to impose the burden of having to provide security upon a *peregrinus* plaintiff, where the plaintiff resides in a civilised country with a civilised legal system, and where there is nothing preventing an *incola* defendant from instituting proceedings against the *peregrinus* plaintiff in his own country

1. This is an Application brought by the First and Second Applicants against the Respondent for payment of security for costs.

2. The First and Second Applicants are respectively the First and Second Defendants in the main action.

3. The Respondent in the security for costs application is the Plaintiff in the main action.

4. The Respondent is a *peregrinus*, resident in Germany. The Applicants seek security for their costs to be incurred in the pursuance of their defence to the main action, in the sum of R300 000.00 (three hundred thousand Rand), alternatively in an amount to be determined by the Registrar. In addition, they seek security for the costs of the claim in reconvention filed by them, which costs they also anticipate to be in the amount of R300 000.00 (three hundred thousand Rand), alternatively in an amount to be determined by the Registrar.

5. The Respondent is the owner of an immovable property situate at […], […], Gauteng ("the immovable property").

6. The Applicants are the occupiers of such immovable property and were the tenants of the Respondent in respect thereof. They have been tenants of the Respondent for many years, under several leases which have been renewed, from time to time.

7. The immovable property is owned by the Respondent and is unbonded.

8. The Applicants attached to the Application a valuation in respect of the immovable property dated 25 November 2019. In accordance with such valuation, the property was valued then at R6 750 000.00 (six million seven hundred and fifty thousand Rand).

31. An *incola* defendant does not have an unqualified *prima facie* right to be furnished with security for costs by a *peregrine* plaintiff. Historically, our courts have refused to order a *peregrine* plaintiff to provide security for costs in the event that the plaintiff owns immovable property in South Africa, unencumbered.

32. A court is thus vested with a discretion to determine whether or not to order security for costs on consideration of the particular facts of the case. **[1]**

33. Factors which come into play are the *peregrine's* impecuniosity, whether the order compelling security would deprive him of the right to litigate against the *incola*, whether he is economically active within the jurisdiction of the court and whether the execution of the court's judgment is possible in the jurisdiction in which he resides. However, none of these factors are decisive.**[2]**

34. An applicant in an application for security for costs must demonstrate that there is a probability that the Respondent would be unable to pay the Applicant's costs, if awarded.**[3]** In *casu*, there is no evidence of any substance to suggest that the Respondent would not be in a position to pay such costs. Ms Ipser placed emphasis on this vital point in her argument, with reference to the principle established in Giddey.

35. The onus falls to be discharged by credible testimony which demonstrate that there is logical reason to believe that a *peregrinus* will be unable to pay the Applicants' costs, should it fail in the action.**[4]**

36. Whilst a *peregrine* plaintiff may be called upon to provide security for a claim in reconvention by an *incola* defendant, a court would be slow to conclude that considerations of fairness and equity favour the granting of such security and would only do so in exceptional circumstances, if at all.**[5]**

37. It is neither in accordance with modern commercial needs, nor just and equitable to impose the burden of having to provide security upon a *peregrinus* plaintiff, where the plaintiff resides in a civilised country with a civilised legal system, and where there is nothing preventing an *incola* defendant from instituting proceedings against the *peregrinus* plaintiff in his own country.

38. Applying the facts of this case to the applicable legal principles set out in the aforementioned judgments, I am not satisfied that the Applicants have established a right to payment by the Respondent of security for their costs in the sum of either R600 000.00, or for any other amount.

39. In the circumstances, I make the following Order:

39.1. The Application is dismissed;

39.2. The Applicants are ordered to bear the cost of the Respondent in relation to this Application, upon the scale as between party and party.

Eskom Holdings SOC Ltd v Emfuleni Local Municipality and Others (76183/2019) [2021] ZAGPPHC 546 (21 August 2021)

Disputes between state organs- *An organ of State involved in an intergovernmental dispute*- The main defence is founded on section 41(3) of the Constitution read with *section 41(1) of the Intergovernmental Relations Framework Act, No 13 of 2005.*

1. This is an application for summary judgment in terms of which the plaintiff claims from the first defendant:

1.1. In respect of claim 1 – payment of R25 million and interest which is the outstanding balance owed by the first defendant to the plaintiff in terms of an acknowledgement of debt and repayment agreement concluded between the parties.

1.2. In respect of claim 2 – payment of R1 326 797 999,75 and interest for electricity supplied to the first defendant by the plaintiff in terms of the electricity supply agreement for which the plaintiff was not paid.

1.3. In respect of both claims the plaintiff claims attorney and client costs.

2. The existence of the acknowledgment of debt and repayment agreement concluded between the plaintiff and the first defendant is not in dispute as well as the existence of the electricity supply agreement between the plaintiff and the first defendant.

3. The first and second defendants in their plea disputed the validity of the acknowledgement of debt and repayment agreement on the basis that the document was not signed by the plaintiff (Eskom) and also that the debts based on the electricity supply agreement between the parties was not correct as it was erroneously calculated by the plaintiff. Both those defences appear to be disingenuous and opportunistic and merit no further attention. The plaintiff in its affidavit supporting summary judgment annexed extracts from affidavits made in a previous case which I shall refer to later in which both the acknowledgement of debt and the repayment agreement as well as the debt owed by the first respondent to the plaintiff is admitted. That brings me to the main defence raised by the first and second defendants.

4. The main defence is founded on section 41(3) of the Constitution read with **section 41(1)** of the **Intergovernmental Relations Framework Act, No 13 of 2005**.

4.1. Section 41(3) of the Constitution provides as follows:

"*41(3) An organ of State involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose and must exhaust all other remedies before it approaches a Court to resolve the dispute."*

4.2. **Section 41(1)** of the **Intergovernmental Relations Framework Act provides** as follows:

"*41(1) An organ of State that is a party to an intergovernmental dispute with another government or organ of State may declare the*

dispute a formal intergovernmental dispute by notifying the other party of such declaration in writing."

5. The allegations of the first and second defendants is that the plaintiff failed to declare a dispute in terms of Section 41(3) of the Constitution and in terms of **Section 41(1)** of the **Intergovernmental Relations Framework Act prior** to instituting summons against the first defendant in this matter. On that basis the first and second defendants ask for dismissal of the plaintiff's claims.

It follows that a dispute between the first defendant and the plaintiff has been declared and was fully ventilated in Court which referred the matter back to *inter alia* the plaintiff, the first respondent, the National Energy Regulator and the Premier of Gauteng Provincial Government to be resolved. The matter was not resolved, the debt is not serviced by the First Defendant and keeps on spiralling. That necessitated the Plaintiff instituting this action. It follows that the defence raised by the first and second defendants that the action is premature for want of compliance with the provisions of section 41 of the Constitution and Act 13 of 2005 cannot be upheld. The dispute was declared and was incapable of resolution within the matter of 6 months from date of the judgment in the Cape Gate matter. The inevitable result is that the plaintiff has no other alternative to institute this action to claim redress from the first defendant to resolve the matter. I am driven to the conclusion that the application for summary judgment must succeed. I make the following order:-

Order

Summary judgment is granted to the plaintiff as follows:-

1. Claim 1:-
    1.1. Judgment for the sum of R25 million;
    1.2. Interest on the amount of R25 million at a rate per annum equal to the prevailing prime overdraft rate charged by First National Bank of Southern Africa plus 2,5% calculated from the date of judgment until date of final payment;
    1.3. The first defendant shall pay the plaintiff's costs on a scale of attorney and client.
2. Claim 2:-
    2.1. First defendant is ordered to pay to plaintiff the sum of R1,326,797,399,75;
    2.2. First defendant is liable for interest on the sum of R1,326,797,399,75 at the rate per annum equal to the prevailing prime overdraft rate charged by First National Bank of South Africa plus 2,5% calculated from 1st of October 2019 until date of final payment;
    2.3. First defendant shall pay the plaintiff's costs on an attorney and client scale.

Cheickhart General Sales (Pty) Ltd v B & W Autobody Experts CC T/A Autobody Experts (UM 156/2020) [2021] ZANWHC 22 (18 August 2021)

Anton Piller orders – onus on return day-Cheickhart had earlier obtained an Anton Piller order, granted ex parte against Autobody Experts. The purpose was to secure bank statements, invoices and information on laptops and data storage to support Cheickhart's case that Autobody was unlawfully competing with it.**Petersen AJ** discusses reconsideration on the return date of the rule nisi; the defences raised by Autobody; the purpose and requirements of Anton Piller orders; and the ***Friedshelf*** and ***Frangos*** cases regarding onus on the return day.
The rule nisi is confirmed.

[1] This opposed application comes before this Court on the return date of an *Anton Pillar* order granted *ex parte* on the 13th August 2020 by Mahlangu AJ which was duly executed. It is apposite to appreciate the relief sought on the return date to have regard to the terms of the order granted as aforesaid:

> 3. The Respondent and/or any other adult person in control of any digital devices or media on the premises or in the vehicle(s) or in the "strong room(s)"/safes, must forthwith disclose to the search persons any passwords and/or procedures required for effective access to such digital devices or media for the purposes of paragraph 2 hereof.
>
> 4. In the event that the Respondent and/or any other adult person in charge or control of the premises refuses to grant access to the premises and to the Respondent's vehicle(s) on the premises, or to the "strong room(s)/safes" on the premises a member of the South African Police Service, assisted, if necessary by a locksmith, may obtain access to the premises and/or vehicle(s) as necessary.
>
> 5. Subject to paragraph 13 hereof, the Sheriff is authorised to attach any items pointed out by any of the aforesaid persons and any digital devices or media, and any forensic copies of hard drives of any digital devices or media, or print-outs of any such items (collectively, 'the identified items").

Ex Parte: Van Schalkwyk (422/2017) [2021] ZANWHC 23 (19 August 2021)

Jurisdiction-readmission as attorney- need not be at court who removed the applicant

[1] This is an application for readmission of the applicant, a former attorney, struck from the roll of attorneys on the 17th June 2010 in the Gauteng Division, Pretoria ("the readmission application").

[2] The applicant was admitted as attorney on the 4th February 2003 in terms of section 15 of the Attorneys Act 53 of 1979 (which Act has since been repealed by the Legal Practice Act 28 of 2014: "the LPA"), and practiced as a sole practitioner under the name and style of Van Schalkwyk Attorneys and Van Schalkwyk, Van der Merwe & Grobler Attorneys Incorporated in Rustenburg. At the time the applicant was struck from the roll of attorneys he had abandoned his practice. The Law Society of the Northern Provinces ("LSNP") filed an application for the striking of the applicant from the roll of attorneys in 2008. During August 2008, the LSNP, filed a supporting affidavit as more claims had been lodged with the attorney's fidelity fund. The applicant failed to file an answering affidavit and the striking off application was unopposed.

The attitude of the Legal Practice Council to the application for readmission

[3] The Legal Practice Council ("the LPC"), North West does not oppose the application for readmission. In correspondence dated the 23rd March 2021 under hand of the Director of the North West Provincial Office of the LPC, directed to the Registrar of this Division, the LPC states as follows:

"We confirm that the Applicant served a copy of the above application on the North West Provincial Office of the Legal Practice Council in compliance with the provisions of Section 24(2)(d) of the Legal Practice Act, No. 28 of 2014 as amended, read with Rule 17.7 of the Rules promulgated in terms of the Act.

We further confirm that the National Council of the Legal Practice Council on 13 March 2021, considered the resolution of the Disciplinary Oversight Committee held on 13 February 2021, and held that the Council has no objection to the Applicant being re-admitted to practice and authorised to be enrolled as an attorney.

The Council further noted that the application is not brought in the Court that heard the suspension application but leaves the matter of jurisdiction for consideration by the Honourable Court.

Kindly convey the above information to the Honourable Court for consideration."

[4] In *Swartzberg v Law Society of the Northern Provinces* **[2008] ZASCA 36**; **[2008] 3 All SA 438** (SCA); **2008 (5) SA 322** (SCA) at paragraph **[18]**, the Supreme Court of Appeal noted that the attitude of professional bodies concerned is a factor of some importance. The attitude of the LPC in the present application must be seen against the established principles of the role it plays in applications for admission and readmission.

[5] The LPC stands in a position of authority over its members where it is bound by law to oversee issues which impact on the regulation of the profession of legal practitioners and at its core to exercise its disciplinary powers over its members. The disciplinary component is essential to protect the image of the profession in general as an honourable profession underscored by the highest standard of ethics and to

protect the public interest. The disciplinary oversight of the LPC over its members extends to its obligations to the Court when the Court is enjoined to exercise its jurisdiction not only in applications brought before court for striking but equally so and probably more importantly in applications for re-admission.

[6] In the present application, the applicant approaches this Court on an *ex parte* basis. The LPC has a material interest in the matter and should preferably be cited as a respondent as it should not be required to bring an application to intervene in the proceedings, if it were to oppose the application. The LPC is a party with a direct and material interest in the application, particularly in respect of its statutory role and duty towards the Court in matters affecting the profession and the image of the profession. The LPC in the present application for readmission must certify compliance with the provisions of the LPA for readmission of the applicant. As the Court is to consider whether or not the applicant is a fit and proper person to be readmitted to the profession, it is incumbent on the LPC to make that assertion to Court.

Jurisdiction

[9] The issue of jurisdiction of this Court to consider the readmission application was raised with Counsel for the applicant considering the fact that the applicant was struck from the roll of attorneys by the Gauteng Division, Pretoria. The applicant indicates in the founding affidavit that he initially intended launching the application in the Gauteng Division. He, however, contends that on a reading of Rule 17.1.2 of the South African Legal Practice Council Rules, which deals exclusively with readmission of attorneys domiciled in the area of jurisdiction of a particular court, that he is domiciled in this Court's area of jurisdiction and that this Court has the requisite jurisdiction. This submission as gleaned from the first supplementary affidavit of the applicant and is premised on information received from a Mrs Jordaan from the LPC.

[10] The final Rules in terms of section 95 (1), 95 (3) and 109 (2) of the LPA was published in Government Gazette 41781 on 20 July 2018. Part V of the Rules of the Legal Practice Council deals, *inter alia*, with applications for admission and enrolment of legal practitioners. Rule 17(1) deals with persons seeking to be admitted to practise and be enrolled as attorneys or as advocates under the LPA as follows:

"**PART V**

Professional Practice

17. Application for admission and enrolment as legal practitioners [sections 95(1)(k) and (t) read with sections 24(2)(d), 30(1)(a) and 30(b)(iii)]

17.1 A person seeking to be admitted to practise and to be authorised to be enrolled as an attorney or as an advocate under the Act –

17.1.1 must apply to a High Court in terms of the provisions of section 24(2) of the Act; and

17.1.2 must simultaneously lodge an application in terms of sections 30(1)(a) and 30(b)(iii) of the Act with the Council, through the Provincial Council where the applicant intends to practise (or in the case of a person who does not intend to practise, where that person is ordinarily resident), for the enrolment of his or her name on the roll of attorneys or advocates, or on the roll of non-practising attorneys or advocates, as the case may be, which application shall be treated as an application subject to the condition that the applicant is duly admitted by the High Court and authorised to be enrolled as a legal practitioner in terms of section 30 of the Act.

17.2 An application for admission and enrolment in terms of rule 17.1 must be in writing and must be accompanied by an affidavit by the applicant setting out the following information supported, where applicable, by documentary evidence:

17.2.1 confirmation of the jurisdiction of the Court;

…"

[11] As stated *supra*, the question of jurisdiction in an application for readmission in the present circumstances, is a novel issue. In *Nthai v Pretoria Society of Advocates and Others* (4496/2018) [2019] ZALMPPHC 33 (18 July 2019), the applicant who was struck from the roll of advocates in the Gauteng Division, brought an application for readmission as an advocate in the Limpopo Division. The issue of jurisdiction was raised only in the context of the Johannesburg Society of Advocates ("the JSA") and the Pretoria Society of Advocates ("the PSA") *locus standi* to oppose the application in the Limpopo Division. In that context the Supreme Court of Appeal found that the JSA and PSA had the requisite *locus standi*. No issue was taken, however, with the jurisdiction of the Limpopo Division to entertain the readmission application, either in that Court or the Supreme Court of Appeal, considering the fact that the striking off was granted by the Gauteng Division.

[12] In the present application, the applicant makes the allegation that he is domiciled in this Court's jurisdiction, has applied for readmission in this Division and has lodged the application with the LPC in the North West Province. He is also desirous to practice in the area of jurisdiction of this Court.

[13] The LPA unlike section 15(3) of the repealed Attorneys Admission Act, Act 53 of 1979, does not contain a provision for readmission of an attorney. The provisions of section 24 of the LPA are therefore to be construed as including an application for readmission. In an application for admission, one of the requirements for admission in a court of a particular Division is that the applicant must be

domiciled in that Court's area of jurisdiction. The applicant is domiciled in this Court's area of jurisdiction and on that basis this Court is enjoined with the necessary jurisdiction to consider the application.

Davidan v Polovin N O and Others (1674/2021) [2021] ZASCA 109 (5 August 2021)

Application for eviction under PIE – unlawful occupation –Consent to occupy – under an oral lease – termination – was consent lawfully terminated.

[1] The respondents are the trustees of the Botany Bay Trust (the Trust) that owns a house in Bantry Bay, Cape Town (the property). The appellant, Ms Petra Davidan, Ms Elizabeth Gunta, the housekeeper, and Ms Helene Schonees, the appellant's 83-year-old mother, occupy the property. On 13 September 2019, the Western Cape Division of the High Court (Hack AJ) granted an order in terms of s 4 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE), evicting the appellant (respondent in the court *a quo)* and all those who occupied through or under her, from the property.

[2] On 10 December 2019, the high court dismissed an application for leave to appeal. On 6 February 2020, this Court granted leave to appeal limited to the following issues:

'(a) Whether any right that the appellant may have had to occupy the property had been lawfully terminated?

(b) Whether Mrs Gunta and Mrs Schonees had a direct and substantial interest in the relief sought in the court a quo and were therefore necessary parties who ought to have been cited as co-respondents?'

[3] A chronology of the relevant facts is set out below. The appellant, a real estate agent and the late Mr Mercure Paizee (Mr Paizee) met on 15 March 2002, after he had separated from his ex-wife. Mr Paizee was residing at the property at the time. Ms Gunta moved into the property during May 2002. Soon thereafter, the appellant and the deceased started co-habiting at the property. The property was the matrimonial property of the deceased and his ex-wife. In 2004 the deceased and his ex-wife divorced.

[4] The property was registered in the name of Mr Paizee's ex-wife. Following an acrimonious divorce, and in terms of the settlement agreement, the property was acquired by and registered in Mr Paizee's name. Compelled by dire financial distress, Mr Paizee agreed after discussions between him and Mr Gamsu that a 'capital realization trust' be created to undertake a development on the property. The development of the property did not materialise. Instead, the Trust was created on 31 March 2004. Mr Paizee transferred the property to the Trust. Mr Paizee had a 50% beneficial interest in the Trust, which was subsequently reduced to 40%. In 2004 a mortgage bond was registered over the property in favour of Absa bank for the standard period of 20 years.

[5] Sometime in 2011, the appellant took out a Discovery Life Policy over the life of Mr Paizee. The purpose of the policy was to ensure that in the event of the deceased's death, their joint obligations to the Trust in respect of the mortgaged bond and municipal charges would be covered. The policy recorded that in the event of either one of them dying, the funds from the policy was to be utilised in full for the purpose of running the property and in particular, settling all outstanding municipal charges since the bond would be settled in full. This was not disputed. In terms of the policy, the benefit amount was reflected as R3 571 428.57 and the total cover was for R5 000 000.00. According to the Trust, the amount outstanding on the bond as at the 11 May 2018 was R2 160 226.15. The appellant submits that R 1 411 202.42 would be left and that this would be enough to settle any outstanding municipal charges. This allegation is met with the following response by the trust:

'[T]he first respondent has not been able to provide any proof that she arranged for the Discovery Life Policy or that she was the one that paid the monthly premiums.'

[6] It is not disputed that on 12 July 2004, the appellant and the trustees of the Trust entered into a one-year lease agreement for the property, which would be subject to one months' notice on either side. The rental payable by the appellant was R20 000 per month. After the expiry of this lease, the appellant alleged that she and the deceased entered into an oral agreement with the Trust, represented by one of the trustees, Mr Gamsu. The terms of the oral agreement were to the effect that the appellant and Mr Paizee would be entitled to occupy the property and in return they would pay the bond instalments and the municipal rates for the duration of the bond.

[7] On 9 March 2017, after the removal of Mr Gamsu and Mr Paizee as trustees, Mr Polovin and Mr Proust were appointed as the new trustees of the Trust. In 2017, tensions developed between Mr Paizee and the appellant. On 12 September 2017, the appellant found Mr Paizee in his study with a fatal gunshot wound.

On appeal from: Western Cape Division of the High Court, Cape Town (Hack AJ sitting as court of first instance):

1 The appeal is upheld with costs.

2 The order of the court a quo is set aside, and substituted with the following:

'The application is dismissed with costs.'

Wirth v Wirth and Others (13801/2020) [2021] ZAWCHC 163 (23 August 2021)

Rule 28(8) and raising exception to an amendment-Defendants delivered a Rule 23(1) notice taking exception to plaintiff's particulars. After plaintiff delivered the amended particulars, defendants delivered a second Rule 23(1) notice taking

exception to the amended particulars. Plaintiff seeks an order setting aside the second notice, contending that it is an irregular step - Rule 30(1). **Nuku J** discusses whether the Uniform Rules preclude a defendant from taking an exception to plaintiff's amended particulars of claim where such defendant has not objected to the plaintiff's notice of intention to amend his particulars of claim; the Wendy Machanik case; and the defendants' contention that Rule 28(8) provides for consequential adjustments and steps contemplated in Rules 23 and 30 for parties affected by an amendment.
The application is dismissed with costs.

[1] Do the Uniform Rules of Court preclude a defendant from taking an exception to the plaintiff's amended particulars of claim where such defendant has not objected to the plaintiff's notice of intention to amend his or her or its particulars of claim? That is the principal question that must be answered in this application.

[2] The applicant, who is the plaintiff in the main action, brings this application in terms of Rule 30, to set aside a notice in terms of Rule 23 (1) filed on 17 February 2021 by the first to tenth and sixteenth to eighteenth defendants. I shall henceforth refer to the applicant as the plaintiff, and the first to tenth and sixteenth to eighteenth defendants as the defendants.

[3] The plaintiff instituted an action against the eighteen defendants seeking the following orders:

(a) declaring his removal as a director of the fourth to tenth defendants to be unlawful and of no legal effect;

(b) directing the eleventh defendant to rectify its register by reinstating the plaintiff as a director of the fourth to tenth defendants;

(c) declaring the first to third defendants to be delinquent directors in terms of **section 162** (2) and **162** (5) of the **Companies Act 71 of 2008**; and

(d) costs of suit.

[4] The defendants and the fifteenth defendant filed a notice of intention to defend. Shortly thereafter the plaintiff withdrew the action against the fifteenth defendant. The defendants failed to deliver their plea within the time period prescribed by the Rules. This caused the plaintiff to deliver its first notice of bar on 12 November 2020.

[5] The defendants responded by delivering their first notice in terms of **Rule 23** (1), indicating their intention to take an exception to the plaintiff's particulars of claim on the basis that, in certain instances, the plaintiff's particulars of claim lack averments necessary to sustain the plaintiff's claim, and that they are also vague and embarrassing in various respects. The plaintiff, in turn, responded by delivering a notice of intention to amend his particulars of claim in terms of **Rule 28.**

[6] The defendants did not object to the plaintiff's proposed amendment. The plaintiff thereafter effected the amendment by delivering the amended particulars of claim. Once again, the defendants failed to deliver their plea within the prescribed time limits and the plaintiff delivered a second notice of bar on 16 February 2021.

GOVAN MBEKI MUNICIPALITY v NEW INTEGRATED CREDIT SOLUTIONS (PTY) LTD 2021 (4) SA 436 (SCA)

Review — Grounds — Legality — Self-review — Concern expressed about frequency of late self-review applications by organs of state where contract periods have run their course and no sanctions for aberrant officials.

The present matter heard in the Supreme Court of Appeal was an appeal and cross-appeal against a self-review action instituted on 21 June 2017 in the Middelburg High Court by the Govan Mbeki Municipality (the GMM) in respect of a contract it had concluded 22 months earlier, on 12 September 2015, with the company New Integrated Credit Solutions (Pty) Ltd (NICS) to provide the GMM with debt management services for a period of three years, from the effective date 1 September 2015 to 31 August 2018. In procuring such services, the GMM relied on an agreement another municipality, the Newcastle Municipality, had secured with NICS after the latter's tender was accepted in terms of the process initiated by the municipality seeking bids for the provision of debt management services. Regulation 32 of the Municipal Supply Chain Management Regulations entitled the GMM to procure services in such a manner, as long as, inter alia, 'the contract has been secured by that [other] organ of state by means of a competitive bidding process . . .' and there 'are demonstrable discounts or benefits . . .' for the municipality to do so. That Newcastle contract, concluded on 30 April 2015 — whose regime the GMM essentially adopted — provided that NICS would collect municipal debts and pay them to Newcastle Municipality, in respect of which services NICS would earn a commission of 16,5% of collected debts exceeding 60 days *and 2,5% of collected debts younger than 60 days.* Critically, the tender notice had *only* called for bids, and NICS and the other tenderers had only bidded, in respect of the *management of debts older than 60 days*; the 2,5% was added subsequent to Newcastle Municipality's decision to appoint NICS*.* The High Court held that the clause granting NICS the 2,5% commission had not been preceded by a competitive bidding process. Further, it held that permitting the GMM such commission was not cost-effective, because persons in that category included those who would have paid anyway, without the need for debt collectors, and that if other bidders had been allowed to bid for both, the percentage commission on either category might have been lower. The court concluded that the inclusion of the additional 2,5% commission had breached reg 32, as well as s 217 of the Constitution, which required that, when an organ of state in the national, provincial or local sphere of government procured goods or services, it had to do so in accordance with a system that was fair, equitable, transparent, competitive and cost-effective. *The court set aside the additional clause, but left the rest of the contract in place*.
The Supreme Court of Appeal confirmed that action brought by the GMM, as a self-review by an organ of state, was in nature a legality review raising constitutional issues (see [33] – [34] and [58]). And, as such, the applicant had to bring the review

without unreasonable delay, the clock starting to run from when it had first become aware, or reasonably ought to have become aware, of the action, subject to the proviso that if the delay was unreasonable, it could be overlooked, should the interests of justice so demand. (See [34] – [35].)

As to the question of delay, the SCA, taking into account that state officials were expected to adhere to a higher standard of conduct, inviting scrutiny of the conduct of the officials concerned, concluded that the GMM ought to have known or have been aware, *at the time (August 2015) it received all the bid documents it had requested from Newcastle Municipality, and certainly at the time of the conclusion of the agreement (September 2015)*, that the agreement was of questionable validity. (See [48].) The SCA, in conclusion, characterised the delay in respect of the initiation and finalisation of proceedings, for which the GMM had offered no explanation, as being unreasonable. (See [50] – [52].)

The SCA went on to consider whether the delay could be overlooked. It held that it could not (see [58]), having regard to the following factors:

- The merits of the matter, including the degree of non-compliance with statutory prescripts. The SCA held that there was no doubt that there was egregious non-compliance by the Newcastle Municipality with reg 32 (see [53]): there had been no competitive bidding process in relation to the 2,5% add-on; and there were no demonstrable discounts or benefits for the Newcastle Municipality (considering, with respect to the 2,5% commission, that a substantial, if not the greater, percentage of consumers would pay their accounts within the first 60-day period without the need for debt collectors; and, regarding the contract in its entirety, commission owing to NICS was calculated with respect to *all amounts* paid into the municipal accounts regardless of whether they were connected to NICS' efforts to recover debt). Further, in breach of reg 51, there was no cap placed on the commission to be earned. (See [53], [54] and [61].)
- The conduct of the GMM itself. The SCA held that there had been a most serious and egregious breach by officials of the GMM of their constitutional duties. There had been no concern shown for good governance, or what was in the best interests of its customer base; no scrutiny to see whether any of the material prescripts of the applicable regulations were met; and no consideration given to the constitutional imperatives of fair, equitable, transparent, competitive and cost-effective procurement of services. (See [55].)
- Potential prejudice to affected parties. The SCA held that there was prejudice to the public purse when remuneration was agreed without regard to efficiencies and costs savings and when it was open-ended and there were no means of measuring effort against results. There was also prejudice to a service provider when it had performed apparently extensive services without remuneration. (See [57].)

Nevertheless, the SCA held that, despite the delay that could not be overlooked, the agreement in question was clearly unlawful, and, in accordance with the dictates of s 172(1)*(a)* of the Constitution and as was clarified in recent constitutional jurisprudence, it had a duty to declare it so (see [41] and [58]). The SCA, however, in line with the wide powers granted it by s 172, which were bounded only by considerations of justice and equity (see [59]), ordered that NICS not be deprived of the benefits that had accrued under the agreement in relation to commission earned on debts older than 60 days (see [60] – [63]). The SCA, however, declined to come to NICS' aid in respect of debts younger that 60 days: In relation to the 2,5% add-on commission, which it described an 'unwarranted benefit' (see [53] and [61]), the SCA held that NICS must have known it was in an unjustifiably advantaged position to

other bidders, having not been asked, as a *qui pro quo*, to revisit the commission on which it had put in a bid; the SCA concluded that NICS had been complicit in the unlawful conduct of the GMM (see [62]).
In the course of its judgment, the SCA noted the controversy that surrounded the stance adopted by the Constitutional Court in *Gijima*, to the effect that s 172 of the Constitution obliged a court to declare invalid conduct that was indisputably and clearly inconsistent with the Constitution, despite the existence of an unreasonable delay on the part of the municipality concerned in bringing such a review that could not be overlooked. The SCA expressed itself bound to follow such approach set by the Constitutional Court. It nevertheless expressed concern at the phenomenon of self-reviews, which it described as a burgeoning and troubling one. It stressed that corruption and maladministration were inconsistent with the rule of law and were the antithesis of open, accountable and democratic government. The functionaries involved, it noted, were almost never subject to scrutiny and sanctions and in some cases falsely assumed the moral high ground. The problem, the court held, was that corrective action, by way of self-review, was usually sought a considerable time after an impugned decision was made and disciplinary steps against those concerned might face time problems. However, if the maladministration or corruption were discovered late by conscientious officials seeking to take corrective and appropriate action, the SCA added, courts might insist in the future that public authorities seeking time indulgences set out the steps they had taken in relation to the misconduct by errant officials that resulted in the need for corrective action, including, but not limited to, disciplinary action, and, where appropriate, criminal proceedings; all the more so, if the corruption or maladministration was hidden from disclosure by inept or corrupt officials. Further, the SCA stated, if a service provider was complicit, then questions might be asked about what steps were taken by the public authority in relation to such complicity. Beyond the courts, these aspects might even be catered for by legislation. The SCA cautioned that 'all of us', in every branch of the state and civil society, had to make every effort to protect public moneys and ensure that South Africa's necessary developmental goals as envisaged by the Constitution, in the interest of all our people, were met.

COTTY AND OTHERS v REGISTRAR, COUNCIL FOR MEDICAL SCHEMES AND OTHERS 2021 (4) SA 466 (GP)

Appeals — Common-law principle of automatic suspension pending determination of appeal — Application to administrative appeals — Discussion.

The first to third applicants were members of the third-respondent medical aid scheme, Discovery (Discovery), and the fourth applicant a member of the fourth respondent medical aid scheme, Medshield (Medshield). The applicants had applied to their medical schemes for funding in respect of certain medical treatments of which they were in need. They were unsuccessful in their applications. So, in terms of s 47 of the Medical Schemes Act 131 of 1998 (the Act), they raised complaints with the Registrar of Medical Schemes. After the Registrar found against them, the applicants, in terms of s 48 of the Act, appealed, successfully, to the appeal committee of the Council for Medical Schemes. Subsequently, Discovery and Medshied in terms of s 50 of the Act appealed to the Appeal Board against the Council's decision under s 48(8). In the meantime, the medical schemes declined to

act upon the decision of the Council. This prompted the applicants to address a letter to the Council asking that it urgently enforce the appeal committee's ruling in terms of s 48(8), notwithstanding the appeal proceedings under way. The Council's answer by way of an email — that it was not in a position to accede to such a request — gave rise to the present application, heard before the High Court of South Africa, Gauteng Division, Pretoria.

The applicants sought the review and setting-aside of the Council's decision as encapsulated in the email. In terms of s 50(3), '(a)ny person aggrieved by a decision of the Registrar acting with the concurrence of the Council or by a decision of the Council under a power conferred or a duty imposed upon it by or under this Act, may . . . appeal against such decision to the Appeal Board'. Section 50, *dealing with appeals to the Appeal Board*, did not expressly state whether or not the lodging of an appeal in terms of s 50(3) suspended the decision which was the subject of the appeal; this was in contrast to ss 48 and 49, dealing with appeals to the Council and appeals against decisions of the Registrar, respectively, which explicitly stated it did. The failure of the legislature to employ express language in respect of s 50 led the applicants to argue that the lodging of an appeal to the Appeal Board in terms of s 50(3) *did not suspend the decisions of the appeal committee*. The Council, they argued, in failing to interpret the Act in such a manner, had committed a material error of law, and the decision in question should accordingly be set aside.

Held, that there was in existence a common-law principle to the effect that the lodging of an administrative appeal suspended the decision that was the subject of the appeal. Such a principle would apply in respect of administrative decisions, unless the statute in question provided otherwise. (See [64].)

Held, that there was nothing in the Act that displaced such common-law principle (see [84]).

- The legislature's decision to use express language in respect of ss 48 and 49 could be explained by the fact that there existed doubt as to whether the procedures provided for by ss 48 and 49 constituted appeals in the ordinary sense, and the legislature accordingly deemed it prudent to provide expressly that such procedures suspended decisions. In contrast, s 50 clearly constituted an administrative appeal, to which the common-law presumption applied. (See [67] – [68].)
- The entire structure of ch 10 of the Act was that decisions should not be implemented prior to the final decision by the Appeal Board (see [72]). Only the Appeal Board, by virtue of s 50(16)*(b)*, was granted the power to give effect to a decision on appeal. (See [6], [30] and [73].) There was no provision in the Act providing for the enforcement of s 48 or 49 decisions pending appeal in terms of s 50 or any penalty in this regard (see [74]).
- The interpretation of the Act favoured by the applicants, entailing as it did the need to reverse decisions that were immediately implemented, should the appeal be successful, would in fact undermine the objectives of the Act, namely to provide a quick, cost-effective and efficient remedy to medical schemes and their members (see [75] – [79]).

Held, accordingly, that the ordinary common-law principle was applicable and that an appeal in terms of s 50(3) suspended a decision by the Council in terms of s 48(8) (see [84]).

Held, in conclusion, that the applicants' review, being premised on an incorrect interpretation of the Act, had to fail (see [86].)

MDLEKEZA v GALLIE 2021 (4) SA 531 (WCC)

Prescription — Extinctive prescription — When it commences — Claim based on alleged sexual offence — Provision that prescription shall not run while creditor unable to institute proceedings because of mental or intellectual disability or disorder, or other factor court deems appropriate — Semble: Claimant to rely on provision to give explanation as to why claim instituted late — Amendment of s 12(4) of Prescription Act 68 of 1969 by Prescription in Civil and Criminal Matters (Sexual Offences) Amendment Act 15 of 2020.

In June 2020 the respondent, Ms Gallie — having seen a social media post recognising the contribution of the applicant, Mr Mdlekeza, to the University of Cape Town's actuarial science department — accused him on Twitter of having in 2012 (later amended to 2014) tried to force himself on her after locking her in a room at his home. She said she was able to escape and summon help. Ms Gallie tagged UCT in her tweet. The allegations were widely shared on social media and also picked up by the mainstream media. Ms Gallie did not press criminal charges against Mr Mdlekeza before she was contacted by UCT regarding her accusations, after which she laid a charge of sexual assault against him. UCT reacted by removing the posting praising Mr Mdlekeza and summoning him to discuss the allegations. His students were offered counselling and some no longer wished to be lectured by him. His consulting business was also negatively affected by the furore.
The matter was referred for oral evidence and both parties testified on the truth of Ms Gallie's statements. In her answering affidavit and oral evidence Ms Gallie stated that Mr Mdlekeza lacked the good character and reputation that would qualify him for the protection under the law of defamation. She justified her publication of tweets on the basis that she wanted to achieve social justice, make people aware that she was sexually assaulted and what Mr Mdlekeza was capable of, and wanted an apology. Mr Mdlekeza, having failed to extract an apology from Ms Gallie, instituted motion proceedings against her in October 2020. He sought an apology and R200 000 damages. Ms Gallie instituted a counterclaim for R250 000 for pain and suffering caused by the alleged assault. When Mr Mdlekeza pleaded that the counterclaim had prescribed because more than three years had passed since the alleged incident, Ms Gallie sought to avail herself of s 12(4) of the Prescription Act 68 of 1969, which had in December 2020 been amended, by the Prescription in Civil and Criminal Matters (Sexual Offences) Amendment Act 15 of 2020, to provide that prescription in claims based on an alleged sexual offence do not run while the claimant is unable to institute proceedings due to mental or intellectual disability or disorder, or for any other factor the court deems appropriate. *

In its judgment the court pointed out, in respect of the prescription defence, that under the rule of law the amendment effected by Act 15 of 2020 would apply only to future matters, not retrospectively. But even if the amended s 12(4) was applicable to the counterclaim, it would not have prevented its prescription since Ms Gallie offered no explanation why she did not pursue her claim sooner. Therefore, Mr Mdlekeza's challenge to the counterclaim on the basis of prescription would be upheld. (See [11] – [13].)
On the issue of defamation, the court pointed out that the message conveyed by the plain wording of the tweets, namely that Mr Mdlekeza was guilty of sexual assault and was a sexual predator, was plainly defamatory, particularly in view of the fact

that she took no steps against him for six years. The manner in which she elected to publish her tweets served to accuse and convict the applicant in the realm of social media without affording him an opportunity of defending himself or of challenging the allegations against him. (See [17] – [19].) On her own testimony, what she had presented in the tweets did not accurately reflect what transpired. She elected to exaggerate and embellish events, implying that Mr Mdlekeza had attempted to rape her, not kiss her as stated in her evidence, and that she had to fight her way out of the house instead of just unlocking the door and leaving. (See [23] – [27].) She was unable to explain how she would achieve social justice by tweeting six years after the incident, especially since she had not taken any steps to hold Mr Mdlekeza accountable in that period (see [28]). Ms Gallie failed to discharge the onus of establishing a defence rendering the publication lawful. The tweets were wrongful, intentional and of a defamatory character (see [30], [32]).
The court proceeded to the issue of the appropriate damages to be awarded. It emphasised that Ms Gallie had accused Mr Mdlekeza of sexual assault at a time of increased awareness of gender-based violence. In addition, the harm was ongoing since the accusations remained on her Twitter feed (see [34] – [35]). Taking into account the seriousness of the defamation, the nature and extent of the publication, the reputation, character and conduct of Mr Mdlekeza and the motives and conduct of Ms Gallie, the court awarded him damages of R65 000 (see [38]). It also ordered Ms Gallie to publish an apology on Twitter (see [46]).

NP v LP 2021 (4) SA 559 (ECE)

Judge — Retired judge — Actions against — Consent of head of court not required unless intended proceedings arising from execution of functions during post-retirement stint as acting judge or from finalisation of matters allocated during active service — Superior Courts Act 10 of 2013, s 47(1).

Judge — Actions against — Consent to — Aims of consent requirement being to protect judges against unmeritorious claims arising from execution of their judicial functions and prevention of improper interruptions of their courts' functioning — Consent requirement not applying to retired judges unless intended proceedings arising from post-retirement stint as acting judge or finalisation of matters allocated to them during active service — Superior Courts Act 10 of 2013, s 47(1).

Does s 47(1) of the Superior Courts Act 10 of 2013, which requires consent of the head of the court before civil proceedings may be instituted against any judge of that court, apply also to retired judges?
In answering this question the court ruled that s 47(1) seeks to protect judges against unmeritorious claims arising from the execution of their judicial functions and improper interruptions of the functioning of their courts. This meant that the qualified immunity bestowed by s 47(1) does not extend to retired judges, except where the intended proceedings arose from (i) the execution of their judicial functions as acting judges; or (ii) the finalisation of matters allocated to them during active service. (See [48] – [49].)

Ingosstrakh v Global Aviation Investments (Pty) Ltd and others [2021] 3 All SA 316 (SCA)

Appeal – Whether order is appealable – Appealability of an order is determined by, amongst other considerations, whether it is final in effect – Where order places position of parties in limbo, interests of justice require court's intervention, making order appealable.

Notice of bar – Defaulting party having no right to file plea until upliftment of bar.

Jurisdiction – Foreign peregrinus – Submission to jurisdiction – Requirements for jurisdiction – Submission of local peregrinus defendant does not suffice, without more, to establish jurisdiction at the suit of a foreign peregrinus plaintiff, and what is required is a ground of jurisdiction that establishes a link between the court and the subject matter of the litigation.

In terms of an insurance policy concluded between the appellant ("Ingosstrakh") and the respondents ("Global"), Ingosstrakh undertook to indemnify Global against all risks of loss or damage occasioned to certain specified aircraft. Shortly afterwards, one of Global's aircraft was seriously damaged. It had been agreed that in the event the cost of repair to damage caused to the aircraft exceeded 75% of the insured value, Global would be entitled to regard the aircraft as a constructive total loss ("CTL"), and Ingosstrakh would be obliged to pay Global the full insured value of US$2 500 000. Global declared the aircraft to be a CTL, and claimed payment from Ingosstrakh of US $2 500 000. Ingosstrakh refused to pay on the basis that the aircraft was not a total loss.

On 9 September 2015, Global issued summons against Ingosstrakh, with service effected on the agreed local address. Ingosstrakh served its notice of intention to defend the action. However, Ingosstrakh failed to deliver its plea, and on 4 November 2015 Global served a notice of bar in terms of rule 26 of the Uniform Rules of Court, in terms of which Ingosstrakh was afforded five days to deliver its plea. Instead of filing its plea, Ingosstrakh filed an application seeking the setting aside of the order authorising service of the summons and upliftment of the notice of bar.

No plea having been filed, Global applied for summary judgment, and Ingosstrakh brought a counter-application raising the question of whether there was an obvious omission in failing to deal with its prayer for the uplifting the notice of bar. Both applications were dismissed, leading to appeals by each party.

Held – The first question was whether the order refusing Global's application for default judgment was appealable. Appealability of an order is determined by, amongst other considerations, whether it is final in effect. The practical effect of the court *a quo*'s order was that the parties' respective applications were in limbo, and the interests of justice required the court's intervention to resolve the impasse. On that basis, the matter was appealable.

Ingosstrakh, having failed to file its plea within the stipulated five days, had no right to deliver its plea until the bar was uplifted. It did not appeal against the dismissal of its application for upliftment of the bar and so remained barred from pleading.

Despite that being the end of the matter, the court also considered whether Ingosstrakh would be entitled to condonation for its failure to file a plea. In terms of rule 27(3) of the Uniform Rules of Court, the court may, on good cause shown, condone any non-compliance with the rules. Thus, in order to succeed, Ingosstrakh had to show good cause why condonation should be granted for its failure to deliver its plea. One of the issues considered by the court in determining the existence of good cause was whether Ingosstrakh's special plea of jurisdiction constituted a valid defence to Global's claim. Both parties were foreign *peregrini* and the insurance policy stated that the parties agreed to submit to the exclusive jurisdiction of the courts of the insured's country of domicile in any dispute arising from the policy. Case law establishes that the submission of a local *peregrinus* defendant does not suffice, without more, to establish jurisdiction at the suit of a foreign *peregrinus* plaintiff. What is required is a ground of jurisdiction that establishes a link between the court and the subject matter of the litigation. Where Ingosstrakh submitted to the jurisdiction of the court *a quo*, that court enjoyed jurisdiction because, in addition to submission, the contract of insurance was concluded within its area of jurisdiction.

Addressing Global's claim, the court confirmed that the damage to the insured craft was such that the CTL threshold was breached.

The appeal was dismissed with costs.

Gigaba (born Mngoma) v Minister of Police and others [2021] 3 All SA 495 (GP)

Jurisdiction – Where alleged illegality of police actions directly affected applicant's rights, court having jurisdiction to intervene even before criminal proceedings properly commenced.

Urgency – Rule 6(12) of the Uniform Rules of Court sets out the principles for establishing urgency – A requirement for establishing urgency is an explanation for the applicant's belief that substantive redress in due course is unattainable.

The applicant was married to a former national Minister ("Mr Malusi Gigaba"). In July 2020, the fourth and fifth respondents, being police officials and members of the Hawks, arrived at the Gigaba home to investigate two alleged offences. The first was malicious damage to property in respect of a Mercedes Benz G-Wagon, and the second related to *crimen injuria* in respect of a WhatsApp message which had been sent from the applicant's cellular phone to an associate of Mr Gigaba. Two days after the first visit, the police officers returned and demanded all the applicant's electronic communication devices and gadgets in connection with the *crimen injuria* complaint. A week later, they arrested the applicant.

In the present application, the applicant challenged the lawfulness and constitutionality of her arrest and prosecution, and of the confiscation of the electronic communications equipment.

The respondents raised two points *in limine* regarding urgency and the court's jurisdiction to grant the relief sought and opposed the application on the merits.

Held – Rule 6(12) of the Uniform Rules of Court sets out the principles for establishing urgency. One of the requirements is an explanation for the applicant's belief that substantive redress in due course was unattainable. Based on the

respondents' conduct, the Court was satisfied that the applicant would not obtain redress in due course as she would be subjected to continuous violations to her dignity, restrictions of movement, invasion of privacy and abuse of power.

Regarding jurisdiction, the respondents argued that the criminal court in which the applicant was to be tried was the correct forum to deliberate on the constitutionality of the arrest and admissibility of evidence. The Court considered the applicant's interest in the matter, and whether the alleged illegality directly affected her rights. The complaint of confiscation of the applicant's property without a warrant and the refusal of the right to legal representation established such interest. The Court therefore did have jurisdiction in the matter. It also had to be established that it was in the interests of justice for the court to hear the application. The application of the principle of natural justice involves striking a balance between public and private interest.

The Court found compelling reasons why the issues raised by the applicant should be addressed by it. There were serious allegations of breach of the applicant's privacy and abuse of power by the applicant's politically affiliated husband who directed a domestic dispute to the Directorate for Priority Crime Investigation under the guise of a conspiracy to commit murder against him. The Court was satisfied that it should intervene before the criminal proceedings properly commenced.

In considering the lawfulness of the arrest, the Court could not find that the magistrate who issued the warrant acted *mala fides*. The next question was whether the police officers' decision to arrest the applicant was lawful and whether they were responsible for the malicious prosecution of the applicant. Where a warrant of arrest is requested under the pretext that it is acquired for a legitimate purpose while in fact the intention is not to use it for that purpose, but for another unauthorised purpose such person acts *mala fide* and *in fraudem legis*. The Court confirmed that the arresting officers abused their powers, presumably to avenge a complaint made by Mr Gigaba and not for any lawful purpose. The arrest was accordingly *in fraudem legis*. Based thereon, the confiscation of the applicant's possessions was unlawful. As the items seized had already been returned, the respondents were directed to restore all information unlawfully removed from applicant's electronic equipment.

Heathrow Property Holdings No 3 CC and others v Manhattan Place Body Corporate and others [2021] 3 All SA 527 (WCC)

Jurisdiction – Primary forum for adjudication of disputes in terms of the Community Schemes Ombud Services Act 9 of 2011 is the Ombud service and the adjudicators appointed by it, who are required to have suitable qualifications and necessary experience – High Court intended to be a secondary, supervisory forum which is to exercise review and appellate jurisdiction.

As owners of 3 loft apartments in a mixed-use sectional title scheme, the applicants objected to a conduct rule adopted by the body corporate of the scheme in 2003. The rule acknowledged the right which owners had to let their units, but sought to regulate the terms thereof in respect of short-term rentals for periods of less than 6 months. The respondents explained that the rule was adopted with a view to addressing security issues pursuant to an increase in short-term rentals of residential units in the scheme.

In 2017, other owners of loft units challenged the ambit and application of the rule by referring a dispute in this regard to the statutory Ombud, as provided for by the Community Schemes Ombud Services Act 9 of 2011. The complainants sought to set aside the rule on the basis that it was unreasonable, and also sought the setting aside of penalties levied by the trustees as fines. The adjudicator found the rule to be reasonable and fair.

Held – The application had been brought on an urgent basis without any basis therefor being established. Secondly, the applicants did not set out any instances where they were unjustifiably refused permission to let their units on a short-term basis since February 2020. Consequently, they had no standing to bring an application in that regard.

A further issue raised by the Court was that the application effectively sought to bypass the dispute resolution mechanisms which have been established by the Community Schemes Ombud Services Act. The issues which the applicants sought to have determined by the court fell squarely within the ambit of the Act which provided for the determination of such disputes by an adjudicator. The legislature intended that the primary forum for adjudication of disputes in terms of the Act is to be the Ombud service and the adjudicators appointed by it, who are required to have suitable qualifications and the necessary experience (not only in relation to the adjudication of disputes, but also in relation to community scheme governance). The High Court is intended to be a secondary, supervisory forum which is to exercise review and appellate jurisdiction (ie oversight over the discharge by the Ombud and its adjudicators of their duties and powers), and not an adjudicatory jurisdiction.

The matter was consequently struck from the roll, with costs, on the scale as between attorney and client.

Kedibone obo MK and another v Road Accident Fund and another and another as *amicus curiae* and a related matter [2021] 3 All SA 544 (GJ)

Settlement agreements – Judicial oversight – Judge President's Practice Directives requiring every settlement agreement involving the Road Accident Fund to be interrogated by a judge who is requested to make the settlement/consent draft order to determine whether or not the circumstances upon which order is premised are justified.

Settlement agreements – Role of attorneys – Any offer of settlement may be accepted after the legal practitioner has filed an affidavit with the court setting out details of the proposed settlement – Road Accident Fund is not empowered to make an out of court settlement in respect of a contingency fee agreement.

The Court was presented with two cases involving claims against the Road Accident Fund ("RAF") on behalf of children, where the parties had entered into settlement agreements and wished to have the agreements made orders of court. The plaintiff's attorney in both matters was the same person. The Court discovered that the amounts which it was being asked to order the RAF to pay, had already been paid by the RAF pursuant to an out of court settlement concluded between the RAF and the attorney (Ms Meistre). Investigations then revealed that Ms Meistre had received the money into her trust account and had then immediately paid herself fees out of the amount received from the RAF - without a court order and without the fees

charged being taxed by the Taxing Master. That was despite the court being led to believe by both legal representatives that the settlement agreement in each case would occur pursuant to the orders being granted.

Held – The Judge President's Practice Directive 2.1 of 2019 was directed specifically at settlement agreements involving the RAF, and requires every settlement agreement to be "interrogated by a Judge who is requested to make the settlement/consent draft order to determine whether or not the circumstances upon which order is premised are justified in relation to the law, the facts, and the expert reports upon which they are based." To subvert the process, some plaintiff's attorneys then attempted to oust the court's jurisdiction by claiming that they were entitled to enter into out of court settlements with the RAF and that the settlement court had no jurisdiction where neither the RAF nor the plaintiff sought that that the settlements be made an order of court. The court held that such an approach subverted the legislative scheme created by the Contingency Fee Act 66 of 1997. In terms of a further Practice Directive, the Taxing Master was not allowed to tax costs where claims were settled *inter partes* without a court order or discharge document. Settlement agreements in cases where the defendant is the RAF had to be enrolled in Settlement Court for the agreement to be made an order of court before the taxation may be enrolled.

The entire RAF system is underpinned by the legislative scheme in the Contingency Fees Act. Any offer of settlement may be accepted after the legal practitioner has filed an affidavit with the court (the section 4(1) affidavit) setting out details of the proposed settlement with reference to the likely prospects of success at a trial, why the settlement is recommended, an outline of the fees to be charged with reference to the difference between fees charged on settlement as opposed to the fees charged if the matter were to go to trial, and details that the client fully understands his position as far as the proposed settlement is concerned. Where there is a contingency fee agreement (which would rationally be the case in all RAF matters where action is instituted using the services of an attorney) the RAF is not empowered to make an out of court settlement. The making of payment without a court order, is incompetent and contrary to the statutory scheme which binds the RAF.

Compliance with the Contingency Fees Act in relation to children's claims involves a heightened duty on the attorney representing the child. The Court set out the information to be provided in the peremptory section 4(1) affidavit.

The Court explained who should be regarded as the guardian of the child, and when a curator *ad litem* should be appointed.

Finally, the management of funds awarded to children by the RAF was considered, with the various possible options described.

The settlement agreements in both matters before the court were invalid for want of compliance with the Contingency Fees Act. The Court issued an order setting out what was required of the parties before approaching the court again.

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