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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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Julies v Peter McKenzie Attorneys (1117/2019) [2021] ZAECPEHC 49 (7 September 2021):

Prescription – claim for damages against attorney-attorney liable- To the plaintiff, Mr Tarquin Julies, the problem with the law has been lawyers.

Mr Julies instructed Masimla Attorneys to institute action against the Minister of Police for damages he suffered after being shot in the face by a police officer. Masimlas let the claim prescribe, so he instructed Peter McKenzie Attorneys to issue summons against Masimlas, but Mr Julies contends that they too allowed his claim to prescribe. Mr Julies now claims damages from McKenzies.

Eksteen J discusses whether the shooting of Mr Julies was wrongful and unlawful; whether Masimlas negligently let the claim against the Minister prescribe; and whether McKenzies negligently let his claim against Masimlas prescribe; what a plaintiff has to prove in a claim against an attorney [14]; and when prescription began to run [17].

The defendant is ordered to pay the plaintiff such damages proven from the shooting.

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The defendant is ordered to pay the plaintiff such damages proven from the shooting.

[1] To the plaintiff, Mr Tarquin Julies, the problem with the law has been lawyers. On 6 December 2008 he was shot in the face by a member of the South African Police Service (SAPS) with a shotgun. In consequence thereof, he lost one eye and all vision in the other. He instructed Masimla Attorneys (Masimlas) in Gqeberha to institute action against the Minister of Police (the Minister) for damages, which he had sustained in consequence of the injuries suffered in the shooting. Masimlas accepted the mandate, but failed to deliver, and they permitted the claim to prescribe. He thereafter instructed the defendant, Peter McKenzie Attorneys (McKenzies) in Gqeberha to issue summons against Masimlas for damages, which he had sustained in consequence of the prescription of his claim against the Minister. They, too, accepted the mandate, but Mr Julies contended that they also permitted his claim against Masimlas, to prescribe. Hence, the present claim against McKenzies for damages arising from the prescription of the plaintiff's claim against Masimlas.

[2] At the commencement of the trial, by agreement between the parties, I ordered that the issue of McKenzies' alleged liability to Mr Julies be separated from the remaining issues in the matter. Consequently, in these proceedings, three issues arose for adjudication. Firstly, whether the shooting of Mr Julies was wrongful and unlawful (the first issue). Secondly, whether Masimlas had negligently permitted the claim against the Minister to prescribe (the second issue) and, thirdly, whether

McKenzies had negligently permitted the plaintiff's claim against Masimlas to prescribe (the third issue).

[3] Mr Julies, who was 25 years old at the time of the shooting, is an unsophisticated man who had grown up in the northern suburbs of Gqeberha where he had successfully completed Grade 7 at school. He terminated his education due to financial constraints and he holds no other qualification. He lived with his mother at 104 Anita Drive in Gelvandale, Gqeberha (his home) and he said that he had been employed as a handyman before the shooting.

[4] On Saturday, 6 December 2008, Mr Julies and a few friends had been drinking at his home when two unmarked police vehicles arrived and parked in the street, approximately in front of his home. Two policemen in civilian clothes alighted from the cars whilst at least one, identified as Sergeant De Maar, remained in one of the police vehicles. The two policemen entered his home. It is unclear what they did inside, but, shortly after entering they again emerged and proceeded to walk down the driveway to their cars. Mr Julies, standing outside in front of his home, demanded an explanation for their conduct inside the house and, as he did so, one of his friends threw a beer bottle at the police, which struck one of their vehicles. Mr Julies said that Sergeant De Maar had then alighted from the vehicle carrying a shotgun and shot at him, without uttering a word. He was struck in the face, which instantly rendered him unconscious and he only regained consciousness in hospital. Mr Julies is unaware of the events that occurred immediately after the shooting, but three of his friends were subsequently arrested and charged of public violence, assault and malicious injury to property. Although the incident was investigated and a police docket (the docket) prepared the charges were ultimately withdrawn.

[5] Mr Julies, as I have said, instructed Masimlas, early in 2009, to institute proceedings against the Minister. He had known Mr Masimla, who had assisted him previously in legal matters, before these events. Mr Julies testified that Mr Masimla had told him that this was a big case and that it would take very long. Although he met with Mr Masimla two or three times per annum after the initial instruction Mr Masimla never explained the delay. Rather, Mr Masimla always assured him that he was still busy with the case and that he would instruct an advocate to assist him. Mr Julies had no knowledge of litigation and he said that he trusted Mr Masimla.

[6] As adumbrated earlier, Mr Julies lost one eye, which had to be surgically removed, and all vision in the other. He had to undergo numerous surgical procedures from 2009 to 2015 in an endeavour to save his eyesight. All these procedures were conducted in the Provincial Hospital in Gqeberha at State expense save for the final procedure in October 2015, which was done at the Eye and Laser Clinic, a private institution in Gqeberha.**[1]** Because it was a private institution, he was concerned that they may look to him for payment. He, accordingly, contacted Mr Masimla to enquire about funds. Mr Masimla did not provide him with a satisfactory response and, he said, he went to see him when he was discharged from hospital in November 2015. To his dismay, Mr Masimla told him that he is not pursuing any claim on his behalf and that he has no file in respect of such litigation. Thus, Mr Julies said, he first discovered that Mr Masimla had not prosecuted his claim. He could not believe it.

Knuttel and others v Bhana and others [2021] JOL 51059 (GJ)

Affidavits-commissioning of founding affidavit via whatsapp video call

In an application for eviction of the first respondent and others from property owned by a trust in which the applicants were trustees, the court had to decide whether there was substantial compliance with the requirements for the commissioning of the founding affidavit, and whether the second respondent had an enrichment lien over the property. Because the deponent to the founding affidavit was infected with Covid-19 at the time, the affidavit was commissioned via a Whatsapp video call.

Katzew, AJ refers to the requirements for administration of oaths [paras 51 - 52] and the effect of non-compliance [para 53] and confirms that there was substantial compliance with the requirements in this case.

Rafoneke v Minister of Justice [2021] 3609-2020 (FB)

Legal practice act and non-citizens- being admitted as legal practitioners -Section 24(2) of the Legal Practice Act is declared invalid to the extent that it does not allow foreigners to be admitted as non-practising legal practitioners.

Applicants challenge section 24(2)(b) read with section 115 of the Legal Practice Act, which precludes non-citizens or non-permanent residents of South Africa from being admitted as legal practitioners.

Musi JP discusses how the applicants are citizens of Lesotho and that they obtained their LLB degrees at the University of the Free State, that they entered contracts of articles of clerkship and passed the practical exams; the requirement in s 24(2)(b) that only citizens or permanent residents may be admitted; section 9 of the Constitution and the right to equality; and whether the discrimination is unfair; the risk in allowing non-citizens to practice [40]; whether the bar against non-citizens is rational and what governmental purpose it serves [88]; and those who wish to be non-practising legal practitioners.

Section 24(2) of the Legal Practice Act is declared invalid to the extent that it does not allow foreigners to be admitted as non-practising legal practitioners.

A replacement section 24 is provided for the 24 months suspension of invalidity to allow Parliament to rectify the defects.

(Molitsoane J and Wright AJ concurred.)

Blumberg v Legal Practitioners' Fidelity Fund (36192/2020) [2021] ZAGPPHC 589 (14 September 2021)

Legal practitioners-claim by client against fidelity fund-attorney –application dismissed because client did not take the Fund on review and not within 30days from knowledge of none payment by attorney

1. The Applicant has been a shareholder and director of the company called Dornay which owned an immovable property hereinafter referred to in this judgment as the “the Property”.

2. Dornay represented by the applicant entered into a written agreement of sale of the “the property” to Hatfield Property Holdings (Pty) Ltd hereinafter referred to in

this judgment as the “purchaser. The parties agreed to a purchase price of R 30 (thirty) million.

3. David Kahn and Associates were appointed as the seller’s (applicants) attorney. In terms of the agreement of sale of the property, the purchaser was required to make payment of a deposit of 3 (three) million to Kahn as an attorney to be held by him pending registration of transfer of the property into the name of the purchaser. This deposit was paid into David Kahn and Associates trust account.

4. The property was transferred to the purchaser on the 4th September 2014 on which date Kahn was accordingly required to release payment of the deposit of 3 (three) million.

5. On or about 26 September 2014 Kahn orally acknowledged to the applicant that he had misappropriated the sum of R3 (three) million which was required to have been held in trust for the applicant and on his behalf representing Dornay. He told the applicant that he was not in a financial position to make payment of the money and requested that the applicant afford him time within which to make the payment. This was the first time that the applicant became aware that Kahn had misappropriated the funds.

6. On 29 October 2014 Kahn paid the applicant an amount of R1 (one)million, leaving a balance of R2 (two) million due to the applicant.

7. On the 10 October 2014 Kahn, in writing acknowledged his indebtedness to the applicant in the capital sum of R2 (two) million together with interest thereon at prime plus 2% per annum charged by First National Bank (“FNB”) to its prime customers on the reducing balance from 1 October 2014 to date of payment, both days inclusive.

8. Kahn failed to effect payment of the instalments as undertaken by him and on 3 November 2015 the applicant and Kahn orally agreed to afford Kahn a further indulgence in respect of his payment obligations. Kahn however once again failed to honour his undertakings.

THE RESPONDENT RAISED THE FOLLOWING PRELIIMARY POINTS

16.1 Failure by the applicant to use Rule 53 of the Uniform Rules of court to set aside the resolution of the respondent of 18 February 2020 rejecting the applicant's claim.**[1]**. In response to this preliminary point counsel for the applicant submits that the rejection of the claim is an issue and not the review of administrative action or other process.

16.2 The second preliminary point is that in terms section 48 (1) of the Attorneys Acts and section 78 (1) of the LPA written notice of the claim was to have been given to the respondent within three months after the applicant became aware of the fact. The applicant referred his claim to the respondent three years and five months late.**[2]** Thus the applicant referred his claim outside the three months period contemplated in the mentioned provisions responding to this preliminary point it is submitted on behalf of the applicant that the applicant's founding affidavit addresses the issue fully and motivates the facts and circumstances supporting an extension to the respondent delayed in its decision until 18 February 2020.

16.3 The respondent did not pursue the third preliminary point

16.4 The fourth preliminary point is that there was no theft being a requirement for a claim in terms of section 55 of the LPA**[3]**. In response counsel for the applicant in his heads of argument says that there is no factual dispute in rebuttal of Kahn having perpetrated theft and that his own version (Kahn) demonstrates a theft.

16.5 Preliminary point 5, that there is an alleged material non-joinder in that Kahn ought to have been joined as a respondent.**[4]**. On this point the applicant's reply is

that there is no legal interest of Kahn that is impacted by these proceedings and by any decision on the relief sought.

16.6 In regard to the 6th preliminary point the respondent submitted that this point will not be pursued since the court is principally seized with the matter and would have spent valuable time considering the matter.

THE LAW

17. The rule 53 of the Uniform Rules of Court reads as follows:

"***Reviews***

(1) Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administration functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairman of the court, tribunal or board or the officer, as the case may be, and to all other parties affected-

(a) Calling upon such persons to show cause why such decision or proceedings should not be reviewed and corrected or set aside, and

(b) Calling upon the magistrate, presiding officer, chairman or officer, as the case may be, to despatch, within fifteen days after receipt of the notice of motion, to the register the record of such proceedings sought to be corrected or set aside together with such reasons as he is by law required or desires to give or make, and to notify the applicant that he has done so"

18. In Blacker v University of Cape Town the court said "*there is no reason why the meaning of the word 'review' should be restricted and the words "any tribunal" are obviously wide enough to include a domestic tribunal of contracted origin"".*

19. Taking into account the case law I have referred to above in my view the applicants should have taken the decision of the tribunal on review.

20. Furthermore, in my view the applicant failed to comply with the three-month time period which is embodied in section 48(1) of the Attorneys Act and section 78 (1) of the LPA. The applicant failed to give any cogent reasons why he failed to do so. Therefore, the respondent's preliminary point must succeed.

21. Mr Kahn denies theft, in my view without hearing Mr Kahn's evidence it is difficult if not impossible to determine whether the offence of theft was committed or not.

22. In my respectful view it was a grave omission for the applicant not to join Mr Kahn this was material non-joinder because Mr Kahn played a significant role in this matter and should have been given an opportunity to answer for himself.

23. I am therefore of the view that the applicant succeeds in all the preliminary points raised. I make the following order:

1. The applicant's application is dismissed.

2. Applicant to pay the costs of this application.

Solomon and Another v Junkeeparsad (37003/2019; 37456/2019) [2021] ZAGPJHC 163 (2 September 2021)

Advocate - Fees - Whether attorney liable for fees charged by advocate whom he or she has instructed - Developments in the regulation of the legal profession subsequent to the *Bertelsmann v Per* 1996 (2) SA 375 (T) decision have evolved the 'professional practice or trade usage' that the attorney is liable for the fees charged by the advocate he or she has briefed to a hardened rule of law that must be implied in the contract between the attorney and advocate as a matter of law, if not so expressly agreed. Legal Practice Act 28 of 2014 (LPA) - Code of Conduct for All Legal Practitioners, Candidate Legal Practitioners and Juristic Entities published under GenN 168 in *GG* 42337 on 29 March 2019 under authority of s 36 of the LPA.

[1] The hearing of two applications, which have been instituted under case numbers 37003/19 (the Marimuthu application) and 37456/19 (the Isseri application), has been consolidated. The applications have been instituted by two members of the Johannesburg Bar, Adv Richard Alan Solomon SC and Adv Arlette Mary MacManus (who are cited as the first and second applicants in each application), against Mr Vishal Suresh Junkeeparsad (who is cited as the respondent in each application). He is a practising attorney and the sole director of Vishal Junkeeparsad and Company Inc., Umhlanga, Durban.

[2] In the Marimuthu application the first applicant seeks payment in the amount of R1 653 880.00 plus interest and the second applicant seeks payment in the amount of R829 399.50 plus interest from the respondent, being outstanding fees owed to them as counsel in respect of legal services they rendered to his client, Mr Marimuthu, and members of his family. In the Isseri application the first applicant seeks payment in the amount of R1 016 640.85.00 plus interest and the second applicant seeks payment in the amount of R657 642.00 plus interest from the respondent, being outstanding fees owed to them as counsel in respect of legal services they rendered to his client, 'Dr Isseri, and various corporate entities controlled by or through him and of which he is the controlling mind'.

[3] Instead of filing answering affidavits, the respondent elected to file notices in terms of r 6(5)(d)(iii) of the Uniform Rules of Court of his intention to only raise a question of law in each application and setting out such question of law, which is identical in each application. Subsequently the respondent sought condonation for his failure to also have filed answering affidavits within the time fixed by an order of this court and that he be granted an extension of time to file them. I dismissed his interlocutory application for condonation and extension of time: *Junkeeparsad v Solomon and another* (37003/2019; 37456/2019) [2021] ZAGPJHC 48 (7 May 2021). What remains to be determined in each application, therefore, is the point of law raised by the respondent. The allegations in the applicants' founding affidavits must be taken as established facts: *Boxer Superstores Mthatha and another v Mbenya* **2007 (5) SA 450** (SCA) para 4.

[4] The question set forth in each of the respondent's amended notices in terms of r 6(5)(d)(iii) is this:

'The question of law that the above Honourable Court will be called upon to determine at the hearing of the above application is whether or not:

4.1 the Respondent in his personal capacity can be sued and a judgment entered against his personal name; alternatively

4.2 the Respondent be held directly and personally liable for the alleged obligations of a separate and distinct juristic entity, namely the registered professional firm that briefed the Applicants, without suing the said professional firm; and

4.3 the privity of contract exists as between the Applicants and the Respondent or whether it lies as between the Applicants and the clients.'

[5] The advocates profession in South Africa was largely self-regulatory in the past, in the sense that no statutory or other body had the power to prescribe rules of professional conduct to members of the profession. The practice, in the past, had been for voluntary associations of advocates to regulate the conduct of their members by laying down rules of professional conduct: *General Council of the Bar of South Africa v Van der Spuy* **1999 (1) SA 577** (T) at 599D-E. The General Council of the Bar of South Africa is an umbrella organisation of various constituent Bars in South Africa, including the Johannesburg Society of Advocates (the Johannesburg Bar). The ethical rules of the Johannesburg Bar in particular include the rules that an advocate may not be briefed by a member of the public, an advocate may not receive payment directly from a client, and that fees charged for any professional services rendered by an advocate may only be paid by or through an attorney, or by the Legal Aid Board. There are certain exceptions to these rules which are not applicable in this case. It is contrary to the etiquette of the Johannesburg Bar for an advocate to sue an attorney for fees; his or her remedy being contained in the ethical rules. In special circumstances an advocate may apply to the Johannesburg Bar

Council for leave to sue an attorney for outstanding fees. The applicants *in casu* applied to and obtained the permission from the Johannesburg Bar Council to sue the respondent.

[11] I respectfully subscribe to the view expressed by Jordaan AJ in *Serrurier* that the attorney would always be liable for the fees charged by an advocate whom he or she has instructed. Nevertheless, developments in the regulation of the legal profession subsequent to the *Bertelsmann* decision have evolved the 'professional practice or trade usage' that the attorney is liable for the fees charged by the advocate he or she has briefed to a hardened rule of law that must be implied in the contract between the attorney and advocate as a matter of law, if not so expressly agreed.

[12] The advocates' profession in South Africa is no longer self-regulatory. The Legal Practice Act 28 of 2014 (the LPA), which commenced on 1 November 2018, created a single unified statutory body, the South African Legal Practice Council (the Council), that now regulates all legal practitioners and all candidate legal practitioners. In terms of s 34(2)*(a)*(i) of the LPA, an advocate may only render legal services in expectation of a fee, commission, gain or reward upon receipt of a brief from an attorney. Only an advocate who, *inter alia*, is in possession of a Fidelity Fund Certificate may, in terms of s 34(2)*(b)*, render legal services upon receipt of a request directly from a member of the public. The Council determines the standards of professional and ethical conduct of all legal practitioners and all candidate legal practitioners. In terms of s 36 of the LPA, the Council must develop a code of conduct that applies to all legal practitioners and all candidate legal practitioners and may review and amend such code of conduct. The code of conduct and every subsequent amendment must be published in the *Gazette* and the rules. It serves as the prevailing standard of conduct, which legal practitioners, candidate legal practitioners and juristic entities must adhere to, and failure to do so constitutes misconduct.

[13] Under the authority of s 36 of the LPA, a Code of Conduct for All Legal Practitioners, Candidate Legal Practitioners and Juristic Entities was published under GenN 168 in *GG* 42337 on 29 March 2019 (the Code of Conduct). It serves as the

prevailing standard of conduct and will be enforced by the Council. It consists of the following parts: (I) Definitions; (II) Code of conduct: general provisions; (III) Conduct of attorneys; (IV) Conduct of advocates contemplated in section 34(2)*(a)*(i) of the LPA; (V) Conduct of advocates contemplated in section 34(2)*(a)*(ii) of the LPA; (VI) Conduct of legal practitioners and candidate legal practitioners in relation to appearances in court and before tribunals; and (VII) Conduct of legal practitioners not in private practice. Failure to adhere to the Code of Conduct will constitute misconduct and transgressors will be subjected to disciplinary proceedings in terms of the rules promulgated under sections 95(1), 95(3) and 109(2) of the LPA in *Government Gazette* 41781 of 20 July 2018.

[14] Paragraph 1 of the Code of Conduct defines 'advocate' to mean 'a legal practitioner who is admitted and enrolled as such under the [LPA]', 'attorney' to mean 'a legal practitioner who is admitted and enrolled as such under the [LPA]', and 'counsel' to mean 'an advocate referred to in section 34(2)*(a)*(i)'. We are *in casu* not concerned with an advocate practising as such referred to in s 34(2)*(a)* (ii) of the LPA. That is an advocate who *inter alia* is in possession of a Fidelity Certificate and who may render legal services upon receipt of a request directly from a member of the public.

[15] Paragraph 27.2 of the Code of Conduct provides that '[c]ounsel shall accept a brief only from an attorney, and counsel shall not accept a brief directly from any other person or entity for either litigious or non-litigious work of any kind, save that counsel may accept a brief . . . from a justice centre . . . [or] perform professional services on brief from an attorney or legal practitioner in another country, including the equivalent of a state attorney or the attorney general or director of public prosecutions, without the intervention of a South African attorney'.

[16] It is clear from the provisions of para 26 of the Code of Conduct that counsel may only decline the acceptance of an offer of a brief in certain circumstances, *inter alia*, 'if agreement between counsel and the instructing attorney cannot be reached on the fee to be charged by counsel' (para 26.5). Counsel undertakes to perform legal professional services in court-craft and knowledge of the law only upon the offer and acceptance of a brief (para 27.1). Counsel shall receive fees charged only

from or through the instructing attorney who gave the brief to counsel, except where such attorney, for reasons of insolvency or any other reason, is unable to pay, in which circumstances, with leave from the Provincial Council, counsel may receive fees due from another source 'in discharge of the indebtedness of the attorney' (para 27.4).

[17] Paragraphs 34.2 and 34.3 of the Code of Conduct provide that '[c]ounsel shall render accounts to the instructing attorney . . . and shall receive payment only from the instructing attorney' and 'shall not submit an account directly to a client except by agreement with the instructing attorney and client and on condition that the same account is simultaneously submitted to the instructing attorney, nor receive payment directly from a client'. And para 35 provides that '[c]ounsel may sue an attorney . . . for fees due and payable to him or her'.

[18] Paragraph 18.18 of the Code of Conduct reads thus:

'An attorney shall pay timeously, in accordance with any contractual terms or, in the absence of contractual terms, in accordance with the standard terms of payment, the reasonable charges of an advocate whom he has instructed to provide legal services to or on behalf of a client; such liability shall extend to every partner of a firm or member of an incorporated practice, and if the firm is dissolved or the incorporated practice is wound up, liability shall remain with each partner or member, as the case may be, the one paying the other to be absolved.'

Furthermore, para 21 provides *inter alia* that the failure of an attorney to comply with the Code of Conduct or any rule with which it is the attorney's duty to comply constitutes misconduct.

[19] By virtue of the LPA and the Code of Conduct made and promulgated in terms s 36 thereof, an attorney, as a rule of law, is liable for the fees charged by the advocate he or she has briefed. What counsel is to charge is the subject-matter of an agreement between counsel and attorney, not between counsel and the client. It is the attorney who offers the brief to counsel and counsel who accepts the brief or declines the acceptance of the offer of the brief, *inter* alia, if agreement between counsel and the instructing attorney cannot be reached on the fee to be charged by

counsel. Fees owed to counsel are the indebtedness of the attorney. The attorney's liability for payment of counsel's fees who he or she has instructed, also extends to every partner of a firm of attorneys or member of an incorporated firm, and if the firm is dissolved or the incorporated firm is wound up, such liability remains with each partner or member. Also, where such attorney, for reasons of insolvency or any other reason, is unable to pay, counsel may, with leave from the Provincial Council, receive the fees due to him or her from another source 'in discharge of the indebtedness of the attorney'.

[20] I am not suggesting that there is not also privity of contract between counsel and the client for whom counsel is briefed to render legal services, or that such client would not have a claim in contract against counsel for breach of his or her duties. Those are matters I need not decide *in casu*. The acceptance by counsel of an offer by an attorney of a brief, what counsel is to charge and the legal liability for payment of the fees charged by counsel are the subject-matter of a contract between the instructing attorney and counsel alone. The client for whom counsel is to render the legal services is not in privity of that contract, although counsel renders the professional services to the client, and not the instructing attorney.

[21] The applicants do not rely on any contractual terms contemplated in para 18.18 of the Code of Conduct. The respondent, therefore, is liable to pay their reasonable charges timeously. Their allegations that the respondent, in his professional capacity as an attorney, instructed them, in their professional capacities as advocates, to provide legal services to or on behalf of his clients, and that it was an express, implied or tacit term of their agreement that the respondent would be liable for payment of their fees charged in respect of such legal services rendered by them, must be taken as accepted facts. Their allegations that they indeed rendered such professional services to or on behalf of his clients, that their fees charged and claimed in the present applications were for such professional services rendered, and that all such fees are due, owing and payable to them, must also be taken as accepted facts. The reasonableness of the applicants' charges for the professional services they rendered has not been challenged.

[22] The respondent as the 'attorney' who instructed the applicants in their capacities as advocates to provide legal services to or on behalf of his or his incorporated firm's clients, therefore, is liable to pay the reasonable charges of the

applicants, although his liability also extends to every member of his incorporated firm, if there are any other member or members. The applicants need not sue the respondent's incorporated firm or any other member thereof. He may legally be sued personally and a judgment can legally be entered against him.

[23] In the result the following orders are made:

(a) In case no: 37003/2019:

(i) The respondent is to pay to the first applicant the amount of R1 653 880.00 plus interest thereon at the rate of 10.25% per annum *a tempore morae* from 24 October 2019 until date of payment.

(ii) The respondent is to pay to the second applicant the amount of R829 399.50 plus interest thereon at the rate of 10.25% per annum *a tempore morae* from 24 October 2019 until date of payment.

(iii) The respondent is to pay the costs of this application, including those of senior counsel.

(b) In case No: 37456/2019:

(i) The respondent is to pay to the first applicant the amount of R1 016 640.85 plus interest thereon at the rate of 10.25% per annum *a tempore morae* from 29 October 2019 until date of payment.

(ii) The respondent is to pay to the second applicant the amount of R657 642.00 plus interest thereon at the rate of 10.25% per annum *a tempore morae* from 29 October 2019 until date of payment.

(iii)The respondent is to pay the costs of this application, including those of senior counsel.

Van Den Bos N.O. v Mohloki and Others AND Van Den Bos N.O v Ngcameva and Another (2020/11190; 2020/11191) [2021] ZAGPJHC 395 (2 September 2021)

Uniform rule 46- High court may not declare immovable property specially executable pursuant to orders granted in the magistrates' court.

1. Can, and should, this court as a division of the High Court declare immovable property specially executable pursuant to orders granted in the magistrates' court? Further, does Uniform Rule 46A apply only in respect of execution against residential immovable property that are the primary residences of judgment debtors, or to all residential immovable property?

2. The relevant facts for purposes of the judgment can be briefly stated.

3. The applicant acts in his capacity as a court appointed administrator of the Panarama Place body corporate for a sectional title scheme established in terms of the **Sectional Titles Act, 1986**. The sectional title scheme is situated in Berea, Johannesburg.

4. The relevant respondents are registered owners of sections (units) in the sectional title scheme. The applicant acting in his capacity as administrator of the body corporate obtained orders by default against the relevant respondents in the Johannesburg Magistrates' Court for arrear contributions and other charges owing to the body corporate. Attempts to execute on warrants of execution issued out of the magistrates' court were unsuccessful as no attachable movable assets belonging to the respondents could be found at the units, with the deputy sheriffs rendering *nulla bona* returns of service. Applications by the respondents in the magistrates' court for rescission of the default orders failed. The respondents have sought to appeal the refusal of the rescissions to the High Court. The applicant contends that the respondents are not pursuing those appeal proceedings with any vigour.

5. The applicant seeks to paint a picture of the respondents being recalcitrant owners who have not paid their contributions and other charges owing to the body corporate for many years, and so much so that the judgment debts exceed the municipal values of the sectional title units. The respondents on the other hand seek to paint a picture of an administrator who does not genuinely seek to advance the interests of the body corporate and the sectional title owners, and who refuses to properly account for payments that he has received. It is unnecessary for me to decide which of these pictures is correct as I am bound to proceed on the basis that the orders granted in the magistrates' court stand until rescinded or set aside on

appeal. Although the respondents, who were represented in the hearing before me by their attorney, Mr Kubayi, asserted that execution proceedings are stayed until the appeal proceedings in respect of the rescission applications have been determined, this is not so.**[1]**

6. The applicant, relying upon the *nulla bona* returns of service rendered pursuant to the warrants of execution issued out of the magistrates' court, launched these present proceedings in the High Court to declare the units as immovable properties specially executable, and to authorise that writs of execution be issued in terms of Uniform **Rule 46(1)(a).**

When seen from this perspective, *Thobejane* supports my approach in this judgment rather than presents an obstacle. *Thobejane* makes it clear that the High Court's inherent jurisdiction, including to regulate its own process taking into account the interests of justice as provided for in section 173 of the Constitution, does not create a free-for-all to approach the High Court with whatever disputes may fall within its territorial jurisdiction without regard to what must be established for the court to grant the relief sought. Sutherland AJA in *Thobejane* cautions that:

> "*The inherent jurisdiction of the High Court can only be applied to address a lacuna which, in the absence of judicial intervention, would result in injustice*". **[15]**

23. In the present instance, there is no lacuna as the magistrates' court rules expressly provide for property to be declared executable by the magistrates' court in exercising its role of judicial oversight over execution against residential immovable property.**[16]** I find that this court cannot rely on an inherent jurisdiction as a basis to enforce magistrates' court orders, as applicant's counsel submitted I should, without the substantive requirements of issuing process-in-aid having been satisfied.

24. Sutherland AJA in *Thobejane* also emphasises the right of an applicant or plaintiff as *dominus litis* to choose whichever forum may have jurisdiction and that he

or she cannot be faulted for exercising that election because another court has concurrent jurisdiction, and should rather have instituted proceedings in that other court.**[17]** In this instance, the applicant made the election to institute proceedings in the magistrates' court and having done so cannot complain that he is required to follow through in his chosen forum.**[18]**

25. In the circumstances, I accept that this court does have jurisdiction and so I do not decline to entertain the applications on the basis that there is no jurisdiction. What I do find is that the applicant has failed to establish a case in the affidavits why this court should through process-in-aid grant an order declaring immovable property specially executable based upon the orders of another court.

26. My finding is therefore dispositive of the applications, and they are to be dismissed.

27. In the circumstances, I do not propose dealing in detail with the second issue that arose. That issue was whether Uniform Rule 46A, which has various requirements that an applicant must satisfy in seeking an order to declare residential immovable property specially executable, only applies where that residential immovable property is a primary residence. The difficulty that presented itself was that the applicant had failed to provide evidence of the market value of the units and of the amount owing to the local authority for rates and other dues, as required in terms of Uniform Rule 46A(5)(a) and (c). The applicant also failed to make out a case on the affidavits why the reserve price that his counsel suggested of R80 000 was an appropriate reserve price. The applicant's counsel sought to address these deficiencies by submitting that the requirements of Uniform Rule 46A(5) and the setting of a reserve price in terms of Uniform Rule 46A(9) only applied where the property sought to be declared executable was a primary residence. In this instance, the applicant contended that the units were not the primary residences of the respondents as the judgment debtors, which the respondents disputed, and therefore Uniform Rule 46A did not apply.

28. In my view, Uniform Rule 46A on its plain wording applies to execution against all residential immovable properties, save where appears otherwise. Where specific provision is made for additional requirements to be satisfied when the property sought to be executed against is a primary residence, this is expressly provided for in the rule, such as in subrule (2)(b) where it is expressly stated that a court shall not authorise the execution against immovable property which is a primary residence of a judgment debtor unless the court, having considered all relevant factors, considers the execution on such property is warranted. In contrast, none of the other subrules under Uniform Rule 46A (other than subrule (8)(d)) make mention of primary residence. To the contrary, there are references to "*every*" notice of application to declare residential of immovable property, without distinction, being required to comply with various requirements, including in subrules (3) and (5).

29. I see nothing new in Uniform Rule 46A which limits its application in its entirety only to execution against primary residences. Rather, I see Uniform Rule 46A seeking to protect the interests of owners of all residential properties and that where the residential property is also a primary residence, further safeguards are provided. Where the immovable property is not residential property (such as commercial or industrial property), then Uniform Rule 46 alone, rather than Uniform Rule 46A also, would apply and which does not require the same level of judicial oversight as required for residential properties. That there is a range of residential properties that may fall within the ambit of the more restrictive Uniform Rule 46A, ranging from a person's primary residence through to a holiday home or investment residential property, can be addressed on a case by case basis in the exercise by the court of its discretion in discharging its judicial oversight under the rule, rather than finding that the rule does not apply at all to some types of residential property.

30. Assuming in favour of the applicant that the units were not primary residences, the applicant nevertheless has not complied with the requirements of Uniform Rule 46A. Had I not dismissed the applications as no case has been made out for affording the applicant process-in aid, I would not have granted the orders in

any event. Whether or not I would then have dismissed the applications, or postponed the applications to afford the applicant an opportunity to supplement his papers to comply with Uniform Rule 46A I need not decide.

31. Although the applications are to be dismissed based upon an issue raised by the court *mero motu*, that does not deprive the respondents of costs in their favour in having resisted the grant of the orders.**[19]**

32. In the circumstances, each of the applications under case numbers 2020/11190 and 2020/11191 is dismissed, with costs.

Tarsus Distribution (Pty) Ltd v Grandbridge Trading 74 (Pty) Ltd t/a Red Apple Furniture (2018/45674) [2021] ZAGPJHC 451 (22 September 2021)

Rule 35(7) of the Uniform Rules of Court to compel further and better discovery and to order the production for inspection of certain documents.

[1] This is an application in terms of Rule 35(7) of the Uniform Rules of Court to compel further and better discovery and to order the production for inspection of certain documents. The applicant is the defendant in an action pending in this Court in which the respondent is the plaintiff. It will be convenient to refer to the parties as the plaintiff and the defendant respectively. The pleadings in the action have closed, but the matter is yet come to trial. The notice of motion is couched in relevant parts thus:

> “1 That the Respondent comply with paragraph 2, 3, 4 and 5 of the Applicant's Notice in terms of Rule 35(3) and (6) dated 30 March 2021 ("the Notice”).
>
> 2 That the Respondent make available for inspection and copying the documents specified in paragraph 2, 3, 4 and 5 of the Notice in terms of Rule 35(3) read with Rule 35(6) within 5 (five) days of this order alternatively to state on oath within 5 (five) days that such documents or tape recordings are

not in the Respondent's possession, in which event the Respondent shall state their whereabouts, if known."

[2] Paragraph 2 of the Notice required the plaintiff to produce for inspection "*AII documentation (including but not limited to instructions, memoranda, meeting notes, file notes and other communications) between the plaintiff and Sizwe IT Group instructing, and appointing Sizwe IT Group to prepare annexures Qf to Q3 of the Plaintiff's Particulars of Claim*". Paragraph 3 of the Notice required the Plaintiff "*to produce for inspection but not limited to instructions, memoranda and notes) between the Plaintiff and Sizwe IT Group relating to any work carried out by Sizwe IT Group for the Plaintiff*."

[2] Paragraph 4 of the Notice required that the plaintiff produce for inspection documents relating to the quantification of the plaintiff's claims, such as its annual financial statements (or any similar documents of a financial nature setting out its profit, loss, assets, expenses, liabilities, and the like). Paragraph 5 of the Notice requires that the plaintiff produce for inspection documents relating to paragraphs 20.13.1, 20.13.2 and 20.13.3 of the Particulars of Claim. (i.e. the documents supporting its figures alleged in its calculation of the loss of profits equalling R 38 000 000.00).

[3] The plaintiff opposes the application on the basis that the documents sought by the defendant in paragraphs 2 and 3 of the Notice have since been provided by way of a supplementary discovery affidavit that were lost due to technical difficulties. On plaintiff's version, there are no further documents in its possession in response to paragraph 2 and 3 of the Notice. The plaintiff contends that, the documents sought in paragraphs 4 and 5 of defendant's notice are irrelevant to the dispute between the parties. Flowing from the closing arguments between the parties it remains to deal only with paragraphs 4 and 5 of the notice as well as the question of costs.

The nature of the plaintiff's claim

[4] The plaintiff's action was instituted in December 2018. The plaintiff's cause of action is founded on a partly written and partly oral contract. The plaintiff claims that the contract was entered upon on or about 16 January 2015. The terms and

scope of the agreement however, are in dispute. The agreement was terminated by notice at the instance of the plaintiff on 20 February 2017. According to the plaintiff, the defendant was to deliver and install a complete e-commerce system for the plaintiff that would be fully functional for its purpose.

[5] The plaintiff pleads that prior to the conclusion of the agreement with the defendant, it had determined to deploy “a new business model, based on a proof of concept blueprint, for an all -in -one fully integrated e-commerce digital technology platform”. In order to implement the e-commerce platform, the plaintiff required the components of the e-commerce platform to be designed, implemented and commissioned by the defendant.

[6] The plaintiff emphasises and alleges that the defendant’s obligations in terms of the agreement was to provide the necessary hardware and software, and commissioned the integrated e-commerce platform so that the proposed business operations could commence. The plaintiff alleges that it incurred a loss in sum of R 1 070 650.00 in the acquisition of additional resources, contractors and equipment or items that were redundant or wasted because of the defendant's breach of the Agreement. The plaintiff claims this amount from the defendant in prayer 1.1 of its Particulars of Claim.

[7] The plaintiff alleges that, it suffered damages *inter alia* for loss of profits in the amount of R 38 000 000.00 over a three-year period brought about by "the delay to the Plaintiff in the launch of its E-Commerce Platform" and calculated on several revenue amounts that are pleaded in paragraph 20.13 of the plaintiffs Particulars of Claim. The plaintiff claims R 38 000 000.00 from the defendant in prayer 1.3 of its Particulars of Claim.

[8] The defendant denies that it was contracted to install a full solution but that is was only required to deliver certain goods.

Accordingly, I make the following order:

24.1 The Plaintiff /respondent is directed to comply with paragraph 4 and 5 of the notice dated 30 March 2021 given by the Defendant /applicant in terms of Rule 35 (3) and (6) (“the notice”);

24.2 That the respondent makes available for inspection and copying the documents specified in paragraph 4 and 5 of the notice within sixty (60) days of this order alternatively to state on oath within sixty (60) days that such documents or tape recordings are not in the plaintiff's possession, in which event the plaintiff shall state their whereabouts, if known;

24.3 That the applicant is given leave, in the event of the respondent failing to comply with the orders in paragraph 1 above, to approach the above Honourable Court on the same papers, supplemented if necessary, for an order striking out the respondent's relevant claim in the above matter, and;

24.4 That the respondent is ordered to pay the costs of this application.

Wesbank, A Division of Firstrand Bank Limited v Investment Auto Group (Pty) Ltd and Others (2020/7439) [2021] ZAGPJHC 449 (24 September 2021)

Res iudicata- In the result it follows that the judgment stands, even though incompetent, and will continue to do so until it is set aside. The plea of *res judicata* is good and the abandonment of the judgment in the current circumstances is ineffectual. The judgment must first be rescinded before the trial can proceed.

[1] This matter was set down for hearing on the trial roll before this court on 25 May 2021. On 17 May 2021 the third defendant filed a special plea. The nub of the special plea is that the plaintiff had set the matter down in the face of a judgment against the third defendant, which judgment has not been rescinded. It is pleaded that the matter is therefore *res iudicata*.

[2] It was agreed between the parties that the special plea needs to be resolved before the trial can proceed. The plaintiff further conceded that even if the special plea is decided in the plaintiff's favour that the trial could not proceed before this court as certain interlocutory applications, to which I will return to later in the judgment, had not been dealt with and were still unresolved.

[3] This judgment therefore deals with one issue only: Is the matter *res iudicata*.

BACKGROUND FACTS

[4] Summons was issued against the three defendants on 3 March 2020. The plaintiff sought monetary judgment for damages suffered due to the first defendant's breach of an agreement. The second and third defendants were cited in their capacities as sureties for the first defendant's indebtedness towards the plaintiff. Only the third defendant filed a notice to defend the matter. On 10 June 2020 the plaintiff filed an application for default judgment in terms of Rule 31(5)(a) against the first and second defendants only. The default judgment application served before the Registrar on 19 September 2020, who referred the application to open court.

[5] The plaintiff also applied for summary judgment against the third defendant, which was opposed. On 30 June 2020 the summary judgment was heard and the third defendant was granted leave to defend. Litigation between the plaintiff and the third defendant thereafter continued in the normal course of litigation, and the plaintiff discovered all the relevant documents in its possession for purposes of proceeding to trial. However, on 10 December 2020, despite the fact that the application for default judgment was sought against the first and second defendant only, default judgment was granted against all three defendants. The order granted followed the terms of the draft order presented by the plaintiff to the court verbatim.

[6] Both the plaintiff and the third defendant were unaware that default judgment was granted against the third defendant. Consequently, on 18 February 2021 the plaintiff set the matter down against the third defendant for trial for 25 May 2021. On the same date the third defendant requested further documentation from the plaintiff in terms of Rule 35(3), and simultaneously filed a request for further particulars to prepare for trial. On 4 March 2021 the plaintiff filed its response to the third defendant's request for further particulars for purposes of trial. On 26 February 2021 and 10 March 2021 the plaintiff filed its notice in terms of Rule 35(6) and its reply to the third defendant's Rule 35(3) notice respectively. On 26 March 2021 the plaintiff filed its affidavit in compliance with Rule 35(3) and on 19 April 2021 filed its answering affidavit to the third defendant's application to compel in terms of Rule 35(7). On 1 April 2021, the third defendant filed an application to compel further and better discovery in terms of Rule 35(7), and simultaneously filed an application seeking further and better particulars. The plaintiff opposed both applications and on 13 April 2021 the plaintiff filed its answering affidavit to the third defendant's application to compel further and better particulars.

26] In the result it follows that the judgment stands, even though incompetent, and will continue to do so until it is set aside. The plea of *res judicata* is good and the abandonment of the judgment in the current circumstances is ineffectual. The judgment must first be rescinded before the trial can proceed.

Federation Internationale de Football Association v Sedibe & Another (303/2020) [2021] ZASCA 113 (8 September 2021)

Jurisdiction- attachment to found jurisdiction- property attached in relation to an envisaged review of an administrative body taken in Switzerland – attachment not permissible if claim is not a claim sounding in money nor an action *in rem* for movables – lack of jurisdiction cannot be cured by attachment.

FIFA suspended Mr Sedibe (former CEO of SAFA) from football for five years and imposed a substantial fine after findings of match fixing. Mr Sedibe obtained a High Court order attaching all the trademarks of FIFA to found jurisdiction in order to review the decision of its Ethics Committee.

Navsa ADP discusses FIFA's contention that our courts have no jurisdiction over FIFA to set aside its decisions taken in Switzerland; attachment to found jurisdiction and claims sounding in money; the ex parte application in the High Court; the purpose of an attachment ad confirmandam jurisdictionem; and that the privilege afforded incola plaintiffs to attach the property of peregrini defendants arose from considerations of commercial convenience; and to which cases this right is limited – The appeal is upheld with costs.

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Jugwanth v Mobile Telephone Networks (Pty) Ltd (529/2020) [2021] ZASCA 114 (9 September 2021):

Exception – extinctive prescription – exception to particulars of claim for not disclosing a cause of action on the basis that ex facie claim prescribed - party relying on prescription must invoke and prove it – no requirement for particulars of claim pre-emptively to plead a basis to defeat a possible plea of prescription – special plea of prescription susceptible to replication – particulars of claim not excipiable.

A claim for legal fees by an attorney who performed work for MTN was met with an exception to the particulars of claim, on the ground that the underlying debts had prescribed.

Gorven, JA confirming approach to an exception that a pleading does not disclose a cause of action [para 3]; when a cause if action is regarded as having been disclosed [para 4]; and the onus of proof when the defence of prescription is invoked [para 6].

Prescription is fact driven and various factors could rebut the defence. It was not necessary for appellant's particulars of claim to pre-emptively plead a basis to defeat a possible plea of prescription.

High Court wrongly upholding special plea of prescription and appeal upheld.

[1] The appellant, an attorney, claims that he was contracted to represent the respondent in matters before the Commission for Conciliation, Mediation and Arbitration.**[1]** For convenience, I shall refer to the parties as the plaintiff and defendant respectively. The plaintiff's claim relates to fees for having performed that work. He sued the defendant, one of the country's largest mobile telephone networks, for payment in the Gauteng Division of the High Court, Johannesburg (the high court). The defendant excepted to the particulars of claim on the basis that they did not disclose a cause of action because the debts on which the claim was based had prescribed. In the high court, Ngalwana AJ granted the following order:

'(a) The exception is upheld.

(b) The [plaintiff] is to pay the [defendant's] costs on exception.'

The appeal before us is with his leave.

[2] The particulars of claim alleged that the contract on which the appellant sued was concluded in April 2006. The services were said to have been rendered between 2006 and 2008. In support of the claim, the plaintiff annexed 148 invoices. The total claim was for payment of R3 875 501.60. The summons was served during

June 2015, more than six years after the last of the services was rendered and invoices issued. The salient averments in the defendant's exception are:

'3. Therefore, the alleged Plaintiff's claims are not enforceable or claimable against the Defendant based on the following reasons:

3.1 **Section 11***(d)* of the **Prescription Act no. 68 of 1969** as amended provides that the period of prescription of debts shall be three (3) years in respect of any debt.

3.2 The Plaintiff alleges that the amounts due and payable as per Annexure(s) "**C1" – "C148"** are for the periods between 2006 and 2008.

3.3 The Plaintiff failed to claim his alleged debts within a period of three years from the date on which the debts were due and payable as required by the Act in terms of **section 11.**

1.25cm; line-height: 150%">3.4 The Plaintiff's debts as per Annexure(s) "**C1" – "C148"** reveal that majority of the alleged debts prescribed in the year of 2009 and the remainder thereof prescribed in the year of 2011 since the Plaintiff issued summons on 28 May 2015.

4. The Plaintiff's claim has prescribed and thus there is no cause of action against the Defendant.'

[3] The approach to an exception that a pleading does not disclose a cause of action was reiterated by Marais JA in *Vermeulen v Goose Valley Investments (Pty) Ltd*:

'It is trite law that an exception that a cause of action is not disclosed by a pleading cannot succeed unless it be shown that *ex facie* the allegations made by a plaintiff and any document upon which his or her cause of action may be based, the claim *is* (not may be) bad in law.'**[2]**

An exception sets out why the excipient says that the facts pleaded by a plaintiff are insufficient. Only if the facts pleaded by a plaintiff could not, on any basis, as a matter of law, result in a judgment being granted against the cited defendant, can an exception succeed. Only those facts alleged in the particulars of claim and any other facts agreed to by the parties can be taken into account.**[3]**

[4] And in *Cook v Gill,* **[4]** referred to with approval by this Court in *McKenzie v Farmers' Co-Operative Meat Industries Ltd*, it was held that a cause of action is disclosed when the pleading contains:

'[E]very fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.' **[5]**

Put another way, judgment could be granted if the averments in those particulars of claim were proved.

[5] There are certain features of the law of prescription which lend clarity to this matter. Prescription is governed by the Prescription Act 68 of 1969 (the Act). The period of prescription for this debt under s 11*(d)* of the Act is three years. Section 10 of the Act reads:

'[A] debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt.'

This provision introduced what is termed 'strong prescription' into our law. **[6]** Despite this, s 10(3) of the Act provides that payment of an extinguished debt is payment of a debt. **[7]** The relevance of this to the present matter will become apparent later. Significantly, s 17 of the Act provides:

'(1) A court shall not of its own motion take notice of prescription.

(2) A party to litigation who invokes prescription, shall do so in the relevant document filed of record in the proceedings: Provided that a court may allow prescription to be raised at any stage of the proceedings.'

Ombud for Financial Services Providers v CS Brokers CC and Others (781/2020) [2021] ZASCA 117 (17 September 2021)

Review – Financial Advisory and Intermediary Services Act – application under s 27(3) for hearing of oral evidence or referral to court – Ombud's discretion – no discretion exercised at all – decision not to allow application reviewable.

[1] On 19 November 2009, the sixth respondent on appeal, Mr J B Wallace (Mr Wallace), invested a sum of R730 000 with a company known as Sharemax; R600 000 of this was money entrusted to Mr Wallace by his mother, a pensioner based in the United Kingdom, to invest on her behalf. The balance came from his own funds. At the time, one Mr Marais was his financial advisor. Mr Marais informed Mr Wallace that he was unable to advise him on an investment with Sharemax and referred him to the second appellant (Mr Storm). Mr Storm functioned as an authorised representative of the first appellant, CS Brokers CC (CS Brokers). I shall refer to them jointly as CS Brokers unless it is necessary to distinguish them. CS Brokers was an authorised Financial Services Provider under the Financial Advisory and Intermediary Services Act 37 of 2002 (FAIS).

[2] Mr Wallace, Mr Marais and Mr Storm met more than once. The investment in Sharemax resulted from these meetings. Sharemax offered a number of investments which were essentially property syndications. Some of the funds of Mr Wallace and his mother were placed in the Villa Development and the balance in the Zambezi Development. Each had its own prospectus. There are differing versions as to how this came about. In her determination, the appellant, the Ombud for Financial Services Providers appointed under FAIS (the Ombud), noted that there was a factual dispute as to whether either Mr Storm or Mr Marais had advised Mr Wallace to invest in Sharemax. She notes that Mr Storm and Mr Marais said that Mr Wallace had already decided to do so prior to meeting Mr Storm. These disputes, of course, go to the heart of the claim of Mr Wallace. CS Brokers points to other factual disputes in addition to those noted by the Ombud.

[3] Despite Mr Wallace expecting income from the investments, by September 2010, no income had been received. Mr Wallace approached Mr Storm and alleged that Mr Storm assured him that the capital was safe, but that there had been a delay in income due to internal problems. On 9 November 2010, Mr Wallace

wrote to Mr Storm requesting the return of the capital amount invested. A meeting took place on 19 November 2010 but no money was forthcoming. Mr Wallace then lodged a complaint with the Ombud. The complaint was supported by an unsworn statement and responded to by CS Brokers in like manner.

[4] The complaint was laid with the Ombud on 10 December 2010. She posed certain questions to CS Brokers, to which she received a response. On 9 May 2011, CS Brokers applied to the Ombud under s 27(3) of FAIS to hold a hearing or to refer the complaint to a court. The motivation was that it was a matter requiring oral evidence and cross-examination to resolve factual disputes as well as expert evidence. On 11 May 2011, the Ombud in effect refused that application. She went on to deal with the matter on the material before her. Some five years later, on 26 April 2016, the Ombud made a determination. She ordered CS Brokers to pay Mr Wallace the sum of R730 000 along with interest. CS Brokers applied to the Ombud for leave to appeal, which was refused.

[5] CS Brokers then applied to the Chair of the Appeal Board under s 26B(12) of the Financial Services Board Act 97 of 1990 (the Board Act). Such an application is one to allow further oral and written evidence or factual information and documentation not made available to the Ombud prior to the making of the decision against which the appeal was lodged. The members of the Appeal Board (the Board) are the third, fourth and fifth respondents in this appeal. The Chair dismissed that application. CS Brokers then applied to the Board for leave to appeal against the determination of the Ombud and were granted leave to appeal on limited grounds, namely:

‘1. Was Mrs Wallace a ‘complainant’ as defined in sec 1 of the FAIS Act and if not, was the Ombud entitled to make an order in respect of her loss?

2. Does the Plascon-Evans rule apply in inquisitorial investigations – and in that context did the Ombud in deciding the disputes of fact use her inquisitorial powers or did she decide the factual disputes on the counter-allegations only?

3. Did the Ombud conflate the risk profiles of the three different investors?

4. Was the advice at the time it was given negligent taking into account the extent to which the risks were indicated? In this regard are the reasons of the Ombud in her determination and her dismissal of the leave to appeal the same or materially different?

5. Would a reasonable FSP have reasonable grounds at the time of the advice to suspect that the Sharemax scheme was a Ponzi scheme?

6. Did the Ombud rely on ex post facts for her conclusion?

7. Was the loss reasonably foreseeable at the time of the advice?'

After considering the record of the Ombud and forming its own view, the Board dismissed the appeal against the Ombud's determination in respect of CS Brokers.

It is therefore unnecessary to address the manner in which the discretion of the Ombud should be exercised and the test for interference with it on review. If no discretion is exercised, when the Ombud was indeed vested with a discretion, that has to be the end of the matter. As was agreed by the parties before us, the entire appeal turns on this single issue. It is clear in these circumstances that the appeal must fail.

[19] In the result, the appeal is dismissed with costs, such costs to include the costs of two counsel, wherever so employed.

Bassani Mining (Pty) Ltd v Sebosat (Pty) Ltd and Others (835/2020) [2021] ZASCA 126 (29 September 2021)

Interdict- common law remedy – anti-dissipation interdict – whether it was a requirement for an anti-dissipation interdict for an applicant to prove that the dispositions were made with the intention of thwarting an applicant's pending damages claim or whether there were exceptional circumstances where a lesser threshold applied – whether appellant satisfied the requirements of an interim anti-dissipation interdict – foundational requirements of interim interdict not met. Appeal dismissed with costs including costs of two counsel.

[1] In 1996, this Court in *Knox D'Arcy Ltd and Others v Jamieson and Others (Knox D'Arcy)*[1] reaffirmed the existence in our law, of a distinctive interdict, which provides a remedy where an applicant has shown on the established basis for an interim interdict: (a) a claim against a respondent; and (b) that the respondent is concealing or dissipating assets with the intent of frustrating the claim.**[2]** This court, in *Knox D'Arcy*, reluctantly accepted the description of this remedy as an 'anti-dissipation interdict'**[3]**. That description has stuck and it is now in common usage.

[2] Before turning to consider a very specific dictum in *Knox D'Arcy*, on which the appellant in the present appeal relies, it is necessary to have regard to the factual background, which appears hereafter.

[3] On 19 February 2020, the first respondent, Sebosat (Pty) Ltd (Sebosat*),* represented by the third respondent, Mr Kurt Herman *(Herman*)*,* its sole director and shareholder, entered into a written sub-contract agreement with the appellant, Bassani (Pty) Ltd *(*Bassani). The essential terms of the agreement, for present purposes, were that Bassani, as the subcontractor, would mine coal at Wesselton Mine on behalf of Sebosat, as the contractor. Clause 16.5 stipulated that for the first three months, Bassani would only be entitled to payment of its invoices within 48 hours after the coal mined had been sold and Sebosat had received payment from its client, the second respondent, Mashala Resources (Pty) Ltd *(Mashala).* Clause 2.1.11 defines the 'Main Agreement' as an '[a]greement entered into between the Client and Contractor', meaning Mashala and Sebosat respectively. The agreement recorded that Mashala was the holder of the mining rights over the mineral area at the Wesselton Mine. In clause 18 of the subcontract agreement, Sebosat agreed that the coal mined would be used to provide security to Bassani for its obligations, for any amounts due by Sebosat to Bassani for mining operation.

[4] Bassani mined the coal from March 2020 until 31 May 2020. At the end of May 2020, a dispute arose between Bassani and Sebosat. Bassani claimed that Sebosat owed it monies, evidenced by unpaid invoices, while Herman, on behalf of Sebosat,

alleged that Bassani had failed to mine the coal as agreed, in that the coal that it mined fell short of agreed tonnage targets. Sebosat, instead of dealing with a contractual breach notice issued by Bassani, terminated the agreement on 1 June 2020. Bassani was adamant that Sebosat's termination of the agreement was without foundation. It asserted that at the time of the termination Sebosat owed it an amount of R14 530 824-90.

[5] Following on the termination there were attempts by the parties to settle the dispute amicably. It appeared, at first, that these attempts might bear fruit, with Bassani of the belief that the parties were on the brink of settling amounts owing and the terms of a handover, including the retrieval of its equipment. Communications then broke down.

[6] During July 2020, according to Bassani, it discovered for the first time, through its attorneys, certain crucial facts, which Herman allegedly failed to disclose at the time the parties concluded the subcontract agreement. These were that: (a) Mashala had been under business rescue since 20 November 2014; (b) the 'Main Agreement', supposedly concluded between Sebosat and Mashala, purporting to be the authority for Sebosat to act as contractor, did not exist; (c) Sebosat was a shelf company with no business address and assets, and was allegedly interposed by Herman for the purposes of the subcontract agreement, to shield Mashala from any liability; (d) Bassani had thus mined the coal for the benefit, not of Sebosat, but of Mashala; and (e) as a consequence, Bassani at all material times never had security for payment of its amounts due in terms of clause 18 of the subcontract agreement.

[7] Consequently, Bassani alleged that Herman had fraudulently misrepresented facts relating to his relationship with Mashala, and also Mashala's relationship with Sebosat. Further, that as a result of the alleged fraudulent misrepresentation, Bassani was induced to conclude the sub-contracting agreement with Sebosat. Bassani further alleged that Herman fraudulently interposed Sebosat as a contractor, in what it described as an unconscionable abuse of juristic personality, with the intent to prevent or shield Mashala from any liability that would arise from the mining operations.

[8] Herman's alleged fraudulent misrepresentation moved Bassani to institute an urgent application for an interdict in the high court, seeking relief *pendente lite*,

against Sebosat, Mashala, Herman and his co-director, Andrea Avril Anderson *(*Anderson), cited as the fourth respondent. Bassani sought an order restraining the respondents from alienating, encumbering or removing directly or indirectly coal, to the value of R25 million from Wesselton Mine, pending an action for damages. There was a further claim for the return of equipment, which is not significant to this appeal as that aspect was settled before the hearing in the high court.

[9] In opposing the relief sought, Sebosat and Herman contended as follows. First, that the contract was terminated because Bassani had failed to meet certain production targets; second, that the coal mined by Bassani had been sold; third, that Bassani had refused to submit the dispute to arbitration, provided for in terms of the agreement; and fourth, that Bassani could not prove that the coal had been sold with the intent to thwart execution on the pending damages claim.

Bassani, as demonstrated above, was not out of the starting stalls in establishing the right to an interim interdict. It certainly did not, for all the reasons aforesaid, establish that it was entitled to an anti-dissipation interdict against any of the respondents.

[21] In the result, I make the following order:

1 The appeal is dismissed.

2 The appellant is ordered to pay the respondents' costs, including the costs of two counsel.

SECRETARY, JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE v ZUMA 2021 (5) SA 1 (CC)

Commission — Witnesses — Privileges — No right to remain silent — Privilege against self-incrimination applicable — Proper approach to raising such privilege — Commissions Act 8 of 1947, s 3(4).

The respondent witness (Zuma) failed to remain in attendance at the applicant commission (the Commission) where he was summoned to appear from 16 – 20 November 2020, having left without being excused from further attendance after his

application for recusal of the Commission's chairperson, moved for on the first day of his appearance was dismissed (by the chairman) on 19 November 2020.
Before leaving, Zuma's counsel cautioned that the recusal ruling would be reviewed, and if he were compelled to attend, he would take the witness stand but would not testify — implying that Zuma had a right to remain silent during the proceedings before the Commission. The Commission thereafter approached the Constitutional Court, by way of an application for direct access and on an urgent basis, for its intervention to secure his appearance before the Commission.
Two amici curiae were allowed to make submissions, one raising the issue whether s 3(4) of the Commissions Act 8 of 1947 — which provides that in the case of witnesses giving evidence before a commission 'the law relating to privilege as applicable to a witness giving evidence . . . [in a criminal trial]
shall apply' — must be construed as excluding the privilege against self-incrimination but retaining all other privileges.

Held

As to the application for direct access

Given the seriousness of the threat that the allegations investigated by the Commission posed to democracy if established, it was in the public interest to grant direct access to enable the Commission to conduct a proper investigation of matters it was tasked to determine. (See [67] and [70] – [71].)

As to the merits

The obligation on a witness was to remain in attendance until the proceedings were concluded or they were excused by the chairperson of the Commission from attendance. Zuma's conduct in defying the process lawfully issued under the authority of the law was antithetical to our constitutional order. The Commission established a claim for compelling him to obey its process and testify before it. (See [87] – [88].)

As to witnesses' rights

Witnesses who appear and testify before a commission had no right to remain silent. Section 6 made it a criminal offence to refuse to answer lawfully put questions fully and satisfactorily. Allowing witnesses to invoke such a right before a commission was contrary to the plain text of the Act, and would seriously undermine commissions and frustrate their investigations. It was implicit that the Act required

witnesses to answer all questions — except a privilege which would be available to a witness at a criminal trial as per s 3(4). (See [91] – [93].)
A statutory provision compelling witnesses to give self-incriminating evidence would be inconsistent with the constitutional right to freedom and security of the person, which right included the privilege against self-incrimination. Interpreting s 3(4) in a manner promoting the Bill of Rights, it bore a meaning promoting the right not to be compelled to give self-incriminating evidence. Section 3(4) must therefore not be construed as excluding the privilege against self-incrimination. (See [95] and [101] – [105].)
The privilege against self-incrimination was not there for the taking by witnesses; it was for the witness to claim privilege against self-incrimination. Sufficient grounds must be demonstrated to the chairman of the commission that, in answering a question, the witness would incriminate himself or herself in relation to a specified crime. (See [109].)

BISSCHOFF AND OTHERS v WELBEPLAN BOERDERY (PTY) LTD 2021 (5) SA 54 (SCA)

Spoliation — Mandament van spolie — When available — Letters cancelling lease agreements and warning possessor of land not to trespass on previously leased land — Not constituting deprivation, let alone unlawful deprivation, of possession — Spoliation order not competent.

The appellants had leased out a number of farms to respondent. The appellants' attorneys sent two letters, both dated 1 February 2016, to the respondent's attorneys in which they were informed that all agreements between them were cancelled, and that the respondent should not trespass upon the land. Based solely on what was stated in the letters, the respondent, on an urgent basis, obtained a High Court spoliation order with costs. In the appeal against that order to the Supreme Court of Appeal —
Held
For a spoliation order there must be unlawful spoliation, ie a disturbance of possession without the consent and against the will of the possessor. A minimum

threshold or degree of actual physical interference or deceit sufficiently grave to qualify as effective deprivation of possession was required; the disturbance substantial enough to effectively end or frustrate the complainant's control over the property. Where the conduct complained of merely constituted threatened deprivation of possession, the *mandament van spolie* was not available as a remedy because it was aimed at the actual loss of possession. The mere use of 'strong and unequivocal' words in a letter, that a person should not trespass upon land, did not constitute deprivation, let alone unlawful deprivation, of possession of the land. The High Court erred. The appeal would be upheld. (See [5] – [7], [12] and [20].)

BLENDRITE (PTY) LTD AND ANOTHER v MOONISAMI AND ANOTHER 2021 (5) SA 61 (SCA)

Spoliation — Mandament van spolie — When available — Access to server and use of email.

In this matter Mr Moonisami (first respondent) and Dr Palani (second appellant) were directors of Blendrite (Pty) Ltd (first appellant) (see [1]). Factually Palani was in control of Blendrite. A dispute arose between the pair and Palani claimed Moonisami had resigned. Moonisami contested this. Ultimately Palani caused Blendrite (via instruction to Global Network Systems (Pty) Ltd (second respondent)) to effect the termination of Moonisami's access to Blendrite's email and server (see [2]).
Moonisami then approached a High Court claiming his peaceful and undisturbed possession of access had been unlawfully denied him and he obtained an order that it be restored (see [3]).
Blendrite and Palani then applied for leave to appeal but this was refused, causing them to apply for and receive such leave from the Supreme Court of Appeal (see [4]).
It upheld the appeal (see [21]): only quasi-possession of a supply of a service that arose as an incident of possession of corporeal property was protected by the *mandament van spolie* (see [15] – [16]). Here Moonisami's prior access was not an incident of possession of corporeal property in that he possessed none to which

such access related (see [17] and [20]). More likely, his access was a contractual right whose quasi-possession was not protected by the remedy (see [15] and [20]). The High Court's order set aside and replaced with an order dismissing the application (see [21]).

HELEN SUZMAN FOUNDATION v MCBRIDE AND OTHERS 2021 (5) SA 94 (SCA)

Appeal — Amicus curiae — Amicus curiae persisting in appeal despite settlement by parties — Amicus seeking on appeal to expand issue for adjudication — Such conduct impermissible.

Police — Independent Police Investigative Directorate — Executive director — Tenure — Renewal — Interpretation of s 6 of Independent Police Investigative Directorate Act 1 of 2011 — Renewal of tenure of executive director of Independent Police Investigative Directorate not at instance of incumbent but within remit of Parliamentary Committee on Policing — Role of Minister of Police limited to making recommendation — Such interpretation not inimical to independence of body — Independent Police Investigative Directorate Act 1 of 2011, s 6.

When Mr McBride's five-year term of appointment to the position of executive director of the Independent Police Investigative Directorate (IPID) was coming to an end, he wrote to the then Minister of Police, enquiring whether he intended to renew his contract. The Minister's response, that he did not, prompted Mr McBride to accuse the former of acting unlawfully, in making a unilateral decision, and demand that he withdraw such decision, and refer it instead to the relevant parliamentary committee, namely the Parliamentary Committee on Policing (the PCP), the rightful body to make the determination. Despite the Minister's assertions during correspondence to the effect that he 'did not intend to remove [him] from office', and that he would refer his decision to the relevant parliamentary committee, Mr McBride ultimately sought the intervention of the Gauteng Division of the High Court, Pretoria, in an application against the Minister and the PCP, both of whom opposed.

Section 6 of the Independent Police Investigative Directorate Act 1 of 2011 (the Act) in ss (1) provided that the Minister had to nominate a person for appointment to the office of executive director of IPID, and in ss (2) that the relevant parliamentary committee had to confirm or reject such appointment. Subsection 6(3) of the Act provided that the appointment was for a term of five years, which was 'renewable for one additional term only'. Mr McBride asserted the importance that IPID — given its vital constitutional role, as an independent investigative body, mandated by s 206(6) of the Constitution to investigate police misconduct and offences — be perceived and experienced by the public as an independent entity. This was not possible, he submitted, if critical decisions, such as the appointment of the executive director, were made by the executive arm of government, without oversight. (See [14] – 15].) He accordingly sought orders for the setting-aside of the Minister's decision; and declaring s 6(3)*(b)* of the Act to be 'unconstitutional and invalid to the extent it conferred the power to renew the appointment of the Executive Director of IPID on the Minister of Police, rather than on the [PCP]'. (See [13].) The non-government organisation, the Helen Suzman Foundation, the only appellant in this matter, applied successfully to be admitted as amicus. In its application it argued that the interpretation of s 6(3) of the IPID Act that best vindicated constitutional imperatives was that the appointment of the executive director of IPID was renewable *at his or her instance* and not at the instance of either the Minister or the PCP. After the admission of the HSF, as well as another NGO, Corruption Watch, the parties, McBride, the Minister and the PCP, came to agree that, inter alia, under s 6(3) of the Act, the Minister's role was in fact limited to making a recommendation, and that the PCP made the decision whether to renew the executive director's tenure (see [22], [39] and [45]). The parties sought the court's leave to have their agreement made an order of court. The HSF objected, arguing that the interpretation captured in the settlement order, in placing the power to renew the appointment of the executive director of IPID in the hands of politicians in the guise of the PCP, was constitutionally untenable, as it compromised the independence of that office. (See [23].) The High Court, however, rejected HSF's objections (see [26] for reasons), and made the settlement agreement an order of court. HSF applied for leave to appeal, and was granted it by the Supreme Court of Appeal (SCA) (see [28]).

The SCA noted the peculiar aspects of the appeal (see [1]). For one, it no longer involved as primary participants the disputants in the court below; rather, it was an

appeal brought by an amicus curiae after the dispute in the court below had been settled and an agreement between the litigating parties was made an order of court (see [1]). Furthermore, there was an attempt by the amicus during the hearing to extend the challenge beyond the scope of the initial dispute, which concerned the correct interpretation of s 6(3) of the Act, to raise the purported illegality of the PCP's decision-making process on the ground of lack of guidelines (see [1] and [36]). This, the SCA held, was impermissible, in circumstances in which there had been no foreshadowing at all, either in the application for admission as an amicus, or by any of the parties. There was no evidence on which such an adjudication could take place and there was no attempt by the HSF, in the court below, to adduce such evidence which would then, in turn, have given the opposing parties a right to challenge by way of evidence and submissions of their own. What an amicus should not be permitted to do was to make out an entirely new case on appeal without the necessary evidence and without regard to due process. (See [67].) *As to the central dispute* —

Held, to be overstated the argument of HSF that, in order to safeguard IPID's independence and thus make it constitutionally compatible, the renewal process had to be removed from *the remit of any political actor, including the legislature*. (See [45] and [46].) Firstly, it postulated a higher degree of independence than that required by the Constitutional Court, namely adequate or sufficient independence to enable IPID to fulfil its mandate effectively. Secondly, the principal threat to IPID's independence lay in the executive having exclusive powers over it without oversight on the part of the legislature. (See [46].) However, Constitutional Court judgments demonstrated that a role played by the legislature in relation to independent bodies was not inimical to the independence of those bodies (see [46] and see cases referred to in [47] – [53]). They refuted the central premise of the HSF's argument, that not only the involvement of the executive, but also that of the legislature, interfered with the independence of an organisation such as IPID. They in fact identified the involvement and oversight of the legislature as an important element of the protection of the functional and structural independence of independent statutory bodies. The legislature, in other words, was a bulwark against the erosion of their independence. (See [54].) Accordingly, the foundation of HSF's interpretation of s 6(3) —that because the PCP having the power to renew undermined IPID's

independence, it was necessary to interpret s 6(3) in a different way that was purportedly constitutionally compatible — was untenable. (See [55].)
Held, as to the competing interpretations of s 6 of the IPID Act, that the wording of s 6 in general supported that contained in the settlement order, ie that the power to renew the tenure of the executive director of IPID was vested in the PCP, while the Minister's role was limited to communicating his or her views to the PCP (see [57] – [58]). In contrast, s 6's text was not reasonably capable of being interpreted in the manner favoured by the HSF (see [59]). Not only was such interpretation illogical, it could also have disastrous consequences. (By way of example, the court referred to what it described as the absurd result of a person who failed miserably in their role as executive director being granted the determinative voice in deciding their continued tenure. (See [59].) Accordingly, appeal dismissed (see [60]).

ZUMA v DEMOCRATIC ALLIANCE AND ANOTHER 2021 (5) SA 189 (SCA)

Attorney-State attorney — Powers — Whether may fund private attorneys to represent former official in matter involving official in his personal capacity — State Attorney Act 56 of 1957, ss 3(1) and 3(3).

In the early 2000s the Presidency and State Attorney came to make decisions that the state would pay for private representation for then President Zuma in criminal matters in which he was in his personal capacity the accused (see [15]).
The present respondents (the Democratic Alliance and Economic Freedom Fighters) had later obtained the setting-aside of these decisions and a direction that the State Attorney should recover the amounts so paid (see [18]).
Here Mr Zuma appealed, the Supreme Court of Appeal dismissing the appeal and holding as follows (see [3] and [52]).

- Any delay in bringing the review had not been unreasonable: though the funding decisions had come to the public attention in the first decade of the 2000s, their details had only crystallised very recently (see [27] – [28]). It was moreover difficult to

speak of delay, in that while the decisions concerned had been taken many years before, the impugned action flowing therefrom (the funding) was ongoing (see [30]).

- Section 3(1) of the State Attorney Act 56 of 1957 only authorised the State Attorney to perform work on behalf of the government, where the attorneys' work it had procured here from a private firm was on behalf of an official in his personal capacity (see [32] – [33]). The decisions establishing this arrangement were thus ultra vires and invalid (see [35]).
- Nor did s 3(3) empower the State Attorney to fund Mr Zuma's private representation (see [43]). The section allows the State Attorney 'to perform . . . functions in . . . connection with . . . matter[s] in which . . . Government . . . though not a party, is interested or concerned in, or in connection with . . . matter[s] in which . . . Government . . . though not a party, is interested or concerned in, or in connection with . . . matter[s] where, in the opinion of the State Attorney . . . it is in the public interest that such functions be performed . . .'. (see [36]). In this regard, whether there was a government or public interest involved required assessment of the nature of the proceedings, the issues, and whether there was legitimate reason to support a non-governmental party's position (see [39]).

Here government or the public could not have a legitimate interest in supporting a defence of a former government official to charges of corruption: deployment of state resources to delay or obstruct such a proceeding would subvert government and the public's interests (see [40]).

- Moreover, the divergence or conflict of the public and government's interest with those of Mr Zuma would preclude the State Attorney acting for him (see [42]).
- Finally, ss 3(1) and 3(3) only permit the State Attorney to perform the State Attorney's functions: they do not authorise the State Attorney to outsource its functions to private attorneys (see [43]).

The High Court's conclusion as to a remedy which was just and equitable (an accounting by the State Attorney, repayment by Mr Zuma) could not be faulted: the funding had been provided subject to an undertaking by Mr Zuma to repay it and it could be presumed he had made provision for this eventuality (see [44]). (He had not in any event presented evidence contradicting this presumption (see [44]).)

A repayment order would remedy abuse of public resources, vindicate the rule of law, and reaffirm the principles of accountability and transparency (see [45]).

Moreover, the nature of the discretion exercised by the High Court warranted no interference (see [46]).

- Baseless and scandalous allegations about the High Court's impartiality justified a punitive costs order on the attorney and client scale (see [51] – [52]).

BOUWER OBO MG v ROAD ACCIDENT FUND 2021 (5) SA 233 (GP)

Children — Guardianship — Children's Act not making provision for new type of guardianship — No such thing as 'de facto' guardian — Children's Act 38 of 2005, s 1 sv 'Guardianship', s 18(3).

Legal practitioner — Attorney — Fees — Contingency fees — Contingency fee agreement — Never in best interests of children — Void or voidable.

MG, a 7-year-old girl, was injured when a car driven by her great-grandmother, Ms G, was involved in an accident. The plaintiff was appointed *curator ad litem* to pursue her damages claim against the Road Accident Fund. The RAF conceded liability and counsel for the plaintiff prepared a draft order. The court, however, mero motu raised the issue of the validity of contingency fee agreements (CFEs) Ms G had concluded on behalf of MG. The curator (the nominal plaintiff) indicated that he had ratified the CFEs because MG was represented by Ms G, her de facto guardian. MG had resided with Ms G both at the time of the accident and when she concluded the CFEs, and only later went back to live with her biological mother, who did not participate in these proceedings.

Counsel for the plaintiff argued that Ms G, as de facto guardian, was legally qualified to sign the CFEs. He further argued that a broad interpretation should be afforded to the word 'guardianship' in the Children's Act 38 of 2005 so that it would include de facto guardianship of the kind provided by Ms G. He contended that the phrase 'other person who acts as guardian of a child' in s 18(3) of the Act — which stipulates the duties of a guardian — included persons who were not one of the types of guardian recognised in South African law. These were natural (parents), testamentary (appointed in the testament of the last surviving parent) and assigned (appointed by the court).

Held

The definition of the word 'guardian' in s 1 of the Act was clear and unambiguous and had to be understood within the ambit of South African law as outlined above (see [33]). The words 'other person who acts as guardian of a child' did not create a further type of guardian, a 'de facto' guardian. At best, a de facto guardian would be the person contemplated in s 23 of the Act, but no real guardianship was awarded to such a person, only the specific responsibilities and rights awarded by the court in question (see [35]). The true position of Ms G was that contemplated by s 32 of the Act, but that was a position that was assigned by the court, which did not happen here (see [38]). At the time the CFEs were concluded Ms G had no authority or court-awarded rights to act on behalf of MG. In particular, she could not usurp the rights contemplated in s 18(3)*(b)* of the Act (see [40]).

There was another reason why Ms G could not have concluded the CFEs, and that was because a CFE was in the best interests of the legal practitioner representing the child, not the child itself (see [41]). With CFEs, the risks involved in potential litigation was crucial; where the risk was minimal, or so far removed, that the necessity of concluding one was questionable, it might not pass the limitations imposed by the Contingency Fees Act 66 of 1997 (see [42]). Here MG was barely 7 years old and a passenger in a motor vehicle involved in a collision, so that no contributory negligence could be attributed to her. There was thus no risk in claiming damages from the defendant. No CFE was therefore necessary. The CFEs were voidable transactions, if not void, and the mere fact that the curator ratified them was of no consequence. There was no valid agreement to ratify and it was not in MG's best interests to slice away a sizable portion of the award to be allowed (see [43] – [45]).

MPHATSOI v VAN STADEN 2021 (5) SA 267 (LCC)

Land — Land reform — Magistrates' courts — Powers under ESTA — Whether s 17(4) of ESTA granting magistrates power to invoke civil contempt process — Extension of Security of Tenure Act 62 of 1997, s 17(4).

Appellant and respondent had settled a claim brought by appellant under s 14 of the Extension of Security of Tenure Act 62 of 1997 (ESTA) and the settlement had been made an order of court by the magistrates' court which was exercising ESTA-derived jurisdiction in the matter (see [2]).

When respondent later failed to comply with the order, appellant applied to the magistrates' court for an order sourced in s 17(4) of the Act that respondent was in civil contempt (see [3]). (Section 17(4) provides inter alia that 'the rules of procedure applicable in applications in the High Court shall apply mutatis mutandis in respect of any proceedings in a magistrate's court in terms of this Act'.)

The application was, however, dismissed on the ground that the High Court rules were not the source of the High Court's power to employ the civil contempt process: the High Court's inherent powers were. Thus the magistrates' court could not invoke the process by dint of s 17(4) and the rules (see [4]).

Here appellant appealed to the Land Claims Court, urging that s 17(4) should be interpreted to include the power to invoke such process (see [5]).

Held, confirming the magistrates' court's reasoning, that the appeal should be dismissed: the power to invoke the civil contempt process came from the High Court's inherent jurisdiction rather than the rules that s 17(4) imported, and no other provision of the statute granted magistrates' courts such a power (see [10], [15] and [17]).

STANDARD BANK OF SOUTH AFRICA LTD v SIBANDA 2021 (5) SA 276 (GJ)

Judge — Indisposition — Civil trial — Effect — After hearing of evidence completed, presiding judge becoming indisposed and unable to deliver judgment — Whether trial to start de novo due to importance of presiding judge's observation of witness demeanour — Critical evaluation of demeanour as factor in evaluating witness credibility — Competent for parties to agree that transcript of evidence, together with documentary exhibits, be placed before another judge for hearing of argument and delivery of judgment.

Evidence — Witnesses — Credibility — Demeanour of witnesses — Critical evaluation of demeanour as factor in evaluating witness credibility.

Practice — Trial — Indisposition of judge — Effect — After hearing of evidence completed, presiding judge becoming indisposed and unable to deliver judgment — Whether trial to start de novo due to importance of presiding judge's observation of witness demeanour — Critical evaluation of demeanour as factor in evaluating witness credibility — Competent for parties to agree that transcript of evidence, together with documentary exhibits, be placed before another judge for hearing of argument and delivery of judgment.

After the hearing of evidence was completed, the presiding judge became indisposed and unable to deliver judgment. The parties agreed that the transcript of proceedings, together with documentary exhibits and the parties' written heads of argument that were furnished to the trial judge, be placed before court for delivery of judgment.
The court, in deciding to proceed as agreed, as opposed to ordering the trial to start de novo, *held* that the premise for starting the trial de novo — that the presiding judge's observation of witness demeanour was of such great value that a judge would not be able properly to determine the matter upon a mere reading of the record — was not supported by social science (see [5] – [10]) or case law; its value should not be overemphasised (see [10] – [14]).

TSOTETSI AND OTHERS v RAUBENHEIMER NO AND OTHERS 2021 (5) SA 293 (LCC)

Land — Land reform — Magistrates' court — Jurisdiction — Whether limited to subject-matter referred to in s 19(1)*(a)* of ESTA (proceedings for eviction or reinstatement and criminal proceedings in terms of ESTA) — Or whether, in terms of more generous interpretation, court also enjoying jurisdiction, by virtue of s 19(1), to grant interdicts and declaratory orders as to rights of parties in terms of ESTA, whether or not that relief relating to subject-matter referred to in s 19(1)*(a)*, but provided relief is 'in terms of ESTA' — Extension of Security of Tenure Act 62 of 1997, s 19(1).

The appellants were occupiers in terms of the Extension of Security of Tenure Act 62 of 1997 (ESTA) of a farm owned by a trust of which the respondents were trustees. By agreement (the details of which were in dispute) the appellants kept cattle on a portion of the property, where they were allowed to graze. That portion of land, it was common cause, became overgrazed, such that it required rehabilitation, prompting the respondents to bring an application in the Vrede Magistrates' Court in the Free State for the removal of cattle. The magistrate hearing the matter found that the appellants were land users as defined in s 1 of the Conservation of Agricultural Resources Act 43 of 1983 (CARA), and, as such, they were jointly responsible with the Trust as landowner in terms of reg 9(1)*(a)* – *(e)* of the regulations made under CARA to take as many of the measures prescribed as were necessary in the situation to protect the veld on the farm unit effectively against deterioration and destruction, which they had failed to do. In such circumstances, the magistrate gave orders to, inter alia, the following effect: (1) that the appellants move all their livestock from the property before a specified date; (2) that, in the event of their failing to do so, the Sheriff of Vrede do so; and (3) that the allocated area be completely rested for a minimum period of two growing seasons, after which a maximum of five head of the appellants' cattle (in line with the requirements of CARA) be returned to graze in the allocated area. The appellants appealed against such orders, in terms of s 19(2) of ESTA, to the Land Claims Court.

A key issue that arose on appeal was whether the magistrates' court had had jurisdiction to hear the matter. In terms of s 19(1) of ESTA, a ' magistrates court *(a)* shall have jurisdiction in respect of (i) proceedings for eviction or reinstatement, and (ii) criminal proceedings in terms of this Act; and *(b)* shall be competent (i) to grant interdicts in terms of this Act; and (ii) to issue declaratory orders as to the rights of a party in terms of this Act'. The LCC raised mero motu the following. Was a restrictive interpretation of s 19(1) called for, such that the magistrates' court's jurisdiction in terms of ESTA, and in turn the LCC's appellate jurisdiction, was limited to the *subject-matter* referred to in s 19(1)*(a)* of ESTA (proceedings for eviction or reinstatement and criminal proceedings in terms of ESTA)? Or was a more generous interpretation appropriate, such that the magistrates' court, by virtue of s 19(1)*(b)*, also enjoyed jurisdiction to grant interdicts and declaratory orders as to the rights of parties in terms of ESTA, whether or not that relief related to the subject-matter referred to in s 19(1)*(a)*, but provided the relief

is 'in terms of ESTA' (see [18]). Apart from these aspects raised by the court, the appellants argued that the magistrates' court did not have jurisdiction, as the orders granted could be classified as neither interdicts nor declarators. (It was common cause that the subject-matter of the present case did not fall under ss (1)*(a)*.)

After hearing arguments from the parties, the court held, as to *the question of jurisdiction*, that the more generous approach should be adopted, for three reasons. One, s 19(1)*(b)* was reasonably capable of the more generous interpretation and this interpretation was not in any way strained: in particular, the different words used to introduce ss (1)*(a)* and *(b)*, ie 'jurisdiction' and 'competence', respectively, were not incompatible and the concept of subject-matter jurisdiction was readily embraced in the concept of judicial 'competence' (see [25]). Two, there were various textual indications that the legislature intended the generous interpretation to be adopted: for example, in the use of the word 'competence' in the context of s 19(1)*(b)*, where elsewhere, in s 20(1), the word 'powers' was used when indicating the ability of the LCC to grant interlocutory orders, declaratory orders and interdicts where doing so was necessary or reasonably incidental to the performance of its functions in terms of ESTA; and further the use of the word 'and' between s 19(1)*(a)* and *(b)*, suggesting that s 19(1)*(b)* added to the subject-matter jurisdiction of what was contemplated by s 19(1)*(a)*. (See [26].) Three, the generous interpretation of s 19 better promoted the spirit, purport and objects of s 34, which secured everyone the right to access to courts, and s 25(1) and (6), which secured landowners the right to property and land occupiers the right to security of tenure, of the Constitution of the Republic of South Africa, 1996 (see [27] an [28]).

The court further held that the orders in question were interdicts in nature (see [30]). Further, that the close nexus between the statutory rights derived from ESTA and the personal rights that flowed from an agreement with an ESTA occupier which regulated grazing, rendered an order about the latter to be '*in terms of*' ESTA for purposes of s 19(1)*(b)* (see [31]). (The court thereby rejected the appellants' argument that the phrase 'in terms of' was limited to statutory rights derived from ESTA, holding that it included sufficiently connected rights derived from an agreement with an ESTA occupier to keep and graze cattle on the property in question (see [33]).) Accordingly, the jurisdictional objection raised by the appellants had to fail (see [36]).

As to the merits, the court ultimately held that court magistrate was correct in granting an order for the removal of the cattle (see [43]). To the extent that the appellants had argued that historically the trustees had provided alternate grazing camps to rotate grazing, the court held, they had failed to plead terms of any agreement which would allow the court to conclude that there was a contractual duty to supply grazing land for rotational purposes (see [40]); further, it was not established on the papers that any such historical practice ever existed (see [41]). The court held, however, that the magistrate, in determining the number of cattle to be returned as five, as per the requirements of CARA, had committed an error (see [48]); and replaced such order with one allowing the appellants, after a period of two growing seasons, to return 'only the number of livestock permitted by the provisions of the Conservation of Agricultural Land Act 43 of 1983 and its regulations applicable at that time' (see [51]).

ZAMANI MARKETING AND MANAGEMENT CONSULTANTS (PTY) LTD AND ANOTHER v HCI INVEST 15 HOLDCO (PTY) LTD AND OTHERS 2021 (5) SA 315 (GJ)

Arbitration — Review — Whether rule 53 of application — Whether arbitrators' notes part of rule 53 record — Arbitration Act 42 of 1965, s 33; Uniform Rules of Court, rule 53.

Applicants and first – sixth respondents had been involved in a dispute which had gone to arbitration, and in which those respondents had obtained an award in their favour (see [1]). Applicants later instituted a review of the arbitrators' (7th – 9th respondents') award and called on the arbitrators under rule 53(1)*(b)* to despatch to the registrar the record of the arbitration proceedings (see [1] and [7]). This the arbitrators had done save for the documents annotated with their notes (see [7]). Applicants in response issued a rule 30A notice requesting despatch of the annotated documents and, on the arbitrators' refusal instituted these proceedings to compel their production (see [2] – [3]).

The arbitrators' reasons for refusal were that rule 53(1)*(b)* was not of application to reviews of awards brought under s 33 of the Arbitration Act 42 of 1965 and in any event that their notes were not part of the record (see [3] and [7]).
Held, that rule 53 was of application in s 33 reviews of arbitration awards and that this finding was supported by the language of the rule, case law and the rule's utility in making for a fair review proceeding (see [16] – [17], [19], [21] and [24] – [25]).
Held, further, that the arbitrators' notes did not form part of the record and that their production could not be compelled under rule 53 (see [44]). This as such notes could be fragmentary, provisional, exploratory or subject to revision or discard and their relationship to the award's reasoning could not be determined with certainty (see [36] and [39] – [40]). Moreover, the notes, as the 'raw material' of reflection, ought to be produced under conditions of utmost freedom and this might be curtailed if production thereof could be compelled (see [41]).
Appeal dismissed (see [46]).

Capitec Bank Holdings Limited and another v Coral Lagoon Investments 194 (Pty) Ltd and others [2021] 3 All SA 647 (SCA)

Civil Procedure – Evidence – Whether evidence of manner in which the parties implemented the subscription agreement could be considered in light of parol evidence rule – Explaining scope of parol evidence rule, the court confirmed the importance of context and had regard to the evidence in question.

Civil Procedure – Mootness – Court having discretion to entertain the merits of an appeal, even where the matter is moot – Where a case poses a legal issue of importance for the future that requires adjudication, that may incline the court to hear the appeal.

Corporate and Commercial – Subscription of shares agreement – Subsequent disposal of shares – Existence of requirement of consent for sale – Interpretation of subscription agreement – Rules of interpretation set out by court.

In terms of a subscription of shares agreement, the first appellant (“Capitec Holdings”) issued 10 million shares to the first respondent (“Coral”). Coral, in turn, was required to allot and issue shares to the second respondent (“Ash Brook”). A

company holding a majority interest in Ash Brook, and various parties related to it (the “Regiments Parties”), Coral and the third respondent, Transnet Second Defined Benefit Fund (the “Fund”), entered into a settlement agreement in terms of which the Fund would be paid R500m by the other parties in settlement of claims it had against the Regiments Parties. The settlement amount was to be funded by the sale of 810 230 Capitec Holdings shares. Capitec Holdings’ consent was requested for the disposal of the shares by Coral. Its refusal of consent led to Coral and Ash Brook approaching the High Court which held that Capitec Holding’s refusal to consent to the sale of the sale shares was in breach of its contractual and common law duties of good faith and reasonableness. Capitec Holdings appealed against the order that it consent to the sale.

Coral, Ash Brook, and the fourth and fifth respondents submitted that the decision of the present Court would have no practical effect or result, and in terms of section 16(2)(a) of the Superior Courts Act 10 of 2013, the appeal should be dismissed.

Held – The court has a discretion to entertain the merits of an appeal, even where the matter is moot. Where a case poses a legal issue of importance for the future that requires adjudication, that may incline the court to hear the appeal. The appeal in this case was of practical consequence, and was not moot. But even if it were, the interpretation of the relevant clause (clause 8.3) in the subscription agreement was a legal issue of consequence for the future of the parties’ commercial relationship. The point regarding mootness was thus dismissed.

On the merits, the key question was whether Capitec Holdings’ consent was required before Coral could sell the sale shares to the Fund, and if it was, whether Capitec Holdings owed duties of good faith and reasonableness to Coral, which Capitec Holdings breached in failing to consent to the sale.

In considering the provisions of the subscription agreement that had relevance for deciding whether Capitec Holdings’ consent was required, the court referred to the established rules of interpretation. Of significance in the exercise, was the submission by Coral and Ash Brook that the manner in which the parties implemented the subscription agreement was relevant evidence as to what clause 8.3 meant. The wider approach to interpretation endorsed in case law referred to by the court states that extrinsic evidence is admissible to understand the meaning of

the words used in a written contract. However, the parol evidence rule which remains part of our law, states that barring exceptional circumstances, extrinsic evidence is inadmissible to contradict, add to or modify the contract. Explaining the scope of the parol evidence rule, the court confirmed the importance of context and had regard to the evidence in question. That led it to conclude that the subscription agreement did not require Capitec Holdings' consent to the sale by Coral of the shares to the Fund. The Court also discussed the role of good faith and public policy in the context of freedom of contract.

The appeal was upheld.

Esorfranki (Pty) Ltd v Mopani District Municipality [2021] 3 All SA 686 (SCA)

Civil Procedure – Evidence – Refusal by trial court to have regard to affidavits filed and received into evidence – There is no procedural impediment to the reception of evidence, by a trial court, by way of affidavit – Where parties agree that facts may be placed before a court by way of affidavit and agree that the deponent will not be cross-examined, then the factual allegations contained in the affidavit stand unchallenged.

Civil Procedure – Plea of res judicata – Party relying on defence required to establish that the same cause of action between the same parties has been litigated to finality ie the same relief has been sought or granted.

Delict – Tender award by Organ of State – Fraudulent awarding of contract – Unsuccessful tenderer claiming damages for loss of profit being the economic loss it suffered in consequence of it not being awarded the contract – Factual and legal causation –Whether impugned conduct was factually linked to the harm caused and whether harm suffered was sufficiently closely linked to the wrongful and unlawful conduct to establish liability – Where neither test was satisfied, delictual claim failing.

In August 2010, the respondent municipality ("Mopani") invited tenders for the construction of a water pipeline. When the contract was awarded to a joint venture, the appellant ("Esorfranki") as unsuccessful tenderer, instituted a claim for damages based on loss of profit, against Mopani and the two entities making up the joint venture. The claim was based on the allegation that the award of the tender was as

a result of wrongful and intentional conduct, amounting to dishonesty and fraud. It was alleged that Mopani's decision to award the contract to the joint venture was vitiated by bias, bad faith, ulterior purpose and dishonesty. In consequence, Esorfranki was alleged to have suffered damages based on the profit it would have earned had the contract been awarded to it as the successful tenderer as it should have been. The present appeal was against the High Court's dismissal of the claim.

Held – The High Court improperly refused to have regard to affidavits filed by Ersorfranki and received into evidence before the court. That led to the court not determining whether the evidence before it established the pleaded cause of action upon which Esorfranki relied. There is no procedural impediment to the reception of evidence, by a trial court, by way of affidavit. If the parties agree that facts may be placed before a court by way of affidavit and agree that the deponent will not be cross-examined, then the factual allegations contained in the affidavit stand unchallenged.

The respondent also pleaded a defence of *res judicata*, on the ground that Esorfranki had previously brought an application for review of the tender decision. A plea of *res judicata* requires the party who relies thereupon to establish each of the three elements upon which the exception is based, namely that the same cause of action between the same parties has been litigated to finality ie the same relief has been sought or granted. The present Court held that although the parties were the same, the cause of action and the relief sought in the trial action was not the same as that pursued before the review court. A plea of *res judicata* was thus not available to Mopani in such circumstances.

The requirements for a delictual claim are a wrongful act or omission, fault in the form of negligence or intention, causation, and finally damages in the form of patrimonial or non-patrimonial loss. Esorfranki's particulars of claim contained several allegations relating to the wrongful and culpable conduct of Mopani and its employees in awarding the tender to the joint venture. The court found, based on the evidence before it, that the decision-maker acted deliberately and dishonesty, with bias in favour of the joint venture. It acted in bad faith, with an ulterior purpose and, fraudulently. That was found to provide a basis for a delictual claim.

The Court then turned to the issue of causation. Esorfranki pleaded that but for the unlawful conduct of Mopani, it would have been awarded the contract. The evidence presented by it established that it presented an eligible or valid bid, ie one that complied with all of the qualifying criteria. Its price was the lowest presented. The differential between its price and the price of the joint venture was approximately R10 million. The bid adjudication report indicated that Esorfranki scored the second highest number of points after the joint venture. The question was whether the harm suffered by Esorfranki was sufficiently closely linked to the wrongful and unlawful conduct to establish liability. Esorfranki's claim was one for loss of profit being the economic loss it suffered in consequence of it not being awarded the contract. The Court found that legal causation had not been established, and dismissed the appeal.

A dissenting judgment would have upheld the appeal, the view being that causation was in fact established.

Minister of Co-Operative Governance and Traditional Affairs v De Beer and another (Council for the Advancement of the South African Constitution and another as *amici curiae*) [2021] 3 All SA 723 (SCA)

Civil procedure – Courts – Court hearings – Propriety of virtual hearing – Where appeal had full record and heads of argument were available to judges hearing appeal, there was no reason why a virtual hearing for the purposes of hearing oral argument would attenuate the open justice principle.

Constitutional and Administrative Law – National state of disaster – Regulations promulgated during pandemic – Constitutionality and validity – Where constitutional challenge not pleaded with specificity and clarity, and review court not applying rationality test to each of the impugned Regulations, granting of review application not sustainable.

In response to the threat to national health and safety presented by the global outbreak of the Coronavirus, the appellant, as Minister of Co-operative Governance and Traditional Affairs promulgated Regulations under section 27(2) of the Disaster Management Act 57 of 2002. The first respondent ("Mr De Beer") was a member and

president of the second respondent (the “LFN”), a non-governmental organisation, which acted primarily as a tenants’ association.

The respondents challenged all the Regulations promulgated from the outset of the government’s response to the pandemic.

The present appeal was against the High Court’s declaring almost all of the regulations unconstitutional and invalid. The Minister contended that the High Court had strayed beyond the pleadings; alternatively, that the respondents had not properly pleaded their constitutional attack, which was upheld by the High Court and the attack based on the Bill of Rights was too vague for the Minister to answer. It was also argued that the respondents had not raised a proper rationality attack and, in any event, the High Court’s application of the rationality test was fundamentally flawed. Finally, the High Court’s orders were said to be impermissibly vague.

Held – The respondents complained that the Regulations were overbroad, but without providing a proper factual foundation for that conclusion, and without specifying why that was so. The court described the founding affidavit as displaying the theme of COVID-19 denialism.

The Court had scheduled a virtual hearing of the matter, as one of the measures taken by courts during the pandemic. The respondents objected thereto, insisting that the court was required to conduct the oral hearing in person, and in a court in Bloemfontein, failing which it would not be acting in accordance with its judicial duties. The Court pointed out that litigants may not specify the conditions under which they are willing to have a matter heard and adjudicated. The appeal was one with a full record and the heads of argument were available to the judges hearing the appeal. There was no reason why a virtual hearing for the purposes of hearing oral argument on any aspect of this appeal would attenuate the open justice principle.

On the merits, the court held that the Minister had been called upon to answer a case that was framed in almost unintelligible terms. The High Court found for the respondents on a case not made out in the founding affidavit and based largely on dispersed and inadmissible assertions and its own speculation as to how the Regulations ought to have been framed. Secondly, the respondents did not plead, or properly plead, the constitutional attack that was upheld by the High Court. It was found further that the High Court did not properly apply the rationality test to each of

the impugned regulations. Instead, it embarked upon a comparative exercise and for the rest, it relied upon conjecture and speculation.

Concluding that neither the challenge brought, nor the High Court's reasons for sustaining that challenge could be allowed to stand, the appeal was upheld.

Timasani (Pty) Ltd and another v Afrimat Iron Ore (Pty) Ltd [2021] 3 All SA 843 (SCA)

Civil Procedure – Court proceedings during business rescue – Requirement of notice to creditors – Non-joinder – Section 145(1) of the Companies Act 71 of 2008 not requiring the joinder of every creditor in such proceedings.

Corporate and Commercial – Company law – Business rescue – Claim by creditor against company in business rescue for repayment of deposit paid – Moratorium on legal proceedings – Section 133(1) of the Companies Act 71 of 2008 provides that during business rescue proceedings, no legal proceedings, including enforcement action, against the company; and no legal proceedings in relation to property belonging to or in the lawful possession of the company may be commenced or proceeded with – Moratorium inapplicable to legal proceedings in relation to property belonging to an entity other than the company in business rescue.

Upon the first appellant ("Timasani") being placed in business rescue on 28 July 2015, the second appellant, as business rescue practitioner, was authorised to sell its assets in terms of a business rescue plan adopted by its creditors.

Prior thereto, the respondent ("Afrimat") had made an offer to purchase Timasani's assets, and had paid a deposit of R1 700 000 to Timasani. The contracts for the purchase of the assets did not materialise due to the non-fulfilment of suspensive conditions.

In the present appeal, the question was whether Afrimat was precluded from launching proceedings for repayment of the deposit by the moratorium on legal proceedings imposed by section 133 of the Companies Act 71 of 2008 (the "Act"). The present appeal was against the High Court's declaration that section 133 was inapplicable and its order that Timasani repay the deposit.

One of the points raised by Timasani was that of non-joinder in that Afrimat had failed to join all its creditors to the proceedings in terms of section 145(1) of the Act.

Held – The test for non-joinder is whether a party has a direct and substantial interest in the subject matter of the proceedings, ie a legal interest in the subject matter of the litigation which may be prejudicially affected by the judgment of the court. Section 145(1) of the Act sets out the rights and obligations of creditors when participating in business rescue proceedings as a whole. Inasmuch as a company in business rescue must be cited in legal proceedings against it, the duty to give notice to creditors in terms of section 145(1)(a) rests on the business rescue practitioner. Being a general notification requirement, the purpose of section 145(1)(a) is to inform creditors of court proceedings brought during business rescue. It does not require the joinder of every creditor in such proceedings. Afrimat was thus not required by section 145(1) of the Act to join all Timasani's creditors in the application to recover its deposit.

On the question of whether section 133(1) of the Act precluded Afrimat from claiming repayment of the deposit, the court held that the section is a general moratorium provision that applies in relation to the assets and liabilities of the company at the stage when business rescue comes into effect. It protects the company against legal action in respect of claims in general, save with the written consent of the business rescue practitioner and failing such consent, with the leave of the court.

The court held that properly construed section 133(1) provides that during business rescue proceedings, no legal proceedings, including enforcement action, against the company; and no legal proceedings in relation to property belonging to or in the lawful possession of the company may be commenced or proceeded with. The latter part of the provision was relevant in the present appeal. Afrimat contended that section 133(1) was inapplicable because the deposit did not belong to Timasani and it was in unlawful possession thereof. The provision limits the reach of the moratorium and renders it inapplicable to legal proceedings in relation to property belonging to an entity other than the company in business rescue.

The High Court's finding that the deposit was property in respect of which Timasani exercised the powers of a trustee, as envisaged in section 133(1)(e) of the Act was not endorsed, as the deposit was not paid as property in trust.

The appeal was dismissed with costs.

Zuma v Minister of Police and others [2021] 3 All SA 967 (KZP)

Civil Procedure – Jurisdiction – Whether High Court having jurisdiction to suspend the execution of a specific order of the Constitutional Court – Constitutional Court is highest court in the hierarchy of courts, and its decisions cannot be undermined by a lower court – Application to High Court to rescind Constitutional Court's order of contempt of court ill-conceived.

The refusal by the applicant, Mr Zuma, to comply with a summons issued by the Judicial Commission of Inquiry into State Capture, Fraud and Corruption in the Public Sector, Including Organs of State, led to the Constitutional Court declaring him in contempt of court, and sentencing him to 15 months' imprisonment. Mr Zuma applied to the Pietermaritzburg High Court for rescission of the said order.

Held – Mr Zuma's challenge to the *locus standi* of the Commission and the seventh respondent in opposing the rescission application was summarily rejected as being grounded on an unsound rationale.

The main issue was whether the High Court had jurisdiction to suspend the execution of a specific order of the Constitutional Court. Mr Zuma contended that the court had jurisdiction as the order for his committal to prison was to be executed within the court's jurisdiction.

The Court referred to the hierarchy of courts as set out in Chapter 8 of the Constitution. Section 167 sets out the Constitutional Court's jurisdiction. It is trite that there is no higher authority than the Constitutional Court, and its decisions cannot be undermined by a lower court. The Court emphasised the importance of the doctrine of judicial precedent. It went on to hold that should the court accede to the contentions advanced on behalf of Mr Zuma, then the hierarchy would be disturbed and there would be no finality to legal decisions.

Mr Zuma also challenged the constitutionality of the Criminal Procedure Act 51 of 1977, contending that there is no requirement that the crime of civil contempt, as in the present circumstances, should be dealt with in accordance with that Act, and the

Constitution. It was submitted that Mr Zuma could not challenge the constitutionality of the Criminal Procedure Act on a direct and urgent basis to the Constitutional Court, on the grounds that it allowed for civil contempt proceedings to be conducted outside of its provisions without a trial. It was contended further that as the Constitutional Court does not have primary jurisdiction in terms of section 167(4) of the Constitution, the challenge must first be brought in the High Court. It was further argued that the suspension of the execution of the committal order was in the interests of justice, and that the High Court could grant such order in terms of section 173 of the Constitution. The Court rejected those submissions, confirming the constitutionality of the civil contempt procedure.

While the above findings rendered it unnecessary to deal with the interim relief sought by Mr Zuma, the court nevertheless found that the requirements for such relief had not been established.

The application for rescission was dismissed with costs.

END-FOR NOW