CIVIL LAW UPDATES OCTOBER 2021[1]

INDEX

CASE NAMES

Davidan v Polovin NO and others [2021] 4 All SA 37 (SCA)

Dimension Data (Pty) Ltd v Pearton (2388/2020) [2021] ZAECPEHC 54 (5 October 2021)

Electoral Commission of South Africa v Democratic Alliance and others [2021] 4 All SA 52 (SCA)

ELECTORAL COMMISSION v DEMOCRATIC ALLIANCE AND OTHERS 2021 (5) SA 476 (SCA)

Gartner and another v University of Cape Town and others [2021] 4 All SA 143 (WCC)

Goliath v Dirk Ellis Motor Group (Pty) Ltd and Another (3034/2021) [2021] ZAECGHC 94 (12 October 2021)

HAL obo MML v MEC for Health, Free State (1021/2019) [2021] ZASCA 149 (22 October 2021)

Kaap-Vaal Trust (Pty) Ltd v Speedy Brick & Sand CC (23143/2020) [2021] ZAGPPHC 668 (18 October 2021)

Khetsekile v Nedbank Limited and Another (2385/2021) [2021] ZAFSHC 231 (7 October 2021)

Limpopo Provincial Council of the South African Legal Practice Council v Chueu Incorporated Attorneys and Others (6947/2021) [2021] ZALMPPHC 75 (25 October 2021)

McGregor v Selborne Park Body Corporate and Others (AR224/2020) [2021] ZAKZPHC 87 (8 October 2021)

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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.

MKHATSHWA AND OTHERS v MKHATSHWA AND OTHERS 2021 (5) SA 447 (CC)

Morakaladi and Others v Bakone ba Masha Mokopole Communal Property Association and Others (2854/2020) [2021] ZALMPPHC 67 (4 October 2021)

Nofuma v Dlhamini and Another (332/2021) [2021] ZAFSHC 256 (26 October 2021)

NOMANDELA AND ANOTHER v NYANDENI LOCAL MUNICIPALITY AND OTHERS 2021 (5) SA 619 (ECM)
Peyper Austen Inc t/a Peyper Lessing Attorneys v Petru Bohta Properties (1277/2021) [2021] ZAFSHC 253 (18 October 2021)

Slabbert v Legal Practice Council, Free State (995/2020) [2021] ZAFSHC 240 (15 October 2021):

South African Breweries (Pty) Ltd v Minister of Co-operative Governance and Traditional Affairs [2021] 4 All SA 189 (WCC)

Stellenbosch University Law Clinic and others v Lifestyle Direct Group International (Pty**)** Ltd and others [2021] 4 All SA 219 (WCC)

SUBJECT INDEX

Amicus curiae – Rule 16A of the Uniform Rules, together with court's inherent jurisdiction to regulate its own process, governing admission to proceedings of an amicus curiae – Discretion to admit an amicus is taken in the interests of justice.
Stellenbosch University Law Clinic and others v Lifestyle Direct Group International (Pty) Ltd and others [2021] 4 All SA 219 (WCC)

Applications— Urgent applications — Non-compliance with rule 41A(2)*(a)* raised in limine — Whether application to proceed as it stood — Uniform Rule 41A(2)*(a)*.
NOMANDELA AND ANOTHER v NYANDENI LOCAL MUNICIPALITY AND OTHERS 2021 (5) SA 619 (ECM)

Applications-Urgency – General rule is that a party's failure to institute proceedings on an issue that existed, and of which that party may have been aware for some time, would make it difficult for such a party to have that issue adjudicated on an urgent basis – Exception to the rule is where there is an ongoing violation of rights.
South African Breweries (Pty) Ltd v Minister of Co-operative Governance and Traditional Affairs [2021] 4 All SA 189 (WCC)

Attonreys-suspension-locus standi of LPC challenged due to faulty resolution of Limpopo LPC-court nevertheless looking at merits-court is the custodian of legal practitioners-has inherent powers Limpopo Provincial Council of the South African

Legal Practice Council v Chueu Incorporated Attorneys and Others (6947/2021) [2021] ZALMPPHC 75 (25 October 2021)

Attorney-application for re-admission – opposed by LPC- The respondent opposed this matter without sound reasons. What stands out for me is for the respondent to set requirements and once they are met, still decide to oppose. That is not fair. The applicant on the other hand is at this point because of his own doing. Slabbert v Legal Practice Council, Free State (995/2020) [2021] ZAFSHC 240 (15 October 2021)

Class action – Class action will be certified where there are some issues of fact, or some issues of law (or a combination thereof) that are common to all members of the class and can appropriately be determined in one action. Stellenbosch University Law Clinic and others v Lifestyle Direct Group International (Pty) Ltd and others [2021] 4 All SA 219 (WCC)

Class action – Opt-out class action – Nature of – Opt-out class action automatically binds members of the class to the class action and the outcome of the litigation unless the individual class members take steps to opt out of the class action. Stellenbosch University Law Clinic and others v Lifestyle Direct Group International (Pty) Ltd and others [2021] 4 All SA 219 (WCC)

Constitutional and Administrative Law – Principle of legality – A body exercising a public power must act within the powers lawfully conferred on it – Electoral Commission's determination of complaint concerning breach of Electoral Code of Conduct violating principle of legality. Electoral Commission of South Africa v Democratic Alliance and others [2021] 4 All SA 52 (SCA)

Costs — Special order — Punitive costs order — When to be awarded — Vexatious litigation and scurrilous remarks about judges — May warrant punitive costs. MKHATSHWA AND OTHERS v MKHATSHWA AND OTHERS 2021 (5) SA 447 (CC)

Exception- The declaration, considered as a whole, should be sufficiently clear for a party to plead thereto. The Plaintiff has elected to formulate its cause of action as set out in the declaration. Whether the cause of action is legally valid is not the issue to determine during exception proceedings. The Plaintiff's difficulty to plead, as submitted lies therein that it is embarrassed to the extent that it is unable to raise a claim of prescription. Exception dismissedPeyper Austen Inc t/a Peyper Lessing Attorneys v Petru Bohta Properties (1277/2021) [2021] ZAFSHC 253 (18 October 2021)

Exceptions to particulars of claim – Approach to exceptions – A court must accept all allegations of fact made in the particulars of claim as true; may not have regard to any other extraneous facts or documents; and may uphold the exception to the pleading only when the excipient has satisfied the court that the cause of action or conclusion of law in the pleading cannot be supported on every interpretation that can be put on the facts. Gartner and another v University of Cape Town and others [2021] 4 All SA 143 (WCC)

Interdict- mandatory interdict- the National Credit Act, 34 of 2005 (the NCA), and the second respondent, a credit bureau registered in terms of section 43(1) of the NCA are compelled to remove his name from the records that the second respondent retains in terms of section 70 of the NCAKhetsekile v Nedbank Limited and Another (2385/2021) [2021] ZAFSHC 231 (7 October 2021)

Interdict- Publishing threatening, defamatory and/or factually untrue information concerning the Applicants and/or the Applicant's employees on the Respondent's websites and/or on any other platform or social media platform- interdict grantedDimension Data (Pty) Ltd v Pearton (2388/2020) [2021] ZAECPEHC 54 (5 October 2021)

Jurisdiction — Power to adjudicate complaints of electoral irregularities limited to disputes of administrative nature — Complaint of contravening Code of Conduct by publishing false statements or allegations with intention to influence conduct or outcome of election — Such not of administrative nature — Electoral Commission not having jurisdiction to determine such complaint or to impose remedy therefor — Electoral Act 73 of 1998, s 89(2) and item 9(1)*(b)* of sch 2. ELECTORAL COMMISSION v DEMOCRATIC ALLIANCE AND OTHERS 2021 (5) SA 476 (SCA)

Jurisdiction-– Eviction order – Jurisdictional requirement to trigger an eviction under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 is that the person sought to be evicted must be an unlawful occupier within the meaning of the Act at the time when the eviction proceedings were launched – Finding that occupier had consent to occupy property meaning that she had a right of occupation and could not be an unlawful occupier – Eviction order not justified in circumstances. Davidan v Polovin NO and others [2021] 4 All SA 37 (SCA)

Lis pendens- divorce action in Magistrates court instituted bbut applicant in high court with declarotary re marriageNofuma v Dlhamini and Another (332/2021) [2021] ZAFSHC 256 (26 October 2021)

Rule 35(12) notice-discovery- on the respondents seeking certain specified documents to enable them to prepare their answering affidavit- court ordered must give Morakaladi and Others v Bakone ba Masha Mokopole Communal Property Association and Others (2854/2020) [2021] ZALMPPHC 67 (4 October 2021)

Rule 7(1) power of attorney the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with leave of the court on good cause shown – APPLICATION DIMISSEDKaap-Vaal Trust (Pty) Ltd v Speedy Brick & Sand CC (23143/2020) [2021] ZAGPPHC 668 (18 October 2021)

Spoliation- access, and the use of an electronic booking system utilised for renting his residential units, was deactivated by the first respondent for failing to pay his arrear levies- appeal-appeal dismissedMcGregor v Selborne Park Body Corporate and Others (AR224/2020) [2021] ZAKZPHC 87 (8 October 2021)

Spoliation application-res juducata- Magistrate's Court after spoliation- court order does not legitimise the respondents' unlawful conduct. Goliath v Dirk Ellis Motor Group (Pty) Ltd and Another (3034/2021) [2021] ZAECGHC 94 (12 October 2021)

Trial – conduct – obligation of parties to define the issues – sequence of witnesses – joint minutes of experts – agreement on facts contrasted with agreement on opinion – approach to agreements on matters of opinionHAL obo MML v MEC for Health, Free State (1021/2019) [2021] ZASCA 149 (22 October 2021)

CASES

Kaap-Vaal Trust (Pty) Ltd v Speedy Brick & Sand CC (23143/2020) [2021] ZAGPPHC 668 (18 October 2021)

Rule 7(1) **power of attorney** the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with leave of the court on good cause shown – APPLICATION DIMISSED

This is an interlocutory application in terms of Rule 30A. On 18 September 2020, the firm Cawood Attorneys (attorneys for the Respondent) served a Notice in terms of Rule 7 on the attorneys for the Applicant, wherein it disputed the authority of Van Der Merwe and Associates to act as attorney of record for the Applicant.**[1]** In the said notice, Van Der Merwe and Associates, representing Kaap-Vaal Trust (Pty) Ltd were requested to provide the necessary proof that the said attorney holds authorisation to act on behalf of the Applicant.

As there was no compliance to the said Rule 7 notice, Cawood Attorneys (representing Speedy Brick & Sand CC), proceeded to serve a Rule 30A application on Van Der Merwe and Associates on 12 November 2020, wherein they sought an order to compel Van Der Merwe and Associates to comply, by virtue of delivery of evidence with the said Notice in terms of Rule 7 and costs.

On 19 November 2020, Van Der Merwe and Associates responded to the said notice by delivering their clients power of attorney, together with a resolution dated and signed 18 November 2020.

4. Cawood Attorneys was not satisfied with the reply so received and proceeded to launch the present Rule 30A application dated 8 December 2020 and served on the Repondent the same day.

5. As per the founding affidavit filed in support of the application and more specifically paragraph 7 thereof, the deponent, Ms Henning sets out the following:

"*On 24 November 2020, the Applicant served a Power of Attorney ('POA2') and Member's Resolution on the Applicant. Copies of the aforesaid documents are attached hereto marked "SH4" & "SH5" respectively. Notwithstanding, "PO2" filed together with the Members Resolution, still does not constitute compliance with Rule 7 of the Uniform Rules of Court. The Respondent is in business rescue and the members of the CC do not have the required authorization to take the resolutions relied upon by the Respondent."*

ISSUES FOR DETERMINATION

8. In casu the main issue for determination is therefore whether this Court is satisfied that Van der Merwe & Associates has the necessary authority to act on behalf of the Respondent. In addition and as an ancilliary point, the parties also requested the court to determine whether the Respondent is currently in business rescue (or not). On behalf of the Respondent it was contended that only if the answers to both questions are in the affirmative, can the application succeed, otherwise it stands to be dismissed.

9. As a point of departure, the main issue falls to be dertermined first, before a determination is made of whether the Respondent is in business rescue or not. In this regard the provisions of Rule 7 of the Uniform Rules of Court should be considered.

10. Rule 7(1) **POWER OF ATTORNEY** reads as follows:

"*(1) Subject to the provisions of subrules (2) and (3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with leave of the court on good cause shown at any time before judgment, be disputed, whereafter such person may no longer act unless he satisfied the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application."* The practice of unnecessarily challenging the authority of individuals to bring applications has been decried.**[7]**

11. On a mere reading of the Rule 7(1) it is clear that a person's authority to act on behalf of a party may be challenged within ten days after it has come to the notice of a party that such person is so acting. The first question, which then requires an answer, is when notice was obtained by Cawood Attorneys that Van Der Merwe and Assocates acts on behalf of the applicant.

12. On behalf of the applicant it was argued that in the main application, the applicant gave its intention to oppose the main application on 29 July 2020.**[8]** This date is undisputed by the respondent.

13. The Rule 7 notice however, was only served on 18 September 2020, some 37 days after an intention to oppose was delivered and even longer after the applicant became aware that Van der Merwe & Associates is acting on behalf of the respondent.

14. This delay, in challenging the authority of Van Der Merwe and Associates outside of the ten-day period provided for in the rule, the respondent submitted, the applicant did not explain, nor did the applicant request leave from the Court to dispute the authority of Van der Merwe & Associates substantially outside the 10-day period. In addition thereto, the applicant also failed to show good cause for wanting to dispute the authority outside of the time period provided for in terms of the rule.

15. In support of this argument, the respondent relied on the decision made in South African Allied Workers' Union v De Klerk,***[9]*** albeit that the court therein did not make a finding on the failure to lodge the challenge within ten days, as the court in that matter was faced with new proceedings which triggered the 10-day period afresh as the previous authority was merely a general authority to represent the party in legal proceedings.

16. In opposition, the applicant requested the Court, to ignore the applicant's failure to have complied with the provisions of Rule 7. On behalf of the applicant, it was argued, that it was rather in the interest of the parties, that a determination on the merits of the application be made, instead of just on the preliminary point, more so that the preliminary point was also not raised in the opposing affidavit.

17. In the present application, no application for condonation was brought to enable the applicant to dispute the authority of Van Der Merwe and Associates, outside of the ten-day period, nor was leave of the Court on good cause shown sought by the applicant.

18. The *point in limine*, this Court cannot simply ignore, more so in circumstances where no attempt has been made by the applicant to explain the delay in challenging the authority of the respondent.

19. The 10-day time period within which the authority of another can be challenge, is not merely superfluous. This time period is set, so as to bring certainty to the litigants that no challenge will be mounted against their authority, and where this challenge is mounted outside of the 10-day period on notice, that this challange can only be mounted with leave of the Court and on good cause shown. The rule thus gives direction and permission that a challenge can still be mounted outside of this 10-day period, but only with leave of the Court and on good cause shown. In the present instance, no leave was also sought by the applicant.

20. This is not an insignificant point to merely be ignored by a Court, as it would mean, that on a mere whim of an opponent, the mandate of an attorney concerned may be challenged. Where a litigant fails to adhere to any time limit provided for in any rule of court, rule 27(3) specifically permits such litigant to seek condonation for its non-compliance.**[10]**

21. In the present application, the applicant has failed to request condonation in terms of rule 27(3) and it follows that the applicant cannot be granted relief on the merits in circumstances where it, by itself, is in flagrant disregard of the rules of court.

22. Consequently, the application must therefore fail.

COSTS

23. In as far as costs is concerned, the respondent, if successful, requested the court to consider awarding it costs on an attorney and client scale.

24. On its behalf, it was submitted that attorney and client costs is justified if the court has sight of the reprehensible conduct on the part of one of the parties,**[11]** or where where a party is vexatious with persistence in futile litigation.**[12]**

25. Furthermore, it was argued that it has been held that if an application was so lacking in arguable merit, that it merited an attorney-client costs order.**[13]** The present application it argued, is one such instance.

26. With reference to the appropriate costs order to be awarded in the event of being successful, no punitive cost order was sought by the applicant.

27. I do not believe that a punitive costs order is warranted under the circumstances.

ORDER

28. Consequently, the following order is made: 28.1 The *point in limine* is upheld.

28.2 The application is dismissed with costs.

Goliath v Dirk Ellis Motor Group (Pty) Ltd and Another (3034/2021) [2021] ZAECGHC 94 (12 October 2021)

Spoliation application-res juducata- Magistrate's Court after spoliation- court order does not legitimise the respondents' unlawful conduct.

[1] The applicant brought urgent proceedings for relief in terms of the *mandament van spolie*, in particular seeking an order directing the respondents, *inter alia*, to:

(a) restore to him undisturbed possession of certain properties situated in Graaff-Reinet (the properties);

(b) return to him all farming implements, water pumps, generators and other items which they allegedly took from the properties; and

(c) rebuild certain structures that they allegedly demolished.

[2] The applicant is the bona fide occupier of the properties. The first respondent, a duly incorporated company, is the registered owner and the second respondent a director of the latter.

[3] It is common cause that the applicant has been in peaceful and undisturbed possession of the properties since 2013. It is also common cause that on 23 and 24 August 2021, the first respondent attempted to gain entry to the property, purporting to exercise the ownership rights of the first respondent. The applicant refused to allow him entry and the second respondent thereafter forcibly entered the properties and undertook certain major earthworks and demolition of existing structures. Although he was accompanied by the police, it was not contended on his behalf that their presence rendered his actions lawful.

[4] The respondents opposed the application on the grounds that the applicant has not established urgency and that the dispute between the parties has already been finalised in another forum, namely the Graaff-Reinet Magistrate's Court. They contended that the matter is therefore res judicata.

[5] In this regard they relied on a judgment granted by the Graaff-Reinet Magistrate's Court under case number 389/2021, on 22nd September 2021, in terms of which an order issued, *inter alia*, restraining the applicant from preventing the second respondent from entering upon the properties and from interfering with the first respondent's directors or their employees in the conduct of farming operations on the properties.

[6] As mentioned earlier, it is common cause that the applicant was in undisturbed and peaceful possession of the properties at all material times and that the second respondent's conduct effectively amounted to a deprivation of his possession. The only issue that accordingly falls for determination is whether the Magistrate's Court court order has the effect of legitimising the respondents' unlawful conduct.

[7] Regarding the issue of urgency, I am satisfied that the respondents' actions being of an ongoing nature, the matter was sufficiently urgent to justify the truncated time periods and non-compliance with the Uniform Rules of Court.

[8] There can be little doubt that the undisputed facts established that the second respondent, acting in his capacity as director of the first respondent, took the law into his own hands, forcibly deprived the applicant of possession and *ex post facto* approached the Magistrates Court for an order legitimising his otherwise unlawful conduct. That the applicant should be without a legal remedy in these circumstances offends one's sense of fairness and justice.

There can be little doubt that the undisputed facts established that the second respondent, acting in his capacity as director of the first respondent, took the law into his own hands, forcibly deprived the applicant of possession and *ex post facto* approached the Magistrates Court for an order legitimising his otherwise unlawful conduct. That the applicant should be without a legal remedy in these circumstances offends one's sense of fairness and justice.

[9] I am of the view that there is no merit in the respondents' contention that the dispute between the parties is *res judicata*. Ms *Teko*, who appeared for the applicant, has correctly submitted that the issues which fell for decision in the Magistrate's Court did not include the applicant's rights as a *bona fide* possessor. That case concerned the respondents' purported enforcement of their ownership rights. The order must accordingly be construed only to restrain the applicant from interfering with the respondents in the lawful exercise of their proprietary rights. Those rights do not entitle them to enter upon the property without the applicant's permission or in the absence of a court order for his ejectment. I am accordingly of the view that the applicant is entitled to relief which will have the effect of protecting his rights as *bona fide* possessor of the properties.

[10] I am, however, of the view that he did not make out a case for an order compelling the respondents to rebuild demolished structures. It seems to me that this issue will depend on the resolution of the dispute relating to the ownership of the properties.

[11] Mr *Miller*, who appeared for the respondents, submitted that the court should express its displeasure with the fact that the applicant did not disclose in his founding papers the existence of the Magistrate's Court order, by making a punitive costs order.

[12] While I agree that the applicant was obliged to disclose that fact in the founding papers, I am of the view that the respondents, having taken the law into their own hands, should not be the beneficiaries of any such punitive costs order. I am accordingly of the view that it is appropriate for the parties to bear their own costs.

[13] In the result the following order issues;

(a) The respondents must forthwith restore to the applicant undisturbed possession of erf 4294, Graaff-Reinet and Erven 1027 and 1028, Addendorp, situated at Peppertree Volwas, in the magisterial district of Dr Beyers Naude Local Municipality, Graaff-Reinet, Eastern Cape.

(b) The respondents must forthwith return all the farm implements, PVC pipes, water pumps, irrigation systems, generators and sprinkler systems that they took from the properties.

(c) The parties shall bear their own costs.

Dimension Data (Pty) Ltd v Pearton (2388/2020) [2021] ZAECPEHC 54 (5 October 2021)

Interdict- Publishing threatening, defamatory and/or factually untrue information concerning the Applicants and/or the Applicant's employees on the Respondent's websites and/or on any other platform or social media platform- interdict granted

[1] This is an application for an interdict brought by way of urgency on 9 October 2020 by the Applicants seeking to interdict the Respondent from:

"2.1 threatening, harassing defaming and and/or abusing the Applicants and/or any employee of the Applicants; and/or

2.2 inciting any other person or entity to threaten, harass, defame and/or abuse the Applicants and/or any employee of the Applicants; and/or

2.3 Publishing threatening, defamatory and/or factually untrue information concerning the Applicants and/or the Applicant's employees on the Respondent's websites and/or on any other platform or social media platform;

3. The Respondent is ordered to take down his websites concerning the Applicants and their employees;

4. The Respondent is ordered to pay the costs of the application on an attorney and client scale".

[2] The Respondent opposed the application on various grounds *viz*:

"2.1 that the application was not urgent and that the Applicants failed to comply with the peremptory provisions Rule 61(2) of the Uniform Rules of Court;

2.2 that the Applicants in their affidavits, have put up objectionable matter which falls to be struck out in particular in their replying affidavit by impermissibly averring new facts in supplementation of the case put up by them in their founding affidavit in material respects;

2.3 that on the facts the Applicants have not established the requisites for the relief sought by them and therefore are not entitled to such relief".

[3] However, on 20 October 2020, the parties by agreement, agreed to remove the matter from the roll, put each other on terms and the Respondent without

conceding that the Applicants are entitled to the order, agreed to be bound by the provisions of the interim order pending the determination of the application. In agreeing along those terms, the Respondent, however pertinently alleged in it that the agreement was made without conceding that the Applicants are entitled to such relief and purely to enable the dispute raised to proceed in an orderly manner in accordance with the Uniform Rules of Court as agued.

B. <u>The Parties</u>:

[4] The First Applicant is a private company duly registered and incorporated in terms of the company laws of South Africa. It is the subsidiary of the Second Applicant.

[5] The Second Respondent is NTT Ltd, a private company duly registered and incorporated in terms of the laws of England with its principal place of business for Middle East and Africa in Sandton, Gauteng.

[6] The Respondent is Rory Pearton an adult businessperson who trades as Internet Services and Technologies or iSAT. I shall throughout the judgment refer interchangeably to it as either the Respondent or iSAT. Apart from the qualifications, the Respondent states that he started a software development and support business in 1984 known as Orion. During 1988, he started iSAT as an adjunct to Orion and iSAT grew to a point relative to similar businesses nationally. Apart from his academic training, the Respondent states that he regards himself as an expert in the field of software development and maintenance as well as the provision of internet and associated service because of his extensive knowledge and experience. The Respondent avers that he proceeded to develop his own virtual services, which were used for internal and external internet service provider systems including his own website and those of his customers; mail servers, his own administrative requirements and a major software development project being undertaken by him. His internal ISP systems included data collection, data storage and data analysis, backup and reporting for the software project.

In the result the following order is made:

1. The Respondent is hereby interdicted and restrained from:

    1.1 threatening, harassing and/or defaming the Applicants and/or any employee of the Applicants, and/or inciting any other person or entity to do so; and/or

    1.2 publishing threating, defamatory and/or factually untrue information concerning the Applicants and/or the Applicants' employees on the Respondent's websites and/or on any other platform; and

2. The Respondent is ordered to pay the costs of the application and the application to strike out.

Khetsekile v Nedbank Limited and Another (2385/2021) [2021] ZAFSHC 231 (7 October 2021)

Interdict- mandatory interdict- the National Credit Act, 34 of 2005 (the NCA), and the second respondent, a credit bureau registered in terms of section 43(1) of the NCA are compelled to remove his name from the records that the second respondent retains in terms of section 70 of the NCA

[1] **Introduction**

This is an application for a mandatory interdict. The applicant seeks an order in terms of which the first respondent, a credit provider as defined in the National Credit Act, 34 of 2005 (the NCA), and the second respondent, a credit bureau registered in terms of section 43(1) of the NCA are compelled to remove his name from the records that the second respondent retains in terms of section 70 of the NCA. The first respondent opposes the application.

[2] **Background**

This matter emanated from an unsuccessful loan application the applicant made to the first respondent during 2013. The basis whereupon the loan application did not succeed was that the Applicant had, in support of the application, provided the first respondent with, *inter alia*, forged bank statements. The first respondent reported this information to the second respondent and the latter recorded same on its database. The applicant became aware of the listing of his name on the second respondent's database in July 2017 whereafter he reported the matter to the South African Police Service. On the 15th July 2020 he lodged a dispute with the second respondent and despite this, the listing was retained on the grounds that the applicant's name was listed for prescribed purposes of fraud detection and fraud prevention services.

The first respondent opposed the application on various grounds (including that the loan application was made in April 2014, not 2013, and denied the allegation that the applicant resent the bank statements to the first respondent and was told that they differed from those submitted earlier) and also raised a preliminary point that the matter ought not to have been brought to court by way of motion proceedings as there was a foreseeable dispute of fact, that fact being whether or not the applicant committed fraud. However, the main ground upon which the first respondent opposed the application is that the applicant's listing on the database of the second respondent was lawful and did not constitute an infringement of any of the applicant's rights.

[3] **The issue**

The issue in this application is whether the first respondent was entitled to report to the second respondent the fact that the applicant provided the first respondent with bank statements that were found to have been tempered with, and if so entitled, whether the concomitant listing of the applicant by the second respondent, without prior notice, was an infringement of the applicant's rights contemplated in section 72(1)(a). This listing is what the applicant alleges to be the wrongful state of affairs for which the respondents are responsible.

[4] **The law**

The legal position in regard to the grant of a final interdict is settled. An applicant for such an order must show, (a) a clear right, (b) an injury actually committed or reasonably apprehended, and (c) the absence of similar protection by any other ordinary remedy. [Setlogelo vs. Setlogelo **1914 AD 221** at 227].

Regarding the point *in limine* raised by the first respondent, the test enunciated in Plascon-Evans Paints Ltd vs. Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623 (A) at 634E-G, is that where the relief sought in motion proceedings is a final interdict, such relief may be granted only if the facts as stated by the respondent, together with the admitted facts in the applicant's affidavits, warrant the granting thereof.

[5] **Evaluation of evidence and application of law to the facts**

The applicant's case as stated in his founding affidavit is that after the first respondent contacted him and informed him that his application for a loan was unsuccessful due to the fact that he tempered with bank statement, he resent the bank statements whereupon he was informed that there was a discrepancy between the bank statements submitted earlier and those submitted later. The Applicant has not attached the copies of the bank statements that he submitted later. Mr Lubbe, on behalf of the first respondent questioned this omission on the part of the applicant, correctly so in my view, as these bank statements are material to the case of the applicant but no explanation for the omission was given by Mr Mogwera, who appeared for the applicant.

The applicant's application for loan did not succeed and he was informed of the reasons for this. In 2017 he became aware that his name was listed on the database of the second respondent and he reacted to this by no more than deposing to an affidavit at the police station, and, three years later, in July 2020, lodging a complaint with the second respondent. The conduct of the applicant in not taking any action in 2014 following the refusal of his loan application based on allegations that he submitted forged bank statements, and the fact that he never sought any explanation from Standard Bank, which issued the bank statements, despite having been in need of the loan to repair his motor vehicle, calls into question his alleged lack of knowledge of the discrepancies that the first respondent observed in the bank statements submitted in support of the applicant's loan application. It was on the basis of these factors that I thought that the factual dispute that arises in this matter is not of the nature that warrants an order of referral to oral evidence as I was of the view that, on a consideration of the totality of the evidence, the probabilities favour the version of the first respondent. The first respondent's version is, in simple terms that the applicant does not have the right to which he lays a claim. The issue whether or not the applicant committed fraud is not material in the adjudication of the dispute in this case.

The submission of the applicant on the issue whether there is a dispute of fact is that there is none. I have found that there is a factual dispute, albeit of the nature not justifying the referral of the matter to oral evidence.

Upon perusal of the applicant's founding affidavit, I could not find any evidence in support of the relief sought. It was difficult to decipher which rights of the applicant, if any, were infringed upon. Notwithstanding this shortcoming in the applicant's founding papers, I decided to consider the applicant's case as stated in his heads of argument and argued by Mr Mogwera in oral submissions in court. The argument advanced in court was based on the provisions of regulation 17(1) read with Section 70(2)(f) and in support of that argument Mr Mogwera referred me to the case of NCR vs SAFPS NCT/23181/2015/140(1) NCA. This is a decision of the National Credit Tribunal, (the NCT).

The right that the applicant sought to enforce, which is stated for the first time in clear terms in the heads of argument, is that contemplated in section 72(1)(a) of the NCA. That section provides that every person has a right to be advised by a credit provider within the prescribed time before any prescribed adverse information concerning the person is reported by it to a credit bureau, and to receive a copy of that information. The time prescribed in the regulations is 20 days.

Section 70(2)(f) provides that;

"A credit bureau must promptly expunge from its records any prescribed consumer credit information that, in terms of the regulations is not permitted to be entered in its records or is required to be removed from its records."

Regulation 17(1) deals with retention periods for credit bureau information and it provides for "consumer credit information' categorised as 'adverse information' relating to 'qualitative information on consumer behaviour' (category 5) to be retained for a period of one (1) year from date of commencement of the event.

As stated above, the applicant relied on the case heard before the NCT which, in its interpretation of regulation 17(1), held that 'fraud information' is 'prescribed consumer credit information' that should be expunged from the records of a credit bureau after expiry of a one-year period. The applicant's reliance on this case was misplaced on the basis that the decision of the NCT was set aside on appeal by the Gauteng High Court and on further appeal by the NCR to the SCA the decision of the Gauteng High Court was confirmed in the case of National Credit Regulator vs South African Fraud Prevention Services **2019 (5) SA 103** (SCA).

In the above case the SCA stated at paragraph 25 that:

> "In our view the meaning that must be given to the term 'adverse classification of consumer behaviour' throughout category 5 of regulation 17(1) is the meaning that it is given in section 71A(4)(a) of the NCA. Various features support that construction. The first is that its central feature is the failure by consumers to perform their legal and contractual obligations under a credit agreement. It encompasses subjective classification of that failure and says nothing about fraud. The latter is more usually an objective assessment of the consumer's conduct in the light of the definition of fraud. The expression 'adverse classification of consumer behaviour' appears to be directed at the behaviour of the consumer once credit has been advanced rather than behaviour aimed at defrauding a credit provider in a prospective credit application."

Following a discussion of the applicability or otherwise of regulation 17(1) to fraud information, the SCA, at paragraph 31, stated that:

> "All of this point to the fraud information held by SAFPS not being subject to the time limit, even if it constitutes consumer credit information, because it is not consumer credit information within any of the prescribed categories in reg. 17. The Tribunal's finding, that fraud information 'is the subset of [consumer] credit information that equally impacts the credit provider's decision whether or not to grant credit to the affected consumer', does not properly address the question whether it falls within one of the categories in regulation 17(1) and it is thus incorrect".

The SCA held that there was no obligation on SAFPS to expunge the fraud information in its possession.

The application is dismissed with costs.

Slabbert v Legal Practice Council, Free State (995/2020) [2021] ZAFSHC 240 (15 October 2021):

Attorney-application for re-admission – opposed by LPC- The respondent opposed this matter without sound reasons. What stands out for me is for the respondent to set requirements and once they are met, still decide to oppose. That is not fair. The applicant on the other hand is at this point because of his own doing.

[1] This is an application for the re-admission and re-enrolment of the applicant as an attorney and notary of this Court. The respondent, as the regulatory authority of legal practitioners in the Republic, is opposing it.

Background facts

[2] The facts that gave rise to these proceedings are that the applicant is a recidivist when it comes to the conduct of the attorney's practice. He was admitted as an attorney and notary of this Court on 19 February 1991 and 16 January 1992 respectively. Barely five years later, on 7 November 1996, he was suspended from practice for failing to submit an unqualified audit report and practicing without a Fidelity Fund Certificate.

[3] A window of opportunity was granted to him when the suspension was uplifted on 24 January 2002. Despite being granted this opportunity, the applicant again did not keep proper books of accounts as contained in the audit report compiled by Mazars Auditors dated 25 November 2010. On this occasion, the then Law Society of the Free State (predecessor to the respondent) approached this Court for an order for his removal from the roll of attorneys and notaries which was granted on 23 May 2013.

[4] This application is a third attempt by the applicant to be admitted in some form or another as a legal practitioner. On 17 August 2017 members of this Court dismissed his application to be admitted as an advocate in a scathing judgment.**[1]** The court held that the applicant does not appreciate and acknowledge the seriousness of his misconduct. As a result, he had not discharged the onus that he is indeed rehabilitated.

[5] Again in 2018 the applicant launched an application for his re-admission under case number 59/2018. It was in my view appropriately withdrawn. It appears that after some engagement between the parties, the respondent set out conditions that must be fulfilled before consenting to the order sought in this application. It is common cause that he complied and was informed by the Provincial Office of the respondent that the Disciplinary Oversight Committee has passed a resolution to the effect that the application will not be opposed. Despite the assurance, somehow the council of the respondent decided to override the aforementioned committee and proceeded to oppose it.

The attitude of the respondent is unhelpful. For quite a period of months, the application remained unopposed. This is compounded by the decision of the Council of the respondent overruling its subcommittee without advancing cogent reasons

thereof. It is of concern to note that the applicant was stringing the respondent along with no real commitment to consent to his application

[16] What remains is the exercise of the discretion. The question is whether to re-admit the applicant or not. I find on the facts before me and applying the test as stated that the applicant has discharged the necessary onus and is entitled to the relief sought. Both counsel intimated that perhaps certain conditions should be attached to such order for re-admission. None could elaborate specifically what conditions must be imposed. Situations may arise where such supervised practice is ordered by the court. I am not a proponent of that idea. It may create more problems than providing the solution to the issue. It is for the respondent as the professional body to enact rules designed to deal with difficult problems and to be applied in appropriate cases.

[17] It is customary that the respondent is treated as special litigant when it comes to the issue of costs. I do not understand that to mean that the discretion of the court where the respondent is involved is taken away. The respondent opposed this matter without sound reasons. What stands out for me is for the respondent to set requirements and once they are met, still decide to oppose. That is not fair. The applicant on the other hand is at this point because of his own doing.

Order

[18] I make the following order: -

18.1 The applicant is re-admitted to practice as a Legal Practitioner.

18.2 The respondent is authorised to re-enrol the applicant as a practicing attorney and notary.

18.3 Each party pays its own costs.

Peyper Austen Inc t/a Peyper Lessing Attorneys v Petru Bohta Properties (1277/2021) [2021] ZAFSHC 253 (18 October 2021)

Exception- The declaration, considered as a whole, should be sufficiently clear for a party to plead thereto. The Plaintiff has elected to formulate its cause of action as set out in the declaration. Whether the cause of action is legally valid is not the issue to determine during exception proceedings. The Plaintiff's difficulty to plead, as submitted lies therein that it is embarrassed to the extent that it is unable to raise a claim of prescription. Exception dismissed

[1] The Plaintiff in this matter, a duly registered incorporated company trading as Peyper Lessing Attorneys, instituted action proceedings against the Defendant in respect of legal services rendered. The action proceedings were instituted by way of a simple summons which was followed by a declaration. The Defendants delivered a notice in terms of Rule 23(1) of the Uniform Rules averring that the declaration contains matters which are vague and embarrassing. The Plaintiff elected not to comply with the request to cure the averred vagueness and subsequently the exception was set down for hearing.

The Exception

[2] The Defendant excepts against the following paragraphs in the declaration:

4.

> "*During April 2016 at Bloemfontein the Plaintiff, there and then duly represented by Mr. Pieter Peyper and the Defendant, there and then represented by Ms. Petru Botha entered into a verbal agreement, in terms whereof:*
>
> *4.1…..*
>
> *4.2….*
>
> *4.3…*
>
> *4.4…*
>
> *4.5 The Plaintiff would attend to all collection matters on behalf of the Defendant.*
>
> *4.6 The Defendant would be liable to compensate the Plaintiff for the legal collection services rendered.*
>
> *4.7 Should the mandate be terminated by either party, the Defendant will be liable to make payment of the Plaintiff's account for services rendered."*

[3] It is submitted on behalf of the Defendant/Excipient that it faces difficulty in establishing the cause of action relied upon by the Plaintiff given that two contradictory causes of action are pleaded, namely a verbal agreement and a termination of mandate.

[4] It is submitted on behalf of the Defendant that fees charged for legal services constitutes a debt since the Plaintiff acquired a complete cause of action for the recovery of the debt on completion of each instruction. It is submitted that the Plaintiff was obliged to account to and invoice the Defendant regularly in accordance with the contract as well as being obliged thereto in terms of the Rules for the Attorneys Profession, promulgated on 26 February 2016 as per Government Gazette no 39740.

[8] It is submitted that payment in terms of paragraphs 4.4 and 4.6 would become due and payable on the rendering invoices in order to escape the defence of prescription and payment in terms of paragraph 4.7 would only become due and payable if and when the Defendant terminates the mandate of the Plaintiff.

The mandate was terminated, as pleaded, and the Plaintiff claims payment of the amount it believes is owing as per taxed bills of costs.

[10] The declaration, considered as a whole, should be sufficiently clear for a party to plead thereto. The Plaintiff has elected to formulate its cause of action as set out in the declaration. Whether the cause of action is legally valid is not the issue to determine during exception proceedings. The Plaintiff's difficulty to plead, as submitted lies therein that it is embarrassed to the extent that it is unable to raise a claim of prescription.

[11] I can see nothing preventing the Defendant from proceeding with a plea of prescription in either of the instances it has identified, namely, on an invoice or debt it believes has become due immediately upon the instruction, or on the other hand upon termination of the mandate. Prescription may be raised and adjudicated in a special plea. The Defendant should thus not be embarrassed to plead to the declaration.

[12] The difficulty complained of in pleading has no merit since the reading of the declaration as a whole, sets out the cause of action with sufficient particularity. It sets out an outline of the Plaintiff's case. The Defendant should have a clear idea of the material facts necessary to make the cause of action intelligible.

[13] In the circumstances the following order is made:

13.1 The Exception is dismissed with costs.

Nofuma v Dlhamini and Another (332/2021) [2021] ZAFSHC 256 (26 October 2021)

Lis pendens- divorce action in Magistrates court instituted bbut applicant in high court with declarotary re marriage

[1] The applicant seeks an order to declare the customary marriage between him and the first respondent valid. He further seeks an ancillary order to authorise the second respondent to register and issue a marriage certificate for him and the first respondent.

[2] The first respondent opposes the application on the basis that this court lacks jurisdiction to adjudicate this matter. The first respondent further opposes the application on the basis that there are pending divorce proceedings between her and the applicant relating to the alleged marriage in the Palm Ridge Regional Court. In her view there is no justification for the institution of the proceedings in this court. On the merits she denies the existence of the marriage. I am of the view that the issue of *lis pendens* will dispose of this matter and will accordingly deal with it only.

[3] For the purpose of this application it is necessary to set out the following brief background:

The applicant and the First Respondent were in a love relationship. On 29 April 2017 the families of the parties met in order to negotiate the issue of their marriage. Lobola was negotiated, agreed upon and paid. On 29 April 2017 and in Phuthaditjhaba, celebrations were held in accordance with the cultural practises of the First Respondent. On 16 December 2017 and in the Eastern Cape another celebration was held in accordance with the Applicant's cultural practise welcoming the First Respondent into the family of the Applicant. She was also given a name during these celebrations.

[4] The Applicant contends that a customary marriage came into being while the First Respondent denies that allegation and in support of her denial she annexed to her answering affidavit an alleged agreement signed allegedly by the Applicant and First Respondent. Clause4.1 of the said agreement stipulates that:

"*The parties confirm that they participated in the customary(traditional) processes that were held by both respective families, however, they both agree that neither of the parties intended or intend for such traditional processes to result into a customary marriage as envisaged in the RCMA (the Act). Accordingly, the parties do not consent to be married, to each other, in terms of the RCMA."*

[5] On 11 December 2019 the Applicant instituted an action for a divorce in the Palm Ridge Regional Court against the First Respondent (defendant in the divorce action) in which he, inter alia, sought an order of divorce. At the time when the application before me was instituted the divorce action was still pending. In his

particulars of claim in the divorce action the Applicant alleges that the "*parties entered into a customary marriage on 29 April 2017 at Monontsha, Phuthaditjhaba, Qwaqwa*' and further that the marriage still subsisted. In her Plea the First Respondent denied the existence of the marriage. This denial of the First Respondent prompted the Applicant to bring this application while the case in the Regional Court was still pending.

[6] The **Jurisdiction of Regional Courts Amendment Act, 31 of 2008** amended the Magistrate Court Act, 32 of 1944 and clothed the regional courts with jurisdiction to deal with civil litigation including divorce matters. Section 29 of the Magistrate Court Act provides as follows:

"(1B)(a) A court for a regional division, in respect of causes of action, shall, subject to section 28(1A) , have jurisdiction to hear and determine suits relating to the nullity of a marriage or a civil union and relating to divorce between persons and to decide upon any question arising therefrom, and to hear any matter and grant any order provided for in terms of the Recognition of Customary Marriages Act ,1998(Act No 120 of 1998).

(b) A court for a regional division hearing a matter referred to in paragraph (a) shall have the same jurisdiction as any High Court in relation to such matter."

here is thus an obligation upon a litigant instituting proceedings to prosecute the case to finality rather than to institute other proceedings again without having regard to the time and costs. To allow parties to willy-nilly institute proceedings between the same parties on the same cause of action in different courts would also congest the court rolls unnecessarily and would have an indirect consequence of denying the majority of litigants speedy resolution of their disputes and may in certain instances deny them access to justice. In *Socratous v Grindstone Investment***[3]** the court held that the South African courts are under pressure due to contested court rolls, and the defence of lis pendens must be allowed to operate in order to stem unwarranted proliferation of litigation involving the same parties based on the same cause of action and related to the same subject-matter.

[11] The other concern for the courts is to avoid a situation where different courts pronounce on the same issue with the risk of differing or conflicting decisions**[4]**.

[12] In order for a party to successfully raise *lis pendens* as a defence, he must allege and prove the following requisites:

a) A pending litigation between the same parties;

b) The litigation must be based on the same cause of action;

c) The litigation must be based on the same subject matter.

[13] In my view the First Respondent, bearing the onus, has established the requirements referred to in paragraph [10] above. This, notwithstanding, the court still retains the discretion to order the stay of these proceedings. I am satisfied that despite all the requirements for *lis pendens* being present, the balance of convenience and equity require the case to proceed**[5]** . In spite of the issue of a pending case being raised in the answering affidavit**[6]** by the First Respondent, the Applicant failed to deal with this issue and give reasons why this matter must proceed despite the pending matter in the regional court.

[14] The Applicant has raised the issue of a customary marriage in the Palm Ridge Regional Court. The First Respondent disputes it. The regional court must, in my view, pronounce itself on that said contentious issue. This issue raised forms the subject matter of the cause of action in the divorce court. The conduct of the Applicant in seeking declaratory relief in this court while the divorce proceedings are pending borders on the abuse of the court process. I am of the view that the proceedings in this court should be held over pending the finalisation of the divorce proceedings instituted at Palm Ridge Regional Court. I can find no reason why the costs shall not follow the cause.

ORDER

1. The application in this court under case number 332/2021 is hereby stayed pending the final determination of the action instituted in the Palm Ridge Regional Court under case number GP/PAL/RC 547/2019.

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

McGregor v Selborne Park Body Corporate and Others (AR224/2020) [2021] ZAKZPHC 87 (8 October 2021)

Spoliation- access, and the use of an electronic booking system utilised for renting his residential units, was deactivated by the first respondent for failing to pay his arrear levies- appeal-appeal dismissed

[1] This appeal concerns the issue whether the *mandament van spolie* remedy was available to the appellant in circumstances where his access, and the use of an electronic booking system utilised for renting his residential units, was deactivated by the first respondent for failing to pay his arrear levies.

[2] The appellant is the owner of certain residential units situated within the Selborne Park Golf Estate (the estate) at Pennington on the KwaZulu-Natal South Coast. The first respondent is the body corporate of the estate, duly established in terms of s 36 of the Sectional Titles Act 95 of 1986 (the Act). The second to eighth respondents are the duly appointed trustees of the estate whilst the ninth respondent is the estate manager. It was common cause that the appellant does not reside within the estate but leases his units to various tenants. He does this through the estate's Glovent portal system (the system). The estate, as the administrator of the system, issues to homeowners authorisation to issue access codes or pin numbers to either guests or contractors wanting access to the estate. All homeowners in the estate, by virtue of their ownership, are registered as users of the system by the estate.

[3] The appellant's contention was that he had peaceful and undisturbed access to and use of his units in the estate and the system since 13 December 2017 when the units were transferred to his name. This access was exercised by him through an access card issued to him by the estate which he would simply swipe at the electronic reading mechanism situated adjacent the main entrance to the estate. He averred that he was also denied peaceful and undisturbed access to and use of the estate's visitor management solution application, the system utilised by the estate and homeowners as the facility through which homeowners wishing to lease their units to prospective tenants.

[4] According to the appellant, the basis for the disturbance of his access and use of the estate and the system was as a result of a resolution passed by the trustees of the estate during December 2018, to the effect that unit owners who were in arrears with their levies would only be granted consent to let their units out from 1 March 2019 on condition that they had paid the outstanding arrear levies. Furthermore, those unit owners who were in arrears would have their access cards deactivated and would be required to sign at the main gate in order to gain access into the estate and would be required to use the intercom system to get to their units.

[5] It was common cause between the parties that the estate had instituted an action in the Durban High Court against the appellant for outstanding levies. The appellant is defending that action and that case is still pending. It came as no surprise then that the appellant would be affected by the resolution. The parties exchanged various correspondence with regard to the action and the effect of the resolution but there was no agreement reached between them. As a result, the appellant, on an urgent basis, launched an application on 20 May 2019, seeking orders that the estate restore his possession and access to the estate and the units by activating or reactivating his access card to the estate and to the system. The orders sought included a punitive costs order, *de bonis propriis,* against the second to eighth respondents.

[6] The respondents opposed the application on various grounds. They also launched a counter application seeking an order that the appellant be interdicted and restrained from hiring out his residential units in the estate until such time that he has obtained consent for doing so from the trustees of the estate and that he has complied with the resolution of December 2018. The respondents denied that the appellant's possession of and access to the estate and to the units was interrupted. They further disputed that the appellant had a right to the system in order to hire out the units. It was contended that the appellant's entitlement to admit tenants to the estate and access to the system was conditional upon his compliance with the terms of the management as well as conduct rules. Furthermore, that right was conditional upon the consent of the trustees. Reference in particular was made to conduct rule 13(1) and (5) of the conduct rules which deals with the letting of units. (I will deal with this rule later in the judgment).

As alluded to earlier, the appellant has not challenged the reasonableness of the resolution or its legality. Even if he did, he could not do so through a spoliation application. Reference was made, on behalf of the appellant, to *Fisher v Body Corporate Misty Bay*.**[8]** However, that matter in my view is distinguishable on the facts from this matter. It was not in dispute when the matter was argued in the court *a quo* and before us that the appellant's access to all his units had been restored through the electronic access card. The only remaining live issue was his right to have access to the portal system. And for him to let out his units, he must obtain approval from the trustees of the first respondent. That rule stands and the appellant agreed to be bound by it when he bought his properties in the estate.

[20] As the appellant required approval from the trustees prior to him letting out his units, this shows that the appellant was never in physical control of the portal system. His right to let the units has always been subject to him obtaining approval from the trustees. That is a contractual right between him and the trustees. Further reference was made to *Singh and another v Mount Edgecombe Country Club Estate Management Association (RF) NPC and others*.**[9]** In my view, this matter is again

distinguishable from *Singh* as there the challenge lay at the fairness and constitutionality of the conduct rules for residents. Accordingly, the appeal must fail.

[21] In the result, the following order shall issue:

'The appeal is dismissed with costs'.

Morakaladi and Others v Bakone ba Masha Mokopole Communal Property Association and Others (2854/2020) [2021] ZALMPPHC 67 (4 October 2021)

Rule 35(12) notice-discovery- on the respondents seeking certain specified documents to enable them to prepare their answering affidavit- court ordered must give

[1] The respondents are the applicants in the main application, whilst the applicants are the respondents in the main application. In the main application, the respondents have instituted an interdict application against the applicants. On 6th August 2020 the applicants served and filed their notice to oppose the applicants main application. On 11th August 2020 the applicants served and filed their Rule 35(12) notice on the respondents seeking certain specified documents to enable them to prepare their answering affidavit. On 21st August 2020 the respondents' served and filed their reply to the applicants' Rule 35(12) notice.

[2] On 24th August 2020 the applicants' attorneys wrote a letter to the respondents' attorneys notifying them to reconsider their refusal to discover certain documents failing which they will launch an application to compel in terms of Rule 30A. On 27th August 2020 the applicants served the respondents with their Rule 30A notice. On 28th August 2020 the applicants served and filed their answering affidavit together with a counter application to the respondents application. On 16th September 2020 the respondents served and filed their replying affidavit.

[3] On 19th October 2020 the applicants launched their notice to compel application seeking orders that the respondents be compelled to file their reply to the applicants Rule 35(12) notices; that in the event the respondents fail to file their reply to the applicants' Rule 35(12) notices, the applicants be allowed to approach the court on supplemented papers for an order striking out the respondents main application; and that should the applicants succeed with an order compelling the respondents to discover, the applicants be given leave to file a supplementary affidavit. In the founding affidavit for the notice to compel, the applicants have stated that when they served the respondents with their Rule 35(12) notices, they deemed the requested documents necessary to prepare their answering affidavit. However, in their conclusion the applicants have stated that they are seeking the documents requested as per their Rule 35(12) to prepare their case in the main application. The documents that the applicants have requested the respondents to discover are the Deeds Registry records; notices, minutes and resolutions of annual and general meetings of the first respondent; a complete constitution of the first respondent; and list of beneficiaries of the first respondent.

[4] The respondents are opposing the applicants' application. The respondents in their answering affidavit have submitted that what the applicants are seeking,

it appears that they are calling upon this court to re-open the land claim, dissolve the CPA and to install the applicants as the leadership of the CPA. It is the respondents' contention that they have furnished the applicants with all documents relevant for the determination of the main application, and that the documents that the applicants are now seeking are irrelevant.

[5] The applicants have argued that the wording of Rule 35(12) does not expressly note requirements that must be satisfied for the documents required in terms of this rule to be discoverable, however, the wording of Rule 35(12) only suggests that the documents as required in terms of the rule must have been referred to in the founding papers of the respondents. The respondents have submitted that whereas the purpose of discovery and inspection is to limit issues between the parties, the relevance and privilege remain the key consideration for discovery. The respondents have further submitted that the applicants have filed their answering affidavit and thus the horse had bolted. The respondents further submitted that Rule 35(12) may be used in cases where the horse has not yet bolted.

Rule 35(12) may be used to authorize production of documents referred to in the founding affidavit or answering affidavit. Generally a party who made reference to documents in his/her founding affidavit or answering affidavit is obliged to discover them when called upon to do so. As held in *Penta Communication Servic*es case, above, the limitation to the obligation to discover are if the document is not in his/her possession and he/she cannot discover it, the document is privileged or irrelevant.

[12] The respondents in their answering affidavit have stated that the grounds upon which they are opposing the applicants' application is that it is clear that the applicants miscomprehended the respondents' case against them, and further that it ought to be clear that if the applicants are mistaken about the gravamen of the application, they ought to be mistaken about the evidence required to resolve the issues. The respondents concluded their answering affidavit by stating that they have furnished all documents relevant for the determination of the dispute in the main application and that documents required by the applicants are irrelevant.

[13] In *Centre for Child Law v Hoerskoel Fochville***[3]** Ponnan JA said:

"In general terms, the rules exist to regulate the practice and procedure of courts. Their object is to secure the "inexpensive and expeditious completion of litigation before the courts" and they are not an end in and of themselves. Ordinarily, strong grounds would have to be advanced to persuade a court to act outside the powers provided for specifically in the rules."

[12] The applicants in their founding affidavit have stated that they have filed their Rule 35(12) notice requesting certain documents which they deem necessary to prepare their answering affidavit. The respondents in answering to this submission by the applicants have stated that the applicants have filed an answering affidavit which is comprehensive and voluminous, and that the issue in their main application for interdict is the entitlement of the respondents to issue residential and business sites on the farm. It is not for

the respondents to determine to the applicants whether their answering affidavit is comprehensive. The applicants are the ones who are going to argue their case and they cannot be dictated how to prepare for their case and which document to use in advancing their defence.

[13] What the respondents were supposed to show the court in justifying their refusal to discover was to show that the required documents were not in their possession, or that they are irrelevant or privileged. They only reason that was furnished by the respondents is that the documents as requested by the applicants are irrelevant. By merely stating that the documents required are irrelevant is not sufficient. Strong grounds substantiating that must be advanced, of which the respondents have failed to do. Under the circumstances, the applicants are entitled to the documents they are requesting. However, at this stage it is premature to deal with prayer 3 of the applicants' notice of motion wherein they are seeking an order granting them leave to file a supplementary affidavit. The applicants in their papers have also not made out a case for such an order. After receipt of the specified documents, should they find a need to supplement their papers, they will bring a proper application for that.

[14] In the result I make the following order

14.1 The respondents are ordered to file their reply to the applicants' notices in terms of Rule 35(12) of the Uniform Rules of Court within 10 days of date of this order.

14.2 In the event that the respondents should fail to file their reply to the notices as envisaged herein, the first and second applicants are allowed to approach this Court on supplemented papers for an order striking out the respondents main application.

14.3 The respondents to pay the costs of this application on party and party scale.

Limpopo Provincial Council of the South African Legal Practice Council v Chueu Incorporated Attorneys and Others (6947/2021) [2021] ZALMPPHC 75 (25 October 2021)

Attonreys-suspension-locus standi of LPC challenged due to faulty resolution of Limpopo LPC-court nevertheless looking at merits-court is the custodian of legal practitioners-has inherent powers

[1] The Applicant approached this court on an urgent basis and sought interim relief pending an investigation in to the affairs of the 1st Respondent. The Applicant applies, *inter alia*, for an order for the suspension of the 2nd, 3rd, 4th, 5th, 6th, 7th and 8th Respondents from practicing as attorneys for a period of 18 months pending the finalization of investigations into their conduct and disciplinary proceedings against them.

[2] The 1st and 2nd Respondents did not oppose the application for suspension, and filed an explanatory affidavit wherein it was stated by the 2nd Respondent on

behalf of the 1st and 2nd Respondents in his capacity as Managing Director of the 1st Respondent that the 1st and 2nd Respondents in principle consents to the suspension, but it is the modalities of the order which an issue is taken with. The 1st and 2nd Respondents prayed for an alternative order envisaging a balance between the interest of the profession, and the continuity of the 1st Respondent.

[3] Before dealing with the merits of the matter, I will deal with a *point in limine* raised by the 4th and 8th Respondents. The Applicant instituted this application by virtue of a resolution taken by the Limpopo Provincial Council on 8 September 2021. The resolution was only signed by the Chairperson of the Limpopo Provincial Council, Mr. Mangena. There were no minutes of the meeting held where it was resolved to institute the proceedings attached, nor an attendance register. The other members of the Limpopo Provincial Council did not co-sign the resolution either.

[4] The 4th and 8th Respondents raised a *point in limine* to the effect that the resolution was fatally defective. It was submitted by the 4th and 8th Respondents that from the Applicant's founding affidavit, and in particular paragraph 4.3 thereof, the Applicant consists of sixteen (16) legal practitioners comprising of ten practicing attorneys and six advocates, two teachers of law, one being a dean of a faculty of law at a university in the Republic and the other being a teacher of law, three fit and proper persons designated by the Minister, one person designated by Legal Aid South Africa and a person designated by the Legal Practitioners' Fidelity Fund.

[5] It was submitted by the 4th and 8th Respondents that Rule 16.2 of the Rules of the Legal Practice Council states that the Provincial Council shall compromise of 6 (six) attorneys and 4 (four) advocates. It was submitted that paragraph 4.6 of the Founding Affidavit clearly states that the decision to institute the current proceedings was taken by the Limpopo Provincial Council but in the same paragraph it is indicated that the Management Committee takes such decisions in-between the meetings of the Council.

[6] It was submitted that the resolution attached as LPC1 clearly indicates that LPC1 is the resolution of the Limpopo Provincial Council. According to the 4th and 8th Respondents, it appears that, the responsibility to institute applications against legal practitioners is the domain of the Limpopo Provincial Council. The resolution authorising the institution of the current proceedings is signed by only one member of the Provincial Council, being the Chairperson.

[7] According to the 4th and 8th Respondents, the Chairperson, and deponent to the Applicant's founding affidavit cannot usurp the powers of the Council unto himself and perform functions of the Limpopo Provincial Council to the exclusion of the other members. The other members further did not confirm the correctness of the application or founding affidavit brought on their behalf.

The 4th and 8th Respondent's assertion that the proceedings are not authorized by Council is supported and strengthened by the fact that, Council members did not sign the Resolution, no attendance register is attached, no confirmatory affidavits are attached, to confirm the correctness of the papers and the Deputy Chairperson, being the deponent to the Replying affidavit contradicts the Resolution which purports to be a Council Resolution by stating in the Replying Affidavit at paragraph 7.6.1 thereof as follows:-

"*The locus standi challenge brought by the Fourth Respondent on behalf of himself and the Eighth Respondent is bad in fact and law owing to the fact that by virtue of*

the office held by the Chairperson of the Applicant, the Chairperson is authorised to depose to affidavits in legal proceedings by and against the Applicant, and in an instance wherein the Chairperson is indisposed, I am also authorised to act as the Chairperson, and depose to affidavits on behalf of the Applicant, as I now do with regard to this replying affidavit."

[18] In my view, the Applicant failed to prove that the Legal Practice Council authorized the current proceedings and therefore the *point in limine* raised by the 4th and 8th Respondents should be upheld.

[19] Despite the *point in limine* having been upheld, I now proceed to deal with the merits of this matter as I deem it in the interest of justice and the parties concerned in this matter that this application for suspension be finalized. Also bearing in mind that the 1st and 2nd Respondent's conceded to the order for suspension being granted and further bearing in mind that the 3rd, 5th, 6th, 7th and 9th Respondents have not raised the issue of the fatally defective resolution as the 4th and 8th Respondents' have.

The Law:

[85] The LPC is empowered under **section 40(3)(a)(iv) read with section 44(1) of the Act**, to launch an application for the striking off the roll or suspension from practice of a legal practitioner. If the court is satisfied that the legal practitioner is not a fit and proper person to continue to practice, the provisions of the Act "do not derogate in any way from the power of the High Court to adjudicate upon and make orders in respect of matters concerning the conduct of a legal practitioner, candidate legal practitioner or a juristic entity.

[86] It is trite that an application of this nature constitutes a disciplinary inquiry by the court into the conduct of the practitioner concerned. These proceedings do not constitute ordinary civil proceedings but are in their nature *sui generis* with the LPC fulfilling the role of *amicus curiae.* Accordingly, the LPC is not an ordinary litigant in this application. As *custos morum* of the profession, the LPC places the facts and its views for this court to take appropriate action in the exercise of its discretion using its disciplinary powers. Significantly, the court's power is inherent in nature over and above the provisions of the Act. See ***Law Society of the Transvaal v Tloubatla*** **[1999] 4 All SA 59 (D);** ***Law Society of the Transvaal v Machaka and Others (No 2)*** **1998 (4) SA 413 (T) and** ***Law Society of the Cape of Good Hope v C*** **1986 (1) SA 616 (A).**

16. The Applicant is ordered to pay the costs of the 3rd to 9th Respondents.

HAL obo MML v MEC for Health, Free State (1021/2019) [2021] ZASCA 149 (22 October 2021)

Trial – conduct – obligation of parties to define the issues – sequence of witnesses – joint minutes of experts – agreement on facts contrasted with agreement on opinion – approach to agreements on matters of opinion

On 1 May 2005 a pregnant Ms HAL (the appellant), then 21 years old, was admitted to the Thebe Hospital (the hospital) in Harrismith, Free State, at approximately 13h00. The following morning, 2 May 2005 at approximately 05h00, she gave birth to

a baby boy (MML) by way of a normal vaginal delivery. At the time neither she nor the hospital raised an alarm about his condition, but some considerable time later he showed signs of neurological regression and eventually he was diagnosed with cerebral palsy. A magnetic resonance imaging (MRI) scan of the child's brain taken in August 2014, a little over nine years later and immediately before the commencement of this action, revealed that he had suffered a hypoxic ischemic encephalopathy (HIE), a brain injury caused by lack of oxygen and lack of blood flow in the brain. It was further confirmed that this was a partial prolonged type brain injury, which develops slowly over 30 to 45 minutes (or longer), and occurs with partial asphyxia.1 The brain's response

1 This must be distinguished from an acute profound injury, which is severe and of short duration, with almost total asphyxia, that is, interruption of the supply of oxygen, to the brain resulting in injury to the central deep grey matter in the brain. Its onset is sudden. It is normally caused by a catastrophic sentinel event like a mother falling, etc. 3

is to direct the flow of blood entirely to its central area, thereby depriving the outside portion of blood and oxygen and causing damage there.

[2] On 2 September 2014, the appellant instituted action against the respondent, the Free State Member of the Executive Council (MEC) for Health, in the Free State Division of the High Court, Bloemfontein (the high court). She claimed that MML had suffered the brain injury during the latter stages of the labour and birth process (ie the intrapartum period). She attributed MML's injury to the negligence of the hospital staff, alleging they did not adequately monitor her and her unborn child, as a result of which they failed to detect foetal distress. This, she alleged, led to MML's brain injury. The respondent denied liability. After a lengthy trial, the high court dismissed the appellant's action with the costs of two counsel, but subsequently granted the appellant leave to appeal to this Court.

The appeal is dismissed with costs of two counsel.

MKHATSHWA AND OTHERS v MKHATSHWA AND OTHERS 2021 (5) SA 447 (CC)

Costs — Special order — Punitive costs order — When to be awarded — Vexatious litigation and scurrilous remarks about judges — May warrant punitive costs.

The applicants sought leave to appeal from the Constitutional Court (the CC) against an *Anton Piller* order and interdict granted against them in the High Court by Roelofse AJ; this, after having unsuccessfully sought leave from the High Court and the Supreme Court of Appeal. The CC found that the application for leave should be dismissed, on the grounds that, based on its merits, it bore no reasonable prospects of success (see [9]). The question arose — and this formed the focus of the Constitutional Court — whether the respondents were entitled to a punitive costs order. This, in the light of the following: In their affidavit the applicants took issue with the fact that Roelofse AJ had heard the matters in camera, in accordance with a directive of the Judge President. The applicants submitted that such a course was inappropriate: The Judge President, the applicants submitted, had exercised undue and improper influence over Roelofse AJ, who consequently failed to act independently, impartially and without fear or favour in the course of hearing and deciding the matter (see [10]). Such charges in fact formed a basis, amongst others, for the applicants' appeal: the orders of the court a quo, the applicants submitted, were granted as a result of this improper influence, and were a nullity and stood to be set aside (see [11]).

Held, that the applicants had not approached the Constitutional Court with clean hands. They had stubbornly persisted with serious and unmeritorious allegations against Roelofse AJ and the Judge President, despite the fact that these allegations had been unequivocally addressed and disposed of by the Judge President in a letter to their legal representatives, and had no factual basis. The fact that these allegations formed a major basis of the application for leave to appeal to the Constitutional Court rendered this approach all the more reprehensible, for the

following reasons. The applicants, in full knowledge of the Supreme Court of Appeal's dismissal of their application, as well as the letter sent by the Judge President, chose to sail a sinking ship into deeper litigious waters, and in the process relied heavily on these unsubstantiated and scandalous accusations as the rudder. This conduct was, at a minimum, vexatious and prejudicial to the respondents, who found themselves, once again, having to foot the bill for necessitated legal responses on issues that had no place in the Constitutional Court. (See [12] and [23].)

Held, further, considering that it was common practice to grant an *Anton Piller* order in camera, and in light of the letter referred to above, there was little room for any genuine or logical belief on the part of the applicants that any untoward and improper conduct was perpetrated by the learned judges in the High Court. In persisting with their accusations, the applicants were either being wilfully ignorant of the practice and its objects, or they were attempting to turn a sow's ear into a silk purse. Aside from the prejudice caused to the respondents by this frivolous exercise, this was tantamount to an attempt to mislead the Constitutional Court by omitting relevant facts and tailoring others to fit an argument that simply could not pass muster. On numerous occasions the Constitutional Court had considered it appropriate to punish attempts at misleading the court with a punitive costs order. (See [24].)

Held, that the Constitutional Court enjoyed a sacrosanct power and privilege to uphold the law in furtherance of the constitutional project. Thus, the importance of its work and the limited judicial resources that it expended in the process ought not to be taken for granted, and it was incumbent upon a litigant to approach it with a bona fide, genuine case. It would not do for litigants to resort to unscrupulous tactics to succeed, especially when such tactics involve unjustifiable attempts at bringing shame and disrepute upon judicial officers. This was because the judiciary, unlike other branches of government, had to rely solely on the trust and support of the public in order to fulfil its functions. Consequently, any conduct that undermined and eroded the authority and integrity of the judiciary had to be prevented. Litigants who resorted to the kind of tactics displayed in this matter had to beware that they were unlikely to enjoy the Constitutional Court's sympathies or be shown mercy in relation to costs. The only reasonable conclusion in the circumstances was that a punitive costs order was apposite. (See [26].)

ELECTORAL COMMISSION v DEMOCRATIC ALLIANCE AND OTHERS 2021 (5) SA 476 (SCA)

Commission — Jurisdiction — Power to adjudicate complaints of electoral irregularities limited to disputes of administrative nature — Complaint of contravening Code of Conduct by publishing false statements or allegations with intention to influence conduct or outcome of election — Such not of administrative nature — Electoral Commission not having jurisdiction to determine such complaint or to impose remedy therefor — Electoral Act 73 of 1998, s 89(2) and item 9(1)*(b)* of sch 2.

Election law — Electoral irregularities — Prohibition on persons publishing false information to influence outcome of election — Whether confined to mechanics or conduct of election — Electoral Act 73 of 1998, s 89(2).

The second-respondent political party, the Good Party, lodged a complaint with the appellant, the Electoral Commission of South Africa (the Commission), alleging that the first-respondent political party, the Democratic Alliance (the DA), had published false and defamatory allegations concerning its leader with the intention of influencing the outcome of the May 2019 national and provincial elections. These statements, the Good Party alleged in its letter of complaint, were in contravention of s 89(2) of the Electoral Act 73 of 1988, which proscribes the publication of false information with the intention of influencing the outcome of an election, and were also in breach of item 9(1)*(b)* of the Electoral Code of Conduct in sch 2 to the Electoral Act (the Code).
The Commission ruled that the s 89(2) issue was for the courts to decide but that the DA had contravened item 9(1)*(b)* of the Code, and directed the DA to, inter alia, make a public apology. This ruling was subsequently set aside by the Electoral Court on review at the instance of the DA. The present case concerned the Commission's appeal to the Supreme Court of Appeal (the SCA).
At issue was whether the complaint fell within the ambit of disputes that 'arise from the organisation, administration or conducting of elections and which are of an administrative nature' as contemplated in s 5(1)*(o)* of the ECA. A further issue was whether — as the Electoral Court had held, relying on *DA v ANC* * — the prohibition on false information in s 89(2) of the Electoral Act or item 9(1)*(b)* of the Code was confined to 'the mechanics or conduct of an election'.
Held
Section 5(1)*(o)* was the only provision in election legislation authorising the Commission to adjudicate disputes. A complaint that a political party breached item 9(1)*(b)* of the Code, by publishing false or defamatory allegations about the candidate of another party, plainly was not a dispute of an administrative nature within the meaning of s 5(1)*(o)* of the ECA. The complaint had nothing to do with the management, organisation or administration of an election, neither did it relate to the electoral or regulatory framework necessary for the process of conducting elections. The Electoral Court was thus correct to hold that the conduct complained of was not a dispute of an administrative nature. The Commission had no power under s 190 of the Constitution or s 5(1)*(o)* of the ECA to have made a finding that the Code has been contravened. The Code did not confer on the Commission any power to impose a sanction for a breach of the Code. At best, the Commission was empowered, in terms of s 103A of the Electoral Act, to resolve a complaint about an infringement of the Code through conciliation. (See [32] – [33] and [48].)
DA v ANC did not hold that the prohibition on false information in s 89(2) of the Electoral Act or item 9(1)*(b)* of the Code had no application beyond statements regarding 'the mechanics of the conduct of an election'. (See [53] – [56].)

NOMANDELA AND ANOTHER v NYANDENI LOCAL MUNICIPALITY AND OTHERS 2021 (5) SA 619 (ECM)

Practice — Applications and motions — Urgent applications — Non-compliance with rule 41A(2)*(a)* raised in limine — Whether application to proceed as it stood — Uniform Rule 41A(2)*(a)*.

Rule 41A(2)*(a)* provides that '(i)n every new action or application proceeding, the plaintiff or applicant shall, together with the summons or combined summons or notice of motion, serve on each defendant or respondent a notice indicating whether such plaintiff or applicant agrees to or opposes referral of the dispute to mediation'; and rule 41A(2)*(b)* that 'a defendant or respondent shall, when delivering a notice of intention to defend or a notice of intention to oppose, or at any time thereafter, but not later than the delivery of a plea or answering affidavit, serve on each plaintiff or applicant or the plaintiff's or applicant's attorneys, a notice indicating whether such defendant or respondent agrees to or opposes referral of the dispute to mediation'. In this case the applicant's urgent application for interim relief was met with respondent's point in limine that the applicant failed to comply with rule 41A(2)*(a)*. At issue was whether the court should allow the application to proceed as it stood.

Held

Rule 41A(2)*(b)* compels the respondents to also file their notice as to whether they agree or oppose referral of the dispute for mediation. The rule did not suggest that their compliance was dependent on the applicant's filing of a rule 41A(2)*(a)* notice. Even if it were, nowhere in the answering affidavit was it stated that they would have wished to explore or not explore the mediation process, but could not do so for reason of the applicant's non-filing. They could have complied with their part of the obligation in terms of the rule or communicated their stance on mediation regardless of the applicant's failure. The rules were meant to be complied with, but they were meant for the court, and not the other way round. While it was ideal that litigants comply with this rule, in the interests of justice the issues raised in the application called for immediate resolution rather than removing the matter from the roll in order for the litigants to pronounce on whether they would agree or oppose mediation. The point in limine would accordingly be dismissed. (See [9] – [11].)

Davidan v Polovin NO and others [2021] 4 All SA 37 (SCA)

Property – Eviction order – Jurisdictional requirement to trigger an eviction under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 is that the person sought to be evicted must be an unlawful occupier within the meaning of the Act at the time when the eviction proceedings were launched – Finding that occupier had consent to occupy property meaning that she had a right of occupation and could not be an unlawful occupier – Eviction order not justified in circumstances.

The respondents were trustees in a trust which owned a house in which the appellant and her partner had resided together. In September 2019, the High Court granted an order in terms of section 4 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, evicting the appellant and all those who occupied through or under her, from the property. According to the appellant, she and her partner had entered into an oral agreement with the trust, allowing them to occupy the property. After the death of her partner, the appellant was requested to enter into a formal lease agreement with the trust. Her refusal led to the trustees obtaining an eviction order against her.

Held – The jurisdictional requirement to trigger an eviction under the Act is that the person sought to be evicted must be an unlawful occupier within the meaning of the Act at the time when the eviction proceedings were launched. Section 1 of the Act

defines an unlawful occupier as “a person who occupies land without the express or tacit consent of the owner or person in charge or without any other right in law to occupy such land”. Consent is defined as “the express or tacit consent, whether in writing or otherwise, of the owner or person in charge to the occupation by the occupier of the land in question”.

The key question was whether the appellant enjoyed a right of occupation. The first enquiry was whether the appellant had the necessary express or tacit consent to reside on the property owned by the trust. In other words, it had to be established whether the oral agreement had been proved. After establishing that the appellant had the necessary consent, the Court considered whether the appellant’s right to occupy was lawfully terminated. The appellant relied on the oral agreement with the previous trustee in support of her allegation of consent having been obtained to occupy the property. The trust would have been obliged to comply with the terms of that agreement before it could terminate the appellant’s right of residence. The underlying basis for the termination had to be legal, for example the expiration of the lease or a material breach of the terms of the agreement. There was no suggestion that the oral agreement was terminated.

The majority of the Court concluded that the appellant was not an unlawful occupier in terms of the Act. The eviction order was not justified and the appeal was upheld with costs.

In a dissenting judgment, it was stated that the appellant did not have consent or any other right to occupy the property, and therefore the trustees had no obligation to terminate her right of residence. The eviction order was viewed as just and equitable.

Electoral Commission of South Africa v Democratic Alliance and others
[2021] 4 All SA 52 (SCA)

Constitutional and Administrative Law – Direct reliance on provisions of Constitution for exercise of right – Principle of subsidiarity – Where legislation has been enacted to give effect to a constitutional right, a litigant must either rely upon that legislation or challenge its constitutionality.

Constitutional and Administrative Law – Elections – Complaint to Electoral Commission – Alleged contravention of Electoral Code of Conduct – Powers of Electoral Commission – Adjudication of disputes – Commission erring in view that section 190(1) and (2) of the Constitution, in terms of which it was enjoined to manage elections and was granted additional powers prescribed by national legislation, gave it the power to determine a complaint concerning a breach of the Code and to take remedial action.

Constitutional and Administrative Law – Principle of legality – A body exercising a public power must act within the powers lawfully conferred on it – Electoral Commission’s determination of complaint concerning breach of Electoral Code of Conduct violating principle of legality.

In March 2019, the second respondent (the “Good Party”) lodged a complaint with the Electoral Commission of South Africa, alleging that the first respondent (the

"DA"), had contravened section 89(2) of the Electoral Act 73 of 1998 and item 9(1)(b) of the Code in the run up to the national and provincial elections held on 8 May 2019 by publishing false information with the intention of influencing the outcome of an election, and false and defamatory allegations concerning the Good Party leader, Ms Patricia De Lille.

Ms De Lille was a former member of the DA. In guidelines prepared for campaigners of the DA, it was stated that Ms De Lille had been fired because she was involved in all sorts of wrongdoing in the City of Cape Town. It was that and related statements which grounded the Good Party's complaint. The Commission found that the DA had contravened item 9(1)(b) of the Electoral Code of Conduct and ordered it to issue a public apology. DA launched an application in the Electoral Court to review and set aside the Commission's decision. The Court held that the Commission's power to adjudicate disputes was limited to the mechanics of an election, and it had no power to adjudicate an issue which was not administrative in nature. It was thus concluded that decisions of the Commission were invalid and had to be set aside. That led to the present appeal.

Held – The Commission erred in submitting that section 190(1) and (2) of the Constitution, in terms of which it was enjoined to manage elections and was granted additional powers prescribed by national legislation, gave it the power to determine a complaint concerning a breach of the Code and to take remedial action. It had made its finding against the DA in terms of section 5(1)(o) of the Electoral Commission Act 51 of 1996. A decision deliberately and consciously taken under the wrong statutory provision cannot be validated by the existence of another statutory provision authorising that action. In any event, none of the provisions relied on grounded the power to make a finding that the Code had been contravened or to take remedial action under it. Secondly, the Commission was precluded from relying directly on the Constitution by the principle of subsidiarity. Where legislation has been enacted to give effect to a constitutional right, a litigant must either rely upon that legislation or challenge its constitutionality. It cannot bypass legislation and rely directly upon the right.

The principle of legality, an aspect of the rule of law, requires that a body exercising a public power must act within the powers lawfully conferred on it. The Commission violated that principle when it decided that the DA had breached the Code.

Gartner and another v University of Cape Town and others [2021] 4 All SA 143 (WCC)

Civil Procedure – Exceptions to particulars of claim – Approach to exceptions – A court must accept all allegations of fact made in the particulars of claim as true; may not have regard to any other extraneous facts or documents; and may uphold the exception to the pleading only when the excipient has satisfied the court that the cause of action or conclusion of law in the pleading cannot be supported on every interpretation that can be put on the facts.

Pharmaceutical and Health – Health professions – Claim against regulatory authorities – Alleged breach of duty of care – Exception to claim averring that

particulars of claim failed to disclose a cause of action upheld as plaintiffs not pleading facts establishing such duty of care.

In 2012, the plaintiffs were admitted to a postgraduate degree offered by the first defendant ("UCT"). They commenced their studies for the two-year degree on the understanding that they would be admitted to a one-year paid neuropsychology internship registered with the second defendant (the "HPCSA"), alternatively the third defendant (the "Board"). The second and third defendants were also collectively referred to in the judgment as "the authorities". After completing the degree, a minor dissertation and an internship, the plaintiffs and UCT intended that the plaintiffs would be entitled to apply to the HPCSA, alternatively the Board, for registration as professional neuropsychologists, would be registered and accredited as such by the HPCSA and entitled to practice as such for their own respective accounts.

However, prior to the commencement of the internships, UCT advised the plaintiffs that the authorities had not created and/or registered the professional category of neuropsychology and that no formal internship category for neuropsychologists had been established, but would register them as unpaid interns. On completion of such internships, they would be entitled to enter the profession of neuropsychology. Notwithstanding their qualifications, the completion of the prescribed internships and the payment of the requisite fees, the plaintiffs were not registered by the authorities as neuropsychologists and they were unable to conduct professional practices as such or earn an income therefrom.

In January 2018, the plaintiffs instituted action claiming damages for loss of income from UCT, the HPCSA and the Board jointly and severally. The present judgment dealt only with the plaintiffs' alternative claims against the HPCSA and the Board and the authorities' preliminary response thereto by way of exception.

The HPCSA and the Board filed an exception comprising five grounds to the amended particulars of claim.

Held – In deciding an exception, a court must accept all allegations of fact made in the particulars of claim as true; may not have regard to any other extraneous facts or documents; and may uphold the exception to the pleading only when the excipient has satisfied the court that the cause of action or conclusion of law in the pleading cannot be supported on every interpretation that can be put on the facts.

In order to succeed with their exception, the authorities had to persuade the court that upon every interpretation which the plaintiffs' claims against them could reasonably bear, no cause of action was disclosed; that the claims were bad in law; and that there was a real point of law or a real embarrassment, failing which the exception had to be dismissed.

In the first exception, it was averred that the particulars of claim were vague and embarrassing or lacked averments necessary to sustain a cause of action *inter alia* because the HPCSA and the Board could not register the plaintiffs other than in accordance with the provisions of regulation 5 of the Regulations promulgated by the Minister under the Health Professions Act 56 of 1974. It was averred further that as statutory bodies, the HPCSA and the Board could not exercise any powers not conferred upon them or perform any functions not imposed upon them by the Act read with the Regulations. The third exception stated that insofar as the plaintiffs had pleaded a breach of a duty of care, they were required to allege facts establishing

such duty of care. In the fifth exception, it was averred that the particulars of claim failed to disclose a cause of action against the second and third defendants because it could not be found that the authorities were under a legal duty, by exercising care, to avoid loss being caused to the plaintiffs – and could not be held liable for the alleged negligent performance of their statutory duties in the absence of *mala fides*, which the plaintiffs did not allege.

The above three exceptions were upheld and the plaintiffs were afforded one month to amend their particulars of claim further.

South African Breweries (Pty) Ltd v Minister of Co-operative Governance and Traditional Affairs [2021] 4 All SA 189 (WCC)

Urgency – General rule is that a party's failure to institute proceedings on an issue that existed, and of which that party may have been aware for some time, would make it difficult for such a party to have that issue adjudicated on an urgent basis – Exception to the rule is where there is an ongoing violation of rights.

Constitutional and Administrative Law – Powers of Minister of Co-operative Governance and Traditional Affairs – Making of regulation to suspend and limit the sale, dispensing or transportation of alcoholic beverages during State of national disaster – Section 27(2) of the Disaster Management Act 57 of 2002 empowering Minister to make regulations – Impugned regulation found to be lawful, and issued in a procedurally fair manner.

Restrictive measures put in place by the Minister of Co-operative Governance and Traditional Affairs in an effort to curb the spread of the Covid-19 pandemic included making regulations to suspend and limit the sale, dispensing or transportation of alcoholic beverages. The Minister's power to make such regulations flowed from section 27(2) of the Disaster Management Act 57 of 2002. The applicant ("SAB") sought review of the making of regulation 29 on 27 June 2021, which suspended and limited the sale, dispensing or transportation of alcoholic beverages, and led to a total prohibition on the sale and dispensing of alcoholic beverages as from that date.

Explaining the necessity of the impugned regulation, the Minister stated that certain restrictive measures were necessary at different stages of the pandemic depending, *inter alia*, on the rate of new infections, the rate of hospitalisations, the capacity of the healthcare system, and its ability to cope. The regulation was centrally aimed at achieving the ultimate objective of increasing the capacity of the healthcare system, through a reduction in the number of alcohol-related trauma and emergency cases. The measures were also said to decrease the likelihood of transmissions, because of the social aspect of liquor consumption and an associated decrease in inhibition.

Held – The first issue to be addressed was whether the matter qualified as urgent when the alcohol ban had been in place in some form since 2020. The general rule

is that a party's failure to institute proceedings on an issue that existed, and of which that party may have been aware for some time, would make it difficult for such a party to have that issue adjudicated on an urgent basis. An exception to the rule is where, as in this case, there is an ongoing violation of rights of persons. The bringing of the application on an urgent basis was thus justified.

The court confirmed that the Minister's regulation-making powers constituted administrative action in terms the Promotion of Administrative Justice Act 3 of 2000.

In contending that the impugned regulation constituted unlawful administrative action, and that the regulation was reviewable, the SAB submitted that the Minister's power to regulate the sale, dispensing or transportation of alcoholic beverages did not include the power to impose a wholesale prohibition of the kind contained in the impugned regulation. It contended that the impugned regulation was therefore *ultra vires* the Minister's powers. The court held that on a proper understanding of the Disaster Management Act which only operates during a limited time under a State of National Disaster, and for a period not longer than three months (unless extended by notice in the *Gazette*), regulation 29 cannot possibly be interpreted to mean that the sale, distribution and transportation of alcoholic beverages will remain in place for an indefinite period. The only sensible interpretation is that regulation 29 suspends the sale, distribution and transportation of alcoholic beverages for a specific period. The court held further that the regulation was not *ultra vires*, because the Minister has the power, by augmenting existing legislation through regulations, to suspend the distribution of liquor in a State of Disaster, and to make regulations which are inconsistent with existing liquor laws.

Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair. Although there was no prior consultation immediately prior to the implementation of the current regulations published on 27 June 2021, such consultation had taken place less than two weeks previously. The exigencies of the situation and the latter fact meant that that regulation 29 was made in a procedurally fair manner.

The application was dismissed with costs.

Stellenbosch University Law Clinic and others v Lifestyle Direct Group International (Pty) Ltd and others [2021] 4 All SA 219 (WCC)

Civil Procedure – Amicus curiae – Rule 16A of the Uniform Rules, together with court's inherent jurisdiction to regulate its own process, governing admission to proceedings of an amicus curiae – Discretion to admit an amicus is taken in the interests of justice.

Civil Procedure – Class action – Class action will be certified where there are some issues of fact, or some issues of law (or a combination thereof) that are common to all members of the class and can appropriately be determined in one action.

Civil Procedure – Class action – Opt-out class action – Nature of – Opt-out class action automatically binds members of the class to the class action and the outcome of the litigation unless the individual class members take steps to opt out of the class action.

Certification of an opt-out class action was sought by the applicants, who were seeking to end alleged fraudulent conduct by the respondents. The applicants alleged that the respondents targeted consumers needing loans, duped them into concluding unwanted contracts for legal services, and deducted unauthorised amounts from their bank accounts.

Two applications by non-parties to the suit were brought for leave to intervene, and for admission as *amicus curiae*.

Held – The admission to proceedings of an *amicus curiae* is governed by rule 16A of the Uniform Rules as well as the court's inherent jurisdiction to regulate its own process. Ultimately, the discretion to admit an *amicus* is taken in the interests of justice. The party seeking such admission succeeded in this matter.

The Court referred to the benefits and representative nature of class actions. A class action does not require every member of the class to have an identical cause of action or to put forward identical facts and seek identical relief. Nor does such an action need to dispose of every aspect of a claim for certification to be granted. It is sufficient that there be some issues of fact, or some issues of law (or a combination thereof) that are common to all members of the class and can appropriately be determined in one action.

The Court was satisfied that the interests of justice warranted certification in this case.

The type of class action sought was an "opt-out" action. Such a class action automatically binds members of the class to the class action and the outcome of the litigation unless the individual class members take steps to opt out of the class action. The Court held that the present matter was suited to an opt-out class action.

Finally, the Court granted the applicants' request for the appointment of a "special master" to attend to the administration of the class action, including the verification of claims, the disbursement of payments and the management of any surplus amounts.