**CIVIL LAW UPDATES NOVEMBER 2021**[1]

**INDEX**



**CASE NAMES**

Bayport Securitisation Limited and Another v University of Stellenbosch Law Clinic and Others (507/2020) [2021] ZASCA 156 (4 November 2021)

Bizz Tracers (Pty) Ltd and Another v Eskom Holdings SOC Thd (13374/2020) [2021] ZAGPPHC 759 (10 November 2021)

Hlophe v Freedom Under Law In re: Freedom Under Law v Hlophe; Moseneke and Others v Hlophe In re: Hlophe v Judicial Services Commission and Others (2021/43482) [2021] ZAGPJHC 743 (29 November 2021)

Industrial Development Corporation of South Africa v Energy Fabrication (Pty) Ltd and others [2021] JOL 51720 (GJ)

Moroka v Keliana Management Company (43345/2018) [2021] ZAGPJHC 608 (3 November 2021)

Ntefang and Another v Seeletso and Others (M180/2021) [2021] ZANWHC 77 (18 November 2021)

S[....] v S[....] and Others (19109/2020) [2021] ZAWCHC 218 (2 November 2021)

Tahilram v Kayser and Others In re: Kayser and Others v Tahilram (2020/10390) [2021] ZAGPJHC 751 (26 November 2021)

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

Van Zyl NO v Road Accident Fund [2021] JOL 51721 (CC)

**SUBJECT INDEX**

Counterclaims –against plaintiff and a person who is not a plaintiff-possibleTahilram v Kayser and Others In re: Kayser and Others v Tahilram (2020/10390) [2021] ZAGPJHC 751 (26 November 2021)

Court orders- recognition in this jurisdiction of an order that she obtained in the Senegalese courtsS[....] v S[....] and Others (19109/2020) [2021] ZAWCHC 218 (2 November 2021)

Joinder proceedings-test for Hlophe v Freedom Under Law In re: Freedom Under Law v Hlophe; Moseneke and Others v Hlophe In re: Hlophe v Judicial Services Commission and Others (2021/43482) [2021] ZAGPJHC 743 (29 November 2021)

National Credit Act 34 of 2005 (the NCA) includes all legal costs pre- and post-judgment-collection costsBayport Securitisation Limited and Another v University of Stellenbosch Law Clinic and Others (507/2020) [2021] ZASCA 156 (4 November 2021)

Prescription- claims against road accident fund where claimant suffers mental impairment Van Zyl NO v Road Accident Fund [2021] JOL 51721 (CC)

Rule 30-irregular proceedings- Hlophe v Freedom Under Law In re: Freedom Under Law v Hlophe; Moseneke and Others v Hlophe In re: Hlophe v Judicial Services Commission and Others (2021/43482) [2021] ZAGPJHC 743 (29 November 2021)

Rule 35-Application in terms of rule 35(14) of the High Court Rule to compel disclosure of invoices relating to the alleged profit made by the respondent in facilitating the UN COP- 17 Conference. Moroka v Keliana Management Company (43345/2018) [2021] ZAGPJHC 608 (3 November 2021)

Rule 7-power of attorney-objection to using he/she-no problem with this-typo errorBizz Tracers (Pty) Ltd and Another v Eskom Holdings SOC Thd (13374/2020) [2021] ZAGPPHC 759 (10 November 2021)

Service process- motion application-attorney of applicant served papers and not the sheriff-court in causu allowed it! See reasons given –based on non averment of harm Ntefang and Another v Seeletso and Others (M180/2021) [2021] ZANWHC 77 (18 November 2021)

Summary judgment-summary judgment based on guarantee agreement Industrial Development Corporation of South Africa v Energy Fabrication (Pty) Ltd and others [2021] JOL 51720 (GJ)

**CASES**

**Bizz Tracers (Pty) Ltd and Another v Eskom Holdings SOC Thd (13374/2020) [2021] ZAGPPHC 759 (10 November 2021)**

Rule 7-power of attorney-objection to using he/she-no problem with this-typo error

[1] This is an application in terms of Rule 7 of the Uniform Rules of Court. In the notice of motion, the applicants seek that the attorney of the plaintiff provides the Power of Attorney, furnished to it by the plaintiff's Board of Directors, as well as the Board Resolution, authorising the plaintiff's attorneys of record to institute these proceedings.

[2] In their founding affidavit, the applicants take the stance that they do not regard the filing of a 'Power of Attorney" and the accompanying "Delegation of Authority" filed by the respondent, as proper compliance with the requirements of Rule 7. The applicants insist on being provided with a Board Resolution because the attorneys of record are not reflected on ESKOM's Legal Panel as approved by the National Treasury. In addition, the applicants submit, the mere fact that the respondent is a company necessitates a Board Resolution granting the attorneys of record the authority to act on its behalf. The applicants are of the view that a Letter of Authority furnishing the attorneys with an instruction to litigate on behalf of the Company, must be produced in order to prove its authority to act.

[3] The applicants also challenge the validity of the Power of Attorney, as it is signed by Ms. Monica Makume who, below her signature, warrants that "he/she" has the authority to sign. The alternative gender reference, the applicants submit, renders it unclear as to whom the authority has been granted

[4] The respondent submits that, with reference to Rule 7(4), the application is without merit. The applicants were provided not only with a copy of the Power of Attorney but also with a copy of the Delegation of Authority. Ms. Macume deposed to the answering affidavit.

**Rule 7**

[5] In *Eskom v Soweto City Council,* Flemming DJP succinctly dealt with Rule 7. The learned judge explained that if an attorney is authorised to bring an application on behalf of the applicant, the application necessarily is that of the applicant, and continued:

> 'As to how the attorney's authority should be proved, the Rule-maker made a policy decision. Perhaps because the risk is minimal that an attorney will act for a person without authority to do so, proof is dispensed with except only if the other party challenges the authority. See Rule 7(1). Courts should honour that approach. Properly applied, that should lead to the elimination of the many pages of resolutions, delegations and substitutions still attached to applications by some litigants, especially certain financial institutions.'

[6] In the present matter the respondent's attorneys of record produced a Power of Attorney signed by Monica Macume, who warrants that she has the

authority to act. The fact that it is stated beneath her signature that '"he/she" has the authority to act', is typographical and of no consequence.

Ms. Macume's authority to provide a power of attorney flows from the Delegation of Authority (the DoA), which was issued by Mr. J Mthembu, and in terms of which he delegated to Ms. Macume –

> 'in her capacity as Senior Legal Advisor – Eskom Legal and Compliance, the authority to sign all the necessary pleadings, affidavits and other documents incidental thereto, on behalf of Eskom SOC Limited (Eskom), in respect of actions and applications by Bizz Tracers (Pty) against Eskom Holdings SOC Limited.'

[8] I am satisfied that the respondent has shown that it mandated its present attorneys of record. The Delegation of Power and the Power of Attorney, confirmed under oath by Ms. Macume, taken cumulatively, properly constitute sufficient proof of the mandate, and further resolutions and delegations would have been superfluous.

[9] The respondent argued that this application amounts to an abuse of process, warranting a punitive costs order. Parties should refrain from unnecessarily challenging the authority of attorneys to act. However, the Constitutional Court emphasised in *Public Protector v South African Reserve Bank**[1]** that:

> 'To mulct a litigant in punitive costs … requires a proper explanation grounded in our law.'

[10] The general principle that costs follow the result applies.

**ORDER**

In the result the following order is granted:

1. The application is dismissed.

2. The applicants shall jointly and severally, the one paying the other to be absolved, pay the costs of the application.

**Ntefang and Another v Seeletso and Others (M180/2021) [2021] ZANWHC 77 (18 November 2021)**

Service process- motion application-attorney of applicant served papers and not the sheriff-court in causu allowed it! See reasons given –based on non averment of harm

[1] This is an opposed application in which the applicants seek relief in the following terms:

> "*1. That the First and Second Respondents be ordered to immediately give undisturbed access and possession to Applicants in respect of the property known as:*
>
> *ERF [....] MMABATHO UNIT 9*
>
> *REGISTRATION DIVISION J Q*
>
> *THE PROVINCE OF NORTH WEST*
>
> *IN EXTENT 457 (FOUR HUNDRED AND FIFTY SEVEN) SQUARE METRES*
>
> *which is situated at [....] ANDRIES BLOEM CLOSE, UNIT 9, MMABATHO.*
>
> *2. That should the First and Second Respondents not comply to prayer 1 above, the Sheriff be authorized to take each and every step necessary to*

*ensure that the Applicants are given access and possession to the property as described in prayer 1 above.*

*3. That the Respondents are interdicted to in future unlawfully interfere with the Applicants possession of the property, described in prayer 1 above.*

*4. The First Respondent be ordered to pay costs, jointly and severally, the one paying the other to be absolved on an attorney and client scale."*

[2] The first and second respondents filed answering affidavits in which they raise a single point in *limine*, without pleading over on the merits of the application. The first and second respondents further filed, what they termed supplementary answering affidavits, in which a number of further points *in limine* are raised. The supplementary answering affidavits have been filed without leave of this court, contrary to Rule 6(5)(e) and are accordingly regarded as *pro non scripto*. That this is the law, was made clear in *Nwafor v Minister of Home Affairs and Others* ***[1]***, where Mbha JA, writing for a unanimous Court stated as follows:

"*[19] The matter was then argued before Potterill J, who on 27 June 2019 dismissed the applicant's application with costs. In the course of her judgment, she held that as the applicant had not sought and obtained the court's requisite leave, the applicant's supplementary affidavit that was filed on 30 June 2017, was pro non scripto. As such, she would not accept or consider the contents thereof.*

…

*[28] In argument before us, the intended application to adduce further evidence in the supplementary affidavit was not pursued. This decision was, in my view, well taken considering that the court a quo quite rightly disregarded the supplementary affidavit on the basis that no leave to file*

*same was sought and obtained from the court a quo, a fact rightly conceded by the applicant in the papers. Nothing further needs to be said about this issue. Regarding the remaining issues, the applicant's counsel submitted that these would be pursued as points of law."*

(my emphasis)

The point *in limine* raised by the respondents

[3] The answering affidavits are brief and the contents is quoted to appreciate the adjudication of the point *in limine* and other aspects of the content of the affidavits:

The first respondent

"***POINT IN LIMINE 1***

***LACK OF CAPACITY BY THE APPLICANT'S ATTORNEY OF RECORD TO SERVE THE APPLICATION***

*3. On the 29th March 2021, the applicants issued this application through their attorney of record and the same attorney, Mr Kgosikala Barry Semaushu served this application at my office at 484 DP Kgotleng Str, Montshiwa, Mmabatho without any justification thereof.*

*4. The conduct in which this application was served is a shock that nullifies these proceedings as this court is precluded to grant the relief sought in terms of the Notice of Motion as there is no lawful application before this court that can be decided in favour of the Applicant.*

*5. The application is an unprecedented application which will never and it is also impossible to appreciate its standing before this*

*court as a lawful application that can be decided by a presiding judge to make a lawful order.*

*6.* ***Rule 4(1)(a)*** *provides that:*

> "*service of any process of the court directed to the sheriff and subject to the provisions of paragraph (Aa)* ***any document initiating application proceedings shall be effected by the sheriff***"

*7. The applicants have failed to allow the service of this documents to be effected by the sheriff as provided for by the law and as the results, this application is unlawful and it cannot be decided in favor of the Applicants. There is no other remedy available rather than dismissal of this application with costs at attorney and client scale.*

*8. This application must be issued afresh to allow the proceedings* ***mutatis mutandis****.*

*9. It will be a waste of time to deal with other issues relating to this application. The first respondent will therefore limit his submissions to this point in limine.*

***WHEREFORE*** *the first respondent prays that the application be dismissed with costs at an attorney and client scale."*

The second respondent

"***POINT IN LIMINE 1***

***LACK OF CAPACITY BY THE APPLICANT'S ATTORNEY OF RECORD TO SERVE THE APPLICATION***

*3. On the 29th March 2021, the applicants issued this application through their attorney of record and the same attorney, Mr Kgosikala Barry Semaushu served this application at my office at 484 DP Kgotleng Str, Montshiwa, Mmabatho without any justification thereof.*

*4. Having perused and conducted my research, the application is unprecedented and there is no that can grant the relief sought in terms of the Notice of Motion.*

*5. **Rule 4(1)(a)** provides that:*

> "*service of any process of the court directed to the sheriff and subject to the provisions of paragraph (Aa)* ***any document initiating application proceedings shall be effected by the sheriff***"

*Further*

***Rule 4(1)(d)** provides that:*

*It shall be the duty of the sheriff or other person serving the process or documents to explain the nature and contents thereof to the person upon whom service is being effected and to state in his return or affidavit or on the signed receipt that he has done so"*

It is common cause that the process initiating the present application proceedings was not served by the sheriff but by *Mr Semaushu*, the attorney of record of the applicants. *Mr Semaushu* filed a service affidavit, the relevant part of which reads as follows:

> "4. On the 30th March 2021 I undertook to serve the above application personally at the offices of the attorney of record of both the first and second respondent's due to high volume of service work the sheriff of the high court is currently faced with in its area of jurisdiction."

[6] Whilst *Mr Semaushu* alludes to the sheriff's workload and delays in effecting service as the reason for taking it upon himself to effect service, which constitutes the complaint of the respondents raised as a point *in limine*, an examination of the papers demonstrates the following. The first respondent, *Mr Seeletso*, is a practicing attorney, practicing under the name and style of T.L. SEELETSO ATTORNEYS. The notice of motion with annexures was served on the first respondent on 30 March 2021 at 09h09 by *Mr Semaushu* at the first respondent's offices. There is no indication that the application was served on the second respondent, whose address is reflected as being care of T.L. SEELETSO ATTORNEYS. At first glance, this would suggest that the second respondent was not served. However, that aspect cannot be considered in isolation from the steps which followed service of the application on the first respondent.

[7] The first respondent, and second respondent, cited for purposes of service at the first respondent's address, through the law firm of the first respondent, on the same day of service of the application, 30 March 2021, drafted a notice of intention to oppose, which was served on the applicants' attorneys of record SEMAUSHU

ATTORNEYS, on 31 March 2021 at 08h31. The content of the notice of intention to oppose is clear in that notice of opposition was given in respect of the first and second respondents. It reads verbatim as follows:

> "*KINDLY TAKE NOTICE that the Respondents hereby gives their intention to oppose this application.*
>
> *FURTHER TAKE NOTICE that the Respondents shall accept service of all notices and documents at the below address*.
>
> *T.L SEELETSO ATTORNEYS*
>
> *RESPONDENT'S ATTORNEYS*"
>
> (my emphasis)

[8] The next step taken by the first and second respondents was to file answering affidavits. On 7 April 2021, the first respondent served his answering affidavit and filed same on 9 April 2021. On 13 April 2021, through his attorneys of record, the second respondent served his answering affidavit and filed same on even date. The filing sheet accompanying the second respondent's answering affidavit makes it plain that TL SEELETSO ATTORNEYS are his attorneys of record.

[9] The notice of opposition which includes the second respondent clearly suggests that he was represented by TL SELEETSO ATTORNEYS. If the second respondent was not represented by said attorneys, it is inexplicable, why on the same date of service of the application, a notice of opposition was filed in respect of the first and second respondents. The second respondent was on the papers, already represented by TM SELEETSO ATTORNEYS and in terms of Rule 4(1)*(aA)*,

the notice of motion with annexures could be served on TM SELEETSO ATTORNEYS. I turn to the content of the answering affidavits.

[10] The respondents contend that "*this application is unlawful…"* and "*There is no other remedy available rather than a dismissal of this application with costs at attorney and client scale."*

[11] Even if it were to be accepted that there has been non-compliance with Rule 4(1)(a) by the applicants' attorney, no allegation is made by the respondents that they have been prejudiced by non–compliance with the letter of Rule 4(1)(a) relating to service of the application, save for the contention that service in terms of rule 4(1)(a) by the sheriff is peremptory. The question of prejudice is an important consideration in this regard, on which I expound later in this judgment.

[12] In *Steinberg v Cosmopolitan National Bank of Chicago**[2]*** the importance of receiving notice of legal proceedings was emphasized as follows:

> '*It is a cornerstone of our legal system that a person is entitled to notice of legal proceedings against such person'*.

[13] In considering the question of notice of legal proceedings, which has at its core, the notion that such proceedings must be brought to the attention of a person, Rule 4(1) cannot be read restrictively, when regard is had to the fact that it does not deal with issues of substance but rather issues of procedure. In *Viljoen v Federated Trust Ltd**[3]*** the Court said the following in respect of the role of the Rules:

‘*This is an interpretation of the relevant Rules of Court which not only facilitates the work of the Courts but also enables litigants to resolve their differences as speedily and inexpensively as possible in applications of this nature. This interpretation is sound in law and I respectfully adopt it as correct.”*

(my emphasis)

[14] In *United Reflective Converters (Pty) Ltd v Levine**[4]***, Roux J made it clear that the Rules provide for procedural steps and do not create substantive law:

“*The Rules of the Supreme Court are made in terms of s 43 of Act 59 of 1959. Section 43(2)(a) provides that the Rules are made to regulate the conduct of the proceedings of the Provincial and Local Divisions of the Supreme Court. Clearly a distinction must be drawn between a rule of procedure and a substantive rule of law. Originally s 108 of the South Africa Act 1909 enabled the Chief Justice to make procedural rules. The distinction between procedural rules and substantive rules of law was recognised in this context in Van Aardt v Natal Law Society* **1930 AD 385** *at 392.*

*In Ex parte Christodolides* **1953 (2) SA 192** *(T) at 195A - D a Rule of Court made in terms of s 108 of the South Africa Act 1909 was held not to be procedural but a substantive rule of law.”*

[15] In terms of the substantive law, it is a requirement that a person who is sued or against whom relief is being sought, should receive notice thereof by way of delivery of the relevant processes initiating the action or application. If notice of such

proceedings comes to the attention of the said person, this purpose is achieved, even if not strictly in accordance with the Rules.

[16] In *Road Accident Fund v Britz obo Britz* ***[5]***, the following was further stated in respect of the role of the rules in the litigation process:

> "*[11] …The role of the Rules in the litigation process must therefore be placed in context. The Rules are formulated to govern procedural matters in the litigation process within specified time limits. They are meant to bring matters to a point where an executable order can be given by a competent court in an expeditious manner. The Rules are designed to remove the burden of regulating procedural matters from the Court. The rules are meant for the Court and not the Court for the rules. The common law jurisdiction of the high court further allows a high court to govern its own procedures and with Rule 27, to condone non-compliance with any of the rules… However, in interpreting the Rules of Court, Schreiner JA in Trans-African Insurance Co. Ltd v Maluleka* **1956 (2) SA 273** *(A) said: "No doubt parties and their legal advisers should not be encouraged to become slack in the observance of the Rules, which are an important element in the machinery for the administration of justice.* ***But on the other hand technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits.***"
>
> (my emphasis)

[17] In the present application, the allegation of non-compliance with the Rules does not result in prejudice to the first and second respondents, who on their own versions had notice of the application and its contents.

[18] The first and second respondents contend that the application should be dismissed for lack of compliance with Rule 4(1). I re-iterate that "…*technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits*.**"** The focus should always be on the real merits of the application to ensure fairness in respect of the Rules rather than less than perfect procedural steps which hold no prejudice. In the final analysis on the question of effective service, the sentiments expressed in *Prism Payment Technologies (Pty) Limited v Altech Information Technologies (Pty) Ltd t/a Altech Card Solutions and Others* **[6]** by Lamont J are apposite:

> "*On the face of it a summons served in any manner, but which is served effectively, is regularly served. Great injustice may follow if the service is set aside on the basis of irregularity without applying the effectiveness test…"*

[19] In the present application the respondents suffer no prejudice. Service of the application whilst not strictly in accordance with Rule 4(1)(a) or without an application to court in terms of Rule 4(2) does not necessarily imply that service of the application was not effective, having due regard to Rule 4(1)(A*a*) discussed *supra*. The notice of motion with the accompanying founding papers clearly came to the attention of the first and second respondents, who first, filed a notice of opposition to the relief sought and second, took a further step in the proceedings with such requisite attention, by filing answering affidavits. Service was clearly effective. In this

regard, the first and second respondents' in their opposing answering affidavits state as follows at paragraph 2 of their respective affidavits:

> "*2. I have read the Notice of Motion and the Founding Affidavit of the Applicants which is accompanied by its annexures and I wish to respond as follows:*
>
> *2. I have read the Notice of Motion and the Founding Affidavit of the Applicants which is accompanied by its annexures and I wish to respond thereto to the best of my little abilities as follows:"*
>
> (my emphasis)

[20] The point *in limine* raised by the first and second respondents accordingly stands to be dismissed.

The reference to case law in the answering affidavits

[21] Insofar as the second respondent refers to case law in his answering affidavit and makes legal submissions on the case law, the law is trite. It is not permissible. Authorities relied on are a matter for argument and not evidence.

The content of paragraph 11 of the second respondent's answering affidavit

[22] In respect paragraph 11 of the second respondents answering affidavit, statements constituting threats of the nature contained in the said paragraph cannot be countenanced and should be deprecated in the strongest terms. The legal representative in preparing the said affidavit should know better. In any event issues related to costs remain within the discretion of a Court and should not be utilized as a means of threatening an opponent in the context used in paragraph 11 of the second respondent's answering affidavit.

The merits of the application

[23] The respondents elected to raise only the point *in limine* and failed to plead over on the merits. The first respondent as indicated above makes the following statement in paragraph 10 of his answering affidavit, with the second respondent echoing similar sentiments in paragraph 10 of his answering affidavit:

> "*9. It will be a waste of time to deal with other issues relating to this application. The first respondent will therefore limit his submissions to this point in limine.*
>
> …
>
> *10. It will be a shame and a waste of time for burdening this court by dealing with other issues relating to the application. The second respondent will therefore limit his submissions to this point in limine.*

[24] In motion proceedings, parties stand and fall on their papers. The first and second respondents in deciding that it would be a waste of time to deal with other issues relating to the application, whilst having effective notice and knowledge of the relief sought, took a calculated risk by raising only a point *in limine*, without pleading to the merits of the applicant's case. They have to abide by that decision which is flawed in law and with the consequence that the application is accordingly unopposed.

[25] I turn to the merits of the application and whether or not the applicants' have made a case for the relief sought. The first and second applicants are married in community of property. The applicants contend that they are entitled to possession of the immovable property which is at the center of the dispute, on the basis that they are the registered owners of the immovable property. The first and second respondents are presently in possession of the property.

[26] The applicants premise their claim on the following. The property was initially registered in the name of Margaret Tikanyetso Malekutu, who passed away on 20 September 2020 ("the deceased"). The deceased's father and the second applicant's father were biological brothers. The deceased and the second applicant were therefore nieces who shared a good relationship. The deceased was married to Phillemon Malekutu who passed away in 1993. At that stage the deceased was the owner of the immovable property. During 2012 the deceased approached the applicants to purchase the property from her. A purchase agreement was consequently concluded and the immovable property was subsequently transferred into the names of the applicants on 4 February 2014, after the purchase price had been paid in full to the deceased. The transfer was handled by KOIKANYANG ATTORNEYS, who practice as Conveyancers in MAHIKENG.

[27] The applicants have since transfer, paid all municipal rates and taxes, in respect of the property, due to the Mahikeng Local Municipality. The applicants were further registered as consumers by the Municipality which is evidenced by the municipal account. The applicants gave the deceased right of habitation in respect of the immovable property until her death. The right of habitation was however not registered on the title deed of the property, as it was a personal arrangement between the applicants and the deceased.

[28] Following the death of the deceased, the first respondent, on the version of the applicants alleged that the deceased had testated to a will, which *inter alia*, appointed him as the executor. The will purported to bequeath the deceased's entire estate to the second respondent. The applicants point out that the will fails to meet the requirements of **section 2(1)(A)** of the **Wills Act 7 of 1953**, as the document does not contain a date, it is not clear that the "will" was signed in the presence of two competent witnesses, the fingerprints of the deceased is also suspicious and the deceased was literate and could write, it is not indicated where the "will" was testated to. These issues do not, however, merit any specific pronouncement, in my view.

[29] The aforementioned evidence in respect of ownership of the immovable property, stands uncontested.

Conclusion (Merits)

[30] I am satisfied that the applicants' have made a case for the relief sought against the first and second respondents.

**Moroka v Keliana Management Company (43345/2018) [2021] ZAGPJHC 608 (3 November 2021)**

Rule 35-Application in terms of rule 35(14) of the High Court Rule to compel disclosure of invoices relating to the alleged profit made by the respondent in facilitating the UN COP- 17 Conference.

[1] The issue in this application is whether the applicant is entitled to an order compelling the respondent to make available for inspection and copying of documents in terms of rule 35 (14) of the Uniform Rules of the High Court (the Rules).

[2] The request for discovery arises from action proceedings instituted by the applicant. He claims payment of 50% profit made from preparing the conference bid, for the United Nations COP-17 (the UN conference), which was hosted by the City of Johannesburg Metropolitan (Johannesburg Metro).

[3] The applicant avers that he and the respondent concluded an oral profit-sharing agreement regarding a tender invitation for professional services in preparation of the UN conference. The claim is further based on the averment that the applicant complied with the terms of the agreement between December 2015 and January 2016. The applicant alleges that he complied with the terms of the oral agreement by providing the defendant with the relevant bid documents required to support the submission by the Johannesburg Metro for the UN conference. The documents were submitted on 21 January 2016.

[4] The respondent does not dispute the applicant's involvement in the project but contends that he was remunerated R120 000,00 as agreed between the parties for the services rendered.

[5] It is common cause that the Johannesburg Metro was in May 2016 awarded the tender to organise the conference, which was completed on 1 October 2018.

[6] The plaintiff's case is that the defendant made a profit from the payment it received from the Johannesburg Metro. For this reason, he contends that in terms of the oral agreement, he is entitled to 50% of the profit.

[7] In his affidavit the applicant avers that the estimated profit made from the projects is R27 000 000.00 and his share of the profit is R1 350 000.00 less the R120 000.00 already paid to him.

As indicated above, the applicant seeks an order compelling the respondent to discover certain documents in terms of rule 35(14) of the Rules. The test for determining whether the requested document/s should be discovered is whether it is essential to enable the requesting party to plead.**[1]** The court in Capricorn Makelaars (Edms) Bpk and others v EB Shelf Investment No 79 (Pty) Ltd and Others 79 (Pty) Ltd and others,**[2]** held that the document/s requested in terms of rule 35 (14) should be "reasonably required in the circumstances."

Court ruled: In my view, the applicant is seeking early discovery of documents that ordinarily can be discovered under other provisions of rule 35. That is an approach that was never intended to apply in the case of rule 35 (14) of the Rules.

[29] In the circumstances, the applicant has failed to make a case to invoke the provisions of rule 35 (14) of the Rules.

**Tahilram v Kayser and Others In re: Kayser and Others v Tahilram (2020/10390) [2021] ZAGPJHC 751 (26 November 2021)**

Counterclaims –against plaintiff and a person who is not a plaintiff-possible

[1] Where a defendant wishes to counterclaim, rule 24(1) permits the defendant to deliver with the plea a claim in reconvention. However, the rules of court do not permit a defendant to pursue, by way of a claim in reconvention, a claim against the plaintiff and a person who is not a plaintiff ("***a third person***"), unless a court has granted leave to the defendant in terms of rule 24(2) of the Uniform Rules of Court

("***the Rules***") to do so. Absent such leave, a defendant may not by way of a claim in reconvention, pursue the claim against such third person. This is an application for such leave.

[2] On or about 20 April 2020, the second to fifth respondents instituted against the applicant an action, in which they claim payment of R1,484,749.76. ("***the action).***

[3] The applicant wishes to pursue by way of a claim in reconvention ("***the proposed claim in reconvention***"*)*, a claim not only against the plaintiffs but also against the first respondent, who is not a party to the action.

[4] For the sake of convenience, the parties will henceforth be referred to as in the action. The first respondent will be referred to as "***Mr Kayser***".

[5] The Lukamber Trust ("***the Trust")*** and the defendant own 70% and 30% respectively, of the shares in the fourth plaintiff ("***the company***"*).* The defendant is a director of the company.

[6] Mr Kayser is the managing director. He is also one of three trustees of the Lukamber Trust, the majority shareholder in the company. In his capacity as trustee, he is the first plaintiff in the action. The other two trustees are the second and third plaintiffs.

However, considering the congestion on the roll for motion court, maintaining the aforementioned sequence is not feasible; the time allowed in the rules for the exchange of pleadings is too short to accommodate an application to court, even an unopposed one. I therefore intend making an order which ensures that the claim in reconvention is delivered after the exception has been disposed of or withdrawn by the defendant. I also have to cater for the possibility that the plaintiffs' application to set aside the irregular step will be granted with the result that the defendant's plea and counterclaim dated 5 October 2020 will be "revived"; but the claim in reconvention would remain an irregular step in terms of rule 24(5) because of the absence of the leave required under rule 24 (2). If the plaintiff's application to set aside the irregular step succeeds, the defendant will have to bring an application

condoning his failure to have obtained leave in terms of rule 24(2). I need to explore whether such an application can be avoided by an order in this application.

[61] The High Court has always had the inherent jurisdiction to control its process and hence the oft-quoted adage that “the rules are made for the court and not the court for the rules”. This in my view entitles a court to adopt a pragmatic and, just and equitable approach that will lead to a speedy and cost-effective resolution of disputes between litigants. Section 173 of the Constitution of the Republic of South Africa, 1996, confirms the High Court’s inherent power to protect and regulate its own process taking into account the interests of justice. This in my view empowers a court to make an order on a procedural issue, even though the parties have not raised it. This is of course subject to the proviso that it is in the interest of justice to do so. The order I intend making is aimed at steering through what seems to be a turbulent phase in the exchange of pleadings. The order will not prejudice the parties. To the contrary, it will be advantageous to them and will serve the interest of justice; not only will legal costs be spared, but pleadings can also be exchanged without further delays and the parties can move closer to having their real disputes settled by a court.

[62] I have come to the conclusion that I should exercise my discretion in favour of granting leave to enable the defendant to claim in reconvention against not only the plaintiffs, but also Mr Kayser; and condone the defendant’s failure to comply with rule 24(2) should the withdrawal of the defendant’s plea and counterclaim be set aside as an irregular step.

**Order**

In the result it is ordered that:

1. In the event that:

1.1. The plaintiffs' application dated 19 January 2021 to set aside as an irregular step the withdrawal of the defendant's plea and counterclaim is refused, or withdrawn; and

1.2. the exception raised by the defendant, embodied in the notice of exception dated 30 November 2020 is:

1.2.1. either withdrawn or dismissed; and

1.2.2. the defendant remains desirous of instituting a claim/s against the plaintiffs and Mr Kayser, in his personal capacity

then and in that event, the defendant is granted leave to proceed with an action against the plaintiffs and Mr Kayser, in his personal capacity, by way of a claim in reconvention in the action instituted by the plaintiffs against him under case number 2020/10390 and the costs of this application shall be costs in the claim in reconvention, however if the defendant does not proceed by way of a claim in reconvention, then the costs of the application shall be paid by him.

2. If, however, the plaintiffs' application referred to in paragraph 1 above is granted, then the defendant's failure to obtain leave in terms of rule 24(2) prior to the delivery of the counterclaim dated 5 October 2020 is hereby condoned, and the costs of this application shall be costs in the defendant's claim in reconvention.

**Hlophe v Freedom Under Law In re: Freedom Under Law v Hlophe; Moseneke and Others v Hlophe In re: Hlophe v Judicial Services Commission and Others (2021/43482) [2021] ZAGPJHC 743 (29 November 2021)**

Rule 30-irregular proceedings-

Joinder proceedings-test for

1. Initially three interlocutory applications were brought before the Court. To avoid the confusion caused by some of the parties being variously both applicants and respondents in different applications, the several parties are referred to only by name.

2. One application for a joinder was by several retired Justices of the Constitutional Court who were implicated in the initial complaint laid against Hlophe JP, namely Justices Moseneke, DCJ, and Mokgoro, O'Regan, Sachs, Van der Westhuizen and Yacoob JJ. After some hesitation, Hlophe JP indicated that he had no objection to their joinder. An order to that effect shall be made joining them as the 5th to 10th respondents.

3. The remaining two applications concerned an application by Freedom under Law (FUL) to join and an application brought by Hlophe JP to set aside the replying affidavit of FUL in its joinder application. This judgment deals with these two interlocutory applications.

4. The interlocutory applications relate to a review application brought by Hlophe JP to set aside a decision of the Judicial Service Commission (JSC) which found him guilty of gross misconduct and then referred that finding to parliament for impeachment proceedings against him. After the review application had been served on the JSC, the President of the Republic, the Minister of Justice and the Speaker of

parliament, only the JSC entered a notice of opposition; the other parties gave notice to abide the decision of the court.

5. Freedom under law (FUL) then brought an application to be joined as a party. Hlophe JP opposed this application. No other party objects to the joinder of FUL.

6. Thereafter Hlophe JP filed an answering affidavit. FUL then filed a replying affidavit. Hlophe JP thereupon filed a Rule 30 application alleging that the replying affidavit was an irregularity and sought an order that it be set aside.

**The Order**

**The Joinder application by the retired Constitutional Court Justices:**

(1) The applicants, Moseneke DCJ, and Mokgoro, O'Regan, Sachs, van der Westhuizen and Yacoob JJ, are joined as the 5th to tenth respondents in the review application.

**The Rule 30 application by Hlophe JP**

(1) The application is dismissed.

(2) The applicant in the Rule 30 application shall bear costs of the respondent in the Rule 30 application, including the costs of two counsel on the party and party scale.

**The Joinder application of FUL**

(3) The applicant is joined in the review application as the 11th respondent.

(4) The costs of the Applicant shall be borne by the Respondent, including the costs of two counsel, on the party and party scale.

Note: full bench!

**Bayport Securitisation Limited and Another v University of Stellenbosch Law Clinic and Others (507/2020) [2021] ZASCA 156 (4 November 2021):**

National Credit Act 34 of 2005 (the NCA) includes all legal costs pre- and post-judgment-collection costs

[1] This appeal concerns the construction to be placed on 'collection costs' as defined in **s 1** and whether collection costs in **s 101(1)(***g*), as read with s 103(5), of the National Credit Act 34 of 2005 (the NCA) includes all legal costs pre- and post-judgment.

[2] The NCA introduced profound changes to the South African credit landscape. It ushered in a host of new forms of protection for consumers. These include the regulation of the consumer credit industry, prohibiting credit providers from extending 'reckless credit' and mechanisms to assist over-indebted consumers to manage their debt burden.**[1]** While the introduced reforms are mostly laudable, the inept and inelegant drafting has, on occasion, been a cause for concern.**[2]**

[3] In *Nkata v FirstRand Bank Ltd*,**[3]** Moseneke DCJ remarked that the NCA infuses constitutional considerations into the culture of borrowing and lending between consumers and credit providers. He observed:

'Credit givers serve a beneficial and indispensable role in advancing the economy and sometimes social good. They too have not only rights but also responsibilities. They must act within the constraints of the statutory arrangements. That is particularly so when a credit consumer honestly runs into financial distress that precipitates repayment defaults. The resolution of the resultant dispute must bear the

hallmarks of equity, good faith, reasonableness and equality. No doubt, credit givers ought to be astute to recognise the imbalance in negotiating power between themselves and consumers. They ought to realise that at play in the dispute is not only the profit motive, but also the civilised values of our Constitution.'**[4]**

While the object of the NCA is largely to protect consumers, the interests of creditors must also be safeguarded and should not be overlooked.**[5]**

[4] The appeal by Bayport Securitization RF Limited (Bayport), a company providing credit (small and intermediate) to consumers, and the Law Society of South Africa (LSSA), the first and second appellants respectively, against a judgment of the Western Cape Division of the High Court (per Hack AJ), is with the leave of that court. The University of Stellenbosch Law Clinic (the Law Clinic) and Summit Financial Partners (Pty) Ltd (Summit), the first and the second respondents, represented the third to twelfth respondents in application proceedings before Hack AJ. The application cited 47 respondents, which included Bayport and LSSA.

[5] The respondents sought and were granted the following three declaratory orders and certain consequential relief:

'(a) That collection costs as referred to in section 101(1)(g), as defined in section 1 and contemplated in **section 103(5)** of the **National Credit Act 34 of 2005**, includes all legal fees incurred by the credit provider in order to enforce the monetary obligation of the consumer under a credit agreement charged before, during and after litigation.

(b) That **section 103(5)** of the **National Credit Act 34 of 2005** applies for as long as the consumer remains in default of his/her credit obligations, from the date of default to the date of collection of the final payment owing, in order to purge his default, irrespective of whether judgment in respect of the default has been granted or not during this period.

(c) That legal fees, including fees of attorneys and advocates, in as much as they comprise part of collection costs as contemplated in **section 101(1)(g)** of the **National Credit Act 34 of 2005** may not be claimed from a consumer or

recovered by a credit provider pursuant to a judgment to enforce the consumer's monetary obligations under a credit agreement, unless they are agreed to by the consumer or they have been taxed.'

Paragraphs (d) to (f) of Hack AJ's order deal with the consequential relief for the appointment of an expert to recalculate the outstanding amounts of certain emoluments attachment orders (EAO) obtained against the third to twelfth respondents and for the repayment of any amount found to have been due and owing pursuant to the recalculation.

[6] The appeal by the LSSA is against the whole of the judgment and order of the high court, whereas Bayport's appeal is directed solely against the declaratory relief granted in para (b) on the basis, in essence, that if that paragraph of the order does not withstand scrutiny, then the rest of the relief granted likewise cannot stand.

**S[....] v S[....] and Others (19109/2020) [2021] ZAWCHC 218 (2 November 2021)**

Court orders- recognition in this jurisdiction of an order that she obtained in the Senegalese courts

[1] The applicant, who currently lives in Senegal, has applied for the recognition in this jurisdiction of an order that she obtained in the Senegalese courts dissolving the bands of marriage between herself and the first respondent (to whom I shall hereafter refer simply as 'the respondent'). The order directed that an equal division of the parties' property should follow in accordance with what the Senegalese court apparently accepted had been the parties' marriage in community of property. The significance of the order locally concerns its bearing on the disposal of the proceeds of a property in Constantia formerly registered in the respondent's name that has recently been sold. The applicant lays claim under the Senegalese order to half of those proceeds. An order was taken by agreement in this court earlier this year sequestering the proceeds pending the determination of the application for the recognition of the Senegalese judgment.

[2] The applicant explained in her founding papers that the divorce order was taken 'by default' after the respondent, who lives in Nigeria, allegedly evaded service of the process instituting the proceedings. She averred that the Senegalese court

was prepared to grant the order after being furnished with evidence establishing that the respondent and his legal representatives were aware of the divorce proceedings and had withheld their cooperation concerning service of the papers. The Senegalese order was issued at a time when there were also pending divorce proceedings instituted by the respondent against the applicant in the Nigerian courts.

[3] The respondent is opposing the application for the recognition order. He, however, failed to deliver his answering papers in time, and it became necessary for the applicant to obtain an order through the chamber book putting him to terms. His answering papers were put in a day after the expiry of the period afforded to him in the order made in the chamber book. The applicant refused to accept the answering papers out of time, and it accordingly became necessary for the respondent to apply for condonation for their late delivery.

[4] The respondent set down the application for the recognition order for hearing when the applicant had not herself taken any steps to enlist the application after the time for allowed for the delivery any replying papers had elapsed. He gave notice that he would move his application for condonation at the hearing of the main application. The applicant continued to withhold her replying papers, taking the position that she was under no obligation to do so until after the applicant had been granted condonation for the late delivery of his answer.

[5] The applicant did not oppose the respondent's application for condonation.**[2]** She, however, applied for a postponement of the hearing of the recognition order application. She appeared to take the attitude that an appeal lodged by the respondent in the Senegalese jurisdiction against the divorce order granted there impelled a stay of the pending proceedings for the recognition of that order in this court. The postponement sought by the applicant was therefore for an indeterminate period, until after the final completion of the appellate proceedings in Senegal.

[6] The respondent opposed the applicant's application for a postponement. He contended that the postponement application was not bona fide and that the applicant had not satisfied the general requirements for the indulgence rehearsed in *Myburgh Transport v Botha t/a SA Truck Bodies* **1991 (3) SA 310** (NmSC) amongst others, more particularly the application for a postponement

had not been made timeously and was not bona fide. The respondent argued that the applicant had only herself to blame for not having filed replying papers and that the recognition application should be decided on the papers as they are. In the alternative, and if the application were nevertheless to be postponed, he asked that it should be on fixed terms as to the further exchange of affidavits by way of supplementary answering papers and the delivery thereafter by the applicant of her replying papers. The respondent's position was that in either case, there was no need for the determination of the recognition order application to await the outcome of the further proceedings in Senegal.

[7] In his answering papers the respondent contended that the application for recognition of the Senegalese order fell to be dismissed for failing to comply with the requirements for recognition identified in *Jones v Krok* **[1994] ZASCA 177**; **1995 (1) SA 677** (A) at 685B-D. The appeal court stated in that case a foreign judgment will be enforced by our courts 'provided (i) that the court which pronounced the judgment had jurisdiction to entertain the case according to the principles recognised by our law with reference to the jurisdiction of foreign courts (sometimes referred to as 'international jurisdiction or competence'); (ii) that the judgment is final and conclusive in its effect and has not become superannuated; (iii) that the recognition and enforcement of the judgment by our Courts would not be contrary to public policy; (iv) that the judgment was not obtained by fraudulent means; (v) that the judgment does not involve the enforcement of a penal or revenue law of the foreign State; and (vi) that enforcement of the judgment is not precluded by the provisions of the Protection of Businesses Act 99 of 1978, as amended'.

I however agree with the respondent's counsel that there is no reason why the determination of the recognition application should be deferred until after the appeal proceedings pending in Senegal have been finally decided. The appeal court's decision in *Jones v Krok* demonstrates that it would be competent for this court to decide the application before the Senegalese appellate procedures have been exhausted. If the Senegalese divorce order were recognised, this court would make an appropriate ruling to avoid any consequent prejudice to the respondent pending the exhaustion of his rights of appeal against the order in Senegal. If, on the other hand, the recognition application were refused, the interim interdict in respect of the

disposal of the proceeds of the sale of the Constantia property could be discharged sooner rather than later.

**mmm**

**Van Zyl NO v Road Accident Fund [2021] JOL 51721 (CC)**

Prescription- claims against road accident fund where claimant suffers mental impairment

The applicant, as curatrix ad litem of a person (Mr Jacobs) injured in a motor vehicle accident, instituted action against the Road Accident Fund (RAF) for payment of damages on his behalf. Mr Jacobs had suffered metal impairment as a result of the accident. The Constitutional Court was approached for relief after the High Court and Supreme Court of Appeal ruled that the claim had prescribed.

Jafta, J in the majority judgment, explains operation of section 23(1) of the Road Accident Fund Act 56 of 1996 which provides that a claim becomes prescribed on expiry of three years from date of accident; and exceptions set out in section 23(2) and (3). Mr Jacobs' mental impairment led to his inability to litigate and to institute action timeously. Court considers whether section 23(1) excludes operation of the maxim lex non cogit ad impossibilia. Maxim held to apply and for as long as the disability arising from Mr Jacobs' mental condition persisted, prescription did not begin to run.

Appeal upheld and special plea of prescription dismissed.

**Industrial Development Corporation of South Africa v Energy Fabrication (Pty) Ltd and others [2021] JOL 51720 (GJ)**

Summary judgment-summary judgment based on guarantee agreement

The Industrial Development Corporation of South Africa (IDC) sought summary judgment against the second defendant for payment of an amount due in terms of a loan agreement. The second defendant had bound itself to the IDC for the guaranteed liabilities of the first defendant, who was engaged in business rescue proceedings.

Flatela, AJ examines the terms of the guarantee agreement, noting that the second defendant denied that the guarantee agreement ever came into effect. Court also sets out legal principles applicable to determination of summary judgment applications [para 64]; provisions of Rule 32 of the Uniform Rules of Court [para 65]; and the legal status of guarantee agreements.

"… where the court has a doubt as to whether the plaintiff's case is unanswerable at trial, such doubt should be exercised in favour of the defendant and summary judgment should be refused. Furthermore, the court has an unfettered discretion, to grant or refuse the application for summary judgement even if, in the latter, the standard requirements resisting it have not been met" [para 70]

None of the defences raised a triable issue, resulting in summary judgment being granted.

END-FOR NOW