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

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CASES

MV Andre Builder Joiner CC v Nordien 2021JOL 518478 WCC

Affidavit-authority to sign - time frame for objecting to authority to depose to founding affidavit-cancellation of commercial lease agreement and eviction of lessee-arbitration clause

The applicant sought cancellation of lease agreements and the ejectment of the respondent from certain commercial premises due to non-payment of rental due.

Montzinger, AJ rejects respondent's attempt to rely on an alleged arbitration clause to compel a stay of proceedings. Clauses relied on not constituting an agreement to arbitrate. "To fall within the ambit of an arbitration agreement and for the applicant to be bound by such a dispute resolution mechanism the clause must clearly be couched in terms that embodies an agreement" [para 15].Court clarifies time frame for objecting to authority to depose to founding affidavit [para 21]; and considers defence of supervening impossibility.Applicant's cancellation of lease confirmed as valid, and respondent given 6 months to vacate premises.

Tyibilika v Member of Executive Council for Department of Health, Eastern Cape Province [2021] JOL 51848 (ECB)

Rule 37A, regarding judicial case management- duties on parties

Case management and duties on parties to ensure trial readinessAfter the action in this matter was enrolled for hearing on quantum, and a directive was issued confirming that the matter was ready to proceed to trial on the allocated trial date, the defendant expressed reservations that the matter was trial ready. The trial court was left to consider the defendant's reservations.**Hartle, J** sets out relevant provisions of the Practice directive on judicial case management, Eastern Cape Division issued on 25 June 2019, and of Uniform [paras 5 and 6]. Practitioners and litigants required to be mutually concerned with and responsible for meeting the objectives of case management.Parties can no longer engage in technical point taking and practitioners cannot adopt supine attitude when it comes to trial matters proceeding by simply waiting for the other to do all the gearing up for trial regardless of who bears the onus or who is *dominus litis*. Both parties must address problems that may arise in finalising cases. Wasted costs and blame apportioned between the parties.

It is also necessary to consider the import of the Uniform Rule of application herein. Rule 37A provides as follows:
"**37A. Judicial Case Management.**—(1) A judicial case management system shall apply, at any stage after a notice of intention to defend is filed—
(*a*) to such categories of defended actions as the Judge President of any Division may determine in a Practice Note or Directive; and (*b*) to any other proceedings in which judicial case management is determined by the Judge President, of own accord, or upon the request of a party, to be appropriate.
(2*) Case management through judicial intervention—*
(a) shall be used in the interests of justice to alleviate congested trial rolls and to address the problems which cause delays in the finalisation of cases;
(b) the nature and extent of which shall be complemented by the relevant directives or practices of the Division in which the proceedings are pending; and
(c) shall be construed and applied in accordance with the principle that, notwithstanding the provisions herein providing for judicial case management, the primary responsibility remains with the parties and their legal representatives to prepare properly, comply with all rules of court, and act professionally in expediting the matter towards trial and adjudication.
(3) The provisions of rule 37 shall not apply etc.

Pena v University of Fort Hare and Others (EL 240/2021) [2022] ZAECELLC 4 (3 February 2022)

Exceptions-what to aver when tacit agreement is pleaded

[1] On 26 February 2021 the plaintiff instituted action against the first two defendants (hereinafter referred to as "UFH" and "SANC" respectively) for damages of R5,5 million allegedly flowing from certain administrative action taken by UFH as a result

of which the plaintiff failed to complete a nursing degree with UFH. During April 2021, SANC delivered a notice of exception averring that the plaintiff's particulars of claim are vague and embarrassing, that they lack averments necessary to sustain an action and that they constitute an irregular step, and affording the plaintiff 15 days within which to remove the causes of complaint.

[2] During May 2021, the plaintiff duly delivered a notice of intention to amend his particulars, purportedly in an attempt to cure the causes of complaint. The proposed amendment in fact constitutes a substitution of the entire original claim. SANC, in a seven-page document, objected to the proposed amendment, clearly and concisely stating the grounds upon which the objection is founded, being in essence similar to those raised in its initial notice of exception. The objection further notifies the plaintiff that should he proceed with the application to amend in its present form, SANC would pursue a *de bonis propriis* costs order against the plaintiff's attorney. The plaintiff nevertheless persisted with the existing application.

[3] It appears to be the plaintiff's case that the grounds upon which SANC are opposing the amendment, do not constitute grounds precluding an amendment, but are defences which SANC must raise in its plea. SANC has raised nine grounds of objection to the proposed amendment. I will attempt to deal with them seriatim.

<u>Failure to enunciate facts and circumstances from which the alleged tacit contract is inferred</u>

[4] The proposed amendment introduces an averment that the plaintiff's claim arises from the breach of a written, alternatively tacit agreement between the plaintiff and UFH (the first defendant) for the plaintiff's enrolment and tuition in nursing studies. It is contended on behalf of SANC (who is the second defendant) that the proposed amendment does not enunciate the facts and circumstances from which the tacit contract is inferred. It is argued that this will render the amendment excipiable as it will fail to disclose a cause of action premised on the alleged tacit agreement.

[5] The plaintiff contends that for a tacit agreement to arise, the plaintiff need only "allege and prove a parallel conduct by rivals", in other words "one which was preceded by suggestive communications that do not themselves form an explicit agreement". The proposed amendment relating to the agreement reads as follows:

'Sometime in 2015, Plaintiff, who is a non-national, applied to study a degree in Nursing at University of Fort Hare (hereinafter referred to as Fort Hare), the First Defendant. Plaintiff was admitted by the said institution to undertake nursing studies. As a consequence, a written alternatively tacit agreement was concluded between the parties on 23th [sic] of November 2015 at East London, Plaintiff acting personally and First Defendant represented by Dr Mbiji P Mahlangu (hereinafter "the agreement"). A copy of the admission letter is annexed hereto as "**RP1"**.

… The material terms of the agreement were that the First Defendant will:

- provide Plaintiff with tuition and supervision of a professional standard in the programme of a nursing study and the courses in which he is enrolled for the duration of the nursing study (four years)

- ensure compliance with the legal requirements for and legislation applicable in the nursing studies including but not limited to registration of Plaintiff as a learner nurse with the Second Defendant

- require and make arrangements for Plaintiff to attend and/or participate in clinical practicals and/or allocate him in health institutions for those clinical practicals.

Plaintiff, who was not in possession of a study permit at the time of his admission at Fort Hare, was advised by the agents of the First Defendant that a grace period was given to academic institutions for the waiver of the said requirement.

In line with the terms of the written and/or tacit agreement referred to above Plaintiff commenced with his studies on 23 February 2016 after being cleared and registered by the First Defendant's international office.'

[6] On the papers before me, no written agreement was annexed to the particulars of claim in compliance with rule 18(6). Nor was the admission letter annexed in compliance with the undertaking in the particulars of claim.

[7] The plaintiff does however, in the alternative, rely on a tacit agreement. Rule 18(7) says that it shall not be necessary in any pleading to state the circumstances from which an alleged *implied* term can be inferred. Generally stated, an implied term arises by operation of law, whilst a tacit term is an unexpressed provision of the contract, derived from the common intention of the parties. It has been held however,

that the expression ‘implied term’ is an ambiguous one in that it is often used to denote at least two distinct concepts.**[3]** It is, on the one hand, used to describe the unexpressed provision of a contract which the law imports. On the other hand, it is also used to denote an unexpressed provision of a contract which derives from the common intention of the parties, as inferred by the court from the express terms of the contract and the surrounding circumstances.**[4]** The latter is sometimes described as a ‘tacit’ term, which is a description which was approved by the Appellate Division.**[5]** The Constitutional Court has described a tacit term as follows**[6]**:

> ‘A tacit term is an unspoken provision on the contract. It is one to which the parties agree, though without saying so explicitly. The test for inferring a tacit term is whether the parties, if asked whether their agreement contained the term, would immediately say, “Yes, of course that’s what we agreed.” Before a court can infer a tacit term, it must be satisfied that there is a necessary implication that they intended to contract on that basis.’

[8] The sub-rule accordingly relates to a tacit term in an express contract.**[7]** In other words, whereas a plaintiff who relies upon a tacit term in an express contract need not set out the circumstances from which the alleged term can be inferred, a plaintiff who relies on a tacit contract must set out the facts and circumstances from which the contract is inferred.**[8]** In any event, where an exception is raised, or, as in the case before me, where an amendment is opposed, the test is whether the tacit term could reasonably be implied.**[9]**

[9] I am not persuaded that the proposed amendment fails to enunciate facts and circumstances from which an alleged contract is inferred. Although I have some difficulty in understanding what the plaintiff means when he refers to “parallel conduct by rivals”, I will assume, in his favour, that what he is seeking to convey is that he has pleaded facts and circumstances from which the alleged agreement can be inferred. To that extent I am constrained to agree. The plaintiff has managed to set out facts and circumstances in sufficient detail for the defendants to plead to them. He has also listed three material terms of the agreement, and has alleged as a fact that agents of the first defendant advised him that academic institutions had been given a grace period during which waiver of the requirement of a study permit applied. From the facts and the circumstances described by the plaintiff, it may be inferred that the first defendant was one of those institutions. This however, only really affects paragraphs 6, 7, 8, 9 and 10 of the 26 paragraph amendment notice.

Victor and Another v Wonderhoek Farms (Pty) Ltd (2356/2021) [2022] ZAFSHC 23 (7 February 2022)

Jurisdiction-inherint jurisdiction- warrant before another court- court has no inherent jurisdiction

[1] The applicants launched an urgent application contending that there is an appeal before this court and pending its finalisation the order of the learned Magistrate E.M. Sebe of Wepener should not be executed. The respondents oppose the matter contending that there is no appeal process before any court. Therefore, the aforementioned order was properly put in operation and executed. The matter first served before me on 31 January 2022 and I made an order allowing both parties to file supplementary papers. It apposite to mention that the papers were served on the respondents few hours before the applicants approached me in chambers. None of the parties took issue with the fact whether the matter is urgent or not. I am of the view that it was a prudent thing to do because this matter is by its very nature urgent.

[2] The facts are fairly straightforward and are as follows. On 12 March 2021, the learned Magistrate E.M. Sebe granted an eviction order in favour of the first respondent. Aggrieved with the order, the applicants filed a notice of appeal to bring the matter before this court. It seems that despite the appeal process pending, the first respondent was hellbent on executing the order. This caused the applicants to bring an urgent application to prevent the first respondent from carrying out the eviction order. The order granted by Van Zyl J reads as follows: -

> "1. Condonation is granted in terms of prayer 1 of the Notice of Motion.
>
> 2. Pending the finalization of the applicant's appeal of the court order granted on 12 March 2021 in the Magistrate's Court for the district of Wepener, under case number 12/2020, the respondents is interdicted from enforcing the eviction against the applicants.
>
> 3. Costs of the application to be costs in the appeal."

[3] On 3 November 2021 Mhlambi J (with De Kock AJ concurring) dismissed the appeal with costs. The effect of this meant that the order of the learned Magistrate E.M. Sebe was confirmed rendering the applicants liable to be evicted from the contested property to *wit* Farm Aanvang, Wepener.

[4] On 15 December 2021, the applicants served and filed the application for leave to appeal with the Registrar of this Court. What followed was an exchange of letters between the attorneys of the parties and they could not resolve the impasse. On 31 January 2022 the second respondent armed with a warrant of ejectment issued by the Clerk of the Court, Wepener and assisted by a number of independent contractors executed the order of the learned Magistrate.

[5] The case for the applicants is thinly based on the provisions of Uniform Rule 30. The main contention on behalf of the applicants is that they have filed the application for leave to appeal. Therefore, in the event that by taking such a step they contravened the Uniform Rules of Court, that action constituted an irregular step. The first respondent was duty bound to invoke the provisions of the aforementioned rule. It was not open to the first respondent to disregard such filing because the respondent cannot unilaterally decide on the legal consequence of the filed document. The applicant further contended that the first respondent wrongly implemented the order of the full court by inserting its own date to effect the eviction. Turning to the order by Van Zyl J, the point raised is that the court can enforce its own order to grant the relief. Lastly, it was argued that the first and second respondents did not act in terms of the order. The main thread of this argument is that independent contractors were involved instead of the South African Police Service (SAPS). Based on these grounds, counsel urged me to grant the application with a punitive costs order against the respondents.

[6] Counsel for the first respondent sketched out the laws governing the appeal process before our courts. He submitted that the lodging of the appeal relied upon by the applicant is not in accordance with the law. The gist of his argument is that the appeal brought outside the Uniform Rules of Court has no effect because it is a nullity. He pointed out that the applicants were obliged to seek leave from the Supreme Court of Appeal and they failed to do that. Further they have not only failed to file their papers, they are now out of time. Therefore, until condonation is granted by that court, there is no appeal pending. Turning to the order of Van Zyl J counsel argued it was applicable only if there is an appeal pending and in this case there was none. Therefore, it is of no force and effect.

[7] The submissions of counsel for the second respondent substantially mirror those made on behalf of the first respondent. He emphasised that the procedure followed in this matter was not an irregular step but a nullity. He urged me that if this argument sustains, it must be treated as if it never occurred. Counsel argued that the second respondent was duty bound to give effect to the order. The second respondent was acting in terms of a valid warrant of ejectment and he was acting lawfully.

Pule v Nedbank Limited and Others (26720/2007) [2022] ZAGPPHC 72 (14 February 2022)

National Credit Act-compliance with section 129

Rescission- based on the Uniform Rules (i.e. Rule 31(2)(b) or Rule 42(1)) or the common law- common law allows the rescission of a default judgment obtained upon the default of appearance by a party, provided the defaulting party establishes or show sufficient cause or good cause for the rescission

[1] The applicant, Ms Doris Shadidi Pule (Ms Pule), concluded a loan agreement with the first respondent, Nedbank Limited (Nedbank), in 2007. Nedbank lent and advanced an amount of R700 000 to Ms Pule for her to purchase an immovable property situated at Erf 43 Rewaltch Johannesburg (the Property). Over the course

of time, Ms Pule had problems in repaying the loan and consequently breached the terms of the loan agreement.

[2] In 2007 Nedbank instituted legal proceedings against Ms Pule. Nedbank was granted default judgment in 2009 for the payment of the amount of R729 822.37. Nedbank bought the Property at a sale in execution and, thereafter, sold it to the sixth respondent, Mr Christian Ikechukwu Ubah (Mr Ubah). Mr Ubah further sold the Property to the fourth and fifth respondents, Mr Evans Odira Esione and Siqinisile Happiness Esione (the Purchasers).

[3] A period of 10 (ten) years elapsed between the granting of the default judgment in favour of Nedbank and the institution of the current application by Ms Pule. She instituted this application for the reinstatement of the loan agreement with Nedbank; rescission of the default judgment and warrant of execution in favour of Nedbank; declaration - as invalid - of the sale in execution whereat Nedbank purchased the Property and all subsequent transactions, and re-registration of the tittle to the Property in her name. The application is opposed only by Nedbank. The other respondents, including the Purchasers, are not taking part.

[4] The opposed motion came before me on 08 November 2021. Mr M Webbstock appeared for Ms Pule and Ms R Carvalheira appeared for Nedbank. They had both filed written argument in terms of the practice directives of this Court. This judgment gratefully benefits from both oral and written argument by counsel. I reserved this judgment after listening to counsel's oral argument. Next, I deal with the statements and submissions in support of each of the party's case.

Applicant's (i.e. Ms Pule's) case

[5] As stated above, Ms Pule obtained a loan from Nedbank to purchase the Property in 2007. She uses the Property as a kindergarten and, at times, to house homeless children. Still in 2007 she defaulted in her repayment of the loan and thus breached the agreement with Nedbank. In September 2007, Nedbank served her with summons for the repayment of the loan. She admits to the receipt of the summons by Nedbank. Naturally, this aspect is relevant for the rescission of the default judgment.

[6] Ms Pule now says that she doubts that Nedbank had complied with sections 129 and 130 of the National Credit Act 34 of 2005 (the NCA) before issuing the summons against her. In fact, she has not seen any documentary proof of compliance. But still she did not oppose the legal action. She appears to suggest that she did not have the required financial resources for legal representation at the time.

Compliance with sections 129 and 130 of the NCA; full settlement of arrears and automatic reinstatement of a credit

[31] It is part of Ms Pule's case that she doubts that Nedbank had complied with sections 129 and 130**[11]** of the National Credit Act 34 of 2005 (the NCA) before issuing the summons. In fact, she has not seen any documentary proof of compliance. I do not find merit in this submission. It is a mere conjecture without any basis. In any way it is Ms Pule who should have proffered proof of her allegation and she did not.

[32] There is further reliance on the provisions of the NCA by Ms Pule. She says that the loan agreement was reinstated by payment of the amount of R30 000.00. It ought to be borne in mind in this regard that Ms Pule's case is that the R30 000.00 payment settled all due amounts or arrears owing to Nedbank. Therefore, Nedbank's letter or notice under section 129 of the NCA could not be used to proceed with the case against Ms Pule. This submission purportedly relies on the decision in *Tarita v Absa Bank Ltd and another* in which it was held that "the continued validity of a s 129 notice" depends upon the facts of the case and that "if the arrears specified in the notice were fully extinguished after the notice had been given, the notice could not then be utilised for any legitimate purpose if further arrears occurred thereafter".**[12]** This view was supported in *Nhlapo v Toyota Financial Services SA* which also held that a new notice under section 129 of the NCA was required for the continued enforcement of the agreement once the arrears in old one have been fully extinguished.**[13]** But the arrears in this matter were never extinguished. No payment was made until after 15 months later. By then the arrears had increased to an amount of R132 807.65 and even higher by the time default judgment was granted on 02 February 2009. I do not understand the abovementioned authorities to suggest that the amount of the arrears stated in the notice would remain the same and the actual or accrued amount of the arrears irrelevant. Ms Pule was not making

payments to reasonably assume that there will be no change to the amount of the arrears. It is common cause that any payments made by Ms Pule during the entire currency of the loan agreement were sporadic. Summons had been issued to Ms Pule's knowledge. One would have expected her to approach Nedbank or its attorneys when making payment to determine the amount of the arrears at the time. But she did not. She simply chose to consider matters frozen-in-time in as far as her relationship with Nedbank was concerned. Accordingly, she has herself to blame. I also find that there was no reinstatement of the loan agreement. Nedbank complied with the requisite provisions of the NCA. I also reject Ms Pule's accusation that Nedbank added legal costs or interest on legal costs when calculating the arrear amount.

Acceleration of debt

[33] Ms Pule also bemoaned the fact that whilst Nedbank proceeded against her on the basis of an accelerated debt or an amount which resulted from Nedbank's exercise of its rights under the acceleration clause in the loan agreement, there was also indication of on-going monthly instalments and interest charges. I understand Ms Pule to be saying the two cannot go hand in hand. It is either the accelerated debt or a balance which represent the accruing monthly instalment, interest and other charges added at intervals. But this simply holds no water. Ms Pule was not asked to pay more, due to the conduct of Nedbank. She did not settle the actual arrears owing on her account to be justified in saying that the accelerated debt or amount should be ignored. Default judgment was granted against Ms Pule for an amount of R729 822.37. Therefore, I find that Nedbank properly relied on the accelerated repayment of the loan due to the breach of the terms of the loan agreement by Ms Pule. It is also significant that Ms Pule despite the default judgment made payment arrangements with Nedbank but failed to honour the arrangements.

[34] I could not find anything in the decision of the Supreme Court of Appeal in *Standard Bank v Miracle Mile Investments***[14]** including the *dicta* in paragraph [15] to support Ms Pule's contention with regard to the acceleration of the balance.

Requirements for rescission of judgment

[35] Ms Pule confirmed that she received the summons and contemporaneously became aware of the default judgment. In her own words she accepted the judgment was valid. It is reasonable to understand her conduct as amounting to acquiescence.**[15]** But Ms Pule also says that over the years she did her best to prevent the sale of the Property in execution of the default judgment. Therefore, she may say that her conduct or part of it contradicted any suggestion of her acquiescence to the judgment she seeks to set aside or rescind. But even this does not alter the outcome of this matter.

Conclusion

[36] I agree with Nedbank that Ms Pule did not indicate whether her application for rescission was based on the Uniform Rules (i.e. Rule 31(2)(b) or Rule 42(1)) or the common law. The common law allows the rescission of a default judgment obtained upon the default of appearance by a party, provided the defaulting party establishes or show sufficient cause or good cause**[16]** for the rescission.**[17]** Nedbank argues that Ms Pule has not given a reasonable explanation for the delay as she has been aware of the litigation since the receipt of the summons, including the default judgment.

[37] I find that Ms Pule did not provide a reasonable and acceptable explanation for the default. She also did not show that this application is *bona fide* and not merely aimed at frustrating the default judgment and its consequences through delays. Also, she has not established the existence of a *bona fide* defence on the merits of the matter.

[38] Whether considered on the basis of the common law or the Uniform Rules, this application discloses no basis to justify interference with the default judgment, the sale in execution and the transactions for the transfer of the Property. In fact, there is credence to Nedbank's claim that this application was launched by Ms Pule simply to avoid her eviction from the Property. This would amount to abuse of the process of this Court. But it is not necessary to express a firm view on the latter issue.

[39] Therefore, this application is unmeritorious and, thus, will be dismissed. Ms Pule will be held liable for costs of the application.

Order

[40] In the premises, I make the following order:

a) the application is dismissed with costs.

Mofokeng v Standard Bank of South Africa (12998/2020) [2022] ZAGPJHC 49 (1 February 2022)

Rule 30A- hat the Respondent is directed to comply with the Applicant's Notice in terms of Rule 35(3)

[1] This is an opposed application in terms of

[1.2] In the event that the Respondent fails to comply with the relief as sought in paragraph 1 of the Notice of Motion (paragraph [1.1] above), that the Applicant may return to Court on the same papers, duly supplemented, for further relief, including an Order for the striking-out of the Respondent's defence to the Applicant's claim in the main action;

[1.3] That the Respondent pay the costs of the Rule 30A Application.

[2] The Notice of Motion also contained the standard prayer that the Applicant seeks "*Further and/or alternative relief*".

[3] In the Founding Affidavit deposed to by the Applicant, and filed in support of the relief sought, the Applicant sets out that on 8 December 2020 the Respondent filed its Discovery Affidavit, but that the Applicant had "*valid reasons*" to believe that the Respondent's discovery was incomplete or inadequate, and based on such belief, the Applicant caused a Rule 35(3) Notice to be served on the Respondent's attorney of record on 11 February 2021, which Notice the Respondent failed to comply with.

[4] The Applicant alleged that the Applicant was being "*extremely prejudiced*", as the documentation sought from the Respondent was crucial to the Applicant's

action, and the Applicant had previously requested the documents and recordings from the Respondent.

[5] The documents and recordings sought by the Applicant in his Rule 35(3) Notice relate to telephonic recordings and/or records relating to the Applicant's "*pre-confirmation, discussion and/or acknowledgment of the purchase transaction executed on 3 January 2012, as per paragraph 12.3 of the pre-agreement statement and quotation/cost of credit*".

[6] The Applicant also sought recordings or records relating to a "*pre-acknowledgement discussion and/or confirmation with the defendant to the drafting of the Pre-Agreement statement, Quotation/cost of credit*" on 15 February 2012.

[7] The Applicant also sought recordings or records relating to the Applicants "*pre-acknowledgment, arrangements, permission or Justification and grounds on which the debit order amounts were altered*" by the Respondent as from 2 April 2013.

[8] The Respondent ought to have responded to the Rule 35(3) Notice by the end of February 2021.

THE RELEVANT LEGAL PRINCIPLES

[18] Rule 30A replaced the old Rule 30(5) of the Uniform Rules of Court and provides a litigant with a remedy to seek compliance with a Rule or a request made in terms of a Rule, and in the event of non-compliance, that a litigant's claim or defence be struck-out.

[19] Rule 30A reads as follows;

> "(1) Where a party fails to comply with these rules or with a request made or notice given pursuant thereto, or with an order or direction made in a judicial case management process referred to in rule 37A, any other party

may notify the defaulting party that he or she intends, after the lapse of 10 days from the date of delivery of such notification, to apply for an order -

(a) that such rule, notice, request, order or direction be complied with; or

(b) that the claimant's defence be struck out.

(2) Where a party fails to comply within the period of 10 days contemplated in subrule (1), application may on notice be made to the court and the court may make such order thereon as it deems fit."

[51] The Applicant placed reliance on the National Credit Act, number 34 of 2005, the Electronic Communication and Transactions Act, number 25 of 2002, and the National Credit Regulations in support of his contention that the Respondent is required to maintain records of all applications for credit agreements for a period of three years after the termination of a credit agreement.

[52] In the Replying Affidavit the Applicant accepts that the Respondent has confirmed that it is unable to locate the call recordings, but however submits that such failure constitutes evidence of professional negligence on the part of the Respondent.

[53] The Applicant further submits in the Replying Affidavit that his application (for the alternative relief) has merit, on the basis that the Respondent has breached the provisions of the National Credit Act, and in so doing has caused prejudice to the Applicant.

[54] The Applicant accordingly sought an order that I impose a sanction on the Respondent "*such as*" finding the Respondent to be professionally negligent, and to strike out the Respondent's entire defence.

[55] In the Replying Affidavit itself the Applicant records that the relief sought in the Replying Affidavit is sought in terms of paragraph 4 of the Applicant's Notice of Motion.

[56] The Applicant submitted that the Respondent's admitted failure to locate the required "*electronic signatures*" despite its statutory obligation and legal duty to maintain such records constitutes a breach of the Respondent's statutory duty.

[57] The Applicant accordingly submitted that I should find the Respondent to be professionally negligent and to impose an appropriate sanction, which would be the striking-out of the Respondent's defence. The Applicant submitted that the conduct of the Respondent amounted to "*gross negligence and contempt*".

[58] Respondent's counsel submitted in response that the Rule 30A Application relates to the production of relevant documentation which can be located, and that it is not about testing or making findings in respect of the Respondent's document management system. Counsel submitted that the Applicant was not entitled to convert a Rule 30A Application into an entirely different application.

[59] Respondent's counsel also submitted that the Applicant cannot rely on the reference to "further and/or alternative relief" as set out in paragraph 4 of the Notice of Motion in order to obtain the relief the Applicant seeks in its Heads of Argument, Practice Note and Replying Affidavit.

[60] It is trite that an applicant must make out its case for the relief it seeks in its founding affidavit and cannot make out its case for the relief it seeks in a replying affidavit.**[6]**

[61] In addition, an applicant cannot seek entirely different relief in the replying affidavit to that which is sought in the notice of motion without seeking at least an amendment and providing a respondent with an opportunity to deal fully with such new relief.

[62] The Applicant's submissions that the relief sought in the Replying Affidavit and Heads of Argument can be sought under the heading of "Further and/or alternative relief" is not legally sustainable.

[63] The reference to "Further and/or alternative relief", as set out in almost every notice of motion that is filed in an application, clearly refers to alternative relief that relates to, or is subsidiary or accessory to, the main relief as sought in the notice of motion.

[64] In the circumstances, the Applicant is clearly not entitled to the relief sought in the Notice of Motion, and is also not entitled to the alternative relief as sought in the Heads of Argument, Practice Note and Replying Affidavit, and during argument.

Samuels v Reddy (1518/2022) [2022] ZAGPJHC 42 (3 February 2022):

Spoliation- what is-depriving member of School Governing body from entrance

Spoliation-not always urgent

[1] The applicant Dr Cyril Samuels brought an urgent spoliation application and further interdictory relief against the respondent, Dr Ranguanathan Reddy, cited herein N.O acting in his capacity as the sole trustee of the Central Trust of the Sathya Sai Organisation of Transvaal.

[2] The applicant averred that he was in the peaceful and undisturbed possession and had access to the Sathya Sai Primary School operating from a property described as erf 2809 extension 2, Lenasia South and situated at 76 Kingfisher Street (the premises).

[3] The applicant alleged that he was unlawfully removed as a mentor and chairperson of the School Governing Body (the SGB).

[4] A dispute between the SGB and the Education Trust, which applicant represented on the SGB, started to brew from 07 December 2021 when the SGB communicated its election to sever all ties with the Education Trust. The latter did not accept this action.

[5] It is this action, which the applicant alleges deprived him of the possession and access to the school. As far as the deprivation of access to the school was concerned the applicant, before this court, relied on a letter received from the respondent's attorneys wherein it was noted that the respondent was the owner of the property on which the school was situated and that the respondent restricted all access of the Trustees of the Education Trust onto the school's property.

[6] The name of the applicant was specifically mentioned and it was stated that should they enter the premises the relevant security service or the South African Police Service will be called in to remove these individuals.

[7] Being an alleged spoliation application it would be central to a decision in this matter to establish if the applicant was in possession of the school. Would a member of a school governing body if removed be deprived of possession of that school? Only if this question is answered in the affirmation, the issue about the denial of access and the further interdictory relief could be considered.

1] It was argued on behalf of the applicant that being a member of the SGB provided him with a right to enter the school premises to perform his functions. It was argued that this right was an incorporeal property right which was invaded. He was in quasi possession of this right. The possession of the applicant was represented by the actual exercise of the right and the dispossession of such right amounted to spoliation.

[12] That the mandament of spolie was broadened to include incorporeal rights is trite. (See Telkom SA Ltd v Xsinet (Pty) Ltd **2003 (5) SA 309** (SCA) at para 9)

[13] On behalf of applicant reliance was placed on the matter of Singh and Another v Mount Edgecombe Country Club Estate Management Association (RF) NPC and Others **2016 (5) SA 134** (KZD). In this matter the applicant's access card to an estate was deactivated and he could not access his residence within the estate. The court found that the applicant was illicitly deprived of his right to enter the estate in his capacity as a resident. He was in quasi possession of this right.

[14] In my view this case is to be distinguished from the case of applicant. Mr Singh wanted access to his property within an estate and the access which he required was to exercise his right to access his property. The applicant did not establish any right to property pertaining to the school. His right to obtain access to the school to serve on the SCB and to exercise control was not an incorporeal property right. He never possessed the school and the premises of the school or any potion thereof. The applicant failed to allege and prove factual possession of the school. He instead relied on a right to possess, by virtue of being a SCB member.

[15] The applicant had to show actual possession, albeit quasi possession, to ground spoliatory relief. In order to succeed in obtaining spoliatory relief the applicant had to demonstrate possession for his own benefit. (See Yeko v Qana **1973 (4) SA 735** (A) at 739H). This was not established. The high watermark of the applicant's case is that he has the right to enter and access the property because he is a member of the SCB.

[16] In my view the applicant has failed to indicate that the court was in fact dealing with a spoliation application. Consequently, the need for a speedy remedy

and relief have not been established. This also pertains to the interdictory relief sought as a further claim.

[17] Even if the court was dealing with a spoliation application urgency should still be considered. It was argued on behalf of the applicant that any spoliation application is by its very nature urgent. It is indeed so that the *mandament van spolie* is designed as a speedy remedy which provides summary relief. This does not, however, mean that because an application is one for a spoliation order, the matter automatically becomes one which should urgently be dealt with. See in this regard Mangala v Mangala **1967 (2) SA 415** ECD at 416 para F where it was found as follows:

> "*F It does not follow that, because an application is one for a spoliation order, the matter automatically becomes one of urgency. The applicant must either comply with the Rules in the normal way or make out a case for urgency in accordance with the provision of Rule 6 (12) (b).*"

[12] On behalf of the respondent it was argued in order to obtain redress in the urgent court, the applicant must satisfy the requirements of rule 6(12)(b) by establishing that there are circumstances which render the matter urgent and, crucially, that he could not obtain substantial redress at a hearing in the ordinary course. I agree with this submission.

[13] Contrary to what is required by this rule, the applicant has failed to provide circumstances, which render the matter urgent. His claim that *"dispossessing and depriving me of possession and access to the school, will result in the Education Trust not being involved in the management of the school, and effectively losing all control"* self-evidently does not create grounds for urgency.

[14] The applicant alleged that the urgency of this matter rests upon the need for the applicant's involvement in the academic and financial day-to-day management of the school.

[15] No further allegations were made why the matter was urgent. Nothing was stated or suggested what would happen to the school if his "*possession*" was not restored and if he is was not given access to the premises.

[16] What the applicant is in fact seeking is to be placed in a position to exercise some control over the school. This redress can substantially be obtained in due course.

[17] I am of the view that the applicant failed to indicate that the matter should have been dealt as an urgent application.

[18] The matter is struck off the roll for lack of urgency with costs.

City Square Trading 522 (Pty) Limited v Gunzenhauser Attorneys (Pty) Ltd and Another (27365/2021) [2022] ZAGPJHC 81 (18 February 2022)

Summary judgment –filing of further affidavit

The question in the interlocutory rule 30 application before the court was whether it was permissible for the plaintiff to file a further affidavit. The affidavit was filed for the purposes of supplementing plaintiff's founding affidavit consequent upon an amendment of defendant's plea, effected after the filing of the main application for summary judgment.

Fisher, J discusses rule 32(4) [paras 11 - 16] which precludes the tendering of evidence other than in the founding affidavit. While that rule does not deal with what is to happen if there is an amendment to the plea, rule 28(8), a rule of general application, takes account of the consequences of the amendment of pleadings generally. Thus where a plea is amended in summary judgment applications, rule 28(8) affords plaintiff the right to adjust the founding affidavit without leave, provided the adjustment is consequential [para 18]. Rule 30 application dismissed.

[1] This is a summary judgment application. Interlocutory hereto, there has been an application in terms of rule 30 by the defendant to set aside the filing of a further affidavit by the plaintiff. This affidavit was filed for the purposes of supplementing the plaintiff's founding affidavit consequent upon an amendment of the defendant's plea effected after the filing of the application for summary judgment.

[2] The determination of the rule 30 application is fundamental to the summary judgment application and it was agreed that it should be determined before argument of the summary judgment application.

[3] The crisp question in the rule 30 application is whether it is permissible for the plaintiff to file the further affidavit in the circumstances.

Procedural history

[4] The summons was delivered on 14 June 2021 for payment of R503 305.6 together with interest and costs. The cause of action pleaded against the first defendant is for outstanding rental under two lease agreements and the cause of action pleaded against the second defendant is for the same indebtedness on the basis of her being a guarantor for such indebtedness.

[5] The first defendant filed a special plea of non-joinder and both defendants filed a plea which read as follows:

> 'AD PARAGAPH 1, 2 AND 3 THEREOF:
>
> The contents of these paragraphs are denied, and the Plaintiff is put to the proof thereof.
>
> AD PARAGAPH 4 —18 AND THE SUBPARAGRAPHS THEREOF:

Each and every allegation contained in these paragraphs are denied and the Plaintiff is put to the proof thereof.

WHEREFORE THE DEFENDANTS PRAY THAT THE PLAINTIFF'S CLAIM BE DISMMISSED ON A SCALE AS BETWEEN ATTORNEY AND CLIENT'

[6] A scanter denial could hardly be imagined. The plaintiff thus issued the summary judgment application on the basis of this plea. The affidavit founding the summary judgment comprehensively sets out the plaintiff's case and engages to the extent required with the then existing plea. The defendants then filed their affidavit resisting summary judgment. In it they raised defences which had not been pleaded.

[7] The defendants thereafter sought leave to amend their plea in a bid to bring it into line with their affidavit resisting summary judgment.

Sebata v Master of the High Court and Another (25821/19) [2022] ZAGPJHC 95 (23 February 2022):

Rescision- rescission of a judgment-based on the common law

INTRODUCTION

The applicant in this matter applies for a rescission of a judgment which was granted on 25 June 2020, in her absence. The application is based on the common law. The second respondent opposes the application. The applicant failed to file her heads of argument, chronology, practise note and list of authorities within 3 days of the order granted by an interlocutory court in terms of the Practise Manual and Directives of this Division. In her main application, the applicant seeks to set aside her late husband's will, on grounds (1) that he bequeathed her half share of their joint estate, and (2) that his signature in a will was forged.

THE EVIDENCE

1. Mr Thinane appeared for the applicant and submitted that the judgment had been erroneously sought because the order granted on 25 June 2020 was superfluous given that by that date, he had filed the replying affidavit.

2. Furthermore, Mr Thinane submits that he contacted the attorneys for the respondent on 24 June 2020, the day before this order was granted when he advised them that he had filed the “replying affidavit” and that he was of the view there was no reason for him to be compelled to do so.

3. Mr Kruger appeared for the second respondent, and he submitted the filing of a reply is irrelevant to this application. He explained that his attorney approached the interlocutory court in terms of the provisions of the Practise Manuel and Directives of this Division, dated 11 May 2020, in particular paragraph 9.8.2.12, to compel the applicant to file her heads of argument, practise note, chronology, and list of authorities, so that he may procced to obtain a date from the registrar for a hearing of the main application.

4. The Judge President’s Consolidated Directive dated 11 May 2020 and the Practice Manual of this Division.at paragraph 9.8.2.12 , provides that should a practitioner be aggrieved by the other party’s neglect, dilatoriness, failure or refusal to comply with a rule of court, provision of the practise manual or directives, he/she/it may approach the interlocutory court for an order to compel the opponent to comply with the Rules of Court, the manual or directive. This is a formal application procedure on notice, in that a founding affidavit, answering and replying papers are submitted upon which a court grants or refuses such an order. I noted that in casu, the second respondent’s attorneys had confirmed service on the applicants.

5. Furthermore, the directives provide that upon such an order being granted, the non-compliant party is ordered to file its documents within 3 days of the order failing which, the application/claim or defence of the non-compliant party will be struck/dismissed.

6. On 25 June 2020, the applicant was ordered to file her heads of argument, practise note, chronology, and list of authorities, pertaining to her main application which I referred to earlier, within 3 days of the order.

On the evidence before this Court, it was clear that the applicant's legal representative had "confused" the service of the replying affidavit, with the filing of heads of argument, practise note, chronology, and list of authorities, for the main application.

40.1. In fact, it was clear that Mr Thinane was not familiar with the provisions of the practise directives. Not only did he fail to comply with them he also "argues that there can be no such provision that strikes off or dismisses a claim or defence.

41. I posed the question to Mr Kruger as to who would be responsible for the filing of such documents and he agreed that the attorney is responsible for service and filing on case lines, but also informed this court that he could find no answering papers or practise note in relation to **this** interlocutory application, on case lines, either.

42. Mr Thinane had failed to comply with the directives on both occasions. The question then arises as to whether such noncompliance, "dilutes/nullifies" the applicant's sufficient cause.

43. The applicant chose her attorney whom she understood to have reasonable skill and knowledge to represent her. I noted Mr Kruger's submissions that our courts have found that in fact a party can be visited with the ineptitude of its legal representatives.

43.1. I noted the contents of the respondent's letter dated 3 March 2020 (001-11) in which is stated

> "Due to the abovementioned (referring to the failure to file heads), we have no other alternative but to proceed with an application, in terms of paragraph 9.8.2.12 of the Practise Manual."

It does not include a "warning" about a dismissal of the claim.

43.2. I agree that second respondent is not obliged to be as detailed, however, in my view it is onerous to expect "the applicant" to know of these supplementary rules of practise. Indeed. even qualified and seasoned practitioners from other jurisdictions have failed to comply with the directives and many still seek clarity on aspects of their implementation.

43.3. Mr Thinane was at cross purposes when he noted the application to compel filing of the heads. He clearly understood it to pertain to the filing of the replying affidavit which he knew to be outstanding at the time as I mentioned in paragraphs 2 and 3 supra.

44. I am of the view that the failure to comply was not due to inadvertence or indifference to the consequences but to a "confusion," which is again evident in Mr Thiane's correspondence dated 20 May 2020, (001-16), which no reasonable party/or member of public could anticipate and be held responsible for. I cannot impute those shortcomings to this "applicant."

45. In **AIRPORTS COMPANY SOUTH AFRICA SOC LIMITED v TOURVEST HOLDINGS PTY LTD AND TOURVEST FINANCIAL SERVCES PTY LTD 26/1/2016,** Kganyago AJ, at 24-26, considered the negligence of an attorney, and stated:

> “from the beginning the applicant’s instructions to their attorneys, was clear, and was to oppose the respondent’s review application. … The applicant could not have foreseen that their attorney would have acted the way they did.”

46. The second respondent could have known that given the martial regime of the parties, and the dispute raised, the applicant may have a valid claim. I have noted the second respondent’s arguments on the defence raised, but Mr Thinane submitted that the matter can be argued without the assistance of an expert. That is a matter for another court.

47. It would be a travesty if the rules of procedure should impose such a burden on a litigant in the circumstances of this applicant. No court can overlook, the history and experience of most of our people on their full knowledge of and full participation in our legal and economic systems. This court is hard pressed to deny this litigant the enforcement of her rights.

48. Having considered the facts I set out in paragraph 11 above, I am satisfied that the applicant has succeeded in proving sufficient cause as well as that she has a bona fide defence with prospects of success. Her marital regime gives her that legal right that this court is enjoined to protect.

49. The application must succeed.

I make the following order:

1. The order granted in default on 25 June 2020 is hereby rescinded and set aside.

2. The applicant is ordered file its papers within 5 days of this order.

3. Costs are cost in the cause.

Outeniqua Skydivers CC v Hartzer and Another (H264/2019) [2022] ZAWCHC 9 (7 February 2022)

Res judicata-special plea

In an action in which an order was sought directing first defendant (Hartzer) to effect transfer of rights to occupy hangar spaces at the Mossel Bay Airfield, second defendant ("Starlite") raised a special plea of res judicata, alternatively res judicata in the form of issue estoppel against the particulars of claim of the plaintiff ("Outeniqua"). Starlight averred that the factual and/or legal issue that arose from Outeniqua's claim had already been determined in a court order of 2 February 2021.

Mangcu-Lockwood, J explains concept of res judicata; the three requisites for a plea of res judicata [para 9]; and issue estoppel [para 10].

Court's finding that "there is an issue of fact and of law, namely the contract relied upon by Outeniqua, which was not considered in the previous judgment, and which has not been finally disposed of" [para 21], resulting in dismissal of special plea.

[1] The second defendant ("*Starlite"*) has raised a special plea of *res judicata,* alternatively *res judicata* in the form of issue estoppel, against the plaintiff's ("*Outeniqua"*) particulars of claim.

[2] In the particulars of claim Outeniqua, relying on an agreement between it (as represented by Hendrik Cornelis Van Wyk ("*Van Wyk"*)) and the first defendant ("*Hartzer"*), seeks an order directing Hartzer to effect transfer of rights to occupy hangar spaces A11 and A12 of the Mossel Bay Airfield ("*the hangars"*), to Outeniqua.

[3] Starlite's special plea is to the effect that the factual and/or legal issue that arises from Outeniqua's claim has already been determined by this Court in an order of 2 February 2021 per Wille, J involving Starlite, Hartzer and Fairoak Investment Holdings ("*Fairoak"*). The relief sought in the special plea is that the Court should extend or relax the 'same persons' requirement of *res judicata* on the grounds of fairness, equity, public policy considerations, avoidance of multiplicity of litigation and conflicting judgments on the same issue.

[4] I made a ruling that the issue raised in the special plea should be separated and determined first, before proceeding into the main trial because if the special plea was upheld that might obviate the need to determine the main dispute.

II. BACKGROUND

[5] The order granted on 2 February 2021 was the culmination of an action launched by Starlite under case number 10739/2018 ("*the action"*). Fairoak and Hartzer were cited as first and second defendants, respectively. The relief sought by Starlite was firstly declaratory relief that, in terms of an agreement between it and Fairoak as represented by Hartzer ("*the Fairoak agreement"*), it was entitled to the transfer of the hangars because it had bought the rights to occupy the hangars from Hartzer. However, it was pleaded that, contrary to that agreement Hartzer sought to sell the hangars to Van Wyk. Secondly, the relief sought in the action was that Fairoak and Hartzer be directed to abide by the terms of the agreement and to pay the costs of the action.

[6] Outeniqua brought an application to intervene in the action, which was opposed by Starlite, but subsequently formally withdrew the application before a determination could be made on it. Then, although Hartzer and Fairoak initially opposed the action brought by Starlite, they subsequently formally withdrew their

opposition. As a result, the Court Order of 2 February 2021 was obtained by default, and ordered as follows:

> "*1. It is declared that [Starlite] is entitled to the transfer of the hangars described as A11 and A12 at the Mossel Bay Airfield, Mossel Bay, Western Cape.*
>
> *2. The first and second defendants are directed to:*
>
> *2.1 abide by the terms of the parties' agreement;*
>
> *2.2 Furnish a copy of this order to the Mossel Bay Aero Club within 5 business days of judgment being granted."*

III. THE SPECIAL PLEA

[7] Similar to the particulars of claim in the action, Starlite relies on the existence of the Fairoak agreement in the special plea, stating that it was initially an oral agreement concluded on 23 April 2018, and was eventually reduced into writing on 11 May 2018. These allegations are denied in the replication delivered on behalf of Outeniqua, and the second defendant is put to the proof thereof.

JUDGMENTS RELATING TO DEFAULT JUDGMENT IN TERMS OF RULE 31(5) IN MATTERS WITHIN THE AMBIT OF THE NATIONAL CREDIT ACT

1. The practice in respect of default judgments in terms of Rule 31(5) has been that, save in those special cases involving residential property, all default judgments have been disposed of by the Registrar as contemplated by the Rules of Court.

2. This practice, and the effect of the Rules have since been challenged. A judgment in the Gauteng Division of the High Court in Pretoria, given on 12 June 2020: Theu v First Rand Auto, held that any default judgment that is

founded on a matter regulated by the National Credit Act must be placed before a Judge and the Registrar has no jurisdiction to grant a judgment. Another decision in

KZN held so too. These judgments rely on the dictum in a Constitutional Court case, Nkata v Firstrand Bank 2016 (4) SA 257 (CC) which held: "[173] Here the legal fees claimed by the bank arose in circumstances where the bank had acted in breach of the Act in a number of respects....Second, it sought and obtained a default judgment from the registrar of the High Court, something that is incompatible with s 130(3) [of the NCA] which requires such matters to be determined by the court"

3. The practice adopted in both High Courts of the Gauteng Division is that the matters may continue to be referred to the Registrar as Rule 31(5) contemplates. The Registrar in turn considers whether a matter is ripe for an Order. If in his or her opinion, it is not, a query is sent to the Plaintiff's Attorney. If in the opinion of the Registrar, a matter is in order, it is referred to a Judge in chambers.

4. The Judge in chambers is of course not bound by that opinion. The Judge thereupon considers the matter de novo. If satisfied that an order is appropriate, an Order is then made and uploaded. The name of the Judge making the order is apparent from the Order. If the Judge is not satisfied, a query in a case note on CaseLines is made and an order is refused, at that time.

Arcus v Arcus [2022] JOL 52034 (SCA)

PRESCRIPTION PERIOD APPLICABLE TO MAINTENANCE ORDERS

The question raised in this appeal was whether an undertaking to pay maintenance in a divorce consent paper, made an order of court, gives rise to a judgment debt as contemplated in section 11(a)(ii) of the Prescription Act 68 of 1969, with a prescriptive period of 30 years, or any other debt, as contemplated in section 11(d), with a prescriptive period of three years.

Smith, AJA explores attributes of a judgment or order of court [para 15] and maintenance orders in particular [para 17]. Maintenance orders are final judgments in that they are "(a) dispositive of the relief claimed and definitive of the rights of the parties, to the extent that they decide a just amount of maintenance payable based

on the facts in existence at that time; (b) final and enforceable until varied or cancelled; (c) capable of execution without any further proof; and (d) appealable."

Appeal dismissed in majority judgment.

Standard Bank of South Africa Limited v Lamont [2022] JOL 52053 (GJ)

BREACH OF HOME LOAN AGREEMENT RESULTING IN GRANTING OF SUMMARY JUDGMENT

Based on alleged breach of a home loan agreement, Standard Bank sought summary judgment against the respondent, and an order declaring the immovable property forming the primary residence of the respondent and his family executable.

Keightley, J refers to rule 46A(6)(a) which deals with applications to declare residential immovable property executable [para 4]. Only if a respondent has been given the opportunity to "make submissions which are relevant to the making of an appropriate order by the court" can the court properly exercise the discretion it is required to under rule 46A(2). Order of executability granted where there was no other way in which the respondent's indebtedness could be satisfied.

To successfully resist summary judgment, defendant must place sufficient facts before court to satisfy it that he has a defence that is bona fide and good in law. Failure to do so resulting in granting of summary judgment.

Afgri Operations (Pty) Ltd v Oberholzer and others [2022] JOL 52123 (WCC)

APPROACH TO EXCEPTIONS TO PLEA AND CLAIM-IN-RECONVENTION

First defendant (Oberholzer) was paid R500 000 by plaintiff ("AFGRI") as agent's commission, but AFGRI later sought to recover the amount on the ground that some of the suspensive conditions in the agreement had not been met. Oberholzer filed a plea to AFGRI's claims and brought a claim-in-reconvention against it. AFGRI raised an exception to both, alleging that the plea failed to disclose a defence to its claim,

that the claim-in-reconvention failed to disclose a cause of action and that Oberholzer's case, as a whole, was accordingly bad in law.

Gamble, J describes approach on exception [para 9], and difference in adjudication of an exception to particulars of claim and to a plea and claim-in-reconvention. Court finding Oberholzer's contention for a commission agreement which was partly written and partly oral not to be legally objectionable and therefore not excipiable.

Doctrine of fictional fulfilment discussed [para 45]. Exceptions found to be without merit.

Changing Tides 17 (Proprietary) Limited NO v Kubheka and another and related matters [2022] JOL 52140 (GJ)

IRREGULAR FORECLOSURE APPLICATIONS REJECTED BY COURT

Four applications were brought in terms of rule 46A(9)(c)-(d), for the amendment of the reserve price set in terms of the original application for foreclosure.

Fisher, J setting out provisions of rule 46A(9)(a) and (b) and explains foreclosure procedure. Rule 46(9)(c), (d) and (e) deal with what should be done if the reserve price is not achieved.

Attempt in all four applications to interpret the rule to allow for revisiting of reserve price with as little trouble and expense to the creditor as possible and with limited regard to the rights of the homeowner criticised by court.

Court considering what form the process under rule 46A(c),(d) and (e) takes; whether applications can be considered in the absence of a proper sheriff's report; and whether there should be service on the judgment debtor and, if so, what form should such service take.

Applications in this case regarded as irregular steps and court declines to entertain them.

Municipal Manager O.R. Tambo District Municipality and another v Ndabeni [2022] JOL 52214 (CC)

DUTY TO COMPLY WITH COURT ORDERS UNTIL SET ASIDE

Ms Ndabeni obtained a declaration from the High Court that she was a permanent employee of the second applicant, a municipality. The municipality's failure to comply with the order led to her obtaining a rule nisi, calling on the municipality to show cause why the failure to comply with the High Court order should not be declared unlawful and in contempt. Taking the stance that the order was a nullity, the municipality relied on that as a defence in the contempt application. Although the defence was upheld in the High Court, the Supreme Court of Appeal overturned that finding. An application for leave to appeal was brought before the Constitutional Court.

Pillay, AJ confirms the obligation to comply with court orders until set aside [paras 23 - 26]; and that the order in question was not a nullity. The municipality was therefore required to comply with the order. Court makes punitive costs order against municipality.

WHAT CONSTITUTES HATE SPEECH?

Four statements made by Mr Bongani Masuku regarding the conflict between Israel and Palestine led to the South African Jewish Board of Deputies (SAJBD) lodging a complaint with the South African Human Rights Commission (SAHRC), alleging that the statements constituted hate speech as contemplated in section 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

The matter came before the Constitutional Court after the Supreme Court of Appeal (SCA) overturned the Equality Court's finding that the statements amounted to hate speech.

Khampepe, J sets out the applicable legal framework [paras 18 - 20].

An application by the respondents for the recusal of Chief Justice Mogoeng due to pro-Israel statements made by him was first addressed. Court refers to presumption of judicial impartiality [paras 59 - 60], and test for recusal [para 63]. Test not met and recusal refused.

SCA's deciding matter in terms of section 16 of the Constitution as opposed to section 10 of the Equality Act ignored principle of subsidiarity. Court discusses section 10(1) and finds only first statement by Mr Masuku to contravene the section.

South African Human Rights Commission on Behalf of South African Jewish Board of Deputies v Masuku and another (South African Holocaust and Genocide Foundation and others as Amici Curiae) [2022] JOL 52146 (CC)

Algoa Bus Company (Pty) Ltd v Nelson Mandela Bay Metropolitan Municipality and others [2022] JOL 52263 (ECG)

CONSEQUENCES OF UNREASONABLE DELAY IN SEEKING REVIEW

As a provider of bus services within the Nelson Mandela Bay municipal area, plaintiff ("Algoa") sought the setting aside of a subsequent contract ("the VOCA") for the operation of starter bus services between the municipality and second defendant ("Spectrum"). According to Algoa, the VOCA granted rights in respect of some of its routes to Spectrum, causing loss of income. It contended that the VOCA did not comply with the National Land Transport Act 5 of 2009 and with the municipality's Supply Chain Management Policy.

Jolwana, J first considers whether Algoa unreasonably delayed in instituting proceedings, setting out relevant provisions of the Promotion of Administrative Justice Act 3 of 2000 [paras 6 - 13]. Algoa found to have unreasonably delayed in

instituting proceedings and did not establish grounds for condonation and extension of the period for review.

Action dismissed with costs.

Bayethe Projects CC v Nelson Mandela Bay Metropolitan Municipality and another [2022] JOL 52265 (ECM)

COSTS IN APPEAL HAVING NO PRACTICAL EFFECT

Appellant ("Bayethe") had sought the review and setting aside of decisions of the Nelson Mandela Bay municipality in awarding a tender to the second defendant ("Bronscor"). The application was dismissed and Bayethe and the municipality were ordered to pay Bronscor's costs of the application. On appeal, Bayethe contended that the court below had erred in making the costs order.

Van Zyl, DJP addresses question of the costs of an appeal that has no practical effect or result, referring to section 16(2)(a)(ii) of the Superior Courts Act 10 of 2013 [para 9]. Court's discretion in awarding costs explained [paras 11 - 13]. No reason existing to find that the usual order as to costs would be unjust in the circumstances.

Appeal dismissed, and appellant ordered to pay respondents' costs in the appeal.

Klingenberg v African Spun Concrete Properties (Pty) Ltd and another [2022] JOL 52264 (WCC)

EXCEPTIONS TO PARTICULARS OF CLAIM

Based on alleged breaches of a joint venture agreement, plaintiff sued defendant for damages. Defendants raised five grounds of exception on the basis that the particulars lacked averments necessary to sustain a cause of action against them, alternatively, that the particulars were vague and embarrassing.

Kusevitsky, J explains approach to deciding exceptions [paras 3 and 6]; requirements of Rule 18(4) of the Uniform Rules of Court [para 4].

Court upholding only one of the exceptions, viz that the damages claimed under the various heads of damages in the particulars of claim, was confusing and contradictory on any interpretation. Remaining grounds of exception dismissed.

CROMPTON STREET MOTORS CC t/a WALLERS GARAGE SERVICE STATION v BRIGHT IDEA PROJECTS 66 (PTY) LTD t/a ALL FUELS 2022 (1) SA 317 (CC)

Minerals and petroleum — Petroleum — Petroleum products — Purchase and sale of petroleum products — Unreasonable contractual practice — Arbitration — Referral to statutory arbitration — High Court's jurisdiction not ousted — Petroleum Products Act 120 of 1977, s 12B.

Minerals and petroleum — Petroleum — Purchase and sale of petroleum products — Unreasonable contractual practice — Arbitration — Referral to statutory arbitration — Stay of legal proceedings pending determination of dispute by arbitration — Application for — Need of applicant for stay to comply with requirements of s 6 of Arbitration Act — Court's discretion to decline stay — Factors to consider — Onus — Arbitration Act 42 of 1965, s 6; Petroleum Products Act 120 of 1977, s 12B.

Arbitration — Stay of legal proceedings — Two avenues to apply for stay of proceedings — By way of substantive application in terms of s 6 of Arbitration Act, or by way of special plea requesting stay of proceedings pending determination of dispute by arbitration — Arbitration Act 42 of 1965, s 6.

In terms of s 12B of the Petroleum Products Act 120 of 1977, the 'Controller of Petroleum Products may on request by a licensed retailer alleging an unfair or unreasonable contractual practice by a licensed wholesaler, or vice versa, *require* . . . *that the parties submit the matter to arbitration*'. The question in the present matter concerned broadly whether a High Court was entitled to refuse a request to stay legal proceedings instituted in respect of a matter already referred to arbitration under the above s 12B. The applicant, Crompton Street Motors CC t/a Wallers Garage Service Station, operated a service station on certain property under a franchise agreement incorporating a lease entered into in February 2003 with Chevron South Africa (Pty) Ltd. In December 2011 the latter ceded and assigned its rights and obligations to the respondent, Bright Idea Projects 66 (Pty) Ltd t/a All Fuels. The agreement was operative for a period of five years, with options to renew for two further 5-year periods. Both options were exercised. However, in August 2017 the respondent informed the applicant that it would not renew the agreement again, and that the agreement would accordingly terminate by effluxion of time on 28 February 2018, and that before such time the applicant would have to vacate the premises. The applicant provided no response to this communication until 14 February 2018, when, in answer to the respondent's queries regarding its intentions,

it indicated that it would not vacate, but was in the process of drafting an application for arbitration. This prompted the respondent, on 16 February 2018, to launch an application in the Pietermaritzburg High Court for, inter alia, the ejectment of the applicant. The applicant filed a notice to oppose and then an answering affidavit, in which, in addition to setting out its defence — reliance was placed on an oral agreement to extend the agreement — it applied for a stay of the proceedings pending the conclusion of an arbitration process initiated under s 12B.

The High Court refused to grant the application for a stay. For one, the court held, the application was not properly before it, as the applicant had failed to meet the procedural requirements for a stay of legal proceedings pending arbitration set out in of s 6(1) of the Arbitration Act 42 of 1965. The court nevertheless went on to consider whether it could exercise the discretion granted it under s 6(2) of the Arbitration Act in favour of a stay. It held that sufficient reasons existed why the matter should *not be referred* to arbitration. It went on to uphold the application for eviction. The applicant was unsuccessful in its attempts to seek leave to appeal from the High Court and the Supreme Court of Appeal. So it applied to the Constitutional Court.

In addition to the preliminary issues of jurisdiction and leave to appeal, * the principal issues for determination were the following (see [16]): *(a)* Whether, as the applicant argued, a s 12B referral to the Controller had the effect of ousting the High Court's jurisdiction; *(b)* if not, whether the applicant's failure to comply with s 6(1) of the Arbitration Act rendered the stay application defective; *(c)* whether the High Court had the discretion to refuse a request to refer the matter to arbitration (see [36]), which in turn required an examination of the relationship between s 6 of the Arbitration Act and s 12B of the Petroleum Products Act (see [40]).

Held

As to *(a)*

The applicant's claim that the High Court's jurisdiction was ousted was unfounded and had to fail (see [28]): In light of the presumption against ouster and the wording of the Petroleum Products Act, there was no basis to find that the High Court's ability to hear disputes of this nature had been assigned by the Petroleum Products Act exclusively to the arbitrator (see [26]). Further, it had been confirmed before by the Constitutional Court that the just and equitable standard required by the Petroleum Products Act applied to High Court litigation. (See [27].) Clearly, the parties had a choice between the s 12B arbitration and High Court litigation, and both forums had to apply the fairness standard (see [28]).

As to *(b)*

The inclusion of the request for a stay of proceedings in the applicant's conditional counter-application and as part of the answering affidavit did not render the application defective (see [14]). Non-compliance with s 6(1) of the Arbitration Act did not render the request for a stay invalid. There were two avenues to apply for a stay of proceedings: a substantive application in terms of s 6 of the Arbitration Act may be made, *or a special plea requesting a stay of the proceedings pending the determination of the dispute by arbitration*. (See [32].) (The court, however, rejected the applicant's assertion that s 6(1) was not applicable because it had relied on statutory arbitration and not contractual arbitration. In terms of s 40 of the Arbitration Act, the provisions of the Act were made applicable to arbitration proceedings under any legislation, unless the legislation explicitly excluded its applicability, or if the Arbitration Act was inconsistent with the procedure recognised by the relevant law. None of those conditions were met in the present case. (See [31].))

As to *(c)*
The language of s 6(2) directed a court acting under that section to stay proceedings where such an application was made, unless sufficient countervailing reasons existed for the dispute not to be referred to arbitration. The words 'no *sufficient* reason why the dispute *should not* be referred to arbitration' denoted that the standard position was that a stay should be granted upon request. The onus of satisfying the court that the matter *should not* be referred to arbitration and instead heard by the High Court was on the party who instituted the legal proceedings. The discretion to refuse arbitration should be exercised judicially and only when a very strong case had been made out. (See [41].)
Further, when the Arbitration Act was being applied in terms of a statutory right to arbitration as opposed to a contractual right, s 6(2) had to be read to require that a court may stay proceedings if there was no sufficient reason to refer the dispute to arbitration *in accordance with the applicable statute or legislation* (in this case s 12B) *as opposed to the terms of an agreement*. (See [43] and [62].) In the case of an application for a stay to which s 12B applied, a court in exercising its discretion had to engage with the purpose and benefits of s 12B (see [43] and [60] – [63]). In this regard, the arbitral mechanism was introduced by the Legislature in order to address the unequal bargaining power between wholesalers and retailers prevalent in the petroleum industry in South Africa (see [42], [60] and [62]); and with this in mind offered a forum for resolving disputes that was cheaper and quicker than litigation, *expedient, specialised and procedurally flexible* (see [44], [45] and [61]). A court confronted with a stay application of the present type also had to guard against treating the dispute as a regular contractual dispute: the equitable standard of fairness and reasonableness prevailed in petroleum contracts (see [62]).
In the circumstances of the present case, the High Court had exercised its discretion judicially when it refused to stay proceedings, and there was no basis for this court to intervene (see [59] and [64]). (In reaching this conclusion, the Constitutional Court held that the High Court had been entitled to consider, inter alia, the following factors in refusing to stay proceedings: (1) That it would be a waste of judicial resources to stay proceedings, as the merits of the applications were fully argued before it and the matter was on the opposed roll (see [49] and [50]). (2) That the applicant had failed to approach the Controller with undue delay once it suspected that there were unfair or unreasonable contractual practices, instead waiting until the lease was due to expire (see [53] – [55] and [64]). (3) That the respondent's refusal to extend the lapsed franchise and lease agreements or to conclude new ones did not amount to a 'contractual practice' that could be corrected by an arbitrator in terms of s 12B, and therefore rendered the section inapplicable (see [49] and [56] – [58]). Appeal accordingly dismissed (see [66]).
PUBLIC PROTECTOR v COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE AND OTHERS 2022 (1) SA 340 (CC)

Public Protector — Powers — Subpoena — Taxpayer information — Whether Public Protector's power of subpoena trumping proscription of disclosure of taxpayer information — Tax Administration Act 28 of 2011, s 69(1); Public Protector Act 23 of 1994, s 7(4)*(a)*.

Revenue — Tax administration — Confidentiality of taxpayer information — Whether Public Protector's power of subpoena trumping proscription of disclosure of taxpayer information — Tax Administration Act 28 of 2011, s 69(1); Public Protector Act 23 of 1994, s 7(4)*(a)*.

During an investigation the Public Protector (PP), exercising her subpoena power under s 7(4)*(a)* of the Public Protector Act 23 of 1994 (PPA), subpoenaed the first respondent (the Commissioner) to provide her with tax information of a third party (see [1]). The Commissioner refused and later applied for a declarator that the Tax Administration Act 28 of 2011 (TAA) (s 69(1)) fortified by the PPA precluded him making the disclosure (see [2] and [5]). The court granted the declarator and here the PP sought the Constitutional Court's leave to directly appeal to it (see [1], [9], [11] and [52]). It refused leave in respect of the declarator (see [2], [8] and [52]).

The Constitutional Court weighed, firstly, that its constitutional jurisdiction was engaged: the contended trumping of the TAA's disclosure prohibition by the PPA's subpoena power demanded interpretation of the Constitution (s 182) and its relation to the subpoena power; the PPA was, moreover, constitutional legislation; and the right to privacy was involved (see [14] – [15]). The Constitutional Court then weighed the interests of justice and found that the case was not urgent and lacked prospects of success (see [18] and [27]).
As to the latter, the PP had argued that her statutory subpoena power flowed directly from her constitutional power to investigate, and as a constitutional power could not be limited by the TAA's proscription of disclosure (see [19]). Indeed a fortiori the subpoena power was an 'additional' power contemplated by the Constitution (see [20]).
The PP urged that any bar of subpoena would be inconsonant with the constitutional duty to assist ch 9 institutions; and the exceptions to the disclosure prohibition were not a closed list (see [21] and [23]).
The Constitutional Court, beginning with the preceding assertion, considered it an untenable interpretation that was at odds with the unambiguous text of the TAA (see [24]).
As to the argument that the subpoena power, flowing as it did from the constitutional investigative power, could not be limited by the disclosure prohibition, the Constitutional Court *held* that its effect was to impermissibly invalidate the proscription without the requisite step of obtaining a declarator (s 172(1)*(a)* of the Constitution) to that effect (see [26]).
Leave to directly appeal the High Court's declarator was accordingly refused (the absence of prospects of success outweighing other factors — the saving of time etc — favouring the granting of leave) (see [28] and [52]).
The Constitutional Court, however, granted leave to appeal the High Court's award of personal costs and set it aside as unjustified (see [41] and [52]).

LEWIS STORES (PTY) LTD v SUMMIT FINANCIAL PARTNERS (PTY) LTD AND OTHERS 2022 (1) SA 377 (SCA)

Credit agreement — Consumer credit agreement — National Consumer Tribunal — Leave to refer complaint directly to it when National Credit Regulator issued notice of non-referral — Decision to grant such leave not appealable to High Court — Nature of Tribunal proceedings granting leave — No formal application or public hearing required — Factors to be considered by Tribunal — Tribunal having wide discretion — National Credit Act 34 of 2005, s 141(1)*(b)* and s 148(2)*(b)*.

Section 141(1)*(b)* of the National Credit Act 34 of 2005 (the NCA) provides that '(i)f the National Credit Regulator issues a notice of non-referral in response to a complaint . . . the complainant concerned may refer the matter directly to the [National Consumer] Tribunal, with the leave of the Tribunal'. And s 148(2)*(b)* that 'a participant in a hearing before a full panel of the Tribunal may appeal to the High Court against the decision of the Tribunal in that matter . . .'.
Here the Tribunal gave leave to Summit Financial Partners (Pty) Ltd (Summit) for a direct referral to it in terms of s 141(1)*(b)*, after the National Credit Regulator's non-referral of a complaint Summit had lodged against Lewis Stores (Pty) Ltd (Lewis) Lewis, which had resisted the Tribunal giving leave for a direct referral, then appealed — purportedly under s 148(2)*(b)* — to the High Court against the Tribunal's decision to give such leave.
At issue in this case, Lewis' appeal to the Supreme Court of Appeal after it was unsuccessful in the High Court, was whether a decision of the Tribunal to permit a direct referral to it in terms of s 141(1)*(b)* of the NCA was appealable in terms of s 148(2) of the NCA; secondly, what test the Tribunal should have applied in assessing the application; and, thirdly, whether Summit had satisfied the test.
Held
Once a matter had been properly referred to the Tribunal in terms of s 141(1)*(b)*, the Tribunal was required to conduct a hearing into the matter referred to it. Section 141(1)*(b)* made no reference to an 'application' or a hearing when seeking leave to refer a complaint directly to the Tribunal. Section 141(1)*(b)* conferred on the Tribunal a wide, largely unfettered discretion to permit a direct referral. The NCA did not require a formal application to be made and it was not necessary for purposes of the present appeal, nor was it desirable, to circumscribe the factors to which the Tribunal should have regard. There was no test to be applied in deciding whether or not to grant a direct referral to it in respect of a complaint. Section 141(1)*(b)* merely contemplated a reconsideration of the Regulator's ruling, not a formal application or a public hearing. (See [12] – [16].)
The ruling which the Tribunal was required to make under s 141(1)*(b)* was not a 'decision', nor an 'order' referred to in s 150. Rather, it involves the exercise of its 'other powers' as contemplated in s 27 and s 150 of the NCA. Accordingly, on a proper construction of the NCA, the grant of leave to refer a complaint directly to the Tribunal was not a 'decision' which must be arrived at in a hearing, and was not susceptible to an appeal in terms of s 148 of the NCA.

DE BRUYN v STEINHOFF INTERNATIONAL HOLDINGS NV AND OTHERS 2022 (1) SA 442 (GJ)

Accountant — Auditor — Duty of care during audit — Claim by shareholders against company's auditors for share-value loss — Auditor owing duty of care to company, not shareholders.

Company — Directors and officers — Directors — Liability — To shareholders for breach of duties under Companies Act — Section 218(2) not imposing general liability — Shareholders must prove breach of duty under substantive provision of Act — Section not imposing common-law liability for such breach — Companies Act 71 of 2008, s 218(2).

Company — Directors and officers — Directors — Liability — To shareholders for breach of duties under Companies Act — Section 20(6) imposing liability on

company officers, not company itself — Conferring no cause of action against company — Companies Act 71 of 2008, s 20(6).

Company — Shares and shareholders — Shareholders — Proceedings by and against — Action under common law against directors for breach of duty resulting in drop in value of shares — Directors liable to company, not shareholders — In absence of special relationship between shareholder and company, directors not liable to shareholders or prospective shareholders for loss in share value.

Company — Shares and shareholders — Shareholders — Proceedings by and against — Action under s 218(2) against directors for breach of duty — Section 218(2) not itself providing cause of action but imposing liability only if duty under substantive provision of Act breached — Not imposing separate common-law liability for such breach — Shareholder's claim depending on wording of provision breached — Companies Act 71 of 2008, s 218(2).

Practice — Class action — Certification — In absence of cause of action raising triable issue, no certification possible — Trumping all other factors — Since they have definitive answer, no reason to refer true questions of law to trial court.

Practice — Class action — Funding — Third-party funding arrangements — Acceptable parameters proposed.

Practice — Class action — Representation — Class representative — Suitability — Capacity to conduct litigation on behalf of class.

On 5 December 2017 the value of shares in the Steinhoff companies * crashed after Steinhoff issued a press release disclosing accounting irregularities. The applicant (De Bruyn), a Steinhoff shareholder, sought authorisation to institute a class action on behalf of various groups of Steinhoff shareholders. The respondents opposed certification on several grounds.

In the class action De Bruyn intended holding the Steinhoff companies, their directors and their auditors, Deloitte (who allegedly failed to conduct a proper audit), liable for the shareholders' losses caused by the fall in value of their shares. ‡ De Bruyn's application was the first shareholder class action brought for certification in South Africa. The parties disagreed, inter alia, on the proper way to decide whether a triable issue was raised; the sufficiency of the class definitions proposed by De Bruyn; whether De Bruyn was a suitable representative plaintiff; the acceptability of the third-party funding arrangements; ‡ and, crucially, whether the proposed class action indeed raised triable issues.

De Bruyn alleged (i) that the directors had incurred *common-law delictual liability* by breaching their duty of care to shareholders by making loss-causing negligent misstatements in the companies' financials; and (ii) that the directors and Deloitte had incurred *statutory liability* to shareholders by breaching various provisions of the Companies Act 71 of 2008 (the Act), including s 22 (reckless trading), ss 28 – 30 (financial information), and s 76 (directors' standards of conduct).

De Bruyn's statutory claims were based principally on (i) s 218(2) of the Act, which provides that '(a)ny person who contravenes any provision of [the Act] is liable to any other person for any loss or damage suffered by that person as a result of that contravention'; and (ii) s 20(6) of the Act, which confers on each shareholder a claim for damages against 'anyone' who 'intentionally, fraudulently or due to gross negligence' causes the company to do anything inconsistent with the Act or ultra vires the powers of the company.

The claims against Deloitte were also based on both common law and statute. De Bruyn claimed that Deloitte owed shareholders a common-law duty of care not to make negligent misstatements causing loss, while the statutory claim was based on s 46(3) of the Auditing Profession Act 26 of 2005 (APA), which provides that auditors incur liability to third parties who relied to their detriment on financial statements maliciously, fraudulently of negligently made by the auditors.

Held

Triable issue?

The common-law claims: Liability for negligent misstatements causing pure economic loss required proof of wrongfulness in the sense of an infringement of a right or legally recognised interest. Directors owed their fiduciary duties to the company, not the shareholders, except where there was a special relationship between directors and shareholders (see [134] – [141], [151]). Since no such relationship was pleaded, there was no foundation for the proposition the Steinhoff directors owed a fiduciary duty to the shareholders or prospective shareholders (see [143] – [146]). Given that the requirement of wrongfulness was thus absent, there was no cognisable common-law claim in delict against the directors (see [160]). As to Deloitte, it owed its duty of care to the company, not its shareholders (see [167]).

The statutory claims: Section 218(2) should not be interpreted literally but to chime with the common law and the limitations it imposed on liability. The specific requirements of liability under s 218(2) resided in the substantive provisions of the Act. Since the common law did not hold that company directors owed fiduciary duties to shareholders, the specific contraventions of the Act relied on by De Bruyn did not accord the shareholders a right of action against Steinhoff or the directors. (See [186] – [203].)

Section 20(6) imposed liability on persons who caused the company to act (in particular, its directors), and not on the company itself. It would be discordant with the common law and the rest of s 20 if s 20(6) were to be interpreted to provide shareholders with a claim for pure economic loss caused by the actions of directors. Properly interpreted, s 20(6) required those who caused the company to act ultra vires or unlawfully to make good *to the company*, not its shareholders, the loss caused. In casu, therefore, the shareholders had no claim under s 20(6) for losses suffered because of the conduct of Steinhoff or its directors. (See [225], [230], [232], [236], [246].)

The common-law claim against Deloitte: Since the duty of care of auditors was owed to the company, not its shareholders, the pleadings failed to disclose a common-law cause of action against Deloitte. There was no proximate or special relationship that would extend to any subset of shareholders a duty of care owed by Deloitte. (See [172], [174].)

The statutory claims against Deloitte: The problem here was that De Bruyn did not plead causation in the form of detrimental reliance required by APA, s 46(3): instead, she relied on the allegation that class members bought shares at inflated prices or held on to shares because of their inflated prices. That being the case, the particulars did not disclose a cause of action against Deloitte. (See [250] – [251], [256].)

Other matters

Certification of class action based on novel point of law: Whether a triable issue was raised was best assessed by the certification court itself on the standard of whether the proposed cause of action was tenable in law. This in turn would be important in

deciding whether there were triable issues that warranted a class action. (See [18] – [19].)

Class commonality: Class definition should permit class membership to be determined by recourse to objective criteria. The revised class definitions proposed by De Bruyn adequately cured the concerns raised by the respondents. Despite the multiplicity of claims against different defendants, there was sufficient class commonality for the purposes of certification. (See [27], [37], [45], [257] – [274], [293].)

Suitable representative: While De Bruyn lacked the technical expertise required of an optimal class representative, she was nevertheless a Steinhoff shareholder who had suffered a loss reflecting an identity of interest with the proposed classes she intended to represent. Even in complex cases, ordinary litigants, properly guided by their legal representatives, could make decisions in their own interests and those of their class. While not ideal, De Bruyn was a suitable representative for the proposed classes. (See [61], [64], [291].)

Funding arrangements: The requirements for the acceptance of the third-party funding arrangements were that they (i) were necessary to provide access to justice; (ii) fair and reasonable; (iii) would not overcompensate the funders; (iv) would not interfere with the duty of the class lawyers to act in the best interests of their clients; and (v) would enable class representatives to exercise control over the litigation in the best interests of class members. Here the proposed funding arrangements, being fair, reasonable and in the interests of justice, ought to be permitted to support the proposed class action. (See [80, [83], [86] – [87], [120].)

In closing, the court pointed out that while there was much to be said in favour of the certification of a class action to compensate buyers of Steinhoff shares that suffered losses, the fact that none of the component parts of the proposed cause of action against the Steinhoff companies, their directors or Deloitte had any basis in law meant that there was nothing to take to trial. Without a cause of action, the application for certification would fail. This did not, however, mean that the shareholders had no remedy: it was for the Steinhoff companies to hold the directors and Deloitte liable for loss resulting from the breach of their duties to the companies, and if they reneged, the shareholders could compel them to act by invoking s 165 of the Act. (See [288] – [289], [298] – [301].)

RAFONEKE v MINISTER OF JUSTICE AND CORRECTIONAL SERVICES AND OTHERS 2022 (1) SA 610 (FB)

Legal practitioner — Admission and enrolment — Prohibition on admission and enrolment of foreigners — Constitutionality — Prohibition mostly in order, being in line with government policy and attendant legislation — Unconstitutional only to extent that it prevents admission and enrolment of foreigners as 'non-practising practitioners' — Declaration of invalidity suspended pending rectification by Parliament — Legal Practice Act 28 of 2014, s 24(2) and s 115.

The applicants — both citizens of Lesotho who had obtained LLB degrees, completed their articles of clerkship and passed their attorneys' admissions exams in South Africa — challenged the constitutionality of s 24(2)*(b)* and s 115 of the Legal Practice Act 28 of 2014 (the Act) after their applications for admission as legal practitioners were refused in the light of those provisions. In addition to the justice

minister, the respondents were the Legal Practice Council and the trade, labour and home affairs ministers.
Section 24(2)*(b)* states that to practise at and be admitted to the High Court as a legal practitioner, the applicant must be 'a South African citizen' or 'a permanent resident' of the country, thus differentiating between citizens and permanent residents on the one hand and non-citizens on the other. Section 115 preserves the entitlement of foreign advocates, attorneys and solicitors from certain countries to be admitted and enrolled as legal practitioners in South Africa, thus differentiating between them and foreigners in the position of the applicants.
According to the applicants, the differentiations in s 24(2)*(b)* and s 115 were contrary to s 9 of the Constitution. They denied, moreover, that there was a rational connection between the differentiation and a legitimate government purpose, and argued that even if there was one, it was still discriminatory and unconstitutional.
The respondent ministers and the Free State Association of Advocates, as amicus, argued that the contested provisions served the rational and legitimate government purpose of protecting citizens and residents' access to articles of clerkship, and that the applicants were bent on circumventing local employment and immigration statutes enacted to achieve this purpose.
Held
It was reasonable for the Act to ensure that the legal profession broadly reflected the demographics of the country by regulating access to it (see [42]). Allowing foreigners to practise without due regard to government policy (to protect jobs for South Africans) and attendant labour and immigration laws (visa and work-permit requirements for foreigners) would render them nugatory (see [48]). Hence there was a rational connection between the prohibition in s 24(2)*(b)* and the government's policy objective (see [49]). The differentiation in s 115 between foreign lawyers who could practise here and persons in the position of the applicants was not arbitrary but similarly served a legitimate government purpose (see [57] – [64]).
As to the applicants' argument that there was, despite the abovementioned rational connection, nevertheless unfair discrimination, that, while they were indeed discriminated against on the basis of their nationality, the discrimination was, in the light of the economic and unemployment realities of South Africa and the government's attempts to address them, fair (see [97], [100], [104], [115]).
But it was different for those who wanted to be admitted but not to work here, ie to be admitted and enrolled as non-practising legal practitioners (see [72]). Nothing in the rules proscribed this. Under s 33 of the Act such persons would not be able to legally work or be paid as practising legal practitioners and they would not threaten South African jobs (see [82] – [86]). The upshot was that an indiscriminate bar against the admission of non-citizens like the applicants served no government purpose and was irrational (see [88]). Hence s 24 did not pass constitutional muster to the extent that it prohibited non-citizens from being admitted and enrolled as non-practising legal practitioners (see [90]).
The appropriate remedy would be a declaration of invalidity and a suspensive order to allow the legislature to cure the defect (see **Order** for details).
National Prosecuting Authority v Public Servants Association obo Meintjies and others and a related matter [2022] 1 All SA 353 (SCA)

Labour and Employment – Practice and procedure – Employment-related matter – Jurisdiction – Whether High Court and Labour Court enjoying concurrent jurisdiction

– On proper analysis of legal basis of claim, majority finding that insofar as claim related to an unfair labour practice, it fell within exclusive jurisdiction of Labour Court.

The Public Servants Association ("PSA") approached the High Court for relief in a dispute regarding the applicability of the Occupational Specific Dispensation ("OSD") structure of remuneration to posts held by Deputy Directors of Public Prosecution and Chief Prosecutors in the National Prosecuting Authority ("NPA"). The PSA relied on certain collective agreements regarding implementation of the OSD for qualifying categories of employees. It contended that the NPA was guilty of an unfair labour practice in not implementing the collective agreements.

In the High Court, the appellants contended that that court did not have the jurisdiction to adjudicate the matter because the PSA's application was a quintessential labour dispute which was to be processed through the mandatory dispute resolution procedures set out in the Labour Relations Act 66 of 1995. They also contended that the High Court could not exercise jurisdiction over the dispute within the contemplation of section 77(3) of the Basic Conditions of Employment Act 75 of 1997 because the various collective agreements relied upon by the PSA were inapplicable to them. Dismissing the jurisdictional point, the court went on to hold that the PSA was entitled to the relief of specific performance, and declared that the NDPP's approval regarding the implementation of the OSD was lawful and enforceable and had to be complied with. That resulted in the present appeal.

Held – The majority ruling that the High Court should have struck the matter from its roll for want of jurisdiction. The Court confirmed that the Labour Court and other tribunals created under the Labour Relations Act 66 of 1995 are uniquely qualified to handle labour-related disputes, and referred to the statutory provisions dealing with concurrent jurisdiction of the Labour Court and High Court.

In its application, the PSA sought the implementation of a determination. The High Court could only have been clothed with jurisdiction if the outcome had been claimed on the ground that the terms of the individual employment contracts between the DDDPs and CPs and the NPA obliged the NPA to act accordingly. Consequently, the notice of motion and founding affidavit had to be analysed to ascertain whether the enforcement of employment contract terms was relied upon. In performing that exercise, substance had to prevail over form and proper regard be had to context. The notice of motion did not convey a reliance on employment contracts. Instead, the PSA claimed specific performance of obligations that had allegedly arisen from certain other documents. The founding affidavit showed reliance on the fact that the failure to implement the OSD in respect of the DDPPs and CPs had constituted an unfair labour practice relating to promotion and benefits, as defined in section 186 of the Labour Relations Act. In terms of section 191 of the latter Act, such unfair labour practice disputes must be dealt with in terms of that Act. As such, the High Court did not have jurisdiction to hear the matter, had no power or authority to determine the disputes and should have struck the matter from its roll.

A dissenting opinion was that the matter engaged the concurrent jurisdiction of the High Court and the Labour Court.

Body Corporate of Nautica v Mispha CC [2022] 1 All SA 399 (WCC)

Civil Procedure – Claim for payment plus interest – Quantum of interest claimed – In duplum rule – Interest runs anew from date that judgment debt is due and payable, and runs on – and is limited to an amount equal to – the whole of the judgment debt, including the portion which consists of previously accrued interest.

Property – Sectional title scheme – Body corporate – Claim for payment of arrear levies and interest – Locus standi – Section 2(7) of the Sectional Title Schemes Management Act 8 of 2011 confers standing upon the body corporate to sue.

The defendant was owner of two units in a sectional title scheme, with the plaintiff as the scheme's body corporate. The defendant's units were a residential unit with a balcony and a garage unit. In keeping with South African law, the participation quota allotted to the units in the scheme determined the contribution or liability of owners towards the incurred expenses of the scheme.

On the ground that the defendant failed to pay levies for the period of March 2008 up to May 2021, the plaintiff brought the present proceedings against the defendant for payment of R1 826 366,86 in respect of outstanding levies, electricity charges and interest on the arrear levies. While not denying not having paid levies due, the defendant denied that it was obliged to make payments as demanded by plaintiff, denied that any valid resolution was taken by trustees to adjust the participation quota, and to add compound interest at the rate of 3% per annum on all arrear levies.

Held – The plaintiff's claim simply arose, factually, from a failure to pay overdue levies. The defendant's attempt to the body corporate trustees' adopting and retracting a resolution did not assist him in any way. He provided no acceptable justification for withholding payment of his levies. Unable to identify any tenable argument raised by the defendant, the court regarded him to be merely grasping at straws.

The next question addressed was whether the plaintiff had the necessary *locus standi* to institute the current proceedings. There was no basis for defendant's contention that there was nothing to indicate that the party described as the body corporate of the scheme was in fact a body corporate in terms of the Sectional Title Act 95 of 1986. Section 2(7) of the Sectional Title Schemes Management Act 8 of 2011 confers standing upon the body corporate to sue. That was exactly what the plaintiff was doing in this case. There was overwhelming evidence to show that it had the necessary legal standing to institute action for monies owed to it by the defendant. The *locus standi* objection was accordingly dismissed.

Regarding the claim for interest, the court stated that the plaintiff, over and above the owed debt on arrear levies, was also entitled to the interest borne by the debt. Interest charges on arrear amounts are intended to mitigate the depreciation or decline in value of the currency, which is ordinarily occasioned by inflation. The parties in this case were in dispute regarding the quantum of interest charged in respect of the outstanding levies. The Court confirmed that the plaintiff was entitled to levy compound interest on arrears. In respect of the claim for *mora* interest, it is established that the *in duplum rule* permits interest to run anew from the date that the judgment debt is due and payable. Interest runs on – and is limited to an amount equal to – the whole of the judgment debt, including the portion which consists of previously accrued interest.

The defendant was ordered to pay the capital amount plus interest at the rate of 9,5 % per annum from date of judgment to date of payment, limited to the amount of the capital debt.

Da Cruz v Bernardo [2022] 1 All SA 414 (GJ)

Civil Procedure – Interest awarded on judgment debt – Whether the in duplum rule applied to limit interest payable – Prescribed Rate of Interest Act 55 of 1975 does not impose a ceiling on interest liability and does not expressly incorporate an in duplum principle – The law does not preclude a plaintiff from recovering mora interest on its liquidated debt in an amount that exceeds the capital amount of the original debt.

As an investment in the respondent's business, the applicant paid an amount of R903 500 into the account of an entity controlled by the respondent. When the deal collapsed, the applicant claimed repayment of his investment. Only R91 000 was repaid to him, leading to his instituting action to recover the balance. Although the applicant had transacted with a trust in which the respondent was a trustee, the trust was found to have no bank account and no funds. The applicant consequently pursued the respondent in his personal capacity. Judgment was granted in his favour, for payment by the respondent of R812 500 plus interest. Demand was then made of the respondent for payment of the capital amount of R812 500 plus interest in the amount of R1,590,952,91.

The respondent disputed the calculation of the interest amount and contended that the *in duplum* rule applied to limit the interest payable by the respondent to R812 500.

In the present application, the applicant sought an order declaring that the *in duplum* rule did not apply to the interest awarded in the judgment.

Held – The first question was whether the *in duplum* rule applies to limit *mora* interest payable on a claim for a liquidated amount. The Court referred to various cases, confirming that the *in duplum* rule provides that interest due in respect of a debt ceases to run when it reaches the amount of the unpaid capital sum. The question in the current matter was whether the rule applies where *mora* interest is claimed on a liquidated amount and there is no agreement on the rate to be applied.

The Court highlighted the distinction between *mora* interest and interest determined by an agreement. In the former, the interest recoverable is accessory to the main debt as fair compensation for the delay. It is not a separate obligation and cannot be recovered in separate proceedings. In the latter, the obligation to pay interest is a separate and distinct contractual obligation and, although it ordinarily would be claimed in the same action, could be claimed in separate actions. The rate of interest payable on a contractual debt is ordinarily stipulated in the agreement. The rate for *mora* interest is determined with reference to the Prescribed Rate of Interest Act 55 of 1975, and can be applicable to a contractual debt where the contract does not prescribe the rate. There is also a difference between *mora* interest on liquidated debts and *mora* interest on unliquidated debts.

The Prescribed Rate of Interest Act does not impose a ceiling on interest liability and does not expressly incorporate an *in duplum* principle.

Based on case law, the following emerged. Where interest is calculated with reference to a rate stipulated in an agreement, the interest which accrues on the debt cannot exceed the capital sum of the debt. From the date of judgment, the capital and interest awarded is consolidated and interest runs afresh on the consolidated amount from date of judgment. The obligation to pay *mora* interest is accessory to the primary obligation and cannot be recovered separately from the primary debt.

The Court found no basis for concluding that the *in duplum* rule should be implied into the award of interest in the order handed down against the respondent. The law does not preclude the plaintiff from recovering *mora* interest on its liquidated debt in an amount that exceeds the capital amount of the original debt. The order made against the respondent in this case was unequivocal and did not provide for an interest ceiling. As such, the judgment had to be enforced on its terms, which included payment by the defendant of the additional interest amount, in addition to any outstanding interest owed on the judgment debt.

Land and Agricultural Development Bank of South Africa and another v Van den Berg and others [2022] 1 All SA 457 (FB)

Civil Procedure – Leave to appeal – Requirements – Rule 49 of the Uniform Rules of Court dictates the form and process of an application for leave to appeal and the substantive law pertaining thereto is to be found in section 17 of the Superior Courts Act 10 of 2013 – Leave to appeal may only be granted if there is a reasonable prospect that the appeal will succeed.

The first to fifth defendants in the main matter between the parties, had brought an application to compel compliance by the plaintiffs with a request for discovery made in terms of rule 35(3). The Court dismissed the application, finding that the information and documents that were not furnished did not have any bearing on the issues in the trial, and that the application was overly broad and would lead to ineffective orders.

In terms of rule 49 of the Uniform Rules of Court read with sections 16 and 17 of the Superior Courts Act 10 of 2013, leave to appeal was sought against the findings of fact and law, as well as the whole of the order and judgment of the court.

Held – Rule 49 of the Uniform Rules of Court dictates the form and process of an application for leave to appeal and the substantive law pertaining thereto is to be found in section 17 of the Superior Courts Act. The latter Act raised the threshold for the granting of leave to appeal, so that leave may now only be granted if there is a reasonable prospect that the appeal will succeed. The possibility of another court holding a different view no longer forms part of the test. There must be a sound, rational basis for the conclusion that there are prospects of success on appeal.

Turning to the grounds of appeal, the court found them to be framed in diffuse and ambiguous sweeping terms. The Court agreed with the plaintiffs' contentions that the application was vague, ambiguous and confusing to the extent that the plaintiffs were not properly informed of the case which the defendants sought to make out and which the plaintiffs had to meet in opposing the application for leave to appeal. The

grounds of appeal did not comply with the requirements of rule 49, and were thus fatally flawed.

Amongst the grounds advanced, were that the trial was not fair, with allegations of bias made against the presiding officer. Not only was that issue not raised at the material time, but the onus of establishing bias was not discharged. The defendants did not specify what acts formed the basis of their complaint.

The grounds of appeal seeking to challenge the order refusing to compel discovery were also unsustainable. There was no room for interference with that order, which was not shown to be wrong.

Concluding that there were no prospects of success on appeal, the court refused leave to appeal.

END-FOR-NOW