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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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Kenny v Craig Andrew Seaman N.O (2062/2020) [2022] ZAECPEHC 3 (18 January 2022)

Locus standi-deceased estate- the executor -*dominium* of the assets temporarily passes to the executor in a representative capacity-only the executor has the power to deal with the totality of the rights and obligations in a deceased estate.

[1] The plaintiff and the defendant are siblings and are the children of the deceased Moira Elizabeth Seaman. They are the nominated testamentary beneficiaries in equal shares of the deceased's estate. The plaintiff instituted this action against the defendant in his official capacity as trustee for the time being of the Des Seaman Family Trust ('the Trust') in which she claims payment from the Trust of the amount of R1 198 258,63 together with interest and costs.

[2] The plaintiff's cause of action thereon is that the Trust, at all times material to the institution of the action, owed the deceased the amount of R2 396 517.26 repayable on demand. The First and Final Liquidation and Distribution Account of the deceased's estate had lain open for inspection, free of objection, in accordance with section 35 of the Administration of Estates Act 66 of 1965 ('the Act'). The estate account, prepared by the executors of the deceased's estate, reflects that the plaintiff inherits R1 198 258.63 being 50% the deceased's loan account in the Trust. The plaintiff claims that this amount representing one-half of the *dominium* in the deceased's claim against the Trust vests in her which amount, despite demand, remains unpaid.

[3] This judgment deals with exceptions raised by the defendant against the plaintiff's particulars of claim on the grounds that it does not make necessary averments to disclose a cause of action alternatively, that it is vague and embarrassing.

APPLICABLE LEGAL PRINCIPLES

[4] A general rule is that pleadings must be lucid, logical and intelligible**[1]**. Pleadings serve the purpose of bringing clarity, to the notice of the court and

to the parties in an action, the issues upon which reliance is to be placed. This objective can only be attained when parties state their case with precision, the degree of which depends on the circumstances of each case**[2]**. Rule 18(4) of the Uniform Rules of Court serves as a guideline for the careful drafting of a pleading to achieve this objective. The rule requires that every pleading,

> "*shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim … with sufficient particularity to enable the opposite party to reply thereto."*

[5] The approach to be adopted to an exception that a pleading is vague and embarrassing is that the *onus* is on the excipient to show vagueness amounting to embarrassment and embarrassment amounting to prejudice. A pleading is vague if it is either meaningless or capable of more than one meaning; it is embarrassing if it cannot be gathered from it what ground is relied on by the pleader.**[3]** An excipient who alleges that a summons does not disclose a cause of action must establish that, upon any construction of the particulars of claim, no cause of action is disclosed.**[4]** In considering an exception that a pleading does not sustain a cause of action, the court will accept, as correct, the allegations pleaded by the plaintiff to assess whether they disclose a cause of action.

[6] The defendant's notice of exception contains several multifaceted grounds. Pragmatism dictates that they be dealt with under the following broad categories.

LOCUS STANDI

[7] A deceased estate has no legal *persona* and consists of an aggregate of assets and obligations. The estate vests in the executor in the sense that *dominium* of the assets temporarily passes to the executor in a representative capacity. It is only the executor who has the power to deal with the totality of the rights and obligations in a deceased estate. Although an inheritance vests in an heir, he/she does not upon the death of the testator acquire ownership in the assets of the deceased, but merely has a

vested claim against the executor for payment or delivery once the liquidation and distribution account has been settled.

[8] The above prescripts were considered and dealt with in *Booysen v Booysen* **2012 (2) SA 38** (GSJ) where the court reflected on the authorities and reference works on the question of *locus standi* in a deceased estate, and after a careful analysis concluded that the executor only has the *locus standi* to sue or be sued. It is unnecessary for me to repeat the reasoning of the court or to survey once again the material to which it referred. Suffice to say that, having regard thereto, I am in respectful agreement with its reasoning and agree with its conclusion.

Linda Nienaaber N.O and Others v Nelson Attorneys and Another (2645/2011) [2022] ZAECPEHC 4 (18 January 2022)

Attorney- duty of care-test and averments

[1] The plaintiffs' claim, which proceeds in delict, in essence alleges that the first defendant ("the defendant") owed them a duty of care and acting negligently and in breach thereof, plaintiffs have suffered damages. The first plaintiff, Leonie Kelbrick, died post *litis contestatio* and has been substituted by Linda Nienaaber N.O as the executrix of her estate. The second defendant is not a party to these proceedings. The second and third plaintiffs are married to each other and, where convenient, will be referred to as the Van den Bergs. Liability and quantum are in issue.

[2] The background to the matter is evident from the pleadings and referenced from various exhibits.**[1]** In the period September to November 2006, in Gqeberha (formerly Port Elizabeth), a series of separate agreements were concluded by the plaintiffs with a developer known as Headline Trading 124 CC t/a Status Homes ("Status"). The agreements were for the sale of abutting immovable properties ("the properties") registered as erven 679, 680 and 681. The driving force in Status was Alphonso Lamour, its sole member. Kelbrick concluded the sale in respect of erf 681 on 4 September 2006. Simultaneously on that date, the Van den Bergs jointly concluded the sale in respect of erf 679. As for erf 680, one Jonker, initially entered into an agreement during September 2005 but subsequently concluded a new agreement with Status on 27 November 2006, which agreement was

the *causa* for the transfer of his property to Status. Albeit that these facts are common cause, Jonker does not feature in these proceedings.

[3] The agreements were prepared by the defendant, represented at all times by Charles Nelson, a conveyancer. The defendant was also the attorney of Status.

[4] In terms of the agreements**[2]** each plaintiff would sell their property to Status for the amount of R1. 4 million. The properties would be transferred to Status and thereafter consolidated for the construction of a new sectional title development ("the development") on the consolidated erven. Kelbrick, in lieu of payment of the purchase price, would receive one new unit valued at R1 million with the remaining R400 000.00 to be paid to her by Status.

[5] The Van den Bergs would receive two newly constructed units against payment of R300 000.00, being the difference between the combined value of the two units, less the purchase price.

[6] Status, in addition, assumed liability for the costs of cancelling any existing bonds over the properties.

[7] Moreover, in the event of the plaintiffs' substitute units not being constructed as soon as possible**[3]**, Status undertook to pay the difference between rent payable by Kelbrick for alternative accommodation and repayment of her previous mortgage bond and rates. For the Van den Bergs, Status agreed to pay the cost for their alternative accommodation.

[8] In the event that construction of the plaintiffs' units did not materialise at all, Status would be obliged to effect payment of the full purchase price to them.

[9] For payment of any amounts owing or any obligation of Status towards the plaintiffs, Lamour bound himself as surety and co-principal debtor with Status. The exact date is unclear though it appears that this occurred simultaneously with the signing of the sale agreements.**[4]** For the proposed development, Status obtained financing from Standard Bank Ltd ("the bank") through registration, in July 2007, of a developer's bond in the extent of R8 706 950 together with an additional R2 176 737.50. In January and in May 2007 (prior to the transfer of the properties), Lamour, bound himself as

surety for Status in favour of the bank for amounts of R10 883 687.50 and R2 125 000.00, respectively.

[10] The transaction was unusual, entailing a substantial risk in that it involved the plaintiff's homes being demolished to allow for the new development.

[52] Turning to Nelson's duty of care, its specific terms were pleaded in paragraph 23 of the particulars of claim, the composition whereof reflects the following:

(a) Nelson was appointed as the conveyancing attorney;

(b) He was duty-bound to:

(i) pass transfer of the plaintiffs' properties to status;

(ii) cancel the bonds over the properties;

(iii) register a development bond over the consolidated property; and

(iv) transfer the completed units to the plaintiffs.

[53] The defendant's admission of the pleaded duty covered all aspects of its composition which Nelson duly fulfilled. The evidence however indicates that the market went down, the development imploded, Status was liquidated, and hence transfer of completed units to the plaintiffs did not occur. Significantly, any indication that Nelson failed to comply with the duty of care for want of diligence in the preparation of the relevant documents for the deeds office, is absent. Relevant to that task entrusted to Nelson, the plaintiffs failed to establish any negligent breach (*Margalit supra*), nor in any event, is that their case on the pleadings. To suggest that there was an omniscient and all-encompassing duty that was breached (a theme in Van den Berg's testimony) over and above what was specifically pleaded, is a fallacy since no additional facts were pleaded to broaden the scope of that duty. From the terms of the pleaded duty nothing emerges to suggest that Nelson had a duty to prevent the plaintiffs from losing money; that he piloted the development, or that he could guarantee its completion. And in so far as

Van den Berg contended that Nelson did not proffer proper advice as to risks, the exact ambit thereof has not been identified in his pleadings.

[54] All things considered, there is merit in the submission by counsel for the defendant that it is highly probable Van den Berg instituted the present action against Nelson as an afterthought after consulting with his present attorney to see if there was "*anything to be salvaged"*- and after becoming aware that the claim against Nelson instituted by Jonker (and which is of no relevance to this matter) had become settled.**[73]** From this perspective it is not improbable that the claim against Nelson is manufactured.

[55] Before concluding the enquiry into the wrongfulness, it is convenient at this point to deal with the Kelbrick claim, this in view of the opening statement by plaintiffs' counsel that the claim is pursued. Other than what was stated by Van den Berg, no factual evidence was tendered in support of the Kelbrick claim. The scope of the evidence relevant to that claim is limited to the testimony by Van and Berg that Kelbrick was initially hesitant but agreed to go along with the proposed development.**[74]** That is where the matter ends.

[56] The limitation in the particulars of claim overlooks the fact that it was at all times the plaintiffs who bore the *onus* to allege and prove wrongfulness. An assessment of the evidence, on the appropriate test, invites the conclusion that Nelson did not wrongfully breach the duty of care, as alleged. In these circumstances the defendant could not be expected to establish a 'defence' to a claim based on wrongfulness that had not been explicitly alleged against it. In all the circumstances the plaintiffs have failed to establish this element and that being so, their claims must fail on this basis alone.

[57] In view of this conclusion it is unnecessary to consider the negligence issue. Although it is not intended to dwell on this in any detail it should be mentioned that on this aspect as well, the plaintiffs have failed to establish their claims. The test for negligence essentially encompasses elements of foreseeability, preventability, and a failure to take steps (*Kruger v Coetzee supra*). It is only once foreseeability is established that the need arises to consider whether a reasonable conveyancer in the position of Nelson would

have guarded against any foreseeable occurrence and failed to do so. The inquiry postulated in the first leg of the test is wide but the answer, inevitably, will only emerge from a consideration of all the facts of each case and will ultimately be the product of a sensible judicial approach to the facts and circumstances that bear on the matter at hand. Where the enquiry proceeds to preventability and a failure to take steps, an unduly rigid approach in borderline cases could result in attributing culpability to conduct which has sometimes been called negligence "in the air". Of note, what is required to satisfy the test for negligence is foresight of the reasonable possibility of harm – foresight of a mere possibility of harm will not suffice.**[75]**

[58] At the outset the pleaded grounds of negligence posited on Burman's opinion pertaining to: the protection of the plaintiffs' interests which could have been done by delaying transfer of their properties to Status; the incorporation of an advice clause in the agreement(s) of sale; the inadequacy of suretyships; and the alleged failure to provide security such as bank guarantees, bonds and the like, are unsustainable due to the finding made in respect of his evidence.**[76]**

[59] In all other instances pertaining to the remaining grounds of negligence**[77]** the plaintiffs have failed on the first leg of the test. There can be no question that Van den Berg knew what he was getting into. The agreement with Lamour had already been conceived before Nelson's involvement; Van den Berg understood that the risk entailed demolishing his home and he would have to wait for Status to build the new units; he held on with no intention of backing out because he stood to benefit handsomely from the development. On these facts it could not reasonably be expected of Nelson to have guaranteed the completion of the development nor could he have predicted the decline in the market; a due diligence by him prior to the parties signing the agreements would in all probability not have made a difference. These are some of the evidential indicators that detract from the foreseeability requirement in the negligence enquiry.

[60] Except for what has been put out above it is unnecessary to traverse the negligence enquiry in greater detail. In the final analysis, the principle in delict that everyone has to bear the loss he or she suffers (the Afrikaans aphorism is "*skade rus waar dit val"*), must apply in the circumstances of this matter.

[61] In the result it is ordered that the plaintiffs' claims are dismissed with costs, including the costs of two counsel.

York and Another v Master of the High Court, Bloemfontein (3108/2021) [2022] ZAFSHC 1 (7 January 2022)

Rule 41A of the Uniform Rules of Court -the notices are not intended to advance or provide an effective disposal of litigation-failure to comply with the provisions of subrule (2) does not warrant an order barring a litigant from being heard.

L*is alibi pendens* -There is no replication of proceedings. In *casu*, the relief sought is that the applicant should be declared a valid creditor in the estate of the deceased whereas in the action that has been subsequently instituted, the applicant is suing the respondents for payment of damages

[1] On 30 July 2018 the applicant's herd of 30 Brahman cattle was stolen from his farm. The cows were later recovered by the police and Mr. Ntau Lucas Mokoena ('the deceased') was arrested for the theft. The deceased passed away before the case was finalized, the first respondent was subsequently appointed as the executrix of his estate.

[2] The applicant alleges that as a result of the deceased's actions he suffered damages in the amount of R230 000.00 being the costs for transporting the cattle back to his farm, repairing his damaged fences, the fodder that was stolen and the loss of the calves aborted by the cows during the theft.

[3] In his quest to hold the deceased estate liable for the alleged damages the applicant submitted his claim with the first respondent on 01 September 2020.

[4] The claim was rejected by the first respondent and it is in that regard that the applicant has instituted these proceedings against the respondents seeking an order in the following terms:

> "*1. Declaring the applicant to be a lawful and valid creditor in the estate of the Late Ntau Lucas Mokoena under estate number 006405/2019;*
>
> *2. The 1st respondent to be directed to include the claim of the applicant with any and all other claims of creditors successfully instituted against the estate of the late Ntau Lucas Mokoena under estate number 006405/2019;*
>
> *3. The 1st respondent to be interdicted from finalising and/or proceeding with the estate until written confirmation of acceptance of the claim is provided to the applicant;*
>
> *4. The costs of this application and against the 1st respondent be paid by the Estate of the Late Ntau Lucas Mokoena, estate number 006405/2019 on an attorney and client scale…"*

[5] The application is opposed by the first respondent on several grounds including, the irregularity of the application due to non-compliance with Rule 41A of the Uniform Rules of Court ("The Rules"), *lis alibi pendens* and the illiquidity of the claim.

Non-compliance with Rule 41A

[6] Rule 41A provides thus:

> "*(2) (a) in every new action or application proceeding, the plaintiff or applicant shall, together with the summons or combined summons or notice of motion, serve on each defendant or respondent a notice indicating whether such plaintiff or applicant agrees to or opposes referral of the dispute to mediation.*
>
> *(b) A defendant or respondent shall when delivering a notice to defend or a notice to oppose, or at any tie thereafter, but not later than the delivery of a plea or answering affidavit, serve on each plaintiff or applicant or the plaintiff's or applicant's attorneys, a notice indicating whether such defendant or respondent agrees to or opposes referral of the dispute to mediation."*

[7] It is common cause that when the application was served on the respondents on 07 July 2021 it was not accompanied by the notice as contemplated in Rule 41A (2) (a). Similarly, the first respondent's notice to oppose the application and the subsequent answering affidavit were served without the notice in terms of Rule 41A (2) (b).

[8] On 14 September 2021 barely two days before the hearing of the application the applicant filed an application seeking condonation of the late service of the 41A (2) (a) notice. He admits that the notice was only served on the respondents on 27 July 2021 and explains that the failure to serve the notice simultaneously with the application was a *bona fide* mistake. It is his submission that the first respondent is not prejudiced by the late service of

the notice as he has also not complied with the provisions of 41A (2) (b) and there is no indication he would have referred the matter for mediation.

[9] According to the first respondent condonation should not be granted, the applicant's failure to comply with the provisions of rule 41A (2) (a) constitutes an irregularity the court should therefore to decline to hear the matter and struck it off the roll as it is done in the Limpopo Division. The first respondent argues that the applicant has also failed to show good cause why the court should condone his non-compliance with the rules.

[10] I do not agree with the first respondent's contention that a failure to comply with the provisions of rule 41A (2) (a) warrants an order striking off the matter from the roll. The object of rule 41A is to afford litigants an opportunity to resolve their disputes through mediation as an alternative to litigation. It is a voluntary process parties cannot be compelled to submit their dispute to mediation. The process is also confidential including the exchange and the contents of the notices contemplated in subrule (2). The notices can only be brought to the attention of the court at the end of the proceedings when the court considers the issue for costs of the action or application in that a party who unreasonably avoided mediating a matter which was capable of being mediated may be mulcted with a cost order. In my view, the notices are not intended to advance or provide an effective disposal of litigation. I therefore fail to understand how the failure to comply with the provisions of subrule (2) warrants an order barring a litigant from being heard.

There is no replication of proceedings. In *casu*, the relief sought is that the applicant should be declared a valid creditor in the estate of the deceased whereas in the action that has been subsequently instituted, the applicant is suing the respondents for payment of damages he allegedly sustained as a result of the theft perpetrated by the deceased. Except for the fact the pending litigation in both matters involve the same parties the litigation is however not based on the same cause of action and the relief sought is not the

same. The objections raised by the first respondent herein are unfounded, they are accordingly dismissed.

[24] There is not even an attempt in the applicant's founding affidavit to aver the requirements of an interdict. In attempt to remedy this anomaly, Mr. Buys inexplicably sought to amend the cause of action and the relief claimed in the notice of motion from the bar.

[25] It is the first respondent's case that the applicant has failed to make out a factual case of the relief he seeks in his affidavit. The affidavit does not deal with the requirements of an interlocutory interdict or any other interdict for that matter. With regard to the amendment, a notice of motion cannot be amended from the bar a proper application must be brought. The application lacks merit it dismissed. Mr. Snyman submits that having regard to the manner in which the applicant has repeatedly abused the court process in the manner in which he dealt with this matter, a punitive cost order is warranted.

[26] It is trite that a party who seeks such a substantial amendment (the cause of action and the relief) must comply with the provisions of Rule 28(1) which provides that:

> *"Any party desiring to amend a pleading or document other than a statement, filed in connection with any proceedings, shall notify all other parties of his intention to amend and shall furnish particulars of the amendment."*

[27] I'm satisfied that the first respondent's opposition is well founded, there is no proper application for an amendment before this court. On the available facts it has been conceded that the applicant's founding affidavit does not make out the case for the granting of the order sought. I have consequently arrived at the conclusion that the application ought to be dismissed.

COSTS

[28] It is clear from the facts of this matter that the applicant has been a serial violator of the Rules of the court. The application provided for less time periods for the respondents to file opposing papers and when the first respondent filed his opposing papers within the truncated periods and opposed the urgency of the matter the applicant's response thereto was merely that the matter was not urgent it was merely a mistake that the application provided for less time periods. Despite having filed a voluminous application (totalling over 203 pages excluding the heads of argument) the order that the applicant ultimately sought varied substantially with the relief sought in the notice of motion. I'm persuaded by the first respondent's contention that the application is an abuse of court process a cost order on a punitive scale is thus warranted.

[29] In the premises, the following order is granted:

(1) The application for condonation for the late service of the rule 41A(2)(a) of the Uniform Rules of Court is granted with no order in respect of costs.

(2) The application is dismissed with costs on the scale as between attorney and own client.

Organisation Undoing Tax Abuse v Minister of Transport and Others (32097/2020) [2022] ZAGPPHC 1 (13 January 2022):

Constitutional law- constitutional challenge to the Administrative Adjudication of Road Traffic Offences Act[1] (the AARTO Act) and the Administrative Adjudication of Road Traffic Offences Amendment Act.

[1] This is a constitutional challenge to the Administrative Adjudication of Road Traffic Offences Act[1] (the AARTO Act) and the Administrative Adjudication of Road Traffic Offences Amendment Act[2] (the Amendment Act). The question before this court is whether Parliament (national government) had the legislative competence to legislate on matters relating to provincial roads or traffic or in relation to parking and municipal roads at local level and whether the two aforementioned Acts are in violation of the exclusive provincial legislative competence conferred upon provincial and local government in terms of section 44(1)(a)(ii) of the Constitution.[3]

[2] The primary relief sought in the notice of motion is that the AARTO Act and the Amendment Act be declared unconstitutional and invalid. In the alternative to this relief, the applicant seeks an order declaring section 17 of the Amendment Act unconstitutional and invalid.

[3] This dispute is not about the desirability of this legislation which provides for a system that, *inter alia,* provides for the penalising of drivers and operators of vehicles who are guilty of an infringement or offences through the imposition of demerit points which may lead to the suspension and cancellation of driving license.[4] This dispute is confined to the narrow issue of the *legislative competence* of national government to enact these two Acts. In essence it is submitted that the two Acts are unconstitutional in that they trespass on the narrow constitutional areas over which the national government has no legislative or executive power.

THE PARTIES

[4] The applicant, the Organisation Undoing Tax Abuse (OUTA), is a civil action organisation and a Non-Profit Company (NPC) incorporated in terms of the Companies Act.[5] OUTA submits that it has a substantial interest in the issues raised in this application in that OUTA is mandated by its Memorandum of Incorporation (MOI) to challenge any policies, laws or conduct that offend the Constitution. OUTA submitted that it brings this application in its own interest and in the public interest in terms of section 38(a) and 38(d) of the Constitution respectively.

[5] It is well-known that OUTA has since 2017 engaged in a range of activities and interventions to promote public accountability which include commenting on draft legislation that is relevant to OUTA's mandate of creating accountability, transparency, rational policy and good governance in the areas of transport, energy, water and sanitation and environmental issues. OUTA further states in its papers that it is a strong promoter of road safety and effective traffic legislation and supports effective and fair processes for the adjudication of road traffic infringements. To this end OUTA was actively involved in the public participation processes in relation to the AARTO Amendment Bill during which it raised a number of concerns about the Bill's constitutional validity. OUTA also made oral submissions on the Amendment Bill on 13 February 2018 and attended various public hearings. OUTA has also addressed two letters to President Ramaphosa regarding the constitutional invalidity of the Amendment Act (on 25 March 2019 and 24 July 2019). OUTA further submitted its written comments on the AARTO Amendment Act's Regulations Bill on 10 November 2019 to the Road Traffic Infringement Agency, the Department of Transport and to Parliament's Select Committee on Economic and Business Development.

[6] The first respondent is the Minister of Transport (the Minister). The Minister is cited in his capacity as the executive member who is responsible for the administration of both the AARTO Act and the Amendment Act.

[7] The second respondent is the Minister of Co-operative Governance and Traditional Affairs. The second respondent is the Minister responsible for the implementation of the Intergovernmental Relations Framework Act.[6] This Act establishes the framework for the national government, provincial governments, and local governments to promote and facilitate inter-governmental relations.

CONCLUSION

[45] The AARTO and Amendment Acts unlawfully intrude upon the exclusive executive and legislative competence of the local and provincial governments, respectively and as such the two Acts are unconstitutional. In light of my finding it is thus not necessary to consider the alternative arguments mainly relating to the constitutional challenge of sections 17 and 30 of the Amendment Act.

REMEDY

[46] Section 172(1) of the Constitution provides that a court *must* declare that any law that is inconsistent with the Constitution is invalid to the extent of its inconsistency and may make any order that is just and equitable in the circumstances.[36]

[47] As pointed out, the primary remedy sought by the applicant is an order that the AARTO Act and Amendment Act are inconsistent with the Constitution. On behalf of the applicants it was submitted that the constitutionally offensive provisions of the two Acts are not severable with the result that the AARTO Act and the Amendment Act, as a whole, must be declared unconstitutional and set aside with immediate effect.

[48] On behalf of the Minister it was contended that, should the court grant the relief, the court should suspend the declaration of invalidity for 24 months to allow Parliament to rectify the invalidity.

ORDER

[51] In the event the following order is made:

1. It is declared that the **Administrative Adjudication of Road Traffic Offences Act, 46 of 1998** and the Administrative Adjudication of Road Traffic Offences Amendment Act, 4 of 2019 are unconstitutional and invalid.

2. The first and third respondents are ordered to pay the applicant's costs jointly and severally the one paying the other to be absolved. Such costs to include the costs of two counsel.

NQM v NWM and Another (2018/39527) [2022] ZAGPJHC 5 (3 January 2022)

Pleadings-bar-upliftment-opposed-granted

1. This is an application in terms of which the applicant seeks the upliftment of a bar in order to enable her to file a plea and conditional counterclaim in the main action. The first respondent, the plaintiff in the main action, opposes the application

and has filed a counter application in terms of which he seeks an order that a receiver and liquidator be appointed to wind up their joint estate.

2. The applicant and first respondent were married in community of property. Their marriage was dissolved by divorce on 6 June 2012. The court granting the order of divorce ordered "*Forfeiture of the benefits arising from the marriage in community of property in favour of the* [applicant]*".* Pursuant thereto, the second respondent made an endorsement on the deed of transfer in terms whereof the first respondent's right, title and interest in the property were transferred to the applicant. The first respondent subsequently instituted the main action wherein he seeks orders that the second respondent cancel the endorsement, that the joint ownership be terminated, that the property be sold and that the nett proceeds of the sale be divided equally between the applicant and first respondent. The first respondent argues that the order made by the court granting the divorce was not made in respect of any particular asset and that "*the order is in fact an order for the division of the joint estate".*

3. The applicant opposes the main action and filed her plea. Soon thereafter, the first respondent took an exception to the applicant's plea. The exception was opposed and on 5 September 2019, the exception was upheld whereafter the applicant failed to amend her plea.

4. On 6 February 2020, the first respondent filed a notice of bar in terms of which the applicant was given 5 days to file her amended plea. The applicant however failed to do so and the first respondent applied for default judgment. Prior to the hearing of the application for default, the applicant brought this application to uplift the bar. The application for default judgment was accordingly postponed.

5. Rule 27 of the Uniform Rules of court provides that:

> "*27 Extension of time and removal of bar and condonation*
>
> *(1) In the absence of agreement between the parties, the court may upon application on notice and on good cause shown, make an order*

extending or abridging any time prescribed by these rules or by an order of court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet.

(2) Any such extension may be ordered although the application therefor is not made until after expiry of the time prescribed or fixed, and the court ordering any such extension may make such order as to it seems meet as to the recalling, varying or cancelling of the results of the expiry of any time so prescribed or fixed, whether such results flow from the terms of any order or from these rules.

(3) The court may, on good cause shown, condone any non-compliance with these rules.

(4) After a rule nisi has been discharged by default of appearance by the applicant, the court or a judge may revive the rule and direct that the rule so revived need not be served again."

6. In order to succeed, the applicant must show good cause. The court has a wide discretion. In principle that discretion should be exercised upon consideration of all of the merits of the case.

7. The courts have refrained from attempting to formulate an exhaustive definition of what constitutes good cause however two principal requirements for the favourable exercise of the court's discretion have crystallized. The first is that the applicant must furnish an explanation of his/her default sufficiently. The court will refuse to grant the application where there has been a reckless or intentional disregard of the rules of court. The second is that the applicant should satisfy the court that he/she has a bona fide defence, that the defence is not patently unfounded and that it is based upon facts which, if proved, would constitute a defence.

As appears from the order of the court granting the divorce, the court was so satisfied and ordered forfeiture of benefits in favour of the applicant. This order can therefore not be ignored and the joint estate cannot be divided in equal proportions

since the court granting the decree of divorce was satisfied on the facts before it that an equal division of the joint estate would result in the first respondent receiving an undue benefit.

16. In light thereof, the applicant has shown that it has a bona fide defence. The applicant's defence is not patently unfounded. Furthermore, regard must be had to the importance of the issues raised in this case and that it is in the interests of justice that the trial court adjudicate the matter.

17. In the result, I make the following order:

17.1. The bar is uplifted;

17.2. The time period for the delivery of the applicant's amended plea and conditional counterclaim is extended for a period of 5 (FIVE) days from 17 January 2022.

17.3. The applicant is ordered to pay the costs of the application.

Pretorius v Bedwell (659/2020) [2022] ZASCA 4 (11 January 2022)

Prescription – of damages claim based on acceptance of repudiation of contract – when prescription commences to run – innocent party's cause of action for damages accrues when election to treat the contract as at an end is communicated to repudiating party – special plea correctly dismissed.

[1] This is an appeal against the judgment of the Full Court of the Gauteng Division of the High Court, Johannesburg (the full court), upholding the respondent's appeal and substituting the trial court's order with one dismissing the appellant's special plea of prescription with costs. The appeal is with the special leave of this Court.

[2] The background of the matter is as follows. The respondent, Mr Kenneth Bedwell, was the owner of a holiday home in Oyster Bay in the Eastern Cape (the property). During 2007, he needed money to complete a guest house project he had started. In order to gain access to further funds, Mr Bedwell requested the appellant, Mr Dave Pretorius (who was his brother-in-law), to provide him with a loan against a

tender of the property as security. In terms of a written agreement that was subsequently rectified by agreement, they eventually agreed that Mr Pretorius would purchase the property for an amount of R1 850 000. Mr Pretorius would obtain a loan from a bank in the amount of R1 650 000 against the registration of a mortgage bond over the property. Mr Bedwell would continue to occupy the property and would remain liable to maintain the property at his own cost and pay all rates and taxes. As soon as Mr Bedwell qualified for a mortgage loan in his own name, that would make it possible to cancel the mortgage bond registered over the property in the name of Mr Pretorius, Mr Pretorius would transfer the property back into the name of Mr Bedwell. Mr Pretorius paid the purchase price and the property was registered into his name on 18 October 2007.

[3] Soon thereafter the relationship between Mr Bedwell and Mr Pretorius deteriorated. On 8 April 2008, Mr Bedwell visited the property in the company of his friends. When Mr Pretorius learned that Mr Bedwell was at the property, he made a telephone call to Mr Bedwell and instructed him to leave the property forthwith. However, Mr Bedwell and his friends only left the property the next morning.

[4] On 8 April 2008, Mr Bedwell wrote a letter to Mr Pretorius raising his concern relating to Mr Pretorius' attitude and stated the following:

'(1) I suggest that after your threats this afternoon that we set up a polygraph test between the three of us and we have one [take] statements through your lawyers and my lawyer analysed. NB VERBAL agreements are binding.

(2) All ASSETS in the house belong to me plus the agreement of SALE.

(3) Please reply on the above fax no.' (Original emphasis.)

[5] Mr Pretorius did not respond to Mr Bedwell's letter. He instead sent a letter through his attorney to the security company responsible for security at the property and to Chas Everitt real estate agents, informing them that Mr Bedwell would no longer be entitled to occupy the property. Indeed, Mr Bedwell received a telephone call from the security company wherein he was informed of the letter the security company had received instructing it to deny him access to the property.

[6] During 2009, Mr Pretorius sold the property to a third party. Mr Bedwell only learned of the sale after his son had attended a birthday party at Mr Pretorius' house on 8 July 2010. The son noticed furniture at Mr Pretorius' house which had been in the property. Upon making enquiries, Mr Pretorius told him that indeed he had sold the property. The son informed Mr Bedwell that evening about the sale of the property.

[11] In my view, the special plea of prescription had to fail for a variety of reasons. First, as I have demonstrated, in the absence of an allegation that the repudiation of 8 April 2008 had been accepted and the contract cancelled, the special plea did not disclose a defence in law. Secondly, in any event, the trial court did not make a credibility finding against Mr Bedwell and his evidence had to be accepted for purposes of determination of the appeal. On his evidence it is doubtful that what occurred on 8 April 2008 objectively amounted to a repudiation by Mr Pretorius, but even so, Mr Bedwell clearly did not accept such a repudiation on that date. It follows that Mr Pretorius did not prove that the running of prescription commenced on 8 April 2008 as alleged.

[12] For these reasons I find that Mr Pretorius' special plea did not disclose a defence in law and failed on the facts. The full court was correct in concluding that it had to be dismissed.

[13] In the result, the appeal is dismissed with costs.

Cipla Vet (Pty) Ltd v Merial and Others (1068/2020) [2022] ZASCA 5 (11 January 2022):

Rule 42 or common law – clarification of order – whether qualifying costs including costs of two counsel occasioned by an amendment prior to hearing included in wasted costs order granted – appeal dismissed – order of the full court confirmed.

[1] This appeal concerns the interpretation of a cost order granted by Murphy J sitting as the Court of the Commissioner of Patents on 24 July 2014. The central issue is whether the wasted costs incurred as a result of an amendment sought and made by the appellant, Cipla Vet (Pty) Ltd, to its pleaded case of invalidity before the commencement of a trial in a patent infringement action, should include the costs of two counsel and the qualifying fees of the expert witnesses of the respondents,

Merial, Merial LTD and Merial South Africa, in circumstances where such costs were not expressly set out in para (ii) of Murphy J's order.

[2] The following are common cause facts. The dispute between the parties emanated from an action that was instituted by the respondents as plaintiffs, against the appellant, as the defendant, for the infringement of South African Patent No 96/8057. The appellant pleaded that the patent was invalid and raised several grounds to support this. Amongst these grounds, the issue of lack of inventorship (obviousness) constituted the bulk of the appellant's case. To this end, extensive preparation and consultation with the respondents' expert witnesses had been undertaken by their counsel in preparation for the trial. The appellant's plea was amended several times, but more relevant to this appeal, again on 9 January 2014, shortly before the trial; to abandon reliance on the ground of obviousness. Subsequently, Murphy J granted the following order:

'(i) The action is dismissed with costs, such costs to include the costs of two counsel and qualifying fees of Prof Barbour.

(ii) The defendant is ordered to pay the wasted costs occasioned by its amendment of its plea.'

[3] The respondents, with leave of the court of first instance, appealed to this Court against para (i) of Murphy J's order (the first appeal). Paragraph (ii) which is the subject of the current appeal was not part of the first appeal. Whilst the respondents' first appeal was still pending, a bill of costs (first bill) was prepared and submitted by the respondents. The appellant opposed the taxation and amongst others, claimed that the tender for wasted costs and the order by Murphy J did not make provision for the recovery of the costs of two counsel and the costs of expert witnesses. It took time before the Companies and Intellectual Property Commission (the CIPC) could appoint a taxing master because the appellant also objected to the forum of taxation. The bill of costs was ultimately set down for taxation for 1 to 4 November 2016.

[4] In the meantime, this Court on 1 April 2016, upheld the first appeal. It ordered amongst others that the appellant (plaintiff) pay the costs, which costs included the costs of two counsel and the qualifying fees of the respondents'

(defendants) expert witnesses. Needless to say, this costs order is of no relevance to the current appeal. Suffice it to state that the respondents thereafter prepared a revised comprehensive bill of all costs and gave notice of their intention to tax it on 7 November 2016. The appellant persisted with its initial objection, which prompted the respondents to launch an application for the clarification, alternatively, variation of the order made by Murphy J. The application served before Baqwa J, who dismissed it and found that the order by Murphy J was unambiguous. And furthermore that, when read in context, the wasted costs did not include the costs of two counsel and the qualifying fees of experts. However, he subsequently granted the respondents leave to appeal to the full court of that division (Tolmay J, Louw and Hughes JJ).

[5] The full court upheld the respondents' appeal, set aside the order made by Baqwa J and substituted it with the one in terms of which Murphy J's order was clarified to declare that the 'defendants' wasted costs shall include the cost of two counsel and the qualifying fees of their expert witnesses'.

[6] In coming to its conclusion, the full court reasoned (paraphrased for brevity): the relief sought by the respondents can either be granted in terms of rule 42 of the Uniform Rules of Court or the common law but Baqwa J limited his judgment to rule 42 only; Baqwa J erred in finding that Murphy J had no intention to deal with the costs and wasted costs on the same basis; Baqwa J failed to have regard to the context and wording of para 96 wherein Murphy J recognised the complexity of the case which could not have been intended to be limited to the appellant's case; the nature of the claim and its complexity was a given whether it applied to the wasted costs or the costs ultimately granted on appeal on the merits to this Court; Baqwa J erred by finding that the application could not succeed due to a long delay which elapsed before they sought relief.

[7] The current appeal is directed at the order made by the full court, special leave to appeal having been granted by this Court on 5 November 2020.

Arcus v Arcus (4/2021) [2022] ZASCA 9 (21 January 2022)

Prescription -Interpretation of **s 11***(a)*(ii) of the **Prescription Act 68 of 1969** – whether a maintenance order is a judgment debt, subject to 30 years' prescription period, or any other debt, subject to three years' prescription period – held:

maintenance orders are final, executable and appealable – a maintenance order is thus a judgment debt for the purposes of the **Prescription Act, and** subject to 30 years' prescription period.

[1] The circumscribed issue for determination in this appeal is whether an undertaking to pay maintenance in a divorce consent paper, which was 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 (the **Prescription Act or** the Act), with a prescriptive period of 30 years, or any 'other debt', as contemplated in section 11*(d)* of the Act, with a prescriptive period of three years.

[2] The facts are common cause, but not really germane for the resolution of the posed legal question. I therefore summarise them briefly and only to provide context.

[3] When the appellant and the respondent divorced each other on 27 July 1993, they entered into a consent paper which, *inter alia*, provided that the appellant would pay maintenance for the respondent until her death or remarriage, and for their two minor daughters until they became self-supporting. The consent paper was made an order of court.

[4] It is common cause that the appellant's obligations to pay maintenance in respect of the minor children terminated during 2002 and 2005, respectively, when they became self-supporting.

[5] Despite the fact that the appellant failed to pay the maintenance stipulated in the consent paper, the respondent did not take any steps to recover the arrear maintenance until December 2018, when she instructed her attorneys to send a letter of demand to the appellant. Notwithstanding demand, the appellant failed to pay the arrear maintenance, but commenced paying the monthly maintenance due to the respondent from January 2019.

[6] On 27 August 2019, the appellant lodged an application in the maintenance court for the retrospective discharge of his maintenance obligations in terms of the consent paper (the discharge application). That application is still pending.

[7] On 17 February 2020, the respondent caused a writ of execution to be issued in respect of the arrear maintenance of some R3.5 million. That writ was served on the appellant on 18 March 2020.

Naidoo and Another v Dube Tradeport Corporation and Others (972/2020) [2022] ZASCA 14 (27 January 2022)

Exception proceedings – proper approach restated.

Close Corporations – common law derivative action – whether available in respect of close corporations – whether an alleged beneficial owner of member's interest in a close corporation can invoke derivative action on behalf of close corporation. Section 54 of **Close Corporations Act 69 of 1984** – third party's reliance thereon must be bona fide and innocent.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Durban (Lopes J sitting as court of first instance):

1 The appeal is upheld with costs.

2 The order of the high court is set aside and substituted with the following:

'1 The exception is dismissed with costs'.

[1] This is an appeal against the order of the KwaZulu-Natal Division of the High Court, Durban (the high court), which upheld the exception of the first respondent, The Dube Tradeport Corporation (Dube Tradeport), to the appellants' particulars of claim. In the action, the first appellant, Mr Sagadava Naidoo (Sagadava) and the second appellant, Odora Trading CC (Odora), a close corporation, sued the first defendant, Mr Sivaraj Naidoo (Sivaraj) and Dube Tradeport to set aside the sale of certain farms, known as the Penare Farm Properties (the properties) by Odora to Dube Tradeport. Sagadava and Sivaraj are brothers, hence the reference to them by their first names. This is without any disrespect, but solely to distinguish the two brothers.

[2] Sivaraj is the sole registered member of Odora, and accordingly holds the entire member's interest in it. However, it was alleged in the particulars of claim that

Sagadava was the actual beneficial owner of the member's interest in Odora, and that Sivaraj holds the member's interest on behalf of Sagadava, and as his nominee. This was alleged to be pursuant to certain oral agreements between Sagadava and Sivaraj. Accordingly, it was alleged, Sivaraj had no right to sell the property to Dube Tradeport without Sagadava's consent. On that basis, it was alleged that Sagadava had instituted a derivative action on behalf of Odora, and a personal action in his own name to set aside the sale of the properties.

[3] The properties were the sole assets of Odora, and were sold pursuant to a written purchase agreement between Odora (under the controlling mind of Sivaraj) and Dube Tradeport. Pursuant to the sale, the properties were transferred and registered in the name of Dube Tradeport, hence the formal citation of the third respondent, the Registrar of Deeds, against whom no relief was sought, and who, as a result, did not oppose the action and does not participate in this appeal.

[4] In the particulars of claim, Sagadava's claim to be the beneficial owner of the member's interest in Odora and of the properties, was explained as follows. Initially Sagadava held the entire member's interest in Odora. During December 2001 Odora purchased the properties. On 20 January 2001 Sagadava and Sivaraj concluded an oral agreement in terms of which certain assets in Sagadava's possession, were to be divided between the two brothers on a 50/50 percent basis (the 2001 agreement). Those assets included Sagadava member's interest and loan account in Odora. As already stated, the properties in issue were already the assets of Odora at that stage. Accordingly, the properties became part of the 2001 agreement. The ultimate agreement was that the assets would be registered in the personal names of Sagadava and Sivaraj. However, the latter repudiated the 2001 agreement and refused to sign any record of it. In response, Sagadava refused to accept Sivaraj's repudiation and elected to hold him liable to the agreement.

[5] In the alternative to the 2001 agreement, it was pleaded that during 1998, Sagadava and Sivaraj concluded an agreement in terms of which Sivaraj would hold certain assets on behalf of Sagadava, as his nominee (the 1998 agreement). Shortly thereafter, in 2001, Odora purchased the properties, which became part of the 1998 agreement. On 13 January 2014, Sagadava instituted action in the high court against Sivaraj seeking an order that his (Sagadava's) member's interest in Odora be transferred and delivered to him. Sivaraj defended the action, also claiming to act

on behalf of Odora. While that action was pending, on 18 December 2015, Sivaraj, purportedly on behalf of Odora, sold the properties to Dube. This is the impugned purchase agreement.

[6] Regarding locus standi, it was alleged that Odora was being prevented from pursuing its rights itself by virtue of the alleged unlawful actions of Sivaraj, as the registered holder of the entire member's interest in Odora. Thus, it was averred, Sagadava brought a 'partially derivative action' on behalf of Odora in relation to the purchase agreement referred to above, and a personal action in respect of his own rights. Accordingly, an order was sought declaring the purchase agreement to be null and void, and for directing the properties to be re-transferred to Odora, together with certain ancillary relief.

[7] In response to the summons, both Dube Tradeport and Sivaraj filed notices of intention to defend, and later, exceptions to the particulars of claim. Before the matter was argued in the high court, Sivaraj withdrew his exception. Accordingly, the court only considered Dube Tradeport's exception, which was predicated on the contention that because Sagadava was not a member of Odora he could not bring an action on its behalf, and that, in any event, s 54 of the Close Corporations Act 69 of 1984 (the **Close Corporations Act) protected** Dube Tradeport. That section provides that a member of a close corporation is an agent of the close corporation in dealings with a third party and has the power to bind the close corporation, except where a third party knows or ought to have known of the member's lack of authority to transact on behalf of the close corporation. I consider the provisions of this section in more detail later.

[8] In its judgment, the high court first considered whether a common law derivative action is available in respect of close corporations, and held that it was. However, it concluded that because Sagadava was not a registered member of Odora, he was not entitled, in terms of that law, to institute an action on its behalf or in its name. According to the high court, neither **s 49** nor **s 50** of the **Close Corporations Act granted** Sagadava the right to institute an action in the name of Odora. In any event, concluded the high court, as Sagadava had relied on the common law derivative action to advance the suit of Odora, he could not rely on **s 50.**

Before I consider the contentions before us, it is necessary to briefly explain the origin and nature of the common law derivative action. It is an exception to the rule enunciated in the English decision of *Foss v Harbottle* **[1843] EngR 478**; **(1843) 2 Hare 461**; **67 ER 189** that individual shareholders have no cause of action in law for any wrongs done to the corporation and that if an action is to be brought in respect of such losses, it must be brought by the corporation itself. The exception is available where what has been done amounts to fraud and the wrongdoers are themselves in control of the company. Although there has not been an express adoption by this Court of the English law of derivative actions as part of our common law, it has been consistently applied. In *Francis George Hill Family Trust* v *South African Reserve Bank and Others* **1992 (3) SA 91** (A) the question was left open as it was deemed unnecessary to determine it because the court considered that the facts of the case did not fall within the exception. However, as noted in *Lewis Group Ltd v Woollam & Others* **[2017] 1 All SA 192** (WCC); **2017 (2) SA 547** (WCC) para 30, subsequent decisions of this Court appear to have accepted, without discussion, that the common law exception forms part of our law.**[1]**

BP SOUTHERN AFRICA (PTY) LTD v MEGA BURST OILS AND FUELS (PTY) LTD AND ANOTHER AND A SIMILAR MATTER 2022 (1) SA 162 (GJ)

Judgments and orders — Suspension of execution of court order — Application for suspension of order pending completion of petition for leave to appeal — Discretion of court — Factors to be considered.

Execution — Suspension pending appeal — Application for suspension of judgment pending outcome of petition for leave to appeal — Discretion of court — Factors to be considered.

The respondent in each of these matters had, in separate High Court applications, obtained money judgments against the applicant. On 31 January 2020 the applicant's applications for leave to appeal were dismissed by the same court. Immediately thereafter, the respondents requested the applicant to pay, and a few days later they issued writs of execution under which the sheriff, on 5 and 7 February 2020, attached equivalent funds in the applicant's bank account.

In the present matter the applicant sought an order suspending the execution of the judgments pending the outcome of a petition for leave to appeal that was yet to be delivered. It argued that its causes of action in each case was an interim interdict and an application under rule 45A of the Uniform Rules of Court. * It argued that it had a 'clear right' to an interdict suspending the High Court's order pending the finalisation of the appeal process. As to relief under rule 45A, the applicant argued that a stay was required to prevent an injustice. It also argued that the present court could not, in exercising its discretion under rule 45A, have regard to the merits of the underlying dispute.

Held

The principle that the judgment creditor was entitled to seek payment almost immediately after judgment has never been overturned. † In exercising its discretion to stay execution, it would weigh heavily with the court that the respondents were entitled to payment. (See [11], [27.2].)

The 'clear right' the applicant relied on did not exist: the law was not that execution could only be levied once the time periods for lodging an application or petition for leave to appeal had expired. Hence the applicant's contention that it had a 'right' to demand that execution be stayed until the right to petition lapsed was ill-founded and could not form the basis for an interim interdict. (See [14] – [15], [27.1].)

This left the interests of justice under rule 45A and the court's inherent jurisdiction. Rule 45A involved a discretionary indulgence based on an apprehension of injustice: the court had to ask if real and substantial justice required a stay, and this required, inter alia, an inquiry into the balance of harm and convenience (see [27.4]).

In exceptional circumstances a residual equitable discretion to stay execution could be exercised to prevent an injustice, even where a litigant had an enforceable judgment and was entitled to payment. The imminent service of a petition for leave to appeal was a potentially significant factor, and if an applicant undertook (as the present applicant did) that an application for leave to appeal would be delivered, the court ought to consider the prospects of success of this step as best it could. (See [21], [23] – [25].)

This was not a matter in which the court would exercise its power to intervene in the normal execution process and respondents' rights: the respondents had enforceable claims for payment, the applicant had weak prospects of success on appeal, and the

balance of convenience favoured the respondents (see [32]). Both applications accordingly dismissed (see [35]).

FERREIRAS (PTY) LTD v NAIDOO AND ANOTHER 2022 (1) SA 201 (GJ)

Default judgment — Default — Meaning of term — Provision in Magistrates' Courts Rules that defendant not in default if absent but represented by legal practitioner not applicable in High Court — Failure by defendant to put its version to court constituting default even where practitioner present in court.

Applications — Affidavits — Answering affidavit — Late filing — Effect — Whether pro non scripto if not accompanied by application for condonation — Uniform Rules of Court, rule 6(5)*(d)*.

The question for the court in this rule 30 application was whether a judgment the respondents wanted rescinded was a default judgment and hence capable of rescission. The judgment was handed down by Louw J in the Pretoria High Court in the presence of the respondents' counsel. Since the answering affidavit was served late without an application for condonation, Louw J had no regard to its contents and dealt with the matter as unopposed, granting the application for payment. When the respondents applied for the rescission of Louw J's order, the applicant launched the present rule 30 application, arguing that the respondents' rescission application was an irregular step because the presence of their legal representative meant that the judgment was not a default judgment and could therefore not be rescinded.

The respondents referred the court to two cases dealing with the position in the magistrates' courts. In them the High Court, citing s 36*(a)* of the Magistrates' Courts Act 32 of 1944, held that a magistrates' court judgment was not given in the absence of the defendant, and hence by default, where the defendant's legal representative had been present in court.

Held

The present matter was distinguishable from the two cases referred to by the respondents because here the court was not dealing with the rescission of a judgment obtained in a magistrates' court. Moreover, in those cases the courts did not consider the effect of a failure to place the defendants' versions before court when the magistrates made their decisions. Under the common law relating to

default judgment, courts were not only concerned with the presence of the parties. (See [7] – [8].)

At common law, default judgment may be given (i) in default of *opposition*; (ii) in default of *appearance* at the hearing; and (iii) in default of a party placing its *own version* before court. In motion proceedings default could occur in various ways:

- A party may elect not to oppose an application, the matter is placed on the unopposed motion roll and dealt with on the applicant's papers only (default in respect of *opposition*, *appearance* and *own version*).
- A party may elect to oppose an application, serve a notice of opposition, and —
  - do nothing more (default in respect of *own version* and *appearance*);
  - serve a notice in terms of rule 6(5)*(d)*(iii) and fail to appear at the hearing (default in respect of *own version* and *appearance*);
  - serve an answering affidavit timeously and fail to appear at the hearing (default in respect of *appearance*, but answering affidavit considered in summary judgment proceedings);
  - prepare an answering affidavit late and fail to appear at the hearing (default in respect of *own version* and *appearance*).
  - prepare an answering affidavit late and appear at the hearing seeking a postponement and/or leave to place an answering affidavit before court; if leave was refused, the judgment was granted on the applicant's papers only (default in respect of *own version*). (See [17].) (Whether such leave was even required was open to question — see [18].)

Louw J should not have treated the answering affidavit as *pro non scripto* for being late without a condonation application. There was authority for the view that no application for an extension of time or for condonation was necessary if an answering affidavit was served before the hearing. Judges should not take too technical an approach in such circumstances. (See [18].)

It was, however, irrelevant why Louw J had disregarded the answering affidavit: the judgment was a default judgment. The applicant should have removed the matter from the unopposed roll at the respondents' cost and delivered a replying affidavit, or else answered the rescission application. (See [20] – [21].) Application dismissed with costs (see [24]).

HEATHROW PROPERTY HOLDINGS NO 3 CC AND OTHERS v MANHATTAN PLACE BODY CORPORATE AND OTHERS 2022 (1) SA 211 (WCC)

Jurisdiction-Housing — Consumer protection — Community schemes ombud — Dispute falling within ambit of Act — Whether High Court may hear matter as forum of first instance — Community Schemes Ombud Services Act 9 of 2011.

Applicants were owners of sections in a sectional title scheme and first respondent was the body corporate (see [2]). The latter had adopted a conduct rule pertaining to short term rentals, and later the trustees had resolved and effected a replacement of the access control system (see [7] and [16]). These actions caused applicants to bring an urgent application to the High Court for declarators on the application of the conduct rule as well as in respect of access control (see [1], [28] and [33]).
Here the court dismissed the application on the basis that it was not urgent, indeed was an abuse of its process (see [20] and [26]); and that it was the wrong forum of first instance to adjudicate the dispute, the appropriate forum being that established under the Community Schemes Ombud Services Act 9 of 2011 for resolution of disputes associated with community schemes (see [29]).
Coming to this conclusion it considered that the law relating to a concurrency of jurisdiction between a magistrates' court and High Court was inapplicable to the relationship of the Ombud and a High Court in that the latter pair's jurisdictions were substantially non-concurrent (see [47]); properly interpreted, the legislature's intention with respect to the Act was that the Ombud should be the primary forum for the adjudication of sectional title scheme disputes, with the High Court retaining an appellate and review jurisdiction (see [56]); authority provided that a specialist adjudicative body should at first instance hear a dispute even where a court had jurisdiction to do so (see [57]); and allowing a court to be approached at the outset would undermine the process provided by the legislature and could eventuate in forum shopping (see [59]).
Thus, a dispute that fell within the ambit of the Act was at first instance to be referred to the Ombud, and a court was obliged to decline to hear it, save in exceptional circumstances (see [61]). What the exceptional circumstances would be that would allow a direct approach to the High Court would have to be determined on a case by

case basis (see [62]). But such circumstances would not be convenience or alleged inefficiency or delay in the process provided by the Ombud Service (see [63]).

MINISTER OF POLICE v SHERIFF, MTHATHA AND ANOTHER 2022 (1) SA 229 (ECM)

State — Actions by and against — Actions against — Execution — Attachment of state assets — Steps to be taken before movable assets may be attached and removed — Sheriff attaching and removing state asset pending payment of execution fees — Failing to comply with procedure in State Liability Act — Retention unconstitutional and invalid — Rei vindicatio granted — State Liability Act 20 of 1957 as amended, s 3.

Vindication — Rei vindicatio — Action by state for return of property attached and removed by sheriff — Failure to comply with procedure in State Liability Act — Retention unconstitutional and invalid — Rei vindicatio granted — State Liability Act 20 of 1957 as amended, s 3.

The applicant (the Minister) was directed to pay the costs in an action that was postponed *sine die*. On 11 July 2019 the plaintiff's attorneys in the action demanded payment of the taxed costs from the applicant. On 27 November 2019 the deputy sheriff, acting on a writ of execution issued by the Registrar of the High Court, attached and removed a bakkie from a police station to sell in satisfaction of the taxed costs. The applicant settled the judgment debt on 21 February 2020 but its demand for the return of the bakkie was met with the argument that the sheriff had a creditor's lien over the bakkie due to unpaid sheriff's fees, storage charges and security charges, for which the sheriff instituted a counter-application.
On 17 August 2020 the Minister instituted a rei vindicatio against the sheriff in both his official and personal capacities, contending that the attachment, removal and retention of the bakkie was unconstitutional and unlawful because the sheriff did not comply with the formalities in s 3 of the State Liability Act 20 of 1957 (the Act), as amended. * The Minister argued that it was impermissible for the sheriff to have retained the bakkie on the basis of a creditor's lien and that any right to remove it

was extinguished when the judgment debt was discharged. The Minister sought costs against the sheriff on attorney and client scale for abuse of power. The sheriff in turn contended that he had complied with the required formalities and in a counter-application sought an order directing the Minster to pay the execution fees.

Held

The rei vindicatio allowed an owner to recover property from possessors who had no enforceable right to it (see [28] – [29]). Since the Minster's ownership and sheriff's possession were common cause, the onus was on the sheriff to establish entitlement to retain possession of the bakkie (see [34], [36]). Since there was no contractual nexus between the parties, the sheriff was precluded from relying on a creditor's lien (see [39]).

The Act, which regulated the satisfaction of final court orders sounding in money against the state or against any property of the state, in s 3 detailed the stages for the satisfaction of judgment debts against the state, each one of which made provision for situations of non-payment until, finally, the stage that culminated in the attachment of the state's movable property. They were the following:

- The relevant department had to ensure that payment was satisfied within 30 days from the date the court order becomes final or within a time agreed on by the judgment creditor and the state accounting officer (s 3(3)).
- If payment is not made within 30 days or as agreed, the judgment creditor could, in order to enforce the judgment, serve the order on —
    - the executive authority;
    - the accounting officer of the relevant department;
    - the state attorney or other attorney acting for the department concerned;
    - the relevant treasury (s 3(4)).
- The relevant treasury had to ensure that the judgment debt was satisfied within 14 days of the court order (or, if there were insufficient funds, within the time frame agreed to with the judgment creditor) (s 3(5)).
- If payment is not made within 14 days or as agreed, then the judgment creditor may issue a writ or warrant of execution against the department, which can be made only against movable property owned by the state and used by the relevant department (s 3(6)).
- Once the writ or warrant is issued, the sheriff must attach the movable property but may not remove it (s 3(7)*(a)*). The sheriff and the accounting officer of the

relevant department may agree on state property that may not be attached, removed or sold in execution because it would severely disrupt service delivery, threaten life or put the security of the public at risk (s 3(7)*(b)*). Absent such an agreement, the sheriff could attach the movable property to satisfy the judgment debt (s 3(7)*(c)*).

- At the expiry of 30 days from the date of attachment, the sheriff may remove and sell the attached property in execution of the judgment debt, at which point the Uniform Rules of Court become applicable (s 3(8)).
- If a party with a direct or material interest in the matter is of the view that the attachment and removal would severely disrupt service delivery, threaten life, put the security of the public at risk, or would not be in the interests of justice, it may apply to court for a stay before the sale of the attached property (s 3(9)). (See [42].)

Since the sheriff did not comply with these requirements, the attachment and removal of the bakkie were contrary to the Act and liable to be set aside (see [43] – [47]). Since the attachment was unlawful, the retention was also unlawful. And, in any event, the sheriff had to sell the attached property or return it to the state. He was not entitled to retain property indefinitely or allow storage charges to accrue. These shortcomings rendered the continued retention of the bakkie unlawful and liable to be set aside (see [48] – [49]).

The nature of the dispute in the main application, coupled with the relief sought in the counter-application, justified the grant not only of the rei vindicatio, but also the detailed declaratory relief sought by the Minister. Not only was the sheriff's conduct unlawful, but he had also breached the principle of legality, which rendered his conduct unconstitutional (see [52]). And the corollary of the conclusion reached on the main application is that the counter-application had to fail (see [53]).

Hence the conduct of the sheriff was unconstitutional, unlawful and invalid insofar as he (i) attached and removed the vehicle without following the procedure in s 3 of the Act and for a purpose other than to sell it;

(ii) retained it on the basis of a creditor's lien and despite payment of the judgment debt; and (iii) imposed security charges and storage fees on it despite payment of the judgment debt (see [65]).

MINISTER OF FINANCE v PUBLIC PROTECTOR AND OTHERS 2022 (1) SA 244 (GP)

Practice — Pleadings — What are — Notice under rule 6(5)*(d)*(iii) of Uniform Rules of Court not constituting pleading as intended in rule 23(1) — Cannot be excepted to.

Practice — Applications and motions — Notice by respondent of intention to rely on point of law only — Not constituting pleading — Cannot be excepted to — Rule 6(5)*(d)*(iii) read with rule 23(1) of Uniform Rules of Court.

Under rule 6(5)*(d)*(iii) of the Uniform Rules of Court a respondent seeking to rely on points of law only in opposing the relief sought by the applicant must deliver a notice to that effect in lieu of an answering affidavit. Since such a notice is not a pleading as intended in rule 23, it may not be excepted to under the latter rule. (See [15] – [16].)

S v MUGERA AND ANOTHER 2022 (1) SACR 53 (LP)

Legal practitioner — Duties of — Priority of and knowledge of court procedures — Attorney intoxicated and admitting was conveyancer who knew nothing of court procedures — Accused not having had benefit of effective legal representation — Proceedings set aside.

Trial — Irregularity in — What constitutes — Attorney intoxicated and admitting was conveyancer who knew nothing of court procedures — Accused not having had benefit of effective legal representation — Proceedings set aside.

In a review of proceedings in a criminal trial, at the request of the magistrate before the conclusion of the trial of the two accused, it emerged that the attorney for the first accused had been behaving in a peculiar manner. After the magistrate questioned her, she admitted that she was very drunk, was a conveyancer, and knew nothing of court processes. On review,

Held, that the failure by the attorney for the first accused, to put the version of the accused in an articulate manner to the witness, had serious consequences for him. When he took the witness box and gave the version that had not been put to the state witnesses, it was like he was adjusting his evidence as the trial progressed. (See [13].) Taking into consideration that the first accused's counsel was very drunk and was a conveyancer who knew nothing about court processes, the first accused did not have the benefit of effective legal representation during his trial, and that

tainted the whole proceedings. The proceedings were therefore not in accordance with justice and stood to be reviewed and set aside. (See [15].) The matter was remitted for trial de novo before another magistrate and the court ordered that a copy of the judgment be sent to the Legal Practice Council. (See [16].)

Trustees for the time being of the Legacy Body Corporate v Bae Estates and Escapes (Pty) Ltd and another [2022] 1 All SA 138 (SCA)

Locus standi to bring review application – Party having substantial and direct interest in impugned decision, the subject-matter of the litigation, and a real and current interest is clothed with locus standi.

Property – Sectional title scheme – Decision of trustees of body corporate to prohibit an estate agency from operating within scheme – Reviewability – Decision of body corporate of sectional title scheme not administrative action which is subject to review in terms of Promotion of Administrative Justice Act 3 of 2000, but decision found to be reviewable at common law.

The first respondent ("Bae Estates") was an estate agency which procured a tenant for a unit in a sectional title scheme. The conduct of the tenants drew complaints from other residents, and the appellant, being trustees of the scheme's body corporate, took a decision to prohibit Bae Estates from operating within the scheme. Consequently, Bae Estates launched an application in the High Court, seeking an interim interdict against the trustees from implementing the decision, pending an application to review and set it aside. The High Court set aside that decision but granted the trustees leave to appeal.

Held – In order for the Promotion of Administrative Justice Act 3 of 2000 to apply, the trustees' decision had to amount to administrative action as defined in section 1 of the Act. The requirement that an impugned decision be of an administrative nature was determinative of whether a particular decision constitutes administrative action. A detailed analysis of the nature of the public power or public function in question must be undertaken to determine its true character. The High Court failed to properly analyse the relevant requirements of the definition of administrative action. The fact that bodies corporate derive their powers from statute, does not, without more, translate their decisions into the exercise of any public power or performance

of a public function. The court identified three critical requirements in that regard. Those were whether the trustees' decision was of an administrative nature; whether the trustees exercised a public power or performed a public function; and whether the trustees acted in terms of any legislation or an empowering provision. None of those questions were answered in the affirmative and it was concluded that the trustees' decision was not administrative decision as envisaged in the Promotion of Administrative Justice Act, and not reviewable in terms thereof.

The trustees also argued that Bae Estates did not have an enforceable right against them to operate in the scheme. It was therefore contended that the trustees did not owe Bae Estates a duty to act fairly towards it before they terminated Bae Estates' ability to operate in the scheme, and that Bae Estates lacked *locus standi* to set aside the trustees' decision. The Court held that Bae Estates had a substantial and direct interest in the decision of the trustees, the subject-matter of the litigation, and that such interest was real and current. Its *locus standi* in seeking review was thus confirmed.

Setting out the grounds on which a decision of a private body can be subjected to judicial review at common law, the Court confirmed that the trustees' decision was reviewable at common law.

Satisfied that the trustees' decision ought to be reviewed and set aside, the court dismissed the appeal.

Rafoneke v Minister of Justice and Correctional Services and others and a related matter (Free State Association of Advocates as *amicus curiae*)
[2022] 1 All SA 243 (FB)

Legal Practice – Admission of foreigners into legal profession – Constitutionality of section 24(2) and 24(2)(b) of the Legal Practice Act 28 of 2014 – Restricting admission as legal practitioner to South African citizens or permanent residents rationally connected to legitimate government objective, but indiscriminate and blanket bar against non-citizens being admitted in South Africa found to be irrational, and serving no governmental purpose.

In two applications heard simultaneously by the court, the applicants were citizens of Lesotho, who studied at the University of the Free State, where they obtained LLB degrees. After completing their training and passing the practical examination for attorneys, they applied to be admitted and enrolled as attorneys of the High Court. However, their applications were dismissed because they were neither South African citizens nor lawfully admitted to this country as permanent residents. They therefore brought a challenge to the constitutionality of section 24(2)(b) read with 115 of the Legal Practice Act 28 of 2014, arguing that their right to equality was infringed upon. An order of constitutional invalidity was sought insofar as the impugned sections precluded persons who are neither citizens of nor permanent residents in South Africa (and not admitted as legal practitioners in foreign jurisdictions) from being admitted and enrolled as legal practitioners of the High Court.

Held – The right to equality before the law is entrenched in section 9 of the Constitution. Where an equality attack is mounted against a provision, it must be determined whether the provision differentiates between people or categories of people, and if it does, whether the differentiation bears a rational connection to a legitimate government purpose. It must then be determined whether the differentiation amounts to unfair discrimination.

In this case, the impugned provision had to be adjudged in light of the Constitution and in conjunction with the Immigration Act 13 of 2002 and the Employment Services Act 4 of 2014. The provisions of the latter Acts and the Legal Practice Act show that the government's policy position is to make sure that work which does not entail a scarce or critical skill should be preserved for South African citizens or permanent residents. The legal profession is not classified as a rare or critical skill.

Section 24(2)(b) allows for admission as a legal practitioner, anyone who is a South African citizen or permanent resident of South Africa. Noting the high unemployment rate in South Africa, and recognising a need to protect young South Africans or permanent residents to enter the legal profession without competition from foreigners from the rest of the world, there was therefore a rational connection between the prohibition in section 24(2)(b) and the government's objective.

However, drawing a distinction between admission as a legal practitioner and enrolment to practise, the court found that section 24(2) does not provide for

situations where non-citizens may want to be admitted without practising in this country. It was held that an indiscriminate and blanket bar against non-citizens such as the applicants being admitted in this country was irrational, and served no governmental purpose. It did not take into consideration the circumstances of some non-citizens who would want to be admitted as non-practising legal practitioners. To that extent, section 24(2) was inconsistent with the Constitution and invalid. The order of invalidity was suspended to allow the legislature to cure the defect.

END-FOR NOW