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Rule 17(2)*(a)* reads:'In every case where the claim is not for a debt or liquidated demand the summons shall be as near as may be in accordance with Form 10 of the First Schedule, to which summons shall be annexed a statement of the material facts relied upon by the plaintiff in support of his claim, which statement shall ***inter alia*** comply with rule 18.' **Alberts and Others v Minister of Justice and Correctional Services (404/2021) [2022] ZASCA 25 (9 March 2022)**

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Barnard Labuschagne Incorporated v South African Revenue Service and Another (CCT 60/21) [2022] ZACC 8 (11 March 2022)

Rescissiion-Tax Administration Act 28 of 2011 — sections 172 and 174 — certified statement filed by South African Revenue Service to be treated as civil judgment — whether susceptible of rescission

On appeal from the High Court of South Africa, Western Cape Division, Cape Town:

1. Leave to appeal is granted.

2. The appeal is upheld.

3. The order of the High Court is set aside.

4. The applicant's application for rescission is remitted to the High Court for hearing before a different Judge in order to determine the merits of the application.

5. The costs incurred to date in the High Court stand over for determination in the remitted proceedings.

6. The respondents must pay the applicant's costs in the applications to the High Court and Supreme Court of Appeal for leave to appeal.

7. The respondents must pay the applicant's costs in this Court.

[1] Judgment in this case, which the Court is deciding without an oral hearing, was initially delivered on 4 March 2022. Shortly after delivery, the judgment was rescinded by the Court of its own accord when it emerged that the first respondent, the South African Revenue Service (SARS), had filed written submissions of which the Court was unaware. The judgment which follows takes account of all the written submissions.

[2] The applicant, Barnard Labuschagne Incorporated (BLI), is an incorporated firm of attorneys. On 15 December 2017 SARS filed with the Registrar of the High Court of South Africa, Western Cape Division, Cape Town (High Court), a certified statement in terms of section 172(1) of the Tax Administration Act[1] (TAA) recording that BLI owed SARS R804 747. In terms of section 174 of the TAA, a certified statement so filed "must be treated as a civil judgment lawfully given in the relevant court in favour of SARS for a liquid debt for the amount specified in the statement". For convenience, I call this a "tax judgment".

[3] BLI brought an application to rescind the tax judgment. SARS's main ground of opposition was that a tax judgment is not susceptible of rescission. In response, BLI contended that if a tax judgment is not susceptible of rescission, sections 172 and 174 of the TAA are constitutionally invalid (the alternative constitutional challenge). In view of this contention, the Minister of Finance (Minister) was joined as a second respondent.

[4] The certified statement arose from BLI's self-assessments for value-added tax, employees' tax, unemployment insurance fund contributions and skills development levies. BLI's attack on the tax judgment was not that its self-assessments were wrong. Its complaint was that the certified statement was wrong because BLI had made payments which SARS had failed to appropriate to the relevant assessed taxes.

[5] The High Court held that the tax judgment against BLI was not susceptible of rescission and dismissed the alternative constitutional challenge. The applicant was ordered to pay the costs of the application. The High Court refused an application for leave to appeal with costs, as did the Supreme Court of Appeal. BLI now seeks leave from this Court. The parties were asked to file written submissions on the issues discussed below.

Jurisdiction

[6] BLI's application, on the question of rescindability, raises an arguable point of law of general public importance. This is because several recent High Court judgments, of which the High Court's judgment in the present matter is the third, appear to have failed to apply binding precedent, a core component of the rule of law, which is a founding value of our Constitution.[3] This is an issue which this Court must redress. We thus have jurisdiction.

Baloyi N.O. and Others v Pawn Stars CC and Another (CCT 15/21) [2022] ZACC 10 (15 March 2022)

Rule 46A of the Uniform Rules of Court — legal persons and trusts — determination of alleged constitutional issue not reasonably necessary for determination of dispute — jurisdiction not engaged

[1] This application for leave to appeal was precipitated by an order granted by the High Court of South Africa, Limpopo Division, Polokwane (High Court) on 17 April 2018 by agreement between the applicants and the first respondent (consent order). In terms of the consent order, and in the event that the applicants defaulted on payment of certain amounts to the first respondent, a Polokwane property (property) owned by the Navuyeriwa Business Trust (Trust), at which the third and fourth applicants reside with their minor children, would become specially executable and a warrant of execution for the property could be issued. The applicants contend that the issue for determination is whether the consent order contravenes the provisions of rule 46A of the Uniform Rules of Court. That rule requires judicial oversight, and consideration, by a court, of various factors, when a creditor seeks to execute against the residential immovable property of a judgment debtor. The applicants' central submission is that the consent order was impermissibly granted without application of rule 46A because the High Court erroneously assumed that it does not apply to property owned by juristic persons or trusts, and that this raises a constitutional issue.

Parties

[2] The applicants are Mr Andrew Tuee Baloyi and Mrs Eunice Mhaka Baloyi, acting both in their personal and nominal capacities as trustees of the Trust. The first respondent is Pawn Stars CC (Pawn Stars), a duly registered close corporation, and the second respondent is the Sheriff of the High Court.

On 15 March 2022 the Constitutional Court handed down a unanimous judgment in an application for leave to appeal against a judgment and order of the High Court of South Africa, Limpopo Division, Polokwane. The applicants contended that the matter required the Court to determine whether rule 46A of the Uniform Rules of Court – which requires judicial oversight when a creditor seeks to execute against the residential immovable property of a judgment debtor – applies in respect of immovable property owned by juristic persons or trusts (rule 46A issue).

In February 2016, Mr and Mrs Baloyi (the applicants in both their personal capacities and nominal capacities as trustees of the Navuyeriwa Business Trust (Trust)), acting on behalf of the Trust, entered into a loan agreement with the first respondent, Pawn Stars CC (Pawn Stars). In terms of that agreement, Pawn Stars advanced an amount of R870 000 to the Trust which was to be repaid within three months of signature of that agreement. Mr and Mrs Baloyi stood surety for the loan. As additional security, a mortgage bond was registered in favour of Pawn Stars over a property owned by the Trust, at which Mr and Mrs Baloyi reside with their minor children (property). In the event of default, Pawn Stars was entitled, on written notice and if the default was not remedied within seven days, to claim immediate repayment of the full amount outstanding, together with interest, and to make an application to declare the property specially executable. Pawn Stars was also entitled, if payment of the capital sum was not made within the stipulated three

months, to levy a penalty fee of R90 000 per month, which would fall due on the day immediately following the due date for repayment of the capital sum.

The Trust defaulted on its obligations and Pawn Stars subsequently obtained default judgment, requiring payment of the full amount outstanding together with interest and penalty fees, and declaring the property specially executable (default judgment).

After a warrant of execution for the property was issued, and a sale in execution scheduled, the applicants applied to rescind the default judgment. They contended, amongst others, that they had not been served with the application, that they were in a position to pay the amounts outstanding, that the penalty fee clause was contrary to public policy, and that they occupied the property, together with their minor children. Had this information been before the presiding Judge, the applicants contended, the default judgment would not have been granted.

After deliberation between the parties, who were both legally represented, the rescission proceedings were settled, and the terms of the settlement were embodied in an order granted by Mokgohloa DJP (consent order). In terms of that order, amongst others, the default judgment was rescinded, the applicants were to pay Pawn Stars an amount of R690 000 in various instalments and, if the applicants failed to make such payment, the property would become specially executable.

The applicants thereafter defaulted on the terms of the consent order. As a result, a warrant of execution for the property was issued, and a sale in execution was again scheduled. The applicants then successfully applied on an urgent basis to interdict the sale of the property pending the determination of a further application to set aside the warrant of execution and to vary the terms of the consent order. In terms of the proposed variation, the property would only become specially executable upon default after a further order was issued declaring the property specially executable. The applicants claimed that they were entitled to this relief because the consent order had been impermissibly granted without application of rule 46A, and had the effect of permitting execution against the property without judicial oversight.

On 7 November 2019, Madavha AJ refused to set aside the warrant of execution or to vary the consent order. Leave to appeal was subsequently refused by both the High Court and Supreme Court of Appeal.

In the Constitutional Court, the applicants persisted with their contention that the consent order had been impermissibly granted without application of rule 46A, because the High Court erroneously assumed that the rule does not apply in respect of immovable property owned by juristic persons or trusts. They contended that this raised a constitutional issue which engaged the jurisdiction of the Court.

In a unanimous judgment penned by Theron J, the Court held that the application did not engage its jurisdiction. This was so for four reasons. First, Madavha AJ seemingly held that rule 46A does apply in respect of immovable property owned by juristic persons or trusts, but nonetheless dismissed the application. The question as to the applicability of the rule was therefore immaterial to her decision, and, as a result, could not engage the Court's jurisdiction. Second, even if rule 46A ought to have been applied before the consent order was granted, this, without more, would

not entitle the applicants to a variation of that order. They would need to show, in addition, that the requirements for variation, set out in rule 42 of the Uniform Rules of Court or the common law, had been met. Since the applicants had failed to do so, a determination of the matter did not require the Court to engage the rule 46A issue. Third, for the rule 46A issue to engage the Court's jurisdiction, the applicants needed to show that, if that rule was applied, the consent order would not have been granted. The applicants failed to do so and, in these circumstances, there was no need for the Court to engage the rule 46A issue. Finally, the Court held that rule 46A applies when a creditor seeks leave to execute against a judgment debtor's residential immovable property. The consent order was not granted pursuant to such an application but was, instead, granted in settlement of the applicants' rescission application. Rule 46A therefore had no application in the present matter, and there was therefore no need for the Court to engage the rule 46A issue.

The application for leave to appeal was therefore dismissed with costs.

Nedbank Ltd v Mabulu N.O and Others (3367/2021) [2022] ZAFSHC 32 (3 March 2022)

Irregular step- application for default judgement prompted the second defendant's application in terms of Uniform Rule 30 and 30A seeking an order to set it aside as an irregular or improper step.

Authority of attorneys - act on behalf – disputed- the power of attorney in his personal and not representative capacity, despite having been sued in his representative capacity as a Trustee

[1] This matter involves two applications. Firstly, there is an application by the second defendant to set aside the plaintiff's application for a default judgement on the basis that it is an irregular step, and, secondly, the adjudication of the disputed authority of Mathunjwa Incorporated attorneys (Mathunjwa Inc.) to act on behalf of the second defendant.

[2] The plaintiff issued summons out of this court on 22nd July 2021, claim 1 being for a debt owing in respect of money lent and advanced and claim 2 alleged to be debt due in respect of money overdrawn from a current banking account in terms of an overdraft facility. The summons was duly served on the 28th July 2021 upon the fourth and fifth defendants and, on the 2nd August 2021 upon the first, second and third defendants. The first, second and third defendants are sued in their representative capacities as the Trustees of the Mabulu Trust, the fourth defendant in his representative capacity as the executor of the estate of the late Rasekoane Vincent Mabulu and the fifth defendant in her personal capacity. The fourth and fifth defendant did not enter appearance to defend and on the 28th September 2021 judgment was granted against them for payment of R867,028.52 together with interest and costs in respect of claim 1 and for payment of R186,856.02 plus costs in respect of claim 2.

[3] On the 16th of August, 2021, Mathunjwa Inc. entered appearance to defend on instructions of the second defendant and, 11 days later, on the 31st August 2021, the plaintiff delivered a notice in terms of Uniform Rule 7(1) disputing their authority to act on behalf of the second defendant. On the 10th September 2021, the second defendant served and filed a power of attorney to which, on the 22nd September 2021, the plaintiff objected on grounds that it was given by the second defendant in his personal capacity and not in his representative capacity as Trustee of the Mabulu Trust. On the same date, i.e. the 22nd September 2021, the plaintiff served a notice of application for default judgment against first, second and third defendants.

[4] I am called upon to decide the following issues:

4.1 whether the plaintiff's application for default judgment against second defendant is an irregular step, and,

4.2 whether Mathunjwa Inc. have authority to act on behalf of the second defendant.

[5] In order to deal properly with the issues raised by the applications before me, it is appropriate to refer to the Uniform Rules whereupon the applications are based.

[6] Uniform Rule 7(1) provides that:

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

[7] Uniform Rule 30 provides as follows:

> "(1) A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside.
>
> (2) An application in terms of subrule (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety alleged, and may be made only if —
>
> > (a) the applicant has not himself taken a further step in the cause with knowledge of the irregularity;
> >
> > (b) the applicant has, within ten days of becoming aware of the step, by written notice afforded his opponent an opportunity of removing the cause of complaint within ten days;

(c) the application is delivered within fifteen days after the expiry of the second period mentioned in paragraph (b) of subrule (2).

(3) If at the hearing of such application the court is of opinion that the proceeding or step is irregular or improper, it may set it aside in whole or in part, either as against all the parties or as against some of them, and grant leave to amend or make any such order as to it seems meet."

[8] Rule 30A provides that:

"(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 claim or 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."

[9] The basis whereupon the authority of Mathunjwa Inc. was disputed is, (a) that the second defendant gave the power of attorney in his personal and not representative capacity, despite having been sued in his representative capacity as a Trustee of the Mabulu Trust, and (b) that the Trust Deed provides that there shall be at least two (2) Trustees in office. The second defendant was, at the time the only Trustee. For these reasons, the plaintiff disregarded the second defendant's appearance to defend and applied for a default judgement. This application for default judgement prompted the second defendant's application in terms of Uniform Rule 30 and 30A seeking an order to set it aside as an irregular or improper step.

[10] On the 31st January 2022, the second defendant served and filed a plea, notwithstanding the fact that the application in terms of Uniform Rule 30 and 30A had not been heard and was set down for hearing on the 3rd February 2022.

Uniform Rule 7(1) requires a party**[5]** disputing the authority of another to do so within 10 days after becoming aware that such other party is so acting. After the expiry of a period of 10 days, such authority to act can be disputed at any time prior to judgment only with the leave of the court and upon good cause shown. A perusal of the pleadings has revealed that the plaintiff became aware of the fact that Mathunjwa Inc. were acting on behalf of the second

defendant on the 16th August 2021 and only disputed their authority to act on the 31st August 2021, eleven days later. In the circumstances, Mathunjwa Inc.'s authority could only be properly disputed with the leave of court and on good cause shown. As such leave was neither sought nor granted, the plaintiff's objection to the authority of Mathunjwa Inc. to act on behalf of the second defendant cannot be entertained.**[6]**

[19] It follows that the second defendant's application in terms of Uniform Rule 30, to set aside the plaintiff's request for default judgement as an irregular step, must, in the circumstances, succeed. Although I make no ruling in this regard, I am of the view that, the provisions of Uniform Rule 30A, which deals with general non-compliance with rules, did not find application in the second defendant's application.

[20] In conclusion, and in the light my finding above and the fact that Counsel were in agreement that the second defendant has purged his default by attaching relevant documents to the plea in proof of compliance with the terms of the Trust Deed, it seems equitable and competent to set aside the application for default judgement. There is no reason why the costs should not follow the cause.

[21] I therefore make the following order:

21.1 The plaintiff's application for default judgement is set aside as an improper step.

21.3 The plaintiff is ordered to pay the costs.

Nedbank Limited v Hattingh and Others (4136/2020) [2022] ZAFSHC 44 (7 March 2022)

Commissioner of oaths-compliance with regulation 7(1) of the regulations published in terms of the Justices of the Peace and Commissioners of Oaths Act and is therefore a nullity. Consequently, so it was submitted, the application for summary judgment is a nullity and should be struck from the roll with costs- court condones

[1] This is a summary judgment application with a little bit of a twist. A *point in limine* has been taken on behalf of the 4th defendant to the effect that the attestation of the founding affidavit in support of the application for summary judgment lacks

II THE PARTIES

[2] The plaintiff in the main action and applicant in the application for summary judgment is Nedbank Ltd who has been represented by Adv CJ Welgemoed, instructed by VDT Attorneys, Pretoria, c/o Phatshoane Henney Attorneys, Bloemfontein.

[3] The 1st, 2nd and 3rd defendants do not feature in the summary judgment application as default judgment has already been granted against them. Furthermore, 1st and 2nd defendants have been sequestrated recently and the 3rd defendant has been liquidated earlier.

[4] Adv JF Mitchley appeared before me on behalf of the 4th defendant on the instructions of Peyper Lessing Attorneys, Bloemfontein.

[5] Henceforth I shall refer to the parties as the plaintiff and 4th defendant respectively.

[6] The plaintiff has instituted action as long ago as 27 October 2020 and once it has amended its particulars of claim, the 4th defendant filed its plea on 8 November 2021 and thus more than a year after institution of action.

[7] On 22 November 2021 the plaintiff filed its application for summary judgment which was set down for hearing on 20 January 2022. The 4th defendant failed to file an answering affidavit in accordance with the rules of court which necessitated not only a postponement, but an application for condonation. The required documents were eventually filed on 28 January 2022. On 20 January 2022 the matter was postponed to the opposed roll of 3 March 2022. The 4th defendant was ordered to pay the wasted costs occasioned by the postponement. I am satisfied that condonation should be granted and this will be reflected in the order to be made.

Pickering J emphasised that the “commissioner of oaths who attests an affidavit is required to be impartial, unbiased and entirely independent of the office where the affidavit is drawn.”**[4]** (emphasis added). On the facts of the matter the court held in *Radue* as follows**[5]**: “It seems clear to me that by entering into an association the attorneys have established some sort of formal relationship with each other in consequence whereof their respective offices are to some extent connected. In my view the fact that the ambit of such relationship might differ widely from case to case is not of importance in the context of this case. What is of importance is that the attorneys, by entering into such association, have obviously agreed that some mutual benefit in relation to the conduct of their practices be derived by each from their association. Were this not so no purpose would be served thereby. By

reason of that association it can therefore ordinarily be expected that each is concerned to some extent with the interests of the other. That being so, it cannot be said, in my view, that the office of the one attorney is entirely independent of the office of the other or that the one attorney is completely impartial and unbiased in relation to the affairs of the other. *Prima facie*, therefore, the requirement of complete independence is lacking. In these circumstances an attorney practising in association with another attorney has an interest such as would preclude him or her from functioning as a commissioner of oaths in respect of an affidavit drafted by the other attorney."

[14] Having found regulation 7(1) peremptory in nature, the court held in *Radue*, notwithstanding this conclusion, that it could not close its eyes for the version in the answering affidavit. It held that the defendant had made out a *bona fide* defence and it was afforded an opportunity of putting its defence before the court in a regular manner by having the affidavit re-attested before a competent commissioner of oaths.**[6]**

[15] When I asked the 4th defendant's counsel whether it would not be appropriate to postpone the application for summary judgment in order to have the founding affidavit re-attested, should I find in her client's favour on the point raised, she submitted that the whole application for summary should be regarded as a nullity and struck from the roll. In *Radue* and the authorities relied upon the court mentioned the danger that an unbiased and impartial commissioner may influence the deponent in regard to the subject matter of the affidavit.**[7]**

[16] The mere fact that the two firms of attorneys featuring herein may be on the plaintiff's panel of attorneys, cannot be used in support of a responsible submission that they are not functioning totally independent from each other. In fact, there can be no doubt that they are completely independent from each other. I cannot see on what conceivable basis could it be held that attorney Steensma has an interest in the present litigation, or that she would want to, or could have influenced the deponent in regard to the issue at hand. Notwithstanding my request, the 4th defendant's counsel could not provide me with any authorities in support of her submissions. The facts in *Radue* and authorities relied upon are clearly distinguishable from the facts *in casu* and consequently, I am not bound to follow any of these judgments.

[17] The 4th defendant's purely technical defence is therefore rejected, but even if I was in agreement with the submission that regulation 7(1) was

contravened, I would have postponed the summary judgment application in order to allow the plaintiff to have the affidavit re-attested. In my view, courts should ensure that disputes are dealt with on their merits and technical defences that merely cause delay and nothing else should be frowned upon and dismissed.

Transnet SOC Limited v Schoemanpark Golf and Recreational Club (3855/2021) [2022] ZAFSHC 48 (10 March 2022)

Lis alibi pendens- It is the respondent' case that there is pending litigation between parties involving exactly the same cause of action and the relief sought by the applicant-allowed

[1] On 7 September 2011 the parties concluded a four year written lease agreement expiring on 28 February 2015 in terms of which the respondent leased the applicant's business premises situated at Sub 83 Bloemfontein number 654 as well as portion of remainder of erf 1964 in Bloemfontein for purposes of operating a golf club for recreational purposes.

[2] The lease agreement provided the applicant with an option to treat the lease as a month to month tenancy upon its expiry, terminable by the applicant on a one month's prior notice to the lessee.

[3] In this opposed application, the applicant seeks the eviction of the respondent from the said premises on the grounds that the lease agreement is defunct, it was cancelled on 30 October 2018 on account of the respondent's breach of the agreement by failing to pay the monthly rental in the amount of R9 406 851.80. Annexure "T2" is a copy of the applicant's letter of demand for payment dated 23 August 2018 and Annexure "T3" is the cancellation notice which required the respondent to vacate the premises within 30 days of receipt of the said notice.

[4] It is the applicant's case that notwithstanding the cancellation of the lease the respondent remains in occupation of the premises therefore, the respondent and all those who occupy the premises through the respondent must be evicted from the premises.

[5] The application is opposed on the ground of *lis pendens,* the invalidity of the cancellation of the lease and that the debt is disputed. In the respondent's answering affidavit, a counterapplication is incorporated in terms of which an order is sought that the applicant must provide the applicant with the record of proceedings and the reasons for its decision to terminate the lease agreement.

Lis alibi pendens

[6] It is the respondent' case that there is pending litigation between parties involving exactly the same cause of action and the relief sought by the applicant. During 2020 the applicant issued summons against the respondent under case number 2891/2020 for arrear rentals and ejectment. The action was defended and it is currently pending.

[7] Annexed on the said summons is a rule 41A(2)(a) notice in terms of which the applicant proposed the referral of the dispute to mediation on the basis that it was capable of being settled. Mediation did not succeed due the applicant's failure to honour the process.

[8] The respondent further states that by agreement between the parties, the dispute was referred to arbitration. In the applicant's statement of claim filed in the arbitration proceedings the applicant seeks an award declaring that the respondent is in breach of the lease agreement and that the lease is cancelled. An order rectifying certain provisions of the lease agreement and payment of arrear rentals together with arbitration costs is also sought.

[9] The Arbitration proceedings are also pending and it is in that regard, that the respondent submits that this application is *lis pendens* it ought to be dismissed merely on that score.

[10] On the other side, the applicant in its replying affidavit denies that the application is *lis pendens* merely on the basis that in this application the applicant seeks the ejectment of the respondent from the leased premises while in the statement of claim filed in the arbitration proceedings the applicant seeks payment of the arrear rentals therefore, the relief sought in these two matters do not arise out of the same cause of action.

[11] I disagree with the applicant's contentions. It is not in dispute that the proceedings in this application involve the same parties that are also embroiled in the arbitration proceedings. Despite having taken the liberty of attaching a copy of the arbitration statement of claim to the replying affidavit (Annexure "RA1"), the applicant has deliberately overlooked the fact that the cause of action relied upon by the applicant in the said claim is the respondent's alleged breach of the lease agreement which is a similar *causa* in these proceedings. Furthermore, in both these proceedings the applicant seeks declaratory orders for the cancellation of the lease agreement. See prayer 1 of the notice of motion and prayer 2 of the arbitration's statement of claim. Ejectment is an ancillary relief pursuant to the cancellation of the lease.

[12] It is also important to note that the fact that there are other pending proceedings arising from a summons issued by the applicant based on the same cause of action and seeking a similar relief, to wit: the ejectment of the respondent is not in dispute. I'm thus persuaded that the proceedings that are pending in the action and also in the arbitration proceedings do not only involve the parties involved in this application but the proceedings are also based on the same cause of action and in respect of the same subject matter.

[13] It is trite that the underlying principle of the doctrine of *lis alibi pendens* is that where a dispute involving the same parties is litigated elsewhere it must be finalized in that forum and not replicated in another forum as that may result in different courts pronouncing on the same issue with the risk that they may reach differing conclusions.**[1]** In the circumstances, I decide the objection of *lis pendens* in favour of the respondent.

[14] In my view this ruling is dispositive of the matter. The costs shall follow the result.

[15] The following order is made:

1. The application is dismissed with costs.

Cliffendale Villas Body Corporate v Mbowane (28013/19) [2022] ZAGPPHC 144 (8 March 2022):

Appeal-revival- appeal in terms of s 57(3) of the Community Schemes Ombud Service Act, 9 of 2011

[1] The applicant filed a notice of motion seeking an order that an adjudication award dated 9 March 2019 be stayed pending the finalisation of the applicant's (CSOS).

[2] The applicant's replying affidavit was filed on 14 June 2019 and on 24 October 2019 the judgment of the Full Bench of this court pertaining to how appeals against adjudication orders are to be dealt with, was handed down. On 2 June 2021 the applicant's heads of argument and practice note in this application were filed. The respondent served a notice of an interlocutory application to file an additional affidavit on 18 August 2021. Although a notice to oppose the interlocutory application was filed, counsel for the applicant indicated from the bar that the applicant will abide in the court's decision relating to the filing of the additional affidavit. The leave sought by the

respondent is granted due to the fact that the supplementary affidavit succinctly sets out the chronology of events and sheds light on the prejudice suffered by the respondent.

[3] It is common cause that the appeal has lapsed because the applicant failed to prosecute the appeal. Although the applicant has not as yet, filed an application for condonation and the reinstatement of the appeal, counsel indicated that the applicant is set on reinstating the appeal. It is trite that an applicant may seek condonation for not-prosecuting an appeal.

[4] It would not be fair to the respondent to allow the applicant to reinstate the appeal at its leisure. However, the court cannot merely disregard the applicant's expressed intention to reinstate the appeal. The application to stay the execution of the award pending the appeal can, however, not be decided before a court has decided whether to grant condonation and reinstate the appeal.

[5] The applicant's lackadaisical approach will be met with an appropriate costs order.

This application is stayed, pending:

1.1. The applicant launching an application for condonation for not prosecuting the appeal against the CSOS-award and the reinstatement of the appeal within 15 days of the date of this order, failing which the respondent is given leave to re-enrol this application for hearing;

1.2. In the event of the applicant having complied with paragraph 1.1 above, the court having heard the condonation application, granting the relief sought;

2. The parties may enrol this application to be heard simultaneously with the condonation application and the application for the reinstatement of the appeal; or upon finalisation of the application for condonation and the reinstatement of the appeal, either party may enrol this application for hearing, on the same papers, duly amplified where necessary;

3. The applicant is to pay the costs of this application thus far incurred.

Fourie v Spruyt Incorporated Attorneys and Others (30607/2020) [2022] ZAGPPHC 151 (8 March 2022)

Contingency fees- factual disputes- motion proceedings not correct way to litigate

1. This is an application for an order declaring the two agreements signed by the applicant and the first respondent as contingency fees agreements and, pursuant

to thereto, and owing to certain alleged violations of the Contingency Fees Act[1] (the Act) as identified in the applicant's affidavit, that the agreements be declared invalid and unenforceable. The application is opposed only by the first respondent. Both the second and third respondents are not participants. I shall, therefore, refer to the first respondent as the respondent.

2. I deem it necessary to set out the prayers sought by the applicant in her Notice of Motion:

   (i) declaring that the fee agreements between herself and the first respondent are contingency fee agreements, and as such, agreements that are invalid and unenforceable;

   (ii) declaring that the first respondent is entitled to a fair and reasonable fee on an attorney and client scale, together with those disbursements which were reasonably necessary as taxed, and that the respondent be directed to pay over those funds which it has appropriated as its fees to the applicant's attorneys of record, pending the taxation of the new bill of costs;

   (iii) directing the first respondent to deliver to the applicant, within 30 days of this order, a fully itemised and detailed accounting in the form of a bill of costs, with the necessary vouchers, reflecting reasonable attorney and client fees of the first respondent, as well as disbursements incurred in the prosecution of case number 30104/2017, in this division;

   (iv) directing the first respondent to immediately pay into the applicant's attorneys' trust account the sum of R 966 659.34, which sum shall be retained in trust on behalf of the applicant, pending agreement or settlement of the first respondent's bill of costs;

   (v) directing the first respondent to pay interest at the rate of 9.75% per annum from 23 January 2020 to date of payment, both days inclusive, on the difference between the amount reflected in paragraph 4 and the fair and reasonable attorney and client fees due to the first respondent, agreed or taxed; and

   (vi) directing the first respondent to pay the applicant's on an attorney and own client scale; and (vii) granting such further and alternative relief.

3. Before going any further, it is necessary to first briefly set out the background to the case. At this early stage, I note that the applicant in her affidavit makes the statement that her agreement with the respondent was partly oral and partly written and that the written memorial as it stands does not reflect the full agreement[2]. In making her case the applicant refers to statements, the origins of which she says may be traced to the oral agreement between her and the respondent. I return to this later in the judgement. For now, it suffices to mention that the respnodent denies the oral agreement. Some of the applicant's statements amount to accusations of fraud[3]. It might be apposite to refer to the reasoning of the court in *Global Environmental Trust and Others* v *Tendele Coal Mining (Pty) Ltd and Others*[4], where it was said:

   'Motion proceedings … 'are all about the resolution of legal issues based on common cause facts'… 'Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in

motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's … affidavits, which have been admitted by the respondent… together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.'

4. It is common cause that the two agreements the applicant wants declared as contingency fees agreements were concluded on 4 November 2016 and in January 2020.

B. BACKGROUND

5. Sometime during August 2016, the applicant was injured in an accident whilst being conveyed as a passenger on a motorcycle. She was admitted to Steve Biko Hospital where she was treated as an in-patient. While in hospital, she was visited by a man named Christo[5]. It is the applicant's case that Christo informed her of the respondent's services and that the latter could assist with prosecuting her claim, based on what Christo described as a '*no win no fee basis*'. In the circumstances the applicant would pay neither fees nor disbursements as the respondent would deduct its fees, which according to Christo, would be limited to 25% of the final award, upon payment.

6. Following her discharge from Steve Biko, the applicant met Christo at her home where Christo presented her with several papers for signature, including a power of attorney. She says she had noted then that the respondent's fees were '*significantly higher than normal*' but Christo explained that this was customary in claims such as the Road Accident Fund claims. Shortly after signing the documents with Christo, the applicant met with the respondent at his offices. She states that she was in poor financial shape at the time. Based on their discussions the applicant applied for certain allowances to be paid to her on a monthly basis. The total amount of the allowances, together with fees and disbursements due to the respondent, would be deducted from the final award.

7. In July 2019, the Fund made an offer to settle the claim in the amount of R 2 010 135.00, which the applicant accepted, based on the advice of one Linton van Van Niekerk, an attorney in the respondent's firm, that it was a fair offer. She said that, at the time, she enquired about fees from counsel but counsel referred her to Van Niekerk. The latter did not provide a clear explanation, according to the applicant. She states that her discussions regarding the settlement were confined only to the offer made by the Fund. The question whether or not a contingency fees agreement existed was never canvassed with her. Neither was the settlement agreement shown to her. I pause to record that van Niekerk, has deposed to an affidavit disputing the claim that he did not provide clear answers when asked about fees. Van Niekerk avowed that he regularly attends court with counsel in relation to personal injury matters. Virtually all of the respondents' clients in the position of the applicant invariably ask about fees when they hear about settlement. He said he informed the applicant that he could not estimate the fees as the answer would require a person who specialises in costs to draw up a bill of costs. Only then would the amount of fees be ascertained. He further added that it would take about six months for the Fund to pay and that she would be contacted at that stage and a bill would be furnished to her.

24. The question to ask then is: can the respondent's defence as disclosed in his affidavit be said to be an uncreditworthy denial or a palpably implausible version, such that it should be jettisoned out of hand without recourse to oral evidence? The short answer is no. Early on, I began by referring to the applicant's contention that the two agreements she has placed before court are not the entire agreement between herself and the respondent. On this basis alone, motion proceedings should have been excluded as a way of seeking relief. The two agreements before court are the basis for the justiciable issue/s between the applicant and the respondent. To accept from the applicant a version which introduces alleged oral terms concluded between the applicant and Christo, to alter the written memorial, and oral terms, which in any event are emphatically denied by the respondent, would amount to disregarding the Supreme Court of Appeal's admonition as set out in paragraph 14 of this judgement, which, in any event, this court cannot do.

25. Owing to the multiplicity of material disputes of fact, in particular the accusations that amount to fraud, it must have been foreseeable to the applicant from the start that motion proceedings were not an appropriate way to approach the court for relief. For all these reasons, the applicant's application must fail. As to the costs, it was foreseeable from as early as 20 June 2020 when the present attorneys wrote to the respondent, that the applicant's version would come under severe attack from the respondent. The applicant made the choice anyway and proceeded by way of motion proceedings instead of an action. She must pay the respondent's costs.

E. **Order**

26. The following order is made:

1. The application is dismissed.

2. The applicant must pay the respondent's costs.

Doornhoek Equestrian Estate Home Owners Association v Community Schemes Ombud Service and Others (32190/21) [2022] ZAGPPHC 153 (8 March 2022)

Irregular step- Rule 30-otice of Appeal and Record served and filed by the applicant

1. This is an interlocutory application in terms of Rule 30 of the Uniform Rules to set aside and declare as an irregular step the Notice of Appeal and Record served and filed by the applicant on 1 September 2021. The application is brought by the third, fourth and fifth respondents, collectively referred to as

respondents. For convenience, I refer to the parties as they are in the main proceedings.

A. INTRODUCTION OF THE PARTIES AND ISSUES

2. The fourth and fifth respondents are members of a joint venture known as De Rust JV in terms of which they agreed to develop certain properties. The properties with which the underlying litigation is concerned are situated in the Doornhoek Equestrian Estate.

3. During December 2019, the De Rust JV, duly represented by its authorised representative, concluded an agreement with the Doornhoek Equestrian Estate (Pty) Ltd, and a third party referred to in the papers as Jononox (Pty) Ltd. The agreement contained a clause which stated that the units to be developed by the JV shall be subject to the condition that permanent occupiers thereof shall be 40 years and older and that no children shall live in the Doornhoek Equestrian Estate. Clause 26.6 of the applicant's Constitution contains the exact same clause.

4. A dispute arose as the third, fourth and fifth respondents claimed that the clause is invalid, unlawful, unreasonable, irrational and discriminatory and is in violation of the South African Constitution. Consequently, the third respondent, as project manager of the joint venture, lodged a dispute with the first respondent.

5. The second respondent, the adjudicator who dealt with the dispute, held that the clause was unlawful and ordered that it be struck from the applicant's Constitution. It is this decision that saw the applicant lodge its application with this court on 29 June 2021 to appeal the adjudicator's decision in terms of **section 57** of the **Community Schemes Ombud Service Act**[1], the Act. The appeal was lodged by way of Notice of Motion, with Part A consisting of an urgent motion to stay the operation of the second respondent's order pending finalisation of Part B, being the appeal. The urgent motion was heard by Neukircher J on 21 July 2021 after which she granted the order summarised here below:

1. Pending finalisation of the appeal …the operation of the adjudication order by the Second Respondent dated 13 May 2021 and delivered on 21 June 2021 is stayed.
2. Pretorius Broers Konstruksie (Pty) Ltd and Johan Paul Casper Kruger are joined in this application as the Fourth and Fifth respondents.
3. The Doornhoek Residents Action Group is admitted as *amicus curiae*.
4. Permission is hereby granted to the Fourth and Fifth Respondents to file an affidavit in response to the relevant paragraphs of the Applicant's replying

affidavit, dated 15 July 2021, which affidavit must be filed on or before 16h00 on Wednesday 28 July 2021.

5. The applicant is directed to file its heads of argument in the appeal, referred to in paragraph 1 supra, on or before 16h00 on Wednesday 11 August 2021.
6. The fourth and Fifth Respondents are directed to file their heads of argument in the appeal on or before 16h00 on Wednesday, 18 August 2021.
7. The amicus curiae is directed to file its heads of argument in the appeal on or before 16h00 on Wednesday, 25 August 2021.
8. Any party may approach the Registrar of this Court, with due notice to the other parties, for the allocation of an expedited date of the hearing of the appeal.
9. The costs in respect of Part A of the notice of motion are reserved for final determination at the hearing of the appeal.

6. The application was set down for argument on 18 October 2021. It is common cause that on 1 September 2021, after close of pleadings and after all the parties had complied with Neukircher J's order, as set out in paragraph 5 of this judgement, the applicant served and filed its Notice of Appeal together with the record. This prompted a notice in terms of **Rule 30** (2) (b) from the respondents in which the following was highlighted: (a) The applicant's conduct in filing a Notice of Appeal and Record amounted to an irregular step. (b) The Notice of Appeal and record were served outside the period of 30 days provided for in **section 57** (2) of the Act, without an application for condonation. (c) The procedure adopted by the applicant in filing its application on 29 June 2021 was, in any event, not in conformity with the Full Court's decision of this Division in *Stenersen & Tulleken Administration CC* v *Linton Park Body Corporate* **2020 (1) SA 651** (GJ).

7. The respondents called upon the applicant to withdraw the irregular step, adding that absent the withdrawal, they intend to apply for an order setting aside the filing of the two documents with a costs order. It is not in dispute that the applicant did not withdraw the two records, hence the present application.

The applicant says it only followed the procedure prescribed by the Communty Schemes Ombud Service, CSOS, as set out in the Ombud's Practice Directive of 22 May 2019. The Practice Note referred to by the applicant was issued following the pronouncement made by the Western Cape High Court in *Trustees of Avenues Body Corporate* v *Shmaryahu,* case number A31/2018. The applicant states that its intention in filing the late Notice of Appeal was to identify its grounds of appeal and have a separate record. There was no intention to replace the original application. The further applicant pointed out that the respondents had made no case regarding prejudice. On this basis alone, they submitted, the application ought not to succeed. In any event, suggested the applicant, this court sits in a different division to that which decided *Stenersen*. Accordingly, it is not bound by *Stenersen*. The statement is incorrect and in stark contrast to the

submission made by counsel during argument. *Stenersen* was decided by the Full Court of this division; therefore, this court is bound by *Stenersen*.

10. The statement regarding the applicant's intention to have the grounds identified amounts to a concession that the initial application did not identify the grounds. Whether the intention was to augment or replace is not the issue. The applicant had made its case in its original application. It was not appropriate to serve a Notice of Appeal and a record long after the close of proceedings, well out of the time prescribed in the Act, just so the applicant could improve its original papers. There can be no doubt that the respondents were prejudiced.

11. I note that the Practice Directive of 2019 followed the Western Cape judgement. After the handing down of *Stenersen* judgement, the CSOS once again updated the procedure for **section 57** appeals by following the procedure set out in the *Stenersen* judgement. This can be seen from the CSOS Annual Report of 2020/21.

Submissions by the Amicus Curiae

12. Counsel for the amicus submitted that this court, in terms of the *stare decisis* rule, is not bound by the order made in *Stenersen* but by the *ratio decidendi*. Expatiating, counsel referred the court to paragraph 38 of the *Stenersen* judgement: The paragraph reads:

> ' For this reason, we also deem it sufficient for the appeal to be brought by way of a notice of appeal, which sets out the grounds of appeal, as opposed to being brought by way of a notice of motion supported by affidavit(s). '

13. It was submitted that paragraph 38 does not close the door to a person who lodges an appeal by way of Notice of Motion, as opposed to a Notice of Appeal. Simply put, the submission is that it is not fatal to lodge an appeal by way of a Notice of Motion as opposed to a Notice of Appeal. Owing to the view I take on the matter, it is unnecessary for the present purposes to answer the question whether it is fatal to use a Notice of Motion as opposed to a Notice of Appeal in **section 57** appeals. The central question in this application is whether the respondents will be prejudiced if the Notice of Appeal and Record that were filed well out of time and post the close of pleadings were allowed to stand. The answer is undoubtedly in the affirmative.

The Law

14. The general principles that have been cited in various cases on the operation of the rule can be summarised as follows: (i) Proof of prejudice is a prerequisite to succeed in an application in terms of **rule 30(1)**[2]. (ii) The court has discretion in that it may dismiss an application in terms of **Rule 30**, which has no real benefit to that party being nothing more than a stratagem to have the matter postponed[3]. The court may set aside the particular step as irregular or improper or make an order as seems appropriate[4]. [See also *Van Zyl v Government of RSA*[5]].

15. Notwithstanding the submissions by counsel, the applicant's affidavit demonstrates prejudice to the respondents. The applicant had made its case in its founding affidavit. To belatedly file a Notice of Appeal in order for the applicant to have its grounds of appeal identified must certainly be prejudicial to the respondents who had long answered the applicant's case and already filed their heads of argument. I accept the respondents' statements that they will be prejudiced.

Conclusion

16. I conclude that, left as it is, the applicant's Notice of Appeal and Record which were filed outside the time allowed in the Act, post the close of pleadings and after the parties had exchanged heads of argument, will prejudice the respondents. Thus, the proper course is to set aside the entire Notice of Appeal and Record. The amicus asked that any losing party pay its costs.

Order

17. The application succeeds. The applicant's Notice of Appeal and Record are set aside as an irregular step.

18. The applicant must pay the costs of the respondents and those of the Amicus Curiae for this application.

Changing Tides 17 (Pty) Ltd v Schuurman and Others (34524/2016) [2022] ZAGPPHC 140 (16 March 2022):

Rule 46(2) or service of the conditions of sale on the respondents 15 days prior to the date of sale as provided for in Rule 46(8)(c) had taken place. The respondents

say this never took place and that, should the sale to the highest bidder be ratified, the sale might be attacked on this ground and transfer to Mr Ledwaba could not validly be effected.

[1] Introduction

This is an application by the judgment creditor for the ratification of a sale in execution of an immovable property where the reserve price fixed by this court had not been attained. The judgment debtors are represented by Mr Venter, an attorney appointed by the Legal Practice Council, acting pro bono. He is thanked for his assistance. The judgment debtors are referred to as "the respondents", which reference then excludes the cited Municipality.

[2] Relevant chronology

2.1 On 11 October 2018 default judgment was granted by the then Deputy Judge President of this court for payment of the outstanding amount on a home loan in the amount of R1 160 417, 43, together with interest and costs.

2.2 As part of the aforesaid order, a certain immovable property belonging to the respondents situated in Secunda (the property) was declared specially executable. A reserve price of R900 00, 00 was set in terms of the provisions of Rule 46A(8)(e). Execution of the order was suspended for four months.

2.3 Almost a year later, on 18 September 2019, the sale in execution took place. It was reasonably well attended by nine bidders as well as the judgment creditor's attorneys.

2.4 The highest bit at the auction was for R 800 000.00, made by one Jacob Mphogato Ledwaba.

2.5 The sheriff gave a report in respect of the sale in terms of Rule 46A(9)(d), confirming the above and stated his opinion that the reserved price might not be met, even at another sale in execution.

2.6 On 9 March 2020, the judgment creditor launched the application under consideration, applying for an order ratifying the sale in execution at R800 000,00 to Mr Ledwaba, alternatively that the property be re-sold without a served price.

2.7 The abovementioned application was initially to be heard on 30 September 2020. Service of the application took place on 4 September 2020 by affixing a copy at the principal door of the property.

2.8 The matter did not proceed on 30 September 20202 and was set down again for hearing on 13 June 2021. On 7 June 2021 the respondents gave notice of opposition to the application and delivered their opposing affidavits on 10 June 2021. This caused the application to be postponed and the respondents were ordered to pay the wasted costs occasioned by the postponement.

2.9 On 10 August 2021 the judgment creditor delivered its replying affidavit, whereafter heads of argument were exchanged and the matter found its way to the opposed motion court roll.

[3] The respondents' opposition

The respondents' only opposition persisted with was that there is no evidence available that the preceding steps to a sale in execution, namely a formal attachment as provided for in Rule 46(2) or service of the conditions of sale on the respondents 15 days prior to the date of sale as provided for in Rule 46(8)(c) had taken place. The respondents say this never took place and that, should the sale to the highest bidder be ratified, the sale might be attacked on this ground and transfer to Mr Ledwaba could not validly be effected.

[4] Not only could the judgment creditor not refute the above denials of service but the return of service which was produced in respect of the conditions of sale, was in respect of service on 17 May 2021, that is after the sale. It may be that documents may have gone missing or lost and it is surprising that the respondents only raise this issue so long after the sale. It was also not raised in correspondence prior to the preceding urgent application. Some doubt exists therefore, about the bona fides of their opposition. Be that as it may, there might be a risk to an innocent bidder which in my view should be avoided.

[5] Appropriate relief

5.1 In terms of Rule 46A(9)(c) where the reserve price is not achieved at an auction, the court may, after consideration of all relevant factors, "*order how execution is to proceed*".

5.2 Despite the respondents collateral allegations regarding the sale in execution, they have not applied for the actual sale in execution to be found to be invalid and no such declaration has been made. The allegations made by them are therefore merely considered as possible risk factors, militating against the granting of an order in terms of Rule 46(9)(e), namely a sale to the person who made the highest bid. I was also concerned about whether that person, Mr Ledwaba, was still able or willing to purchase the property after such a long time has elapsed. The parties could not assist the court in this regard, which is another factor militating against a ratification of a sale to him as highest bidder.

5.3 Taking all these factors into consideration, I am of the view that a fresh sale in execution should take place. Mr Venter conceded that this would be the appropriate consequence of the respondents' opposition to the application. This is also the alternative relief claimed by the judgment creditor.

5.4 The question then is whether the same or a different reserve price, or none at all, should be set. The returns of service made by the sheriff since the granting of the order, all indicate that the property is no longer the primary residence of the respondents. On 28 May 2019 the warrant of execution in respect of the property which has been declared executable, was served at the property on a Mrs Brunner who was a tenant thereof. She was also served with a copy of the warrant as being the occupier of the property when the sheriff obtained a detailed description of the property.

5.5 In their answering affidavits, the respondents declined to furnish their current addresses. They also failed to answer to the express allegation made in the judgment creditor's founding affidavit supporting the current application that the property is no longer the primary residence of the respondents and

that therefore, there is no need for a reserve price to be set, contrary to what may have been the initial position when executability was considered in terms of Rule 46(A)(1). The protection of primary residences as contemplated by this Rule is therefore no longer necessary.

5.6 Taking all these factors into consideration, I am of the view that the alternative relief claimed by the judgment creditor, should be granted. Taking into account the absence of proof of preceding steps but also the technical nature of the defence and the lateness thereof, in the exercise of my discretion, I determine that each party should pay its own costs.

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5.6 Taking all these factors into consideration, I am of the view that the alternative relief claimed by the judgment creditor, should be granted. Taking into account the absence of proof of preceding steps but also the technical nature of the defence and the lateness thereof, in the exercise of my discretion, I determine that each party should pay its own costs.

[6] Order

1. The immovable property which has been declared executable by the order of this court dated 11 October 2018 is to be sold by the sheriff at a new sale in execution, without any reserve price.

2. Each party shall pay its own costs of this application.

Koosimile v Mahomed and Others (2022/6409) [2022] ZAGPJHC 114 (3 March 2022)

Spoliation application-posession restored

[1] The applicant seeks a spoliation order in terms of rule 6 (12) (a) of the Uniform Rules of Court. She seeks the restoration of possession of the premises situated at ERF [....] WITFONTEIN EXTENSION 30, REGISTRATION DIVISION IR, PROVINCE OF GAUTENG, known as [....] Civet Place, Serengeti Golf and Wildlife Estate, Witfontein, Kempton Park ("the property"), until the end of February 2022. She was the previous owner of the property. The application is opposed by the first to the third respondents. The fourth respondent has filed a notice and abides the decision of this Court. After hearing closing arguments on the matter, I ordered accordingly but reserved my reasons.

[2] The order reads:

2.1 The applicant's non-compliance with the forms, service and time limits for filing of affidavits provided for in the Uniform Rules of Court is hereby condoned and the matter is heard as one of urgency;

2.2 The First to Third Respondents are ordered to immediately restore to the Applicant, full and undisturbed possession of the premises situated at Erf [....] Witfontein Extension 30 Township, [....] Civet Place, Serengeti Golf and Wildlife Estate, Kempton Park, until the 28th of February 2022.

2.3 The Fourth Respondent is directed to give the Applicant immediate and unrestricted access to the Estate where the aforesaid premises are situated, until the 28th of February 2022.

2.4 The First to Third Respondents are directed to pay the Applicant's costs of the application.

These Are My Reasons

[3] In *limine*, the first to third respondents took issue that the applicant caused this application to be served on their attorneys of record, Gilpin Attorneys and not in accordance with the Rules of Court. Gilpin Attorneys were the attorneys of record for the spoliation application brought on 2 February 2022 in the Tembisa Magistrate' Court by the applicant. They however, admit receiving a copy of the application.

[4] Rule 6(12)(a) provides that: "In urgent applications the court or a judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as it deems fit". This being urgent court proceedings, and in addition that there was effective service, the point in *limine* holds no water and is accordingly dismissed.

[5] The facts are largely common cause. As indicated, the applicant is the previous owner of the property. The property was purchased by the first, second and third respondents on 5 August 2021 at a public auction conducted by the Sheriff of Kempton Park and Tembisa, pursuant to a warrant of execution issued by the Registrar of this Court. On 30 November 2021 the first to third respondents became the registered owners of the property.

O' Connell v City of Johannesburg Metropolitan Municipality (19781/2020) [2022] ZAGPJHC 134 (10 March 2022):

[1] The applicant in this matter had an account for municipal services with the respondent.

[2] The applicant sold his property and the new buyer became responsible for the payment of services.

[3] The applicant applied to the respondent that his liability for municipal charges ceased on the date that the property was transferred to the purchaser and further to pay out any amount to the applicant that remained as credit on the applicant's account, as at the date of transfer.

[4] Applicant waited for 10 months for this to happen but to no avail.

[5] On or about 8 August 2020 the applicant filed an application against the respondent for the following relief:

5.1 Payment of the amount of R13773-23;

5.2 Closing of the account number [....];

5.3 Costs of the application on an attorney and client scale.

[6] On 14 September 2020 respondent, on its own accord, paid the amount claimed by applicant and closed the account.

[7] All that remained as a *lis* between the parties was the claim for costs as the respondent made no tender in this regard.

Mabizela v Minister of Police and Another (2020/24049) [2022] ZAGPJHC 170 (11 March 2022)

Legal Proceedings against certain Organs of State Act-condonation application-

This is an application wherein the Applicant seeks condonation for the late filing of a notice in terms of Section 3 of the Institution of Legal Proceedings against certain Organs of State Act**[1]** (hereinafter referred to as "the Act").

[2] The application is opposed by both Respondents.

BACKGROUND FACTS

[3] The Applicant was arrested on 26 October 2017 and charged with common assault. He alleges that he was found not guilty by the Court. This is as far as the Applicant goes, in this application for condonation, in dealing with the merits of his action against the Respondents.

[4] The Applicant indicates that he approached the Police Station at Moroka and was unsuccessful in trying to convince the personnel to assist him in obtaining his docket information.

[5] The Applicant had a notice issued in terms of Section 3 of "the Act" which notice was sent by registered post to the Respondents on 21 January 2020.

[6] The Applicant had a summons issued against the Respondents on 19 September 2020 and the said summons was served on the Respondents on 21 September 2020.

[7] A notice of intention to defend was filed by the Respondents on 8 October 2020 and on 18 November 2020, a plea and special plea was filed by the Respondents.

Insofar as the attitude of the Respondent is concerned, one has to evaluate same against the objective facts of the Respondent knowing the explanation of the Applicant before filing their own answering affidavit and whether this knowledge worked against them and prejudiced them in any way. In my view, no such prejudice has been shown relating to the facts contained in the founding, supplementary and replying affidavit. The fact remains that the Applicant was thwarted by the First Respondent in his efforts to access information relating to his case.

[22] However, this is not the end of the matter either. The further question in evaluating the requirements of Section 3 (4) of the Act is whether the Applicant, on the papers, has shown good prospects of success**[10]** in the action against the Respondents. Just as the Applicant dealt cursorily with the explanation for the delay in his founding, the same applies to the requirement of 'good prospects of success'. In an application for condonation this could sound the death knell for an Applicant. Unfortunately for the Applicant, the deficiency of the application on this ground, counts against him and the Court must perforce refuse the application for condonation for the reason that he has not dealt with the requirement of 'good prospects of success' sufficiently or at all.

CONCLUSION

[23] Accordingly, the application for condonation must, for the reason set out above, fail.

COSTS

[24] It is trite that the Court has a discretion with regard to costs but such discretion must be exercised judicially and the norm of the successful party being entitled to costs may only be deviated from in exceptional circumstances. I find no exceptional circumstances to deviate from the norm and the Respondents are entitled to their costs.

Barzani 53 (Pty) Ltd v Body Corporate Witfield Ridge (2022/9286) [2022] ZAGPJHC 146 (14 March 2022)

Authority-authority of the deponent to the founding affidavit who is a director of the applicant- affidavit allowed

[1] The matter was heard on 10 March 2022 and I handed down the following order on 11 March 2022, as corrected.

"*1. The application is dismissed.*

2. The applicant is ordered to pay the costs of the application."

[2] I set out the reasons for the order below.

Urgency

[3] The applicant satisfactorily set out grounds for urgency and prejudice should the matter be heard only in the ordinary course. I held that the matter was sufficiently urgent on the day to merit a hearing.

The authority of the deponent to the founding affidavit

[4] In the answering affidavit the respondent disputes the authority of the deponent to the founding affidavit who is a director of the applicant. As the applicant correctly points out, the respondent failed to invoke the provisions of Rule 7 of the Uniform Rules and while the allegation of authority is made cursorily without reference to a resolution of the applicant and without elaboration in the replying affidavit, I am satisfied on a reading of the papers that the deponent did have the necessary authority.

The merits of the application: Introduction

[5] The applicant holds a certificate of real right under **section 12(1)(e)** of the **Sectional Titles Act, 95 of 1986**, in terms of which it has the right to erect buildings in the Witfield Ridge Sectional Title Scheme at Erf [....], Witfield Ext 46 in Ekurhuleni. It developed phases 1 and 2 of the complex and is at the moment engaged in the building of phase 3. The development commenced in 2016 and the development of phase 3 in August 2021.

[6] The applicant now brings a spoliation application namely that the water supply to the building site of phase 3 be restored to it (an application in respect of the supply of water to unit 188 of phase 2 was abandoned in the replying affidavit), and an order that free access via the main gate to the complex be restored to it. The application takes place against the background of other litigation between the parties.

[7] It is convenient to deal with the two legs of the application separately.

The authority of the deponent to the founding affidavit

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Access to water

[8] The applicant complains that the water supply to the building site was terminated by the respondent by cutting the water pipe leading to the building site on or about 28 February 2022.

[9] The respondent alleges that the applicant unlawfully obtain access to water supply of phase 1 and 2 of the complex when construction commenced of phase 3. There was no water meter in place to record the usage. The applicant ought to have arranged for the installation of its own water meters to monitor its usage and then paid for such usage which it has failed to do.

[10] The respondent also denies that it was in any way involved in disconnecting the water supply or authorising the disconnection. It states that any person attending to such a disconnection would have been acting other than on behalf of the respondent.

[11] The respondent's evidence that the water supply was not disconnected by the respondent is supported out by a letter**[1]** written by the applicant to the Ekurhuleni Metropolitan Municipality on 21 February 2022 where the applicant stated that "*some residents thought it good to cut our water supply"*. There is no evidence on the affidavits to suggest that the respondent spoliated the water supply and on the applicant's own version in correspondence to the Council, the water supply was disconnected by third parties who were alleged to be residents in the complex.

[12] In the replying affidavit**[2]** the applicant deals with the respondent's denial by merely stating that "*it was only respondent who would benefit from terminating the water supply which it did."* The only evidence presented by the applicant is that it makes the inference that the respondent terminated the water supply because it was the only party who would benefit. The applicant is therefore unable to satisfy the onus to prove its allegations and also fails to meet the so-called Plascon-Evans test.**[3]**

[13] I was informed from the bar that the respondent advised the applicant on 10 March 2022 that a prepaid meter had now been installed by the respondent for the use of the applicant.

The access gate

[14] It is clear from a reading of the papers that it is not the case for the applicant that it was spoliated and deprived of its occupation of the premises or from access to the premises, but rather that it was spoliated from the use of a specific access gate used by the applicant since the commencement of building operations in 2016.

[15] In support of its application the applicant relies on an email**[4]** message from the respondent's attorney dated 28 February 2022 where it was stated that:

"*We further wish to advise/remind you that the security company appointed by the Body Corporate (DA6 Security) has been instructed not to allow any of your contractors or staff on site at the complex. Should we receive any further communications from the Trustees in this regard, we will have no option but to take further action."*

[16] Reading this correspondence the impression is clearly created that the respondent might have been spoliated. However, the letter is not a model of clarity and it continues as follows:

"*Your contractors/staff are instructed to make use of the building site entrance only, in the continuance of building phase 3. Any further tampering with the water supply or electricity supply will be met with swift legal action, as this will be deemed trespassing on the common property at the complex."*

[17] The correspondence informs the applicant that access would be provided to the site but through a designated entrance, the '*building site entrance.'* Any uncertainty could have been discussed in a phone call or dealt with in further correspondence seeking clarification but this never happened.

[18] The relationship between builders and bodies corporate are usually dealt with in contracts that deal with issues such as access, but in the current instance no such contracts are relied upon by either party.

[19] It is common cause that the complex was developed in three phases. Phases 1 and 2 are complete and the applicant is building in phase 3. It stands to reason that an access gate that was suitable when the land was completely vacant might no longer be suitable when houses have been built and people are now living in the complex. Circumstances when phase 1 was commenced with, would be very different to circumstances when two phases are complete and a third is being embarked upon. A body corporate such as the respondent would be within its rights to regulate access to the premises for the sake of the convenience and safety of residents and owners, and for good management.

[20] When it is no longer feasible in the opinion of the body corporate to use a specific entrance gate, there cannot be any objection in principle to access being granted to contractors through another access gate. Regulating access is one of the prime purposes of the management of a body corporate such as the respondent. Regulating access does not amount to spoliation. To use just one obvious example, a person who habitually enters premises can not complain of spoliation when told that access will henceforth be controlled and he would have to present proof of his identity when entering the premises, or that his temperature will be taken to limit exposure to disease.

[21] It is unrealistic to expect the management of the busy complex to continue to provide access to the complex through a gate that might have been eminently practical in 2016 but no longer serves the needs in 2022 after the completion of phases 1 and 2 of the complex. The use of a '*residents' entrance'* and a separate '*contractors' entrance'* is not uncommon and a contractor is not spoliated by having to use an alternative entrance.

[22] The applicant's statement in the replying affidavit**[5]** that the use of an alternative entrance would be an act of trespass is made with reference to a letter dated 2 March 2022.**[6]** In the letter it is said that the site entrance referred to is adjacent to privately owned property and not in a good condition. No further information or evidence is provided and it is impossible to evaluate this statement meaningfully. The bald and unsubstantiated statement that the alternative access is over private land and is not in a good condition takes the matter no further.

[23] The application is solely based on the fact that the applicant has enjoyed access since 2016 through the main gate and now insists on such access through that gate and no other. The spoliation argument does not get out of the starting blocks as the applicant was never in possession (either on its own or with others) of the gate and has not been denied access to the building site. To the contrary, the applicant was always allowed to access to the complex and is still allowed access.

The Court need not decide whether the complained-of instruction amounted to spoliation on the facts of the case. In deciding such a question the specific contractual arrangements or the absence of any contractual arrangements would have been relevant.**[7]**

[24] I therefore granted the order as set out above.

Oosthuizen and Others v Konar (21/58019) [2022] ZAGPJHC 143 (15 March 2022)

Interdict- final interdictory relief in founding papers and interim relief in the alternative, in their reply. The applicants did not justify an order for final interdictory relief in the urgent court and I considered the alternative for interim relief only.

[1] This opposed application came before me in the urgent court on 23 December 2021. I heard the parties on the urgency of the application as well as the substantive relief claimed by the applicants.

[2] The latter sought urgent interdictory relief against the respondent, interdicting him personally and on behalf of any third party, either directly or indirectly, from:

2.1 Distributing copies of a charge sheet dated 25 October 2021 issued by the Association of Certified Fraud Examiners ('ACFE') against the first and second applicants, to the clients and potential clients of the third applicant and any third parties;

2.2 Disseminating copies of any complaints made by the respondent or any party acting on the respondent's behalf to any of the third applicant's clients, potential clients and any third parties;

2.3 Defaming and making untrue statements in respect of the applicants to any of the third applicant's clients, potential clients and any third parties;

2.4 Communicating in any way, be it verbally or in writing, the contents of ACFE's charges and complaints dated 25 October 2021 against the first and second applicants, to any of the third applicant's clients, potential clients and any third parties; and

2.5 Costs of the application.

[3] The applicants claimed final interdictory relief in their founding papers and interim relief in the alternative, in their reply. The applicants did not justify an order for final interdictory relief in the urgent court and I considered the alternative for interim relief only.

[4] The first applicant, Maryka Oosthuizen, ('Oosthuizen'), was a director and internal auditor of the third applicant, Outsourced Risk Compliance and Assessment (Pty) Ltd ('ORCA'). ORCA provided risk advisory and management services to its clients.

[5] The second applicant was Joshua Asa ('Asa'), a director of ORCA and employed as ORCA's IT auditor.

[6] The third current director of ORCA, one Mulaudzi, was not a party to the application.

[7] The respondent was Dr Deenadayalen (Len) Konar ('Konar'), a businessman and former director of ORCA. Konar resigned his directorship on 2 August 2018 and allegedly transferred his shareholding in ORCA during 2018.

[47] In the circumstances, the applicants are entitled to interim relief and I propose granting an order in such terms.

[48] The costs of this application will be reserved for determination by the court seized with finalisation of this application.

[49] By reason of the abovementioned, I grant the following order:

[50] Pending final determination of:

50.1.1 This application in the ordinary course; and

50.1.2 The charges raised by ACFE against the first and second applicants:

50.2 The respondent is interdicted, both on his own behalf and / or on behalf of any other person or party, (be they natural or juristic), directly or indirectly, from:

50.2.1 distributing or disseminating copies of the charge sheet dated 25 October 2021 issued by the Association of Certified Fraud Examiners ("ACFE") against the first and second applicants, to any of the third applicant's clients or any third parties;

50.2.2 distributing or disseminating copies of any complaints made by the respondent or any person or party, (natural or juristic), acting on the respondent's behalf, to any of the third applicant's clients or any third parties;

50.2.3 Defaming and/or making untrue statements in respect of any one or more of the applicants to any of the third applicant's clients or any third parties; and

50.2.4 Communicating the contents of ACFE's charges and / or complaints dated 25 October 2021 against the first and second applicants, in any manner, verbally or in writing, to any of the third applicant's clients or any third parties.

[51] The costs of this application are reserved for determination by the court seized with finalisation of this application.

Sheriff African Board of Sheriff v Cibe and Others (30169/2021) [2022] ZAGPJHC 153 (17 March 2022)

Interdict- freeze business bank account

[1] This judgment is about whether the Applicant is entitled to freeze the business bank account of the first Respondent held with Nedbank, the second Respondent, being account number [....].

[2] The Applicant says that the purpose of the order being sought above is to enable the Applicant firstly, to investigate the first Respondent's failure to distribute proceedings of a Sale in Execution in respect of certain immovable property and secondly to add such failure as a further charge in a pending disciplinary action against the first Respondent.

[3] It is necessary to set out a brief narrative of certain facts and circumstances that gave rise to this litigation which bears on the question to be decided by me.

COMMON CAUSE ISSUE

[4] The Applicant is the South African Board of Sheriffs a statutory body established in terms of Section 7 of the Sheriffs Act No 90 of 1986 its function is to regulate the activities of persons appointed as Sheriff. It has disciplinary powers over the activities of such persons relating to their business.

[5] On the 2nd October 2018 in this Court Millar AJ granted an order at the instance of the Applicant in terms of which the third Respondent who like the first Respondent is a Sheriff was appointed as a *curator bonis* to manage and control the first Respondent's Trust Account pending the outcome of a disciplinary enquiry instituted against the first Respondent.

[6] When the order by Millar AJ was granted it was on the basis the first Respondent had made herself the subject matter of an investigation into improper conduct in terms of Section 43 of the Sheriffs Act. In the judgment by Millar AJ it is

only the administration and control of the first Respondent's Trust Account that was placed in the care of the third Respondent as *curator bonis*. The first Respondent was allowed to retain her Fidelity Fund Certificate entitling her to continue practicing as a Sheriff. It was further ordered that the interim order directing the Minister of Justice to suspend the first Respondent be discharged. That judgment stands and was never appealed against.

PRIMA FACIE RIGHT

It is trite law that an Applicant for an interdict must show a right which is being infringed or which he apprehends will be infringed and if he does not do so the application must fail (See **Coolair Ventilation Co. (SA) (Pty) Ltd vs Liebenberg and Another 1967 (1) SA 686 (W)**). In this matter the Applicant being a creature of statute is not clothed with the right to seek relief concerning the first Respondent's business account.

[38] APPREHENSION OF IRREPARABLE HARM

(i) As regards this requirement the Applicant has to show that it is reasonable to apprehend that injury will result.

(ii) The first Respondent paid the amount into the trust account. It is therefore inconceivable to still argue if irreparable harm when the subject matter has been resolved. The application also fails on this aspect.

[39] BALANCE OF CONVENIENCE

In the matter of **Minnaar vs Oberholzer Liquor Licencing Board and Another 1955 (1) SA 681 (T) at 684 A- B** it was held that a Court must weigh the prejudice the Applicant will suffer if the interim interdict is not granted against the prejudice to the Respondent if it is. If there is greater possible prejudice to the Respondent, an interim interdict will be refused.

[40] The first Respondent conducts business through her business account it is used to pay salaries as well as office overheads. The balance of convenience clearly favours the first Respondent.

[41] SATISFACTORY ALTERNATIVE RELIEF

(i) It is trite law that in every case of an application for an interdict *pendente lite* the Court has a discretion whether or not to grant the

application. It exercises their discretion upon a consideration of all circumstances and particularly upon consideration of the probabilities of success of the Applicant in the action.

(ii) In this matter the Applicant and or the third Respondent made no effort to consult with the Respondent to resolve the issue they chose to run to Court on an urgent *ex parte* basis when there was no need for such hurried procedure. The first Respondent has expressed her view that there is a conspiracy to rid her of that position.

[42] CONCLUSION

(i) The Applicant has failed to prove its entitlement to the relief it seeks and must accordingly fail.

(ii) The order granted on the 9th July 2021 by me is hereby confirmed.

SR v DR and Another (2980/2007) [2022] ZAGPJHC 172 (22 March 2022)

Interdict-Anti-dissipation interdict – arrear maintenance payable pursuant to divorce order – applicant seeking interim order preserving net proceeds of sale of property to recover arrear maintenance – applicant entitled to interim interdict.

[1]. In this opposed urgent application, the applicant applies for a preservation order of sorts in respect of the proceeds of the sale of immovable property by the respondent, her ex-husband, with a view to securing payment of arrear maintenance in respect of their children. As far back as 2008 this court, as part of the decree of divorce, ordered the respondent to pay maintenance to the applicant in respect of their children and he is at present in arrears with such maintenance.

[2]. The respondent is in the process of selling his property and the applicant requests that the proceeds of that sale or a portion thereof be appropriated towards the arrear maintenance. The exact order prayed for by the applicant is as follows:

(1) The second respondent be ordered to facilitate the sale proceeds of the property sold by the first respondent (section [....], Bushmill) through their trust account, and that the first respondent provides his consent thereto.

(2) The second respondent be ordered to retain all proceeds due to the first respondent in terms of the sale of the property in their trust account, pending determination of the exact amount due on arrear maintenance by the first respondent to the applicant.

(3) The second respondent be ordered to pay the applicant directly any amount due on maintenance as determined, from the proceeds so retained of the first respondent.

[3]. The second respondent is a firm of attorneys, which has been requested to attend to and is in fact attending to the registration of the transfer of the first respondent's property, being Sectional Title section [....], Bushmill.

[4]. It is the applicant's case that the first respondent is at present in arrears with payment of maintenance in respect of their two children, payable in terms of an order of this Court dating back to 5 December 2008. The applicant estimates such arrear maintenance to amount to about R200 000, but she has as yet not done the exact calculation. In this application she asks for an interim order preserving the proceeds of the sale of the first respondent's property pending the determination of the exact amount due to her in respect of such arrear maintenance. The first respondent does not dispute that he is at present in arrears with payment of the maintenance. He also does not seriously take issue with the applicant's claim that the arrears at present amount to approximately R200 000. He does however aver that he fell into arrears through no fault on his part and as a result of circumstances beyond his control, notably the fact that on at least two occasions he was retrenched from formal employment, leaving him in dire financial straits. He nevertheless paid whatever he could towards the maintenance of his children from his meagre resources and even from the proceeds of personal loans obtained from members of his family.

[5]. So, for example, the applicant's attorney, on 25 August 2021, addressed a demand to the first respondent, informing him that as at that stage he was in arrears with his maintenance payments in an amount of R188 067. The first respondent's response to the demand was to the effect that he was experiencing employment and financial difficulties. He also proposed that he be allowed to make monthly payments of R10 000 per month towards the current maintenance payable, which, according to the applicant, amounted at that stage to R18 000 per month. There would therefore have been a shortfall of R8000 per month. This shortfall, so the applicant claims, she had to foot.

[6]. At present, so the applicant avers, the first respondent continues to make short payments in respect of his maintenance obligations, which, needless to say, exacerbates the situation. The applicant is of the view that, because of the financial difficulties experienced by the first respondent, he is busy liquidating his assets, whereafter, so the applicant alleges, he will most likely sequestrate himself and claim that the cash was used to pay off other debts, such as those payable to his family. Once this has happened, so the applicant alleges, there will be little or no chance of her recouping any of the arrear maintenance that the first respondent owes her.

[7]. The applicant alleges that this application is urgent as the registration of the transfer is imminent. The applicant fears that, if the net proceeds from the sale of the first respondent's property is paid out to him, he will not utilise any of that money to pay towards the arrear maintenance. The applicant's fear, in my view, is well-founded and her application is urgent. The point is that the first respondent is singularly reluctant to make a commitment to the applicant that he will make a payment from the proceeds to the arrear maintenance.

This is the relief which the applicant *in casu* is entitled to. What she essentially seeks is an interim interdict to secure the proceeds of the sale pending the determination of the exact amount of the arrears payable to her pursuant to an order of this court. It is indeed an interdict as envisaged in the *Knox D'Arcy* case.

[13]. In my view, the applicant has established that she has a *prima facie* case that she is entitled to the proceeds of the sale of the first respondent's property. She will suffer irreparable harm since the said property is the first respondent's only asset. The applicant also has no other satisfactory remedy against the first respondent, who has made it clear that he does not regard as priority his maintenance obligations to the children. In fact, the first respondent views his indebtedness to his family as enjoying preference over his maintenance obligations. There appears to be no logic to the first respondent's reasoning, especially if regard is had to the fact that there is a court order in place, which obliges him to make payment of the maintenance due to the applicant. The same cannot be said of his indebtedness due to his father.

[14]. Without an order interdicting the proceeds of the sale of the property the applicant will be left with little tangible options to protect her rights and interests. The balance of convenience therefore favours the applicant.

[15]. In the circumstances I find that the applicant has set out a *prima facie* case that the proceeds of the sale should, in the interim, be interdicted until the calculation of the exact amount of the arrear maintenance has been finalised.

[16]. The applicant is however not entitled in this urgent application to an order for payment of arrear maintenance, still to be determined. For starters, an order to that effect is not a competent order as it would not be executable. Moreover, the exact calculations have to be done, whereafter the applicant would be entitled to obtain a court order for payment of the said sum, alternatively, to have issued a writ for payment of the amount due.

Order

[17]. Accordingly, I make the following order: -

(1) The applicant's application is urgent.

(2) Upon the registration of the transfer of the first respondent's property, being Sectional Title section [....] Bushmill, the net proceeds are to be paid to the second respondent, to be held in trust, pending the determination and the calculation of the

exact amount of the arear maintenance payable by the first respondent to the applicant pursuant to and in terms of the order of this court dated 5 December 2008.

(3) The first respondent shall pay the applicant's costs of this urgent application.

ABSA Bank Limited v Go On Supermarket (Pty) Limited (The Spar Group Limited intervening) (9442/2022) [2022] ZAGPJHC 173 (24 March 2022)

Urgent application – General notarial bond over movable property – Perfecting of – Effect of debtor placed under business rescue – Business Rescue Practitioner consenting to the perfection of general notarial bond over movables – creditor obtains possession by leaving debtor in control and possession – pledge perfected – symbolic transfer of possession sufficient to constitute a pledge – real right established – application granted to limited extent.

(1) The intervening party is granted leave to intervene in this urgent application.

(2) The applicant's non-compliance with the rules of this Court in respect of time periods and service of processes, is condoned and compliance with such rules are dispensed with and this application is enrolled as an urgent application in terms of Uniform Court Rule 6(12).

(3) Subject to the Spar Group Limited's pledge and real right of possession over all the assets and equipment as contained in annexure A to the Special Notarial Bond BN9369/2018 held by and in favour of the Spar Group Limited, the applicant is authorised to perfect its security of pledge under General Covering Notarial Bond BN16/43750, limited to the amount of R6 000 000, in respect of those assets of the respondent that are not the subject of the Spar Group's Special Notarial Bond BN9369/2018, situated at the respondent's premises at shop 12 and 13, Lyndhurst Superspar, Lyndhurst Square Shopping Centre, corner Drome and Pretoria Road, Lyndhurst, Gauteng, 2192 or wherever else situated.

(4) The Sheriff of the High Court is authorised to attach and take a written inventory of and value so much of such moveables and stock-in-trade situated at the premises, limited to the value of R6 000 000 ('the attached assets') and thereafter hand such written inventory to the applicant's attorneys and the Business Rescue Practitioner.

(5) This order of perfection in respect of the movables and stock-in-trade shall vest with the applicant a continuing real right of attachment over such attached assets, subject to the conditions that:

5.1 The applicant itself shall not take physical possession or remove such attached assets;

5.2 The Business Rescue Practitioner is allowed to use the attached assets in its day-to-day trading activities of the respondent, while in business rescue.

(6) Notwithstanding that provided for in paragraph 4 above, the Business Rescue Practitioner is nominated as and will at all times act as the applicant's agent for the purposes of the applicant exercising control and physical possession of and over the attached assets.

(7) The applicant may not, without the leave of the Court or with the written consent of the Business Rescue Practitioner, sell, alienate and/or dispose of the attached assets.

Trustees for the time being of the Burmilla Trust and Another v President of the RSA and Another (64/2021) [2022] ZASCA 22 (1 March 2022)

Exceptions- exception should have been dismissed in respect of claim for value of mining lease and costs of prosecution of that claim before SADC tribunal – exception otherwise correctly allowed – claim for moral damages would in law have been denied by SADC tribunal for failure to exhaust domestic remedies – no basis pleaded for wasted legal costs to be awarded as constitutional damages.

International law – appellants claimed before Southern African Development Community Tribunal (SADC tribunal) that Kingdom of Lesotho (Lesotho) had violated SADC treaty by expropriation of valid mining lease without compensation and were liable for moral damages – allegation that respondents violated appellants' rights under s 34 of Constitution by participating in prevention of prosecution of claims before SADC tribunal – exception to claim for constitutional damages under s 172(1)*(b)* in respect of value of mining lease, moral damages, costs of claim before SADC tribunal and wasted costs of subsequent legal proceedings – whether SADC tribunal could in law have held that mining lease was valid despite Lesotho court decisions to contrary – under international law SADC tribunal not bound by Lesotho court decisions – could reach different conclusion on proper ground – proper grounds alleged – whether *Van Zyl v Government of Republic of South Africa* **2008 (3) SA 294** (SCA) precluded claim in respect of value of mining lease – decision not *res iudicata* in respect of any issue in present action – exception should have been dismissed in respect of claim for value of mining lease and costs of prosecution of that claim before SADC tribunal – exception otherwise correctly allowed – claim for moral damages would in law have been denied by SADC tribunal for failure to exhaust domestic remedies – no basis pleaded for wasted legal costs to be awarded as constitutional damages.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Tuchten J sitting as court of first instance):

1 The appeal of the first appellant is upheld with costs, including the costs of three counsel.

2 The appeal of the second appellant is dismissed with costs, including the costs of three counsel.

3 The order of the court a quo is set aside and replaced with the following:

‘(a) The exception against the claims of the first plaintiff in respect of the value of the Rampai mining lease and the costs of the prosecution of that claim before the SADC tribunal, is dismissed with costs, including the costs of two counsel;

(b) The exception is allowed in respect of all other claims of the first plaintiff and they are struck out;

(c) The exception is allowed in respect of all the claims of the second plaintiff and they are struck out with costs, including the costs of two counsel.’

4 The appellants may seek to amend their particulars of claim by notice delivered within 30 days of the date of this judgment.

[1] The first appellant, the trustees for the time being of the Burmilla Trust (the Burmilla Trust), and the second appellant, Mr Josias van Zyl, instituted action in the North Gauteng Division of the High Court, Pretoria against the first respondent, the President of the Republic of South Africa in his official capacity as head of state and the second respondent, the Government of the Republic of South Africa, for payment of damages in the total sum of approximately R800 million, as well as interest and costs. In their particulars of claim the appellants put forward various claims, which will be fully discussed below. The respondents excepted to the particulars of claim, alleging on 14 grounds that they did not disclose a cause of action in respect of any of the claims. The court a quo (Tuchten J) upheld most of the grounds of exception. Although it did not say so explicitly, the effect of the order was to put an end to each of the claims of the appellants. The court a quo granted leave to the appellants to appeal to this court. In broad terms the issue on appeal is whether the amended particulars of claim disclosed a cause of action in respect of all or any of the claims.

Background

[2] As I shall explain, aspects of the protracted litigation between the parties were decided by this court in *Van Zyl and Others v Government of the Republic of South Africa* (*Van Zyl SCA*).[1] Already in that judgment, handed down during September 2007, Harms ADP said that the case had a long and convoluted history, the salient parts of which he proceeded to set out in the judgment. It is unnecessary to repeat that exposition. Nor is it necessary to fully set out the relevant events subsequent to the judgment in *Van Zyl SCA*, many of which have also been found to be facts in the arbitral award and foreign judgments referred to below, as well as in the judgment of the Constitutional Court in *Law Society v President of the RSA*[2]. This is so, of course, because we are dealing with an exception and the question is whether on the facts alleged by the appellants, they disclosed a cause of action in law. I shall in due course embark upon a detailed analysis of the particulars of claim. For a proper understanding of this judgment it is necessary that I set out, at this juncture, the essential factual allegations upon which the appellants rely. These are the following.

[3] During 1988, the Government of the Kingdom of Lesotho (Lesotho) granted five mining leases to Swissborough Diamond Mines (Pty) Ltd (Swissborough), a company incorporated in Lesotho and controlled by Mr van Zyl. The mining leases would *inter alia* entitle Swissborough to mine on and extract diamonds from the land to which the mining leases related. These mining leases were registered in the Lesotho Deeds Registry, after having been approved by various officials of Lesotho. Only one of the mining leases is directly relevant to the present matter, namely the one that pertains to the Rampai area. This mining lease and the rights that emanated therefrom has for decades been referred to as the Rampai lease and I shall follow suit.

[4] It transpired, however, that the area of the Rampai lease would largely be submerged by the execution of the Lesotho Highlands Water Project, a joint venture in terms of a treaty between the second respondent and Lesotho. In order to avoid having to pay compensation for the expropriation of the Rampai lease, the emergent military government of Lesotho attempted to revoke the mining leases. These attempts were prevented by decisions of the Lesotho courts. During 1995, however, the Lesotho Highlands Development Authority (LHDA) applied in the Lesotho High Court for an order declaring the Rampai lease void *ab initio*. The application was essentially based upon the allegation that under Lesotho law the grant of any rights to land was subject to the consent of the relevant Chiefs and that such consent had not been obtained. The Lesotho high court granted the relief sought and during 2000 its order was upheld by the Lesotho Court of Appeal. As I shall demonstrate, these two decisions (the Lesotho court decisions) play a central part in the determination of the matter.

[5] The Treaty of the Southern African Development Community (the SADC treaty) came into force on 30 September 1993. It established the Southern African Development Community (the SADC). Lesotho was one of the original signatories of the SADC treaty. The Republic of South Africa acceded to the SADC treaty and this was duly ratified by both houses of Parliament. In terms of Article 10 of the SADC treaty, the Summit consists of the heads of all the member states and is '. . . responsible for the overall policy direction and control of the functions of the SADC'. Article 4(c) of the SADC treaty provides that the 'SADC and its member states shall, [inter alia], act in accordance with . . . human rights, democracy and the rule of law'. Article 6.1 provides:

'Member States undertake to adopt adequate measures to promote the achievement of the objectives of SADC, and shall refrain from taking any measure likely to jeopardise the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of this Treaty.'

[6] The Southern African Development Community Tribunal (the SADC tribunal) was established in terms of Article 16 of the SADC treaty. The SADC Tribunal Protocol approved by the Summit during 2001 (the Protocol) provided for the composition, jurisdiction and powers of the SADC tribunal. Article 3.1 of the Protocol determined that the SADC tribunal had to consist of no less than 10 members. Importantly, Article 15.1 provided that the SADC tribunal had jurisdiction over

disputes between states and between natural or legal persons and states. In terms of Article 23 the Rules of Procedure of the SADC tribunal annexed to the Protocol (the Rules) formed an integral part of the Protocol.

City of Tshwane Metropolitan Municipality v Brooklyn Edge (Pty) Ltd and Another (928/2020) [2022] ZASCA 23 (1 March 2022)

Court orders-speciific performance- Contract – sale by municipality of immovable properties – challenge by municipality of order enforcing sale agreement – suggested tacit condition – not necessary for business efficacy of contract – bystander test not satisfied – purchase price not undetermined or undeterminable – compliance by municipality with s 79(18) of Local Government Ordinance 17 of 1939 – s 14 of **Local Government: Municipal Finance Management Act 56 of 2003** – no retrospective effect and not applicable – no interest in arrears – *in duplum* rule not applicable – order varied only in respect of interest.

ORDER

On appeal from: North Gauteng Division of the High Court, Pretoria (Strijdom AJ sitting as court of first instance):

1 The appeal succeeds only to the extent reflected in para 3 below.

2 The appellant is directed to pay 80% of the first respondent's costs of appeal.

3 Paragraph 6.2 of the order of the court a quo is deleted and substituted with the following:

'6.2 The first plaintiff shall pay the defendant an amount of R8 550 000 plus interest thereon at the bond interest levied by the defendant's approved banker, calculated from 1 February 2005 to date of payment, in respect of which payment the plaintiff shall provide RVK or its successors with a guarantee, acceptable to RVK or their successors, from a bank or financial institution.'

[1] On 31 July 2003, the appellant, the City of Tshwane Metropolitan Municipality (the City) and the first respondent, Brooklyn Edge (Pty) Ltd (Brooklyn Edge), then known as Nieuw Pivot Investments (Pty) Ltd, entered into a deed of sale. In terms thereof the City sold the immovable properties that I shall describe shortly, to Brooklyn Edge. The deed of sale provided that the properties may be transferred into the name of a nominee of the purchaser. Alleging that Brooklyn Edge had so nominated it, the second respondent, Pivot Property Development (Pty) Ltd, instituted an action in the North Gauteng Division of the High Court, Pretoria in which it essentially claimed enforcement of the deed of sale. As a co-plaintiff, Brooklyn

Edge claimed the same relief in the alternative. The court a quo (Strijdom AJ) held that the second respondent had not accepted the purported nomination, but gave judgment in favour of Brooklyn Edge. It refused the City's application for leave to appeal, which was subsequently granted by this Court. The second respondent did not file a cross appeal. The broad issue in the appeal is whether the court a quo correctly ordered specific performance of the deed of sale.

Background

[2] Erven 162, 163, 164, 165, 193, 194 and portions 1 and 2 of the remainder of erf 195, Muckleneuk (the properties) constituted a public open space within the area of jurisdiction of the City. On 20 June 2003, the council of the City accepted the recommendations of its relevant departments and resolved that the public open space be closed permanently (the closure) and that the properties be sold to Brooklyn Edge at the recommended price. As I have said, the deed of sale was signed on 31 July 2003. It set the combined purchase price of the properties at R9,5 million. A 10% deposit was payable simultaneously with the signing of the deed of sale. Before us, the City does not challenge the finding of the court a quo that the deposit was duly paid.

[3] The provisions of the deed of sale in respect of the payment of the balance of the purchase price play a central part in the appeal. They state:

'1.2.2 The balance namely R8 550 000,00 (Eight Million Five Hundred and Fifty Thousand Rand) plus interest thereon at the bond interest levied by the Seller's approved Banker, against registration of transfer of the Property in the name of the Purchaser. Provided that no interest shall be payable until the closure and rezoning referred to in clauses 7.1 and 7.3, have been completed or for a period of 18 (eighteen) months from the date of signing of the Deed of Sale, whichever period expires first. Provided further that, should the closure and rezoning not be finalised successfully, this transaction shall be deemed to have been mutually cancelled by the parties, in which instance the Seller will refund the Purchaser all payments made by him in terms of this Deed of Sale, excluding those in respect of assessment rates and service charges, if any, plus interest at the rate referred to above.

1.2.3 The Purchaser must provide the Seller with a guarantee from a bank or financial institution for the balance of the purchase price plus interest payable against registration of transfer of the Properties in his name within 30 (thirty) days after being requested thereto by the Seller's attorney which request however shall not be made before finalisation of the closure and rezoning referred to in clause 7.1 and 7.3 herein.'

[4] Clauses 7.1 to 7.3, in turn, provide as follows:

'7.1 The Seller shall in terms of the provisions of section 67 of the Local Government Ordinance, 1939 (Ordinance 17 of 1939) close the property as a public open space.

7.2 The Property will only be transferred after the publication of the amendment scheme contemplated in clause 7.3 below.

7.3 The Purchaser shall at his own cost and risk, apply in terms of the appropriate provisions of the Town-planning and Townships Ordinance, 1986 (Ordinance 15 of 1986) and take appropriate steps in terms of other applicable legislation to amend the Pretoria Town-planning Scheme, 1974, by rezoning the Property essentially in accordance with the Annexure B conditions, attached hereto as Annexure C, which conditions however may on request of the Purchaser be amended in the sole discretion of the Seller.'

Clause 7.3 envisages the rezoning of the properties in terms of the City's town planning scheme to 'special use' as well as the removal of restrictive conditions from their title deeds (the rezoning).

[5] In terms of clause 10.1, Brooklyn Edge is obliged 'prior to or simultaneous with any development' of the properties, to at its cost relocate the existing sport and recreational facilities on the properties (two clubhouses and six tennis courts) to a property identified by the City within 30 days from the date of the deed of sale. There is no dispute about the identification of this property. Clause 10.1.5 provides:

'Owing to the fairly poor condition of the existing tennis courts and clubhouse, 50% (fifty percent) of the replacement cost shall be set off against the selling price of the property.'

[6] Section 68 of the Local Government Ordinance 17 of 1939 (the 1939 Ordinance) clothes the City with the power to effect the closure, subject to compliance with the procedure set out in s 67. The City commenced the implementation of this procedure. The objections that had been received in response to the public notice of the intention to close the public open space, were subsequently withdrawn. Section 67(9)*(a)* required the City to give effect to the closure by giving notice thereof to the Surveyor-General and the Registrar of Deeds. This formal notification is colloquially referred to as a 'closure certificate'. The City failed to comply with this requirement. The relief claimed in the action included an order directing the City to submit a closure certificate in respect of the properties to the Surveyor-general and the Registrar of Deeds.

[7] The City also obstructed the finalisation of the rezoning. It accepted Brooklyn Edge's application and processed it, but unreasonably delayed its determination. As a result, Brooklyn Edge appealed to the member of the Executive Council for Development and Planning (the MEC), in terms of s 7 of the Gauteng Removal of Restrictions Act 3 of 1996. The appeal was successful and the MEC approved the rezoning. The City was finally notified hereof by letter dated 21 November 2011. In terms of s 7(16) of the Gauteng Removal of Restrictions Act, the Registrar (defined as a designated provincial official) has to give notice of the decision of the MEC without delay, by publication in the provincial gazette, but has not yet done so. By way of the joint minute of town planning experts, the parties agreed that the publication of the required notice would bring the rezoning into effect. According to the evidence, the notice must make reference to an amendment scheme map and schedule thereto. These must be prepared by the City. The publication of the notice is in terms to town planning parlance referred to as the publication of the amendment scheme.

Alberts and Others v Minister of Justice and Correctional Services (404/2021) [2022] ZASCA 25 (9 March 2022)

Summons – multiple plaintiffs – special plea of misjoinder – test whether issues of fact and law substantially the same for each plaintiff – issues of fact and law substantially the same – convenience and absence of prejudice – permissible to join in single action – appeal upheld and special plea dismissed.

Rule 17(2)*(a)* reads:'In every case where the claim is not for a debt or liquidated demand the summons shall be as near as may be in accordance with Form 10 of the First Schedule, to which summons shall be annexed a statement of the material facts relied upon by the plaintiff in support of his claim, which statement shall ***inter alia*** comply with rule 18.'

ORDER

On appeal from: Eastern Cape Division of the High Court, Port Elizabeth (Rawjee AJ, 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 special plea is dismissed.

2 The defendant is directed to pay the costs arising from the special plea.'

[1] This appeal arises from a summons sued out by 138 plaintiffs (the plaintiffs). Each of them has claimed damages from the Minister of Justice and Correctional Services (the Minister). Each claim arises from an alleged assault on the particular plaintiff at St Albans Medium B Correctional Centre on 1 and 2 March 2014. The assaults are alleged to have been perpetrated by Correctional Services officials employed there by the Minister. They are alleged to have used batons, hands and feet to beat, slap and kick the plaintiffs. Different injuries and sequelae are pleaded for each plaintiff and each plaintiff claims R500 000 by way of general damages.

[2] The action was instituted in the Eastern Cape Division of the High Court, Port Elizabeth (the high court). The plaintiffs annexed 138 separate sets of particulars of claim to the summons.

[3] This prompted the Minister to enter a special plea which, in essence, raised two defences. First, that a combined summons is defined in rule 1 of the Uniform Rules of Court (the Uniform Rules) as a summons with a statement of claim annexed thereto. If one has regard to form 10 of the Uniform Rules, a summons must have annexed to it 'a set of Particulars of Claim'. Because 138 sets of particulars of claim were attached to the summons, the summons was irregular as not complying with form 10. Secondly, that the particulars of claim of the respective

plaintiffs do not comply with the requirement in rule 10(1) that the claims depend upon the determination of substantially the same question of law or fact.

[4] The special plea was heard separately and initially in the high court. No evidence was led. Rawjee AJ upheld the special plea and dismissed the claims of the plaintiffs. She also dismissed the plaintiffs' application for leave to appeal. The appeal is before us with the leave of this Court.

[5] On appeal, the plaintiffs addressed the same issues for determination. The first issue is whether the annexing of 138 sets of particulars of claim to a summons by the individual plaintiffs, rather than one set referring to all of the plaintiffs, was irregular in failing to comply with rule 17(2)*(a)* read with form 10. This issue depends on whether annexing more than one document rather than a single one is an irregularity and, if so, a fatal one which should result in the dismissal of each plaintiff's claim.

[6] Rule 17(2)*(a)* reads:

'In every case where the claim is not for a debt or liquidated demand the summons shall be as near as may be in accordance with Form 10 of the First Schedule, to which summons shall be annexed a statement of the material facts relied upon by the plaintiff in support of his claim, which statement shall ***inter alia*** comply with rule 18.'

There is no issue that rule 18 was not offended. And form 10 informs the defendant in the part dealing with the combined summons that the plaintiff institutes action against them:

'. . . in which action the plaintiff claims the relief and on the grounds set out in the particulars annexed hereto.'

[7] I see no reason why, when a number of documents containing the particulars in respect of each plaintiff's claim are annexed, this should result in the dismissal of all of the claims. After all, if a single, composite set of particulars had been annexed, the present action would simply include paragraphs describing each plaintiff in turn. The other 13 paragraphs which are, as shown below, virtually identical, could then follow one after the other. It may be that the manner in which the particulars of claim have been annexed is unwieldy but it is not irregular. Of course, this should not be understood as encouraging the practice. It must be said that, in argument before us, the Minister, while not abandoning this point, indicated that it was not being pressed. In my view this was prudent.

Eviction-contract – whether a person who claims possession by way of ownership of a property must prove the termination of a contractual right of another to hold such a property prior to the institution of proceedings – agreement must be unequivocally cancelled before an application for eviction is launched.

The appeal is dismissed with costs.

[1] This appeal, brought by the appellants, Mashao John Thepanyega NO and eleven others, the trustees of the Madibeng Letupi Community Trust (the Trust), is against the decision of the Limpopo Division of the High Court, Polokwane (the high court), whereby Naude AJ (Phatudi J concurring) set aside an order on appeal from the Magistrate's Court for the District of Molemole, held at Morebeng (the magistrate's court).

[2] The Trust is the registered owner of Portion 6 of the Farm Kalkfontein 812, Registration Division L.S, Limpopo Province (the farm) (the trust property). The Trust had for some time allowed the respondents, Messers Herman Letsoalo, Seja Letsoalo and Frans Ramotihane, to graze their livestock on the trust property subject to payment of a grazing fee and other related charges. The appellants, contending that the respondents had in breach of the grazing agreement failed to pay the grazing fee and other related charges, launched proceedings in the magistrate's court against the respondents for, inter alia, the eviction of the respondents' livestock (cattle) from the trust property; authorising the sheriff or the pound master to remove the livestock from the trust property; and to retain same until the grazing fee and related costs have been paid. During the hearing of the application, the Trust sought and obtained an amendment of the notice of motion so as to incorporate a prayer for an interdict preventing the respondents from grazing their livestock on the trust property. The magistrate granted the relief as sought by the Trust.[1]

[3] Aggrieved by the judgment, the respondents approached the high court. The high court upheld the appeal, and found that the magistrate's court lacked jurisdiction, and that the appellants did not make out a case for an interdict. Importantly, the high court found that it was common cause that there was a verbal agreement between the parties, which had entitled the respondents to graze their livestock on the farm belonging to the appellants, and which agreement had not been unequivocally cancelled by the appellants before they launched the application for the eviction. This appeal is with the leave of this Court.

[4] The crisp issue in this matter is whether the respondents had established a right entitling them to graze their livestock on the farm. But first, the facts.

[5] It is common cause that the respondents began to graze their livestock on the farm since 2012. According to the founding affidavit of the appellants, the respondents were allowed to graze their livestock on the farm subject to the payment of fees. However, the respondents paid no fees, and despite many requests by the appellants to formalise the agreement to establish their contractual

grazing rights on the payment of fees, the respondents refused to comply. It is apparent from the pleadings that the respondents had a right to graze their livestock on the farm with the appellants' consent. Their use of the appellants' property was therefore not unlawful. It is not alleged by the appellants that they had terminated the respondents' right to graze their livestock.

[6] At the hearing counsel for the appellants pointed out that what was being sought by the appellants was an interdict, not eviction. To succeed in their claim for a final interdict the appellants had to establish, among other things, the existence of a clear right and its infringement by the respondents. Thus, at least at the time the application was launched, there was still a valid oral agreement between the parties in terms of which the respondents were allowed to graze their livestock on the farm.

[7] The high court accordingly correctly found that there was some tacit agreement between the parties and that agreement had not been cancelled. Furthermore, the appellants do not explain why it took them four years to enforce a claim for grazing fees. More importantly, when they eventually wrote to the respondents claiming grazing fees, there was no suggestion that an election had been made to cancel the agreement.

Adams and Others v Minister of Mineral Resources and Energy and Others (1306/22) [2022] ZAWCHC 24 (1 March 2022)

Interdict- interdicted from continuing the seismic survey of the West and South-West Coast of South Africa in terms of a Reconnaissance Permit granted by the First Respondent on 18 May 2021 in terms of section 74 of the Mineral and Petroleum Resources Development Act, 2002 (MPRDA) pending- outcome of the applicants' internal appeal against the decision to grant the Reconnaisance Permit not sufficient to give relief

[1] The applicants sought a two part application. This judgment is in respect of Part A wherein the applicant sought an order on an urgent basis interdicting the third, fourth and sixth respondents from commencing, alternatively continuing their seismic survey along the West and South West Coasts of South Africa in terms of a reconnaissance permit granted by the first respondent on 18 May 2021 in terms of section 74 of the Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002) (the MPRDA) pending the outcome of the applicants' internal appeal against the grant of the reconnaissance permit to the third and fourth respondents in terms of section 96 of the MPRDA and the outcome of part B of this application. The applicants did not seek any relief against the first and second respondent in respect of Part A of the application.

[2] The applicants are individual and collective formations of small scale fishers [applicants 1-12], indigenous communities [applicants 1, 10 and 11] an environmental organisation [applicant 13] and an organisation established to enhance good governance [applicant 14]. Only the third and fourth respondents

(Searcher) delivered a notice of opposition. The other respondents filed notices to abide the decision of the court.

[3] The subject is the seismic survey on the West Coast of the Republic of South Africa in the Western Cape Province. The issue is whether an interim interdict is to be in place pending the decision on Part B.

[4] The structure of the judgment will start with the applicable law, and then continue to deal individually with the points taken, to wit, the alleged unlawfulness of the permit, the illegality of the commencement of the survey, irreparable harm, public interest and the balance of convenience, and will conclude with the remainder of the requisites for an interim interdict.

[5] "*The Law of South Africa,* second edition, volume II, Lexis Nexis, WA Joubert, defines an interim interdict as follows at 401:

"401 Definition An interim interdict is a court order preserving or restoring the *status quo* pending the final determination of the rights of the parties. It does not involve a final determination of these rights and does not affect their final determination."

At 403, the requisites for an interim interdict are set out, and these are:

(a) A *prima facie* right;

(b) A well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;

(c) That the balance of convenience favours the granting of an interim interdict; and

(d) That the applicant has no other satisfactory remedy.

403 then continued:

"In view of the discretionary nature of an interim interdict these requisites are not judged in isolation and they interact."

THE LAWFULNESS OR OTHERWISE OF THE PERMIT

[6] Section 74(4)(a) of the Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002) (MPRDA) provided that:

"74. Application for reconnaissance permit. –

(4) If the designated agency accept the application, the designated agency must, within 14 days of the receipt of the application, notify the applicant in writing to –

(a) consult in the prescribed manner with the landowner, lawful occupier and any interested and affected party and include the result of the consultation in the relevant environmental reports required in terms of Chapter 5 of the National Environmental Act, 1998;"

[7] The survey was a subject in which the applicants were concerned and had an interest and wanted involvement in. They wanted to know about it because it would

have an effect on them that had the potential to make a difference to and influence their lives. They are the interested and affected parties referred to in section 74(4)(a) of the MRPDA. The small scale fishers and their communities alleged that they were not consulted.

[49] There is an internal appeal remedy provided for in section 96 of the MPRDA. Section 90 also provided for the suspension of the permit. The applicants have lodged an internal appeal. They are not the only party that has lodged an internal appeal. The Western Cape Provincial Government has also lodged an internal appeal according to the papers. The time periods provided by the prescripts for the Minister to consider the appeal outrun the period envisaged for the survey. This means that by the time that the Minister considered the appeal, the harm apprehended by the applicants would have manifested. The appeal, as a result, does not meet the apprehended harm. It is an impractical remedy as there are no adaptations for its use, and therefore insensible to rely on as it is impossible to provide the urgent relief sought by the applicants.

[50] For these reasons I make the following order:

1. The third, fourth and sixth respondents are interdicted from continuing the seismic survey of the West and South-West Coast of South Africa in terms of a Reconnaissance Permit granted by the First Respondent on 18 May 2021 in terms of section 74 of the Mineral and Petroleum Resources Development Act, 2002 (MPRDA) pending-

    1.1. The outcome of the applicants' internal appeal against the decision to grant the Reconnaisance Permit to the third and fourth respondents in terms of section 96 of the MPRDA; and

    1.2. The outcome of Part B of this application.

2. The third and fourth respondents, jointly and severally, the one paying the other to be absolved, to pay the costs of Part A of this application, including the costs of three counsel.

3. The third and fourth respondents, jointly and severally, the one pay paying the other to be absolved, to pay the costs of 7 February 2022, including the costs of three counsel.

4. The third and fourth respondents, jointly and severally, the one paying the other to be absolved, to pay the costs of 14 February 2022, including the costs of three counsel.

COETZER v WESBANK t/a FIRSTRAND BANK LTD 2022 (2) SA 178 (GJ)

Practice — Judgments and orders — Default judgment — Abandonment — Effect — Judgment remaining in force until varied or rescinded by court — Party cannot usurp court's role by resorting to abandonment — Res judicata applying — Uniform Rules of Court, rule 41(2).

Default judgment was erroneously granted against three defendants instead of just two. The plaintiff, Wesbank (the present respondent), filed a notice under rule 41(2) of the Uniform Rules of Court stating that it abandoned the default against the third defendant (the present applicant). Wesbank, being of the view that its partial abandonment obviated any obstacle to the advancement of the main action, requested the applicant to urgently enrol two interlocutory applications to compel, to avoid postponement of the trial. The applicant replied that the main action could not proceed to trial while the default judgment stood. The issue before court was whether Wesbank's partial abandonment of the default judgment meant that it was entitled to proceed with the main action.
Counsel for the applicant argued that no further action could be taken with the trial since the default judgment rendered the main action res judicata and the court was functus officio. The judgment would have to be rescinded for the trial to proceed.
Counsel for Wesbank argued that it was for the trial court to decide the effect of the default judgment and its subsequent partial abandonment. He asked the court to proceed with the hearing of the applications to compel on the merits, arguing that, notwithstanding the court order, the applications were validly brought before court for consideration.
Held
Abandonment was an election available to Wesbank whether to enforce the rights obtained in terms of the judgment and did not extinguish the existence of the default judgment against the applicant. The default judgment was final in its effect, and stood until varied, rescinded or set aside by a court, and Wesbank could not usurp the court's role by invoking rule 41(2). The present court could therefore not adjudicate the applications to compel, which fell to be dismissed. (See [26] – [29].)

DA CRUZ v BERNARDO 2022 (2) SA 185 (GJ)

Interest — In duplum rule — Whether in duplum rule applies to mora interest claimed on liquidated debt as contemplated in s 1(1) of Prescribed Rate of Interest Act — Prescribed Rate of Interest Act 55 of 1975, s 1(1).

In previous proceedings in the Johannesburg High Court before Foulkes-Jones AJ, the applicant had successfully brought a claim, based in delict, against the respondent for the repayment of moneys invested by the applicant in one of the respondent's businesses (after the deal in terms of which such investment had been made had collapsed). The respondent was ordered to pay the capital sum of R812 500, as well as interest on the amount *a tempore morae* calculated from 3 December 2007 (being the date on which the applicant had initially claimed repayment) to date of payment. Subsequent to the judgment, the applicant sent a letter to the respondent demanding payment of the capital sum, of R812 500, plus the interest owing at that stage, in the amount of R1 590 952,91. The respondent in answer disputed the calculation of the interest amount, contending that the *in duplum* rule applied to limit the interest payable by the respondent to R812 500. The respondent subsequently paid the capital amount outstanding and made a further payment of R812 500. This prompted the applicant, in the present matter, to apply to the Johannesburg High Court again to seek, inter alia, an order declaring that the *in duplum* rule did not apply to the moratory interest awarded in the judgment by Foulkes-Jones AJ; declaring that the respondent remained indebted to the applicant in the amount of R785 008,56, being the balance due in respect of moratory interest

awarded in the judgment; and seeking interest on the aforesaid amount of R785 008,56 *a tempore morae* to date of final payment, both days inclusive.
The *in duplum* rule, broadly speaking, provided that arrear interest ceased to accrue once the sum of the unpaid interest equalled the amount of the outstanding capital. The question in the present matter was whether the rule applied to liquidated debts — like the present one — in respect of which *there was no law or agreement governing the calculation of the rate of interest*, but which, instead, in terms of the common law, bore *mora interest*, and accordingly fell within the purview of s 1(1) of the Prescribed Rate of Interest Act 55 of 1975. That section provided that the type of debt in question attracted interest as calculated 'at the rate contemplated in subsection (2)*(a)* as at the time when such interest begins to run, unless a court of law, on the ground of special circumstances relating to that debt, orders otherwise'.
After a thorough review of the operation of the rule in South Africa (see [17] – [43] and [57]), the court held that the *in duplum* rule *did not apply* to limit mora interest claimable on a liquidated debt (see[58], [62] and [66]). The plaintiff was therefore not precluded from recovering mora interest on its liquidated debt in an amount that exceeded the capital amount of the original debt (see [62]).
In reaching such a finding, the court had regard to the following:

- All of the cases and the examples in the old authorities in which the *in duplum* rule was discussed and applied involved contractual claims *where the interest rate was fixed by agreement between the parties* (see [43] and [57.1]). The rule has been stated to apply to arrears interest ('agterstallige rente') on all contracts in which a capital sum owing was subject to a stipulated exchange rate (see [59]). The purpose of the rule was, from Roman times, to prevent lenders from exploiting borrowers in respect of debt agreements (see [59]).
- However, mora interest was fundamentally different to contractual interest. It was not payable in terms of an agreement, but constituted compensation for loss or damage resulting from default (see [45.1], [55], [57.3] and [60]). The circumstances in which a liquidated debt giving rise to mora interest may be recoverable covered a broad territory and may cover circumstances as broad as theft, to goods sold and delivered. Further, a court had some flexibility in determining a defendant's liability for mora interest in terms of the Prescribed Rate of Interest Act and so, like with an unliquidated claim, the defendant's liability for interest was not certain until the court had delivered its judgment. (See [60].)
- Delays in litigation may run longer than it took for the interest to equal the capital at the applicable mora interest rate. In these circumstances it was preferable, as a matter of public policy and in the interests of justice, for the court to retain a discretion on how interest should be awarded, exercised on the facts of each case. Where the court had such a discretion, it could exercise that discretion to limit interest payable to a dilatory plaintiff or to allow that interest where the defendant was the reason for the delay. Section 1(1) of the Prescribed Rate of Interest Act provides the court with that discretion. The 'special circumstances' which give a court the discretion set out in s 1(1) of the Prescribed Rate of Interest Act would include circumstances where a plaintiff had been dilatory or where delay ought not to be visited on one of the parties.
- The Prescribed Rate of Interest Act did not impose a ceiling on interest liability and did not expressly incorporate an *in duplum* principle (where it could easily have done so) (see [56] and [57.4]).

In the circumstances the court granted the applicant the relief in the terms sought (see [71]).

NEDBANK LTD v YACOOB 2022 (2) SA 230 (GJ)

Practice — Pleadings — Generally — Reliance on written contract — Requirement that true copy be annexed to pleadings — Where impossible for plaintiff to produce written contract — Substantive law allowing him/her to plead and prove conclusion of contract and its terms by way of secondary evidence — Magistrates' Courts Rule 6(6), which requires that contract be attached to pleading, cannot be construed to deprive plaintiff of their cause of action or of his/her right to prove contract by means of secondary evidence of contract — Magistrates' Rules of Court, rule 6(6).

Practice — Pleadings — Generally — Reliance on written contract — Requirement that true copy be annexed to pleadings — Where impossible for plaintiff to produce written contract — Processes and principles applicable in such circumstances — Whether application for condonation required in order for matter to proceed — Magistrates' Rules of Court, rule 6(6).

The Magistrates' Courts Rule 6(6) required a party relying upon a written contract in its pleadings to annex such contract, or the part relied upon. In the present matter, the appellant bank, in respect of its claim for moneys lent and advanced to the respondent debtor, had not attached to its pleadings a copy of the actual credit agreement it sought to rely on; instead, explaining that it could not locate the original agreement, it attached its pro forma standard terms, and pleaded the salient terms thereof. The magistrates' court a quo dismissed the application for default judgment brought in respect of such claim. The basis of its decision was its finding, based on the above rule 6, that the appellant's claim, in light of the failure to attach a true copy of the relied-upon agreement, was not capable of proper proof or pleading, absent condonation. The appellant appealed to the Johannesburg High Court. Key questions to be considered were whether a plaintiff in the predicament of the appellant may still proceed to claim under the missing contract; and if so, what processes and principles applied to the making of such a claim, including whether an application for condonation was necessary.
Held, that the substantive law of evidence prescribed that the original signed contract was the best evidence that a valid contract was concluded and the general rule was thus that the original had to be produced. But, if it was impossible for the plaintiff to produce the written contract or a copy thereof, substantive law allowed them to plead and prove the conclusion of the contract and its terms by way of secondary evidence. A rule of procedure such as Magistrates' Courts Rule 6(6) (or the equivalent High Court rule 18(6)) could not be construed to deprive the plaintiff of their cause of action or of their right to adduce secondary evidence of the contract. (See [20].)
Held, further, provided a plaintiff pleaded the conclusion of the contract and the material terms, the particulars of claim would disclose a cause of action. The failure to attach a contract would, in the absence of a properly pleaded explanation for such failure, be in breach of the procedural rules pertaining to pleadings — but this did not deprive the pleader of a cause of action. In the present case, the appellant had pleaded a cause of action (see [23]).
Held, further, that the process to be adopted where the pleader was unable to attach the contract on which the claim was founded was fact-specific. At the very least, the reason for this inability should be fully pleaded. The date, place, parties and

circumstances of the conclusion of the contract should also be properly set out to the extent possible as these were procedural requirements. It was important also that the salient terms relied on be properly pleaded. The manner in which the plaintiff would seek to establish the terms was also required to be fully pleaded. If this was not properly done, the pleadings may be attacked as excipiable for being vague or irregular. (See [25].) It was not necessary for condonation to be applied for and granted for the matter to proceed (see [27] – [29]). (The court held that the responsibility for the loss of the document was only relevant to the extent that it impacted ultimately on the proof of the contract (see [29]).)
Held, applying the relevant legal principles to the facts, that the appeal should be upheld (see [33] and [35]).

STELLENBOSCH UNIVERSITY LAW CLINIC AND OTHERS v LIFESTYLE DIRECT GROUP INTERNATIONAL (PTY) LTD AND OTHERS 2022 (2) SA 237 (WCC)

Practice — Class action — Administration — Appointment of 'special master' — Appropriateness of.

Practice — Class action — Availability — Opt-in or opt-out — Relevant considerations.

Practice — Class action — Certification — Application — Requirements — Commonality — Not required that every member of class have identical cause of action or put forward identical facts and seek identical relief — Sufficient that there be some issues of fact, or some issues of law (or combination thereof), that were common to all members of class and could appropriately be determined in one action.

Practice — Class action — Certification — Application — Requirements — Discussion of.

The present matter in the Western Cape High Court concerned an application for the certification of an 'opt-out' class action. The first applicant, the Stellenbosch University Law Clinic, which undertook to act as class representative in these proceedings, alleged that the 1st – 17th respondent corporate entities, as well as their effective owners, the 18th and 19th respondent individuals, operated a number of websites which misled innocent, often poor, consumers into believing that, when they completed an online application form, they were applying for loans, when instead, through the operation of terms buried in the terms of service, they were unwittingly contracting for the provision of unrelated legal advice services for which they would be charged on a monthly basis, via debit order. Consumers' attempts to cancel such legal advice contracts would be met with threats of legal action and blacklisting. The class the first applicant sought to represent was 'all persons who [had] had any moneys debited from their bank accounts and/or who [had] been harassed and/or threatened in connection with any demand for or collection of payment by any of the respondents at any time from [the date of registration of the websites] to date on the basis of them having concluded purported agreements with any of the respondents through any of the websites [listed]'. In the class action the applicants would ask for an order against the respondents to reverse the agreements concluded by class members through the websites, as well as the various transactions concluded pursuant thereto, and to compensate members for losses

they had incurred. The applicants would rely on various causes of action (see [44] – [48]), including, inter alia, that the agreements in question were prima facie unconscionable, unjust and/or unreasonable, in terms of the Consumer Protection Act 68 of 2008, and accordingly unenforceable; in the alternative, that the agreements were unlawful at common law on the basis of fraudulent misrepresentation, entitling members to restitution and damages.

The High Court noted that there was much common ground between the parties and that the only real issues for determination (see [12]) were whether the following two requirements for certification of a class action had been met: *(a)* commonality, ie that the relief in question depended upon the determination of issues of fact, or law, or both, common to all members of the class; and *(b)* appropriateness of the remedy, ie that given the composition of the class and the nature of the proposed action, a class action was the most appropriate means of determining the claims of class members. (See [19].)

Held, as to *(a)*

There were a number of common issues of fact and of law (see [53]) that could be determined by the adducing of evidence and the presentation of argument at one hearing. The argument that, since the individual causes of action were delictual, there were issues unique to each prospective plaintiff that were not capable of class-wide resolution — such as the question relating to causation, whether a particular consumer was indeed 'duped' by the website they had visited — missed the point (see [55] and [56]). The primary issue was whether the respondents' modus operandi was the establishment of websites which were intended to mislead innocent consumers into believing they were applying for loans when, in truth and fact, they were not. That state of affairs could be factually determined with reference to an objective assessment of the individual websites concerned and, in particular, whether they were designed to mislead. The enquiry, ultimately, was whether the respondents created a trap for consumers through which the respondents intended to benefit themselves. (See [56].)

Similarly, the proposed enquiry under the CPA as to whether an agreement into which a consumer was misled was unconscionable, unjust and/or unreasonable, and thus not enforceable, was capable of being made on an objective assessment of the wording of the agreement itself, read in its contextual setting. That was an assessment that could be made on behalf of a class as a whole without the necessity of having to resort to an individualised approach through the presentation of case-specific evidence. (See [57].)

Further, even if there were areas where the concept of commonality was perhaps somewhat stretched, this would not be a reason to refuse certification. Such issues as may well be found to be lacking in commonality could be dealt with in due course through the directions of the trial judge and the judicial manager (the so-called 'special master' referred to below) appointed to oversee the class action. After all the overriding consideration in certifying any class action was the interests of justice, and this purpose was served by such an approach. (See [58].)

Further, a class action did not require every member of the class to have an identical cause of action or to put forward identical facts and seek identical relief. Nor did such an action need to dispose of every aspect of a claim for certification to be granted. It was sufficient that there be some issues of fact, or some issues of law (or a combination thereof), that were common to all members of the class and could appropriately be determined in one action. (See [51] and [59].)

Held, as to *(b)*

As to the appropriateness of the envisaged procedure in respect of the claims in the present matter, one had to first consider the definition of the class sought to be represented. (See [60].) Here, having regard to the proposed class, membership was determined by way of objective criteria (see [65]): it was determined by an objective connection to one (or more) of the respondents; the alleged unlawful conduct of the respondents in question; and a defined time frame. This rendered certification appropriate. (See [66].)
The appropriateness of the certification was confirmed by the fact that the class was a large one and the claims relatively small — some so low that they might conceivably be recoverable in the Small Claims Courts. Added to that was the fact that the claims were spread over a multitude of geographical jurisdictions, such that for each to be brought individually would not only place strain on the litigants (and the respondents in particular), but the courts as well, where there was the risk of multiple findings at variance with each other. Such an outcome was clearly not in the interests of justice. (See [67].)
The present matter was well suited to an *opt-out class action*. The envisaged class was large and the individual claims were relatively small. Given that there was no evidence that any of the affected consumers had commenced legal proceedings against any of the respondents, it was reasonable to infer that there was little likelihood of independent litigation ensuing. Lastly, the cost of individual litigation in relation to the sums intended to be recovered was likely to be high and thus a deterrent to the pursuit of individual claims. The interests of justice would, in such circumstances, favour the extension of collective litigation to all members of the class without more, so as to render such consumer-based claims affordable. (See [70].)
Further, the appointment of a special master, as requested by the applicants, was also appropriate. It would provide an effective procedural mechanism in this matter to oversee the administration of the consequences of the class action (if successful). It was, however, best left to the trial court to determine the precise parameters of the special master's functions and duties. (See [74].)
In the circumstances, and mindful of the built-in safeguards contained in the order proposed by the Law Clinic, the certification of a class action on the terms and conditions proposed should be granted (see [75] and order at [97]).

WDL AND OTHERS v GUNDELFINGER AND OTHERS 2022 (2) SA 272 (GJ)

Legal practitioner — Attorney — Rights and duties — Duties — Former clients — Confidential information — What constitutes — Husband's former attorney in divorce proceedings joining firm representing wife in same pending divorce proceedings — Application by husband to interdict former attorney and/or any associates of firm she joined from acting for wife — Whether information imparted to former attorney remained confidential — Degree of specificity required iro information claimed to be confidential — Whether 'inherent jurisdiction approach' to be applied.

One of the three attorneys who dealt with Mr L's divorce matter at the firm that previously represented him, Ms Steyn (the second respondent), joined the first-respondent firm of attorneys (Gundelfinger Attorneys) which represented his wife (Mrs L) in the same pending divorce proceedings. When this came to Mr L's

attention, his new attorneys, citing a conflict of interest, demanded that first respondent withdraw as Mrs L's attorneys. The demand was not acceded to, and Mr L (and his new attorneys as second applicant) brought the present application for a final interdict against, inter alia, the first and second respondent and/or any of its associates representing Mrs L in the divorce proceedings. This on the basis that it was the only available remedy for protection of Mr L's unqualified right to the confidential information imparted to Ms Steyn when she represented him and that he had a well-founded apprehension of harm that the confidential information had been or would be compromised by virtue of Ms Steyn's employment with Gundelfinger Attorneys.

Mr L further submitted that if the court found that he had failed to meet the standard of proof required for such interdict, the court must, as a matter of public policy, exercise its inherent jurisdiction to control the conduct of its own officers, as the basis for such an interdict so as to ensure the due administration of justice and the integrity of the judicial process.

The respondents did not dispute that Ms Steyn received confidential information from Mr L but contended that the applicants failed to furnish particularity and specificity of the confidential information sought to be protected, and as a result failed to establish that the confidential information alleged to have been imparted, or reasonably apprehended to have been imparted, to Ms Steyn remained confidential and relevant to the issues in the divorce proceedings. (See [13].)

Held

The only duty that survived the termination of the legal representative's mandate was the duty to preserve the confidentiality of information imparted to them through their professional relationship with a former client. In order to obtain an interdict to preclude a former representative from acting against a former client, the latter must, inter alia, prove that the information remained confidential, relevant and that the interests of the present client were adverse to theirs (see [6]).

The degree of particularity required depended on the facts of a particular case. It was generally not sufficient for an applicant to make a general allegation that the attorney was in possession of relevant confidential information if this was at issue. The more general the description of the information which an applicant sought to protect, the more difficult it was for the court to satisfy itself as to the relevant confidential information that should be protected. This requirement must be insisted on, even though it may necessitate disclosing to the court the very information sought to be protected. The applicants did not make the slightest attempt to identify, with the necessary degree of specificity, the information which they contended was confidential. In the specific circumstances of this case, it was a fatal deficiency. Moreover, the applicants did not attempt to demonstrate that the information imparted to Ms Steyn remained confidential and, if so, might legitimately be said to be memorable and not forgettable. The failure to do so, in the specific circumstances of this case, was also fatal to their application. The application for a final interdict must therefore fail at the most fundamental level: the right foundational to the relief sought had not been established to have been extant at the time Ms Steyn entered the employ of Mr Gundelfinger. (See [6], [52] and [56] – [57].)

As a matter of public policy and in the interest of the administration of justice, the facts in the present matter justified the recognition of the 'inherent jurisdiction approach' in our law. The inherent jurisdiction of the court to grant such relief was discretionary and should be exercised only in exceptional circumstances and with caution. The test was whether a reasonably minded person in possession of all the

relevant facts would consider the judicial process and due administration of justice to be threatened if Mr Gundelfinger continued to act for Mrs L in the divorce proceedings. This was not established, and in the circumstances it was not in the public interest to disqualify Mr Gundelfinger from continuing his services to Mrs L. Consequently, the application would be dismissed. (See [77], [84] and [89].)

Arcus v Arcus [2022] 1 All SA 626 (SCA)

Civil Procedure – Prescription period applicable to maintenance orders – Whether an undertaking to pay maintenance in a consent paper, made an order of court, gave 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 – Court confirming that maintenance orders possess the essential nature and characteristics of civil judgments, and are final judgments for the purposes of the Prescription Act, with a 30-year prescription period.

Upon their divorce in 1993, the appellant and respondent entered into a consent paper which provided that the appellant would pay maintenance for the respondent until her death or remarriage, and for their minor daughters until they became self-supporting. The consent paper was made an order of court. The appellant did not comply with his obligations, but 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. The appellant then commenced paying the monthly maintenance due to the respondent from January 2019, but failed to pay the arrear maintenance. The respondent instituted action to recover the arrear amounts due to her.

In the High Court, the appellant sought a declaration that all maintenance obligations under the consent paper which accrued before 1 March 2017 (being the due date for payment of maintenance three years prior to the date of service of the writ obtained by the respondent) had been extinguished by prescription. The Court held that the maintenance obligations in the consent paper arose from a “judgment debt” as contemplated in section 11(a)(ii) of the Prescription Act 68 of 1969 and were consequently subject to a 30-year prescription period.

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

While accepting that a maintenance order has characteristics of a civil judgment, in that it is executable without further proof and appealable, the appellant contended that a judgment debt for purposes of section 11(a)(ii), is one which is final in the sense of it being appealable, capable of execution and unalterable by the court which granted it.

Held – That resolution of the appeal involved determination of whether maintenance orders possess the essential nature and characteristics of civil judgments. The court examined the attributes of a judgment or order of court, and of maintenance orders in particular. Maintenance orders are final judgments in that they

are 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; final and enforceable until varied or cancelled; capable of execution without any further proof; and (d) appealable. The Court rejected the appellant's contention that a maintenance order cannot constitute a final judgment for the purposes of the Prescription Act, since it can be varied by the court which granted it, for sufficient reason or good cause. A maintenance order fixes the parties' obligations, and variation can only occur if new circumstances arise.

The appellant's contention that various policy considerations militated against a finding that maintenance orders are subject to a 30-year prescription period also failed to sway the court, which found no room for interpretation of section 11(a)(ii) to give effect to such considerations.

The appeal was dismissed in the majority judgment.

A seperate judgment agreed that the appeal should be dismissed, but adopted a different approach – focusing on the hardships on women and children which would be perpetuated should the appellant's interpretation be accepted.

Eskom Holdings Soc Limited v Lekwa Ratepayers Association NPC and others and a related matter [2022] 1 All SA 642 (SCA)

Civil Procedure – Interim interdict – Appealability – Although an appeal against an interim interdict is generally not permissible, in exceptional circumstances the interests of justice dictate that an interim interdict be appealable.

Constitutional and Administrative Law – Disputes between Organs of State – Intergovernmental Relations Framework Act 31 of 2005 requires Organs of State to make reasonable efforts in good faith to settle intergovernmental disputes – Failure to exhaust all efforts to resolve disputes before taking action constituting non-compliance with Intergovernmental Relations Framework Act.

Eskom's reduction of its bulk electricity supply to several towns due to non-payment by the relevant municipalities, led to residents, through their associations, seeking interim interdicts against Eskom to restore electricity supply. The High Court granted the interim interdicts pending finalisation of review applications, and Eskom appealed.

Held – The present matter was one of the exceptional cases where the interests of justice demanded that the interim interdicts granted by the High Court should be appealable. Electricity being one of the most common and important basic municipal services and the right of citizens to receive basic services such as electricity was an issue of special public importance.

Eskom, an Organ of State, is the only entity licensed to supply electricity to municipalities in the country. Municipalities, for their part, are licensed by the third respondent ("NERSA") to reticulate electricity supplied to them in bulk by Eskom. They, in turn, supply and on-sell the electricity to the end-users within their areas of jurisdiction.

After explaining the contractual relationship between Eskom and the municipalities, the Court clarified that the residents involved in this litigation were all paying consumers for pre-paid electricity. However, the two municipalities had failed to honour their payment obligations towards Eskom for years. The reduction of the bulk electricity supply by Eskom had serious socio-economic and humanitarian consequences that adversely impacted the health and well-being of individuals within the municipalities' jurisdictions, which led to the High Court finding that the residents had established a *prima facie* right to the interim interdictory relief sought. Thus, the essential question for determination on appeal was whether the High Court was correct in its finding regarding a *prima facie* right having been established. The other requirements for an interim interdict had been met. For the granting of an interim interdict, an applicant must establish a prima facie right, even if open to some doubt.

The court referred to the case of *Eskom Holdings Soc Limited v Resilient Properties* (*Pty*) *Ltd and others* [2021] 1 All SA 668 (SCA) in which it had held that before Eskom decides to invoke its powers under section 21(5) of the Electricity Regulation Act 4 of 2006 to interrupt the supply of electricity to a municipality, it must be mindful of its constitutional obligations as an Organ of State. Its status brought it within the purview of the Intergovernmental Relations Framework Act 31 of 2005 which requires Organs of State to make reasonable efforts in good faith to settle intergovernmental disputes. Eskom, as an Organ of State, could not act in a manner that rendered another organ of State unable to discharge its constitutional and statutory obligations, and its impugned decisions were held in the *Resilience* case to be irrational. The court in this case held those principles to be of equal application in this matter. Eskom's failure to exhaust all efforts to resolve the disputes with the municipalities fell foul of the Intergovernmental Relations Framework Act. The residents, therefore, established a *prima facie* right for interim relief. All the requirements for granting interim interdictory relief having been established, the High Court's granting the interim interdicts was unassailable and the appeal was dismissed.

Allem Incorporated v Baard; *In re*: Baard v Allem Incorporated [2022] 1 All SA 680 (GJ)

Civil Procedure – Security of costs – Uniform Rules of Court, rule 49(13) envisaging that security for costs must be given by an appellant unless the counterparty has waived the right to security; or the court granting leave to appeal has released the appellant from the obligation – Application for security to be furnished refused where court lacked jurisdiction and case for security not established.

The applicant sought an order to compel the respondent to furnish security for costs as contemplated in Uniform Rule 49(13) within 5 days, failing which the applicant be authorised to apply for the respondent's appeal to be struck or dismissed with costs. The applicant relied on the purported obligation expressed in rule 49(13) that an appellant furnish security for costs, and elected to give effect to its asserted right by invoking the procedure in rule 30A to compel compliance with rule 49(13).

Held – Rule 30A(2) confers a discretion on the court, which discretion must be exercised judicially and upon a proper consideration of all the relevant circumstances, which may include the reasons for non-compliance; whether the defaulting party's case appears to be hopeless; that the defaulting party does not seriously intend to proceed; and prejudice to either party. The list is not exhaustive,

but it is indicative of the matters properly to be taken into account in the judicial exercise of discretion.

Rule 49(13)(a) appears to be peremptory in its terms, envisaging that security for costs must be given by an appellant unless one of two circumstances prevails, namely, either that the counterparty has waived his or her right to security; or the court granting leave to appeal has released the appellant from the obligation.

The Court considered the respondent's contention that rule 49(13) was constitutionally invalid for infringing upon the right of access to court in a manner that is not justifiable in an open and democratic society, and for want of compliance with the doctrine of legality. It could not be found that rule 49(13) infringed upon the right to access to court. However, the Rule did fall short of the doctrine of legality in that it was inconsistent with section 17(5) of the Superior Courts Act 10 of 2013 and *ultra vires* the powers of the Rules Board under section 6(1) of the Rules Board for Courts of Law Act 107 of 1985. Nevertheless, the court pointed out that conclusion of constitutional non-compliance ought not to be resorted to if the determination in the case could be made without recourse to the constitutional question.

It was held that the application for security fell to be dismissed as the court did not enjoy the jurisdiction to entertain a rule 30A(2) application to compel security where the Supreme Court of Appeal had granted leave to appeal without making provision for security, because in such an application this court would have to engage upon the question of whether an appellant ought to be released from an obligation to furnish security – in respect of which it lacked jurisdiction. Even if the court did enjoy jurisdiction, a judicial consideration of the relevant factors did not lead to the conclusion that security ought to be compelled in the circumstances of the case.

Hlophe v Freedom Under Law and related matters [2022] 1 All SA 721 (GJ)

Civil Procedure – Joinder – Test – Requirement that a direct and substantial interest in the subject matter of the case be established.

Civil Procedure – Pleadings – Uniform Rules of Court, Rule 18(5) – Rule 18(5) regulates information that must be contained in a pleading and format of the pleading, and makes the responsibility that of the pleader rather than a deponent to an affidavit – The word "pleading" in rule 18 does not include an affidavit.

A finding of the Judicial Service Commission ("JSC") of gross misconduct by Hlophe J was the subject of a review application. The allegation leading to the Commission's finding was that Hlophe JP had tried to suborn two Justices of the Constitutional Court to pervert their judgment to favour former president, Jacob Zuma.

In the first of two interlocutory applications in that matter, Freedom Under Law ("FUL") sought to be joined as a party, and in the second Hlophe JP, in terms of rule 30, sought an order setting aside FUL's replying affidavit due to alleged non-compliance with rule 18(5).

Held – Uniform Rules of Court prescribe the manner of presentation of documents in court proceedings. Non-compliance with the prescripts are the subject matter of rule 30 which deals with irregular proceedings and what an aggrieved party may do about

the irregularities allegedly perpetuated by an adversary. The rule 30 application in this case was based solely on the failure of the replying affidavit to comply with the prescripts of rule 18(5) ie, the injunction that there shall be a “clear and concise statement of the material facts relied on” for a claim, answer or defence and that this be made with “sufficient particularity to enable the opposite party to reply”. The rule regulates the information that must be contained in a pleading and the format of the pleading, and makes the responsibility that of the *pleader*, ie Counsel or attorney rather than a deponent to an affidavit.

The rule 30 application in this case hinged on whether rule 18 applies to affidavits. The Court found no authority for the proposition that an affidavit equates to a pleading. The conclusion that the word “pleading” in rule 18 does not include an affidavit led to the application to set aside the replying affidavit being dismissed.

The test for joinder involves establishing a direct and substantial interest in the subject matter of the case. As a public interest organisation whose objectives included upholding of constitutional norms through participation in litigation of constitutional significance, FUL established proper grounds to be joined.

Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy [2022] 1 All SA 796 (ECG)

Environment – Seismic survey operations by oil company – Interim interdict – Applicants satisfying court that they had established a prima facie right; a reasonable apprehension of irreparable and imminent harm of the right if the interim interdict was not granted; that the balance of convenience favoured the granting of the interim interdict; and that they had no other satisfactory remedy.

The applicants sought to prevent the third respondent (“Shell”) and the fourth and fifth respondents from proceeding with a seismic survey off the eastern coast of South Africa, pending an application for a final interdict prohibiting the respondents from proceeding with the seismic survey unless and until an environmental authorisation had been granted under the National Environmental Management Act 107 of 1998. Shell was currently conducting the said seismic survey in an area covering almost the entire Eastern Cape coastline. According to Shell, the survey would take between 110 and 140 days, from December 2021 until April 2022.

Held – To secure the interdict sought, the applicants were required to satisfy the court that they had established at least a *prima facie* right even if it was open to some doubt; a reasonable apprehension of irreparable and imminent harm of the right if the interim interdict was not granted; that the balance of convenience favoured the granting of the interim interdict; and that they had no other satisfactory remedy.

According to the applicants, they had a *prima facie* right to be meaningfully consulted about the seismic survey, because it impacted upon their customary rights, including customary fishing rights; and a statutory right under the National Environmental Management Act, which requires that prospectors must obtain an environmental authorisation for exploration for oil and gas. Reliance was also placed on constitutional rights contained in sections 24, 30 and 31 of the Constitution. The consultation process was set out in the environmental management programme,

which was the basis upon which the exploration right was granted to Shell. Shell relied on the fact that the advertisements were placed in four newspapers to notify the public about the proposed project and providing details of the consultation process. However, such notifications were not published in the languages spoken in the affected communities, who were thus excluded from the consultation process. Emphasising that meaningful consultation entails providing communities with the necessary information on the proposed activities and affording them an opportunity to make informed representations, the Court found the process embarked on by Shell to fall short of allowing for meaningful consultation. The exploration right which was awarded on the basis of that substantially flawed consultation process, was thus unlawful and invalid. The applicants having established a *prima facie right*, they were entitled to have that right protected against such unlawfulness, provided that the other requirements of an interim interdict have been met.

Based on evidence of a series of expert witnesses, the Court was satisfied that the applicants had established a reasonable apprehension of irreparable to marine life. The seismic survey would also negatively impact on the livelihood of the fishers and cause cultural and spiritual harm. Finally, the applicants established that the balance of convenience favoured the granting of the interim interdict; and that they had no other satisfactory remedy.

An interdict was granted preventing the conducting of seismic survey operations pending finalisation of the relief sought under Part B of the notice of motion.

Systems Applications Consultants (Pty) Ltd v Systems Applications Products [2022] 1 All SA 824 (GJ)

Corporate and Commercial – Claim for delictual damages for unlawful interference with contractual relationship – Breach of agreement by contracting party as a result of inducement by another party to no longer honour the contract but to support another product, amounting to a delict in German Law, which applied to dispute – Contravention of sections 826 and 823 of the German Civil Code leading to third party which interfered with contract to be held liable for damages.

The plaintiff (“SAC”) sued the defendant (“SAP”) as parent company of SAP SI, a company appointed by SAC to promote SAC’s software product. According to SAC, SAP induced SAP SI to breach its contractual obligations with SAC. Alleging that such interference in the contractual relationship between it and SAP SI resulted in the destruction of its business, SAC sought damages suffered as a result of SAP’s unlawful conduct.

Held – SAP was an *incola* of Germany and the cause of action of SAC arose wholly in Germany. It was on that basis that German law was applicable while all the procedural issues relating to the matter were to be determined under South African law.

Four issues were identified for determination by the court. They were whether SAC was a party to the contract concluded between it and SAP SI and whether the parties who acted on behalf of SAP SI had the necessary authority to bind it; whether the contract between SAC and SAP SI was in fact ever concluded; and whether in German law of delictual liability, SAC made a case in terms of section 826, alternatively in terms of section 823(1), of the German Civil Code.

The issue regarding the identity of the contracting party to the software distribution agreement was raised as a special defence by SAP which alleged that SAC was not a party to the agreement, but an Irish company was the party with whom SAP had contracted. The evidence overwhelmingly established that both SAP SI and SAP knew that the company that was to partner with SAP was SAC. SAP's submission to the contrary was regarded by the court as a red herring and was rejected. The special plea on that point was dismissed.

Next, the court turned to consider whether the agreement was ever concluded and whether the parties who acted on behalf of SAP SI had the necessary authority to bind it. Having regard to a number of emails between the parties, the court was satisfied that there was a valid software distribution agreement entered into between the parties, and the persons who acted on behalf of SAP SI had the necessary authority and permission to act on its behalf. The fact that SAP SI did not sign the contract was held to be irrelevant. The intent to be bound was implicitly assumed by the mutual agreement accompanied by the implementation of the terms of the agreement.

SAC contended that the breach of the agreement by SAP SI as a result of the inducement by SAP to no longer honour the contract but to support another product, amounted to a delict in German Law. SAC relied in that regard on section 826 alternatively section 823 of the German Civil Code. The Court found that there was inducement of SAP SI to breach the agreement to the prejudice of SAC, in contravention of section 826 of the German Civil Code. The conduct of SAP was *contra bonos mores*. SAP's conduct was also unlawful in terms of section 832(1). The breach resulted in the damages that SAC might suffer and prove in due course, for which SAP was liable.

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