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

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Applications-ex parte-when allowed- surrogate mother-declarotory order-not ex parte

[1] The applicant in this matter wants to have a child with the assistance of a surrogate mother, and seeks a declaratory order from this court with regard to what is permissible in terms of s 294 of the Children's Act 38 of 2005 (the Act) regarding the genetic origin of the child. He is a single man and is unable to contribute his own gamete, as he is for all practical purposes infertile. He seeks an order declaring that for purposes of his intended surrogate motherhood agreement he 'can use sperm from Donor 6293 of Fairfax Cryobank'. He seeks a further order declaring that the first order will relate 'only to this one aspect of the applicant's intended surrogate motherhood agreement, namely compliance with section 294 of the Children's Act...and that the applicant shall further be required to bring an application to the. court to confirm the intended surrogate motherhood agreement'.

[2] Section 294 of the Act provides as follows:

'No surrogate motherhood agreement is valid unless the conception of the child contemplated in the agreement is to be effected by the use of the gametes of both commissioning parents or, if that is not possible due to biological, medical or other valid reasons, the gamete of at least one of the commissioning parents or, where the commissioning parent is a single person, the gamete of that person,'

[3] On the face of it the declaratory order sought by the applicant is inconsistent with the wording of s 294. He however contends that the section, on a purposive interpretation, seeks to ensure that the child will in due course know its genetic origin. He accordingly wants the court to declare that he is entitled to use sperm from a donor who lives in the United States of America and who has agreed to his identity being disclosed to the child when it reaches 18 years of age. The applicant says this differs from the practice in South Africa, where sperm banks only offer anonymous donors.

[4] The applicant relies on the decision of the Constitutional Court in AB and another v Minister of Social Development, [1] where a single woman had applied for section 294 to be declared unconstitutional on various grounds, including that of irrationality. The majority judgment held that the rational purpose of the section was

to create a bond between the child and the commissioning parent or parents, which is designed to protect the best interests of the child to be born so that it has a genetic link with its parent(s). The court held that the section was not irrational, or unconstitutional on any other basis.

[5] The applicant accepts that s 294 of the Act is not unconstitutional. He contends, however, that the purpose of the section is served if a gamete is used from a donor who has consented to his identity being revealed. He submitted that in those circumstances it does not matter that the child will not have a genetic link with the commissioning parent, because the child's genetic origin can be made known to it at the appropriate time. The applicant accepts that such an interpretation is contrary to the express wording of the section, and made it clear that he was not contending for a reading-in. [2] 1 am therefore concerned with the proper interpretation of the section as it stands.

[6] In Natal Joint Municipal Pension Fund v Endumeni Municipality, [3] Wallis JA said:

.. consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors.' (Footnote omitted.)

[15] I should add that if I had concluded that the applicant's contentions were correct I would nevertheless have declined to make a declaratory order. In AB the Minister of Social Development participated in the proceedings and contended successfully that the section was not unconstitutional. A declaratory order by me regarding the proper interpretation of the section will not be binding on the Minister or other interested parties in a subsequent application for the confirmation of a surrogacy motherhood agreement, because they are not parties in the proceedings before me. They will be free to contend that the declaratory order was wrongly granted, and the judge hearing that application may disagree with my interpretation of the section. The position is different from that, for example, in Lawson & Kirk (Pty) Ltd v Phil Morkel Ltd,**[8]** where both parties to the dispute participated in the proceedings for a declaratory order and were bound by the outcome. A declaratory

order in the form sought by the applicant in an ex parte application will be worth no more than legal advice.

[16] The application for a declaratory order therefore cannot succeed. I empathise with the applicant's desire to have a child, and would have helped him if I thought I could. Regrettably, I do not think I can.

[17] The application is dismissed.

Fourie N.O. and Others v The Land and Agricultural Development Bank of South Africa; Fourie v The Land and Agricultural Development Bank of South Africa; Saunderson N.O. and Others v The Land and Agricultural Development Bank of South Africa; Saunderson v The Land and Agricultural Development Bank of South Africa (1425/2020;1426/2020;1427/2020;1428/2020) [2022] ZANCHC 20 (8 April 2022)

Rule 18 for summons-Rule 18(1) signed by the attorney-did not mention he is an attorney-

Rule 18-18(6) true copy of the written agreement not attached -by virtue of which respondent claims to have taken cession of the relevant claims- it is necessary for the written agreement relied upon to be annexed to the particulars of claim.

Rule 30A as opposed to Rule 30-mno averments made

1. These four cases being case numbers 1425/2020, 1426/2020, 1427/2020 and 1428/2020 are dealt with in one judgment as both the respective applicants and the respondent agree that the issues in each matter are such that if one application goes one way the other 3, must of necessity, follow to the same conclusion.

2. Although the applicants launched 4 distinct applications the respondent answered all 4 applications with one answering affidavit. In doing so, the respondent relied on the contention that in all four applications the same issues and questions would be dealt with in each application. The respective applicants then filed a single replying affidavit dealing with the answering affidavit. Confirming in form and in

substance that both respective sides indeed shared the view that a decision in one of the matters will of necessity mean the same result in the other three.

3. Furthermore, at the hearing of the matter both Mr Jankowitz for the respective applicants and Mr Tsangarakis for the respondent agreed that if one application succeeded then all must succeed and if one application were to fail then of necessity, they must all fail.

4. The present application is an interlocutory application under the provisions of Rule 30 of the Uniform Rules of Court (the Rule/s). The applicants' contention is that in the respective actions, the respondent has not complied with various provisions of Rule 18. The details of such omissions will be dealt with presently.

5. The respective applicants were placed under Notice of Bar on the 22 October 2020 in the various actions relevant to this matter. The notice contemplated by Rule 30(2)(b) was filed on the 30 October 2020 in each of the 4 matters relevant hereto.

6. In each of these Notices served and filed under the provisions of Rule 30(2)(b) it was alleged that in each of the relevant combined summonses commencing action, the following provisions of Rule 18 were not complied with: Firstly, failed to comply with Rule 18(1) in that the summons purported to have been signed by the attorney of the plaintiff in terms of s25(3) of Act 28 of 2014**[1]**; Secondly, Rule 18(4) in that it was alleged that the Particulars of Claim did not set out a clear and concise statement of fact in order to establish a cession that is a key element of respondent's respective claims; and Finally, Rule 18(6) in that the respondent did not attach a true copy of the written agreement by virtue of which respondent claims to have taken cession of the relevant claims.

7. The respondent chose not to respond to the notice under the provisions of Rule 30(2)(b) and did not remove any of the alleged causes of complaint. By the time that the respective applicants filed their respective Notices of Motion in the respective applications, the objection under and in terms of Rule 18(4) had fallen away without any explanation and was not proceeded with.

8. Thus, in the present applications, the applicants only proceeded with the irregular proceedings in terms of Rule 30 in respect of the alleged failures in respect of Rule 18(1) and 18(6) as set out above.

9. At the hearing of this matter, Mr Jankowitz who appeared for the applicants in all four of the abovementioned matters sought to deal with the applications as having been brought under and in terms of Rule 30A as opposed to Rule 30. This despite the fact that the Notice of Motion in each of the respective cases was brought under the provisions of Rule 30.

10. Mr Tsangarakis, who appeared for the respondent in each of the four matters dealt with objected to this proposal on the basis that the respondent had been brought to court under the provisions of Rule 30 and had prepared for court on that basis. That the respondent in each case would be unduly prejudiced if the applicant were to be allowed to deal with the matter as if it had been brought under the provisions of Rule 30A as opposed to Rule 30.

9. Mr Jankowitz did not argue that there was a need for a formal amendment to indicate in which capacity both Mr Strydom and Mr Oosthuizen signed the Particulars of Claim. The fact that the respective practitioners did not explain the capacity in which the signed the Particulars of Claim in these matters has been cured by their explanation in the answering affidavit in the present matter. In these circumstances, I intend to adopt the pragmatic approach set out by my Brother Chwaro AJ in the matter of Quill Associates (Pty) ltd v Dawid Kruiper local municipality**[3]**.

20. In the circumstances, I rule that no formal amendment is required. Rule 18(1) has been complied with. The confusion in this matter could have been obviated by way of a collegial letter and response thereto between the respective representatives of the parties. I will take into account that this aspect was only adequately explained in the answering affidavit when I come to consider the question of the costs of the present applications.

21. Turning now to the second aspect to be considered, namely the alleged non-compliance with Rule 18(6). The requirements of the rule have already been set out above. The respondent in the various Particulars of Claim relevant to this application has pleaded that the principal debtor obtained finance from a certain entity, who then entered into a written contract of cession with the plaintiff/respondent to cede such debt to the plaintiff/respondent.

22. The provisions of Rule 18(6) were considered by Swain J in the matter of Moosa v Hassam**[4]** Where he referred to the matter of South African Railways and

Harbours v Deal Enterprises (Pty) Ltd**[5]**, Swain J notes that whilst the said South African Railways and Harbours case**[6]** dealt with the position before Rule 18(6) required true copies of written contracts or the excerpts relied upon had to be furnished, the reasoning of Botha J in the S.A. Railways and Harbours case**[7]** was still relevant and instructive. The relevant passage in the S.A. Railways and Harbours case reads as follows:

> "He is accordingly obliged to furnish the particulars mentioned in Rule 18(6) whenever the contract forms a part of the cause of action put forward by him, irrespective of whether the contract can be described as the 'basis' of the claim or not."**[8]**

23. In the Moosa case**[9]**, Swain J in referring to the passage from S.A. Railways and Harbours set out above, reasons:

> "[17] This I consider to be the crux of the present enquiry. Rule 18(6) speaks of a party who in his pleadings 'relies' on a contract or 'part' thereof. A party clearly 'relies' on a contract when he uses it as a 'link in the chain of his cause of action'. (references omitted)
>
> [18] In the present case the respondents base their cause of action against the applicants upon the written agreements. The written agreement is a vital link in the chain of the respondents' cause of action against the applicants. In order for the respondents' cause of action to be properly pleaded, it is necessary for the written agreement relied upon to be annexed to the particulars of claim. In the absence of the written agreement the basis for the respondents' cause of action does not appear *ex facie* the pleadings."**[10]**

24. Relating this approach to the facts of the present matter, the respondent, The Land and Agricultural Development Bank of S. A., relies on a cession in respect of the original rights in respect of the respective claims. This is clearly 'a link in the chain' of its respective claims. As such the provisions of Rule 18(6) are applicable and the relevant contracts or at least the relevant extracts need to be annexed to the Particulars of Claim in the respective matters.

25. The respondent in an annexure to the respective Particulars of Claim has annexed a document which is titled "RECORDAL", in which the respondent and

certain other entities have recorded a number of contracts, *inter alia* the sale of the relevant book debts and the cession of the relevant rights. In this document the respondent and the other signatories to such document record their understanding of the effect of the listed contracts and agree that the effect of the relevant contracts is a cession of the relevant book debts.

26. Whilst this “RECORDAL” might constitute evidence of the intention of the relevant parties in entering into the relevant contracts and in certain circumstances, it might even be determinative of the matter, it is still not the contract which the respondent relies on as a ‘link in the chain’ of its claim. In these circumstances Rule 18(6) has not been complied with.

27. In his oral address Mr Tsangarakis for the respondent referred me to a number of cases where it was alleged that a similar approach was pleaded and the relevant courts in each case accepted the manner of pleading. All of the cases referred to by Mr Tsangarakis were motion proceedings. The short answer to Mr Tsangarakis’ contention is that different rules apply to actions as opposed to motion proceedings. Respondent has brought an action in the matters relevant to the present application and in these circumstances, Rule 18(6) applies and has to be complied with.

28. Should I reach this finding the respondent filed an application under the provisions of Rule 27(3) to condone their failings in this regard. When the matter was argued before me, Mr Tsangarakis did not pursue this application for condonation. I believe Mr Tsangarakis was correct in not doing so because the respondent had not set out ‘good cause’ for this court to consider such an application for condonation. In the absence of ‘good cause’, I cannot consider or grant such condonation.

29. This leaves the question of costs to be considered. Mr Tsangarakis strongly motivated that if I were to grant the applicants the relief they sought, I should only award costs up to the stage of the filing of the answering affidavit. Mr Tsangarakis argued that I should adopt this approach because in the answering affidavit respondent indicates that the applicants have indeed had access to the relevant contracts in an application to sequestrate the principal debtor. This is not disputed by the applicants in fact the deponent to the replying affidavit clearly uses such knowledge of the relevant contracts to make certain submissions.

30. At first, I was tempted to go along with Mr Tsangarakis' approach, however it occurred to me that a formal amendment would be required to insert the relevant agreements into the Particulars of Claim. If the respondent wanted to avoid the risk of an adverse cost order against it, it ought not to have continued in its opposition to the present application, but effectively it ought to have removed the cause of complaint by effecting the required amendment in each case. In other words, what Rule 18(6) requires is not that the other party have knowledge and insight into the terms of the relevant agreements, but that written agreements or the relevant extracts must be annexed to the relevant pleading.

31. In relation to the Rule 18(1) objection, both parties at most gave this aspect cursory treatment. To treat this aspect separately would not materially affect the outcome. The applicants have been substantially successful. There is no reason not to follow the general rule that costs should follow the result.

In the circumstances, the following order is made in all four of the applications to which this judgment applies, THAT:

1) The respondent is directed, within 10 (ten) days of service of this order, to comply with Rule 18(6) of the Uniform Rules of Court.

2) In the event that respondent fails to comply with Order 1 set out above, the applicants may return to Court on the same papers, duly supplemented if required, for further relief, including an order to strike out the Summons and Particulars of Claim of the Respondent.

3) Respondent is to pay the costs of these applications.

Soft Coffee (Pty) Limited and Others v Legal Practitioners Fidelity Fund (88809/2019) [2022] ZAGPPHC 228 (5 April 2022)

Legal Practitioners Fidelity Fund-funds were not "entrusted" to the impugned attorneys, as envisaged by section 26 of the Attorneys Act-fraud and scheme-Fund not liable-attorneys are

[1] This matter concerns the theft of monies (by an attorney and/or an employee of a firm of attorneys) belonging to the first to sixth plaintiffs (the Plaintiffs) and the liability of the defendant, the Legal Practitioners Fidelity Fund (the Fund) to reimburse the Plaintiffs for the loss arising from the theft under section 26**[1]** of the

Attorneys Act 53 of 1979 (the Attorneys Act). The Plaintiffs caused summons to be issued in this Court against the Fund for payment in the amount of R6.7 million owing to the first plaintiff, Soft Coffee (Pty) Ltd (Soft Coffee, when referred to individually) (claim A), and R2.7 million owing to the Second to Sixth Plaintiffs (claim B), together with interest on both claims and costs. The Fund denied liability in respect of both claims and is defending the action. Its defence has since crystalised to the denial of liability on the basis that the stolen funds were not "entrusted" to the impugned attorneys, as envisaged by section 26 of the Attorneys Act.

Plaintiffs' case

Claim A

[4] Claim A is exclusively by Soft Coffee against the Fund. Its features include the following. During 2017, Mr Dadic and Mr Stephens, alternatively Mr Stephens provided Soft Coffee with two loan agreements, purportedly, to be separately concluded between Soft Coffee and two entities called Atomic Transport CC (Atomic) and Flake Ice Services (Pty) Limited (Flake Ice). The loan agreements appeared to have already been signed by a certain Mr Charles Henry Parsons (Mr Parsons), as the representative of both entities.

[5] Mr Dadic and Mr Stephens, alternatively Mr Stephens (henceforth Dadic Attorneys) misrepresented to Soft Coffee that the loan agreements were valid and had been signed on behalf of Atomic and Flake Ice, when this was not the case. This meant that monies would be lent and advanced in terms of the loan agreements by Soft Coffee to Atomic and Flake Ice. Dadic Attorneys, further, misrepresented that the loan monies would be paid first through the trust account of Dadic Attorneys and, thereafter, advanced to Atomic and Flake Ice. The misrepresentations were for the payment of the amount of R3 million and R5 million for the purported loans to Atomic and Flake Ice, respectively. It is common cause between the parties that the loan agreements were invalid and part of a fraudulent scheme contrived by Dadic Attorneys to misappropriate the monies from Soft Coffee.

[52] Based on what is stated above, I find that there was no entrustment in respect of claim A by Soft Coffee against the Fund. The trust account of Dadic Attorneys was merely intended to be used as a conduit for the payment of the stolen funds to

Atomic and Flake Ice, as loans or investment in terms of which returns were expected in the form of interest. Indeed a sum of R1.3 million was returned and appears to have been accepted by Soft Coffee as “interest”. The Fund’s reliance on the exclusionary provision of section 47(1)(g) of the Attorneys Act is justified. With regard to claim B, I find that the amount of R2.7 million, which represents the pecuniary loss suffered by the Second to Sixth Plaintiffs due to the theft by Dadic Attorneys or Mr Stephens as an employee of Dadic Attorneys was entrusted by or on behalf of the Second to Sixth Plaintiffs to Dadic Attorneys in the course of Dadic Attorneys’ practice. Therefore, I will grant an order dismissing claim A and granting claim B.

[53] In as far as costs are concerned the usual order is that costs should follow the outcome. But this is a bit tricky as both parties are equally successful, but I will let the aforementioned conventional rule prevail: costs will follow the outcome(s). The taxing master would have to find a way of dealing with the effect of the order when the bills of costs are presented for taxation. Counsel for the Plaintiffs had submitted that the trial was anticipated to run for approximately 2 to 3 days, but was concluded in less than a day, because there was no dispute of fact between the parties. But I don’t think that this aspect is so pronounced as to have a bearing on the location of liability regarding the issue of costs or whether to grant same at a punitive scale. Therefore, costs shall be at the scale of party and party, but (in the case of the Plaintiffs) shall include costs consequent to the employment of two counsel, wherever employed.

Order

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

a) the first plaintiff’s claim for payment in the amount of R6 700 000.00 (referred to as Claim A in the pleadings) is dismissed with costs;

b) the second to sixth plaintiffs’ claim for payment in the amount of R2 700 000.00 (referred to as Claim B in the pleadings) is granted with

costs, and the defendant shall pay the amount of R2 700 000.00 to the second to sixth plaintiffs;

c) the defendant shall pay interest on the amount in b) hereof at the rate of 10.25% *per annum* from date of this order to date of full payment of the amount in b) hereof, and

d) the costs in b) hereof shall include costs consequent upon the employment of two counsel, wherever employed.

Faraday Taxi Association v Director Registration and Monitoring MEC for Roads and Transport and Others (58879/2021) [2022] ZAGPJHC 213 (5 April 2022)

Rule 6(12) (c)- application-reconsideration of the order- attorneys failed to discharge their ethical and professional duties as officers of the Court

1. On 24 December 2021 the Faraday Taxi Association (FTA) obtained an order in the urgent court before the learned Crutchfield AJ (as she then was). It is common cause that order was obtained without service on certain of the respondents. One of those respondents was the Orange Farm United Taxi Association (OFUTA), which was cited as the fourth respondent. It has applied for a reconsideration of the order under Rule 6(12) (c), which provides that: '*A person against whom an order was granted in his absence in an urgent application may be notice set down the matter for reconsideration of the order*.'

2. OFUTA set the matter down on the urgent court roll on 10 March 2022 for hearing in the week of 15 March. However, it then removed the matter and re-enrolled it for hearing the following week. Only FTA opposes the relief sought. When the matter came before me I directed that I would only consider OFUTA's *in limine* point based on FTA's alleged non-disclosure before Crutchfield AJ. If OFUTA failed to succeed on that point before me in the urgent court, I directed that a full reconsideration of the merits of the original application and OUTA's counter-application could be dealt with on the extended return day of the rule that was granted by Crutchfiled AJ, being 25 April 2022.

3. Despite the earlier decision of this Division in *Rhino Hotel & Resort (Pty) Ltd v Forbes and Others*[1] that where Rule 6(12)(c) is used '*the original application is reconsider on its own without reference to anything else*', the correct view has subsequently been held to be that a party relying on the Rule may file an affidavit in support of its application for reconsideration.[2] OFUTA filed an affidavit in support of its reconsideration application. In *Industrial Development Corporation of South Africa v Sooliman*[3] it was held that in such circumstances the other party has an opportunity to file a replying affidavit. FTA originally elected not to do so. However, when it became apparent that the issue of non-disclosure was pivotal to the reconsideration, I stood the matter down to enable FTA to prepare and file a replying affidavit.

4. In I*SDN Solutions*[4] it was held that:

> 'The framers of the Rule have not sought to delineate the factors which might legitimately be taken into. What is plain is that a wide discretion is intended. Factors relating to the reasons for the absence, the nature of the order granted and the period during which it has remained operative will invariably fall to be considered in determining whether a discretion should be exercised in favour of the aggrieved party. So, too, will questions relating to whether an imbalance, oppression or injustice has resulted and, if so, the nature and extent thereof, and whether redress is open to attainment by virtue of the existence of other or alternative remedies. The convenience of the protagonists must inevitably enter the equation. These factors are by no means exhaustive. Each case will turn on its facts and the peculiarities inherent therein.'

5. The purpose of the Rule is to afford an aggrieved party a mechanism designed to redress imbalances and injustices associated with the order having been granted in her absence.[5] It has also been held that the discretion of the Court under the Rule is a wide one. The only jurisdictional facts the Court is required to consider are whether the order was granted in the absence of the aggrieved party, and whether this was by way of urgent proceedings. Once this is established, the Court is free to reconsider the order initially given in the widest sense of the word.[6]

6. Much was made by FTA about the alleged deficiencies in OFUTA's Notice of Motion in that the short form of Notice was used rather than the long form. It thus did not specify that FTA could file an affidavit in answer to the application, nor specify a date by which it had to be filed. The reconsideration procedure under the Rule is, as the cases cited above demonstrate, a sui generis procedure. The Rule itself does not specify that an application need be made on Notice of Motion, nor does it specify that it must be accompanied by a supporting affidavit. In the circumstances, OFUTA cannot be criticised for electing to proceed on the form of Notice that it adopted. In any event, there was no material prejudice to FTA. It was notified of the application, and it elected to oppose. Furthermore, it was given and acted on the opportunity to file a replying affidavit.

17. On this basis, they represented to the Court that service by Sheriff was the appropriate method of service, thus providing what appeared on the face of it to be an acceptable explanation for non-service. In the circumstances of this case, FTA's submission that it was doing no more than attempting service in a manner prescribed by the Rules must be rejected as being no more than a hopeless attempt to explain what looks very much to have been a deliberate strategy to avoid alerting OFUTA that the earlier urgent application had been brought to life again. There can be no doubt that had FTA or its legal representatives played open cards with the urgent Court as they were obliged to do and disclosed that they had the names and contact details of OFUTA's appointed attorneys, the Court would have insisted that attempts be made to alert them of the application and provide them with an opportunity to be heard.

18. The egregious nature of the non-disclosure and the fact that it had the effect of fundamentally undermining the principle of *audi alteram partem* leads to the ineluctable conclusion that the appropriate relief in this case is to set aside the rule *nisi* that was granted on the back of the non-disclosures. The fact that OFUTA and other respondents will be entitled on the return day to challenge the merits of the dispute does not warrant keeping the rule alive. In this case, it is not only the interests of all the respondents that will be served by discharging the rule nisi, but also the due and proper administration of justice. This is because the Court itself was misled by the conduct of FTA and its legal representatives. The non-disclosure in

this case falls at the very high end of the spectrum of materiality and seriousness, and the only suitable remedy is to set aside the rule *nisi ab initio* in respect of all respondents. This means that the return day for the rule falls away.

19. In my view, the application by OFUTA for a punitive order of costs on the scale of attorney and client is appropriate in this case for all the reasons cited above.

20. As to the legal representatives of FTA, I believe that the same attorneys and counsel were involved in both urgent applications. They have failed in my view to discharge their ethical and professional duties as officers of the Court. It is difficult to understand their conduct in any light other than it being a deliberate attempt to obtain an urgent application through the back door and without the intervention at least of OFUTA, in respect of whose service and contact details they were fully aware. Furthermore, I direct that both Mr Munyai, who deposed to the affidavit of non-service, and Mr Mashavha, who acted as Counsel for FTA report themselves to the Legal Practice Council.

21. I make the following order:

21.1. The application for reconsideration of the order granted by Crutchfield AJ on 24 December 2021 is granted.

21.2. The rule nisi granted by Crutchfield AJ on 24 December 2021 is set aside in its totality.

21.3. The return date for the aforesaid rule nisi is removed from the Roll.

21.4. The applicant in the main application, Faraday Taxi Association, is directed to pay the costs of this application on an attorney and client scale.

21.5. Mr Munyai and Mr Mashavha, the attorney and advocate for the Faraday Taxi Association respectively, are directed to:

(a) provide the Legal Practice Counsel (LPC) with a copy of this judgment;

(b) report their potential breach of any professional or ethical rules arising from this judgment to the LPC; and

(c) upload onto Caselines proof of their compliance with this directive by 19 April 2022.

Maclachlan and Another v City of Johannesburg Metropolitan Municipality and Others (2020/28164) [2022] ZAGPJHC 243 (22 April 2022):

Costs-punitive costs-against municipality not issuing clearance figures

1. This was originally an application for a mandamus to compel the City of Johannesburg ("**the respondent**") to issue clearance figures for a property. With the merits of the dispute now being academic, given the delivery and payment of those figures, the only remaining issue is costs. The applicants seek punitive costs against the respondent; the respondent seek the dismissal of the application with costs. Both parties allege malfeasance or abuse of process by the other.

Background

2. On 22 June 2020, the applicants entered into an agreement to sell the Remaining Extent of Portion 5 of Erf 1085, Bryanston ("**the property**"). For the transfer of the property to be effected, in accordance with **section 118(1)** of the **Local Government: Municipal Systems Act, 2000**, the respondent was required to issue a rates clearance certificate. To this end, the respondent was first required to deliver a statement setting forth what are in conveyancing practice referred to as "clearance figures", which would have to be paid by the applicants prior to the issue of the certificate.

3. In light of the above, the applicants applied to the respondent on 5 or 7**[1]** August 2020 for the respondent to issue clearance figures in respect of the property. In terms of the respondent's own general conditions listed on the clearance figures application form, "*[s]ubject to there being no outstanding council levies or queries on services the application will be processed within five (5) working days.*" There is no suggestion in this case that there were any outstanding council levies or queries on services which would have delayed the release of clearance figures.

4. When no clearance figures were provided, the applicants on 27 August 2020 sent a demand to the respondent's officials, including the respondent's legal advisers, officials who deal with clearance figures and clearance certificates, and the general contact email address for the respondent.

5. No response was received to this communication and the applicants launched a court application on 29 September 2020 to compel the respondent to deliver clearance figures for the property, and related relief.

17. Generally speaking, costs follow the result. Ordinarily, they are awarded on the party-and-party scale. In circumstances where the conduct of one of the parties was abusive, *mala fide* or vexatious, the Court may award punitive costs against that party. The term "vexatious" has a broad meaning in this regard, and includes situations where a party has in fact been put to unnecessary trouble and expense by the conduct of the other party,**[5]** even where there was no ill-intent by the first-mentioned party.

18. In my view, given that the respondent failed to carry out its regulatory and other legal responsibilities within five working days or any other reasonable period and its silence in response to the follow up email of 27 August 2020, the launch of this application was justified. The substance of the application became moot on or about 13 November 2020. Up to that point, while the conduct of the respondent as a state body had not been exemplary, a costs award on the ordinary scale is warranted.

19. The next question is what is to be done about the subsequent process. It may have been preferable at that stage, in mid-November 2020, for the applicants to

liaise with the respondent about the termination of these proceedings, and to signal that they will only be persisting with the costs prayer.

20. That evidently did not occur, but it is unclear that such an engagement would have yielded any helpful results, given the position adopted by the respondent in the answering papers. The principal contributor to the unnecessary prolonging of this dispute and processes after mid-November 2020 is the respondent. This has not only diverted judicial resources, but also caused undue expense to be incurred and effort to be expended by the applicants. Given the vexatious effect of the respondent's conduct, I believe that a punitive costs order for the period after the filing of answering papers is warranted. In my estimation and given the role played by each party, it is fair and reasonable for the respondent to bear 80% of the applicants' costs on a punitive scale for the period 22 December 2020 onwards.

21. I thus make the following order:

21.1 The first respondent is declared liable for the applicants' costs of this application in the following respects:

21.1.1 100% of the costs on a party-and-party scale for the period up to and including 21 December 2020;

21.1.2 80% of the costs on the scale as between attorney and client from 22 December 2020 onwards.

JMH-Doctors SPV (RF) (Pty) Ltd v 3 Health Holdco Mauritius Ltd and Others (32492/2021) [2022] ZAGPJHC 266 (26 April 2022)

Review – arbitration- ruling of the Tribunal is not subject to review under the IAA because it is not a final award, but that even if it were, the application has made out no case that the procedure adopted by the Tribunal was unfair.

[1] This is an application to review an order amending the pleadings in an arbitration at the appeal stage.

[2] The appeal Tribunal, during oral argument in the appeal, raised that the relevant terms in issue in a Shareholders Agreement (SHA) which forms the basis of the case, may mean something other than the meaning assumed by the parties when they prepared for and ran the arbitration a quo.

[3] Thus the Tribunal raised what I will call a 'new defence'.

[4] This led to the Tribunal allowing the parties the opportunity to make supplementary written submissions as to this new defence.

[5] The first respondent (the defendant in the arbitration) in the wake of the Tribunal's raising of this new defence sought to amend its pleaded defence in the arbitration to specifically plead this new defence.

[6] The amendment was granted by the Tribunal.

[7] The applicant (the claimant in the arbitration) who was the victor in the arbitration seeks to review the granting of the amendment.

[57] Whilst this may be so, the amendment does not suggest an interpretation which is fact dependant. It relies on the letter of the agreement. And the approach which the Tribunal has taken to the alleviation of prejudice is that, should the applicant wish to claim rectification or estoppel or any other viable rejoinder to the new defence, it will not be deprived of pleading these issues and leading evidence accordingly.

[58] Thus, in sum, there is no withdrawal of an admission of a fact and thus no need for the respondent to explain why it conceded a factual position which it now wishes to argue is inaccurate or false.

[59] In any event, to the extent that an explanation of the withdrawal of the concession of what the SHA means were required this emerges as axiomatic from the process which unfolded before the Tribunal: The Tribunal's raising of a different construction of the SHA was the reason for the raising of the point by way of the amendment.

[60] In the circumstances I find that the ruling of the Tribunal is not subject to review under the IAA because it is not a final award, but that even if it were, the application has made out no case that the procedure adopted by the Tribunal was unfair.

[61] There is no reason why the costs should not follow the result.

[62] I thus make an order which reads as follows:

1. The application is dismissed.

2. The applicant is to pay the costs of the application, such costs to include the costs of two counsel where employed.

Minister of Police v Mzingeli and Others (115/2021) [2022] ZASCA 42 (5 April 2022)

Rule 33-stated case-Delict – claim for damages – quantum of unliquidated damages – no oral evidence – stated case – whether properly formulated in terms of Rule 33 – requirements restated.

On appeal from: The Eastern Cape Division of the High Court, Mthatha (Zono AJ sitting as court of first instance):

1 The appeal succeeds with no order as to costs.

2 The order of the court a quo is set aside.

3 The matter is remitted to the court a quo for the determination of the quantum of damages.

[1] This appeal is with the leave of this Court, granted on the following terms:

'The leave to appeal is limited to the following:

(a) Whether it was permissible for the court to determine the quantum of unliquidated damages without hearing oral evidence in light of the decision of *EFF and Others v Manuel* **[2020] ZASCA 172**;

(b) Whether the stated case was properly formulated in accordance with the rules of court and the requirements for such a stated case, so as to be sufficient to enable the court to determine the issue of the quantum of damages;

(c) The quantum of damages awarded to each of the plaintiffs.'

[2] The respondents did not file heads of argument and opted to abide by this Court's decision. The appellant sought condonation in terms of rule 12 of the Rules of the Supreme Court of Appeal for the late filing of the record and heads of argument. Both applications were unopposed by the respondents. In support of the condonation application, the appellant stated that the courier company entrusted with the task of delivering the record to the Court failed to provide a plausible explanation for the late delivery to the Court. This Court, having satisfied itself that a proper case for condonation was made out, grants condonation in both instances.

[3] Briefly, the following are the facts. The respondents, Messrs Xolile Mzingeli, Luthando Ndayi and Mpumezo Xabadiya, instituted an action against the appellant, the Minister of Police, claiming damages for unlawful arrest, detention and malicious prosecution.

[4] And this is how the claims came about: On 13 September 2009 the respondents were arrested and charged with housebreaking, theft and murder. They were detained and, on 17 September 2009, the first and third respondents were found guilty of theft and were sentenced to 12 months' imprisonment. The murder charge was still being investigated. After serving their sentence of 12 months, the first and third respondents remained incarcerated together with the second respondent in respect of the murder charge. The respondents remained in custody until 24 July 2014, when the murder charge was withdrawn against them. The first

and third respondents claimed damages for the period 14 September 2010 to 24 July 2014 and the second respondent for the period 13 September 2009 to 24 July 2014.

[5] The trial was scheduled to proceed on 15 October 2019. However, the parties attempted to settle both the issue of liability and quantum, but were not successful in respect of quantum. The court a quo (Zono AJ) made an order in terms of rule 33(4) of the Uniform Rules of Court, thereby separating the issues of liability and quantum. It was further recorded in the order that the appellant was found liable on the merits and the only issue left for determination was the quantum for general damages arising from the detention of the respondents. The respondents did not persist with the claim for malicious prosecution and the issue of quantum was then adjourned to the following day.

[6] On 16 October 2019, the court a quo acceded to hear the issue of quantum by way of a stated case as formulated by the parties. After hearing oral argument, the court a quo awarded the first and third respondents an amount of R3 000 000 as a reasonable and fair compensation, whilst, the second respondent was awarded an amount of R4 000 000 as reasonable and fair compensation.

Songo v Minister of Police and Others (220/2021) [2022] ZASCA 43 (5 April 2022)

Pleas-Whether the court a quo was correct in holding that the fourth and fifth special pleas of no cause of action had to be adjudicated separately – was it correct to uphold the sixth special plea of misjoinder – whether the court a quo failed to discharge its primary function of determining the disputes that were properly before it – whether this court could determine the issues that the court a quo declined to determine as the court of first instance or remit the matter to the court a quo.

On appeal from: Gauteng Division of the High Court, Pretoria (Sardiwalla J sitting as court of first instance):1 The appeal is upheld with costs.

2 Paragraphs 3 and 4 of the order of the court a quo are set aside and replaced with the following:

‘The Sixth special plea is dismissed with costs.

3 The matter is remitted to the high court for the determination of the fourth and fifth special pleas.

[1] On 19 November 2009, the appellant, Mr Simon Songo was convicted on two counts of murder by the North-West Division of the High Court (the high court) and sentenced to eighteen (18) years' imprisonment. On 15 October 2015, he successfully appealed against his conviction to the Full Bench of the high court, and he was immediately released.

[2] The appellant instituted an action against the respondents, the Minister of Police, the National Director of Public Prosecutions and the Minister of Justice and Correctional Services in the Gauteng Division of the High Court, Pretoria for damages. The respondents resisting the claim, raised six (6) special pleas, namely : (i) the first and second special pleas referred to the failure to comply with ss (18)(1) and 18(10) of the Uniform Rules of Courts in that the combined summons were fatally defective; (ii) the third special plea referred to the non-compliance with the provisions of **s 3(1)** and **3**(2)*(a)* of the **Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002**, which were peremptory and no condonation was obtained thereto; (iii) the fourth and fifth special pleas raised the issue of no cause of action against the first and second respondents; (iv) the sixth special plea raised the issue of misjoinder of the third respondent.

[3] However, the first and the second special pleas were abandoned. The gist of the fourth and fifth special pleas was that the appellant's imprisonment was based upon the conviction and sentence during criminal proceedings and as a result his imprisonment was not unlawful. It is contended that the appellant failed to set out and aver any grounds by which a causal nexus could be established between any of the facts pleaded, a cogent cause of action or the alleged damages suffered. As to the sixth special plea, the respondent averred that the particulars of claim were fatally flawed because of the lack of averments which are necessary to sustain the action, alternatively, because no cause of action against the Minister of Justice and Correctional Services was disclosed. Again, the appellant is said to have failed to set out and aver any grounds upon which a causal nexus can be established between the facts pleaded, a cogent cause of action or the alleged damages suffered.

[4] The matter came before Sardiwalla J in the Gauteng Division of the High Court, Pretoria (the court a quo), where the remaining special pleas were argued. Sardiwalla J delivered a judgment on the third special plea, the alleged non-compliance with the provisions of Act 40 of 2002, and after discussion of the facts and the law, he concluded that the appellant's claim had not prescribed. However, he failed to deal with the remaining special pleas, the absence of a cause of action against the respondents, including the alleged misjoinder of the third respondent.

[5] It is common cause that both parties' attorneys complained to the court about its failure to deal with the remaining issues that were argued. The parties then submitted further written submissions to Sardiwalla J, after being requested to do so, and thereafter, on 6 November 2020, the court a quo handed down judgment, and again did not determine the issues in respect of the fourth and fifth special pleas. Sardiwalla J made the following order:

'(1) The applicant's alleged failure to serve the notice contemplated in **s 3(1)(a)** of the **Institution of Legal Proceedings Against Certain Organs of State, Act 40 of 2002**, within the period laid down in s 3(2)(a) of the Act is hereby condoned.

(2) The third special plea of non-compliance is dismissed;

(3) The fourth and fifth special plea of no cause of action must be adjudicated separately;

(4) The sixth special plea of misjoinder is upheld; and

(5) The respondents are ordered to pay applicant's costs of the application on an opposed basis.

[6] It appears from the aforegoing order of Sardiwalla J that he proceeded to uphold the sixth special plea of misjoinder. It is strange, though, that he did not decide the fourth and fifth special pleas (of no cause of action) and ordered that the fourth and fifth special pleas must be adjudicated separately. It is not known which court was to decide the latter two pleas separately. It is apparent that the determination of the fourth and the fifth special pleas was effectively postponed by

the high court. In paragraph 7 of its judgment, the high court stated the following concerning the fourth and fifth special pleas:

'This Court is of the opinion that there may be a need to present further evidence on this aspect as this raises an important constitutional issue which may require the law to be developed. This Court finds that there is insufficient evidence before it to determine that particular issue in light of the severe lack of jurisprudence on the subject matter. It is my view that a preliminary ruling on that issue could result in a gross irregularity being committed. Therefore, this judgment will not deal with that aspect but rather will deal with the remainder of the special pleas only.'

WK Construction (Pty) Ltd v Moores Rowland and Others (952/2020) [2022] ZASCA 44 (6 April 2022)

Prescription- begin to run- Early knowledge of facts leading to reasonable suspicion of possible negligence by auditors established

WK Construction sued its auditors ("Mazars") for failing to detect fraud perpetrated by one of its directors. Mazars' special plea of prescription was upheld by the High Court, leading to an appeal to the Supreme Court of Appeal.

Gorven, JA refers to salient provisions of Prescription Act 68 of 1969 [para 4].

The issue on prescription was when the alleged debt was deemed to have become due. Court having to determine when WK Construction had the relevant knowledge or could have acquired the relevant knowledge by exercising reasonable care.

In order for prescription to run, the creditor need not be in a position to prove its case [para 33]. Early knowledge of facts leading to reasonable suspicion of possible negligence by auditors established. Appeal dismissed.

[1] The appellant WK Construction (Pty) Ltd, which I shall refer to as WK Construction, had employed a Mr Maartens as its financial director. Mr Maartens defrauded WK Construction between 2006 and 2013. He did so by including

fraudulent transactions in its books of account. WK Construction was defrauded of R80 132 548. It recovered R26 million from Mr Maartens. The net loss sustained by WK Construction from the fraudulent activity was thus R54 132 548. It is pleaded by the respondents that the auditor for WK Construction from 2007 was a partnership known during various periods by the names of the three respondents. From 31 August 2013, it is pleaded that the partnership was dissolved and the erstwhile partners and others became directors of an incorporated entity, Mazars Incorporated. This was the auditor of WK Construction from then until 28 February 2015. If any issues arise from the identity of these entities, they do not concern us here. I shall collectively refer to them as Mazars. Mazars failed to report on the fraudulent transactions during its term as auditor, rendering a clean audit report each year. The claim relates to the audits for the financial year ending 28 February 2007 to that ending 28 February 2013.

[2] WK Construction sued Mazars in the KwaZulu-Natal Division of the High Court, Durban (the high court). The summons was served on 23 August 2016. The cause of action was an alleged breach of the auditing contract or contracts. Mazars entered a special plea that the claim of WK Construction had been extinguished by prescription. As an alternative, it contended that WK Construction was time barred from claiming from Mazars on the basis of a clause in the contract governing their relationship.

[3] These two issues were separated from the others in terms of rule 33(4) of the Uniform Rules of Court. The evidence of one witness was led by Mazars, after which Phillips AJ upheld the special plea of prescription. He also held that WK Construction was time barred under the contract or contracts from claiming against Mazars. The appeal is before us with his leave.

[4] It is not disputed that Mazars bore the onus on both issues. The special plea of prescription invoked the provisions of the Prescription Act 68 of 1969 (the Act). The salient provisions are:

Section 10(1) of the Act provides:

‘Subject to the provisions of this Chapter and of Chapter IV, a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt.’

This introduced what is known as ‘strong’ prescription. Not only does the debt become unenforceable after the lapse of the period in question, but, subject to certain exceptions, it is extinguished such that a right of action based on it no longer exists.**[1]** Section 11*(d)* of the Act fixes three years as the period for extinguishing a debt of the kind in question. Section 12(1) of the Act provides:

‘Subject to the provisions of subsections (2), (3), and (4), prescription shall commence to run as soon as the debt is due.’

And s 12(3) of the Act provides:

‘A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.’

As is the case in the present matter, this provision has provided fertile soil for litigation over the years.

[5] Boiled down to its essentials, the issue on prescription is when the alleged debt was deemed to have become due. This required a finding on when WK Construction had the relevant knowledge or could have acquired the relevant knowledge by exercising reasonable care. This, in turn, required an assessment of what comprised the relevant knowledge. If this was acquired prior to 23 August 2013, the debt had been extinguished by the time action was instituted.

[6] The sole witness called in the proceedings was one Ms De Coster. She had been employed by WK Construction as its financial manager from May 2006 to May 2018. She was a qualified chartered accountant. She reported directly to Mr Maartens. She testified about the accounting systems employed by WK Construction at the time. There was no dispute as to her testimony in this

regard. In order to properly assess the matter, it is of some importance to delve into these systems.

[7] Each project undertaken by WK Construction was allocated an account number. An example pertinent to this matter was account number 69990, for a project designated East Cape Small Contracts. An account was either open or closed. Three digit general ledger codes were allocated for various types of expenditure. This allowed ready identification of the nature of the expenses incurred which could then be reconciled against the project in question. For example, general ledger code 423 related to materials. When these were procured for a project, that code and the amount were entered under the account number for that project. All of the items allocated to any one project could be extracted from the system so as to see at a glance all of the entries, their codes, and the dates. This enabled WK Construction to establish the profit or loss made on each project and identify the items on which the expenses had been incurred. When a project had been completed, the account relating to it was closed. A closed account was an historical account that was not in use any longer. No transactions would take place on that account. At all times material to this matter, the project with account number 69990 had been completed and the account was a closed one.

Johannes G Coetzee & Seun and Another v Le Roux and Another (969/2020) [2022] ZASCA 47 (8 April 2022)

Prescription – extinctive prescription – 'facts from which the debt arises' in terms of s 12(3) of the Prescription Act 68 of 1969 – knowledge of legal consequences not required by s 12(3) of the Prescription Act – Alienation of Land Act 68 of 1981 – failure to comply with s 2(1) of the Alienation of Land Act.

On appeal from: Northern Cape Division of the High Court, Kimberley (W J Coetzee 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:

'The special plea of prescription is upheld with costs and the plaintiffs' action is dismissed with costs.'

[1] This appeal is about extinctive prescription, in particular whether the creditor must be aware of the full extent of its rights before prescription may start running against it.

[2] The first and second respondents, Mr Pieter Paul le Roux and his wife, Ms Johanna Catharina le Roux, who were the plaintiffs in the Northern Cape Division of the High Court, Kimberley (the high court), instituted action against the first and second appellants, Johannes G Coetzee & Seun and Mr Daniel Cornelius Coetzee, who were the defendants therein, and which were the respondents' erstwhile attorneys. The respondents sued the appellants for damages suffered as a result of a breach of a mandate. For convenience, hereafter the parties will be referred to as they were in the high court.

[3] The plaintiffs alleged that the defendants were negligent in carrying out their mandate to exercise an option to purchase a farm in Calvinia, in the Northern Cape (the property), from the late Mr Jan Harmse Steyn (the deceased), who had concluded the option to purchase (the option) with the plaintiffs. Notwithstanding the existence of the option and unknown to the plaintiffs, on 8 July 2003, the deceased and his wife concluded a written deed of sale with Mr Paul Nel (Mr Nel) in terms of which the deceased sold the property to Mr Nel at a purchase price of R141 000. On 13 September 2003, the deceased passed away. On 16 September 2003, the property was transferred to Mr Nel.

[4] On 14 October 2004, in an attempt to enforce the option, the plaintiffs issued summons against Mr Nel, as the first defendant therein, and Mr Alwyn Johannes Müller NO, the attorney of the deceased's estate, as the second defendant therein, claiming transfer of the property and damages. Mr Nel pleaded to the summons admitting receipt of the second plaintiff's letter purporting to exercise the option, but disputing the validity thereof. On 11 September 2009, Williams J (Northern Cape high court) dismissed the action with costs on the basis that the option was not executed in terms of the provisions of **s 2(1)** of the **Alienation of Land Act 68 of 1981**. The plaintiffs unsuccessfully appealed against the judgment

of Williams J in this Court.[1] Subsequently, on 29 September 2009, the plaintiffs issued summons against the defendants in the high court in respect of the matter which forms the subject of this appeal. In this action, the defendants delivered a special plea in terms of which they pleaded that the plaintiffs' claim had prescribed. Thereafter, the parties agreed to submit a special case on prescription for adjudication, first, in terms of **rule 33(4).[2]**

[5] Before the high court, in their special plea of prescription, the defendants alleged that the plaintiffs' claim had prescribed for the following reasons: more than three years had elapsed since the debt became due before summons was served; that the content of Mr Nel's plea (para 4) in respect of the action before Williams J should have alerted the plaintiffs to the nature of the defendants' breach and the fact that the option was not exercised in terms of the provisions of **s 2(1)** of the **Alienation of Land Act; and** that had their new attorneys, NME Nilssen & Associates, conducted themselves in the manner expected of reasonable attorneys, they would have become aware of the plaintiffs' claim against the defendants.

[6] In their replication, the plaintiffs alleged that they acquired knowledge of the identity of the debtor and the facts from which the debt arose only in early November 2007, during the cross-examination of the first plaintiff in the action against Mr Nel; alternatively, on 11 September 2009, when the judgment of Williams J was handed down. Accordingly, they alleged that prescription began to run only in early November 2007, or on 11 September 2009, and that the summons served in October 2009 interrupted prescription.

[7] The high court (Coetzee AJ) found that the alleged 'debt' arose from a breach of an implied term of a mandatory contract;**[3]** and that from the evidence of the first plaintiff, it was clear that the first plaintiff only came to know of the provisions of **s 2(1)** of the **Alienation of Land Act during** the trial in the action instituted by the plaintiffs against Mr Nel, being in early November 2007. Furthermore, the high court held**[4]** that the non-compliance with the provisions of **s 2(1)** of the **Alienation of Land Act is** a fact of which the defendants had to have had knowledge, and not a

legal conclusion. Therefore, the high court concluded that '[s]ave for relying on the submission that the plaintiffs should have been alerted to the breach by the contents of Nel's plea, [of 23 December 2004], the defendant[s], bearing the onus, did not place anything before [Coetzee AJ] which justifies a conclusion that the plaintiffs did not act as expected of a reasonable [person]'. Notably, the high court considered the recent judgment of this Court, *Fluxmans Incorporated v Levenson*,[5] and held that it is distinguishable on the facts. It thus dismissed, with costs, the defendants' special plea of prescription.

Advertising Regulatory Board NPC and Others v Bliss Brands (Pty) Ltd (786/21) [2022] ZASCA 51 (12 April 2022)

Jurisdiction-Administrative Law – private body exercising public functions – submission to jurisdiction – powers of the Administrative Regulatory Board (ARB) – complaints relating to advertising by non-members of ARB – whether lawful for ARB to consider – whether ARB structures independent, usurp judicial authority or follow fair procedures

Courts– civil procedure – courts should decide issues defined by parties – court raising constitutionality of ARB's powers *mero motu* – inappropriate.

[1] The first appellant, the Advertising Regulatory Board NPC (ARB), is a non-profit company which carries on business as an independent, self-regulatory body in the advertising industry. Its members are required to adhere to the Code of Advertising Practice (the Code), which is based on international best practice for advertising self-regulation and is the guiding document of the ARB. The Code states that its two main purposes are to protect the consumer and to ensure professionalism among advertisers; and that advertising is a service to the public and thus 'should be informative, factual, honest and decent'. All advertising in the electronic broadcast media is subject to the Electronic Communications Act 36 of 2005 (ECA). Every electronic broadcaster must adhere to the Code as determined and administered by the ARB,**[1]** which has replaced and performs the same functions as the former Advertising Standards Authority of South Africa (ASA).**[2]** The second and third appellants, Colgate-Palmolive (Pty) Ltd and Colgate-

Palmolive Company (Colgate), and the respondent, Bliss Brands (Pty) Ltd (Bliss Brands), are competitors in the toiletries business.

[2] In December 2019 Colgate lodged a complaint with the ARB that Bliss Brands, in the packaging of its Securex soap, had breached the Code by exploiting the advertising goodwill and imitating the packaging architecture of Colgate's Protex soap. Although Bliss Brands is not a member of the ARB, it raised no objection to the ARB's jurisdiction and participated fully in its hearings, taking the matter all the way to the ARB's Final Appeal Committee (FAC). After the FAC dismissed its appeal, Bliss Brands applied to the Gauteng Division of the High Court, Johannesburg (the high court) to review and set aside the FAC's decision.

[3] The high court (Fisher J) *mero motu* questioned the constitutionality of the ARB's powers. Bliss Brands then amended its notice of motion and supplemented its founding papers so that they bore little resemblance to its original application. It raised a number of constitutional points which found favour with the court. It made a series of orders which effectively dismantled the system of self-regulation of advertising in South Africa in its entirety. This included an order declaring part of the ARB's Memorandum of Incorporation (MOI) 'unconstitutional, void and unenforceable', together with further declaratory and interdictory relief. The issue in this appeal, which is before us with the leave of the high court, is whether it was correct in making those orders.

The complaint and proceedings below

[4] The Directorate of the ARB, responsible for adjudicating complaints at first instance, found that Bliss Brands had not breached the Code in the packaging of its Securex soap. Colgate appealed to the Advertising Appeals Committee (AAC), which overturned the Directorate's decision. Bliss Brands then lodged an appeal to the FAC. It found in favour of Colgate in a split decision. Its chairperson, Judge Ngoepe, cast the deciding vote. The FAC's ruling required Bliss Brands to cease distribution of the offending Securex packaging. This was followed by a brief FAC decision clarifying the costs award in its earlier ruling.

[5] Subsequently, Bliss Brands brought an urgent application in the high court to suspend the FAC's ruling, pending a review application. That application was dismissed. Undeterred, on 2 October 2020 Bliss Brands launched another urgent application for interim relief, coupled with an application to review the FAC's ruling based on a violation of the principle of legality and various grounds under the Promotion of Administrative Justice Act 3 of 2000 (PAJA). It did not challenge the ARB's jurisdiction, nor did it suggest that its participation in the ARB's proceedings was anything but voluntary.

[6] On 30 October 2020 Fisher J issued a directive that the parties submit argument on the constitutionality of those parts of the Code and the MOI, which authorised the Directorate and the Committees of the ARB to determine whether the packaging of a product constituted passing off or breach of copyright (the directive). The parties were also required to address the basis of the ARB's jurisdiction 'to usurp the function of the courts in relation to these issues'.

[58] The high court held that the issues raised by clauses 8 (exploitation of advertising goodwill) and 9 (imitation) of the Code are squarely legal issues which entail the same enquiries as those which courts are called upon to consider in cases dealing with passing off and contraventions of copyright and trade marks. However, the mere fact that elements of a complaint before the ARB might overlap with elements of a cause of action that could be pursued in a court or other tribunal, does not mean that the ARB ousts the court's jurisdiction.**[43]** The ARB and the courts are different fora with distinct powers. The ARB operates consensually and is not permitted to determine questions as to whether the packaging or get-up of a particular product constitutes passing off or breach of copyright. The ARB may only determine whether its Code has been breached. It does not exercise a judicial function when doing so.

[59] In the result the following order is made:

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the Gauteng Division of the High Court, Johannesburg, is set aside and replaced by the following:

'The relief sought in paragraphs 1, 4, 5, 6 and 8 of the applicant's amended notice of motion is dismissed with costs, including the costs of two counsel.'

3 The relief sought by the applicant in paragraphs 2, 3 and 7 of its amended notice of motion is remitted to the Gauteng Division of the High Court, Johannesburg for determination.

HLB International (South Africa) v MWRK Accountants and Consultants (113/2021) [2022] ZASCA 52 (12 April 2022)

Court orders-interpretation of court orders

A dispute about the meaning of an order issued by the High Court led the court to make a second order interpreting and correcting its first order. That resulted in an appeal against the second order.

Meyer AJA addresses concepts of an "order" and a "judgment" [para 18]; and confirms court's power to rescind or vary an order in terms of Rule 42(1)*(b)* of the Uniform Rules of Court [para 19]. Relevant rules of interpreting a court's judgment or order discussed.

Test for interpretation of court orders set out:

"The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court's intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention" [para 26].

High Court correctly rectified a patent omission so as to give effect to true intention, which correction did not alter the intended sense and substance of the order. Appeal dismissed.

[1] This appeal concerns the principles applicable to and the interpretation of a court order. The order in question was granted by the Gauteng Division of the High Court, Pretoria (Davies AJ) on 15 November 2019 (the first order).

[2] The respondent, MWRK Accountants and Consultants (Pty) Ltd (MWRK), holds 49% of the shareholding in the appellant, HLB International (Pty) Ltd (HLB), and Par Excellence Finance and Leasing (Pty) Ltd (PE) - the second respondent in the high court - holds 51% of the shareholding in HLB, a property holding company; it was the owner of Erf 3726, Benoni Extension 10, Ekhurhuleni (the property). MWRK launched an application for equitable relief - the winding-up of HLB in terms of s 81(1)*(d)*(iii) of the Companies Act 71 of 2008 (the **Companies Act) on** the basis that it is just and equitable for HLB to be wound up - or for relief from oppressive or prejudicial conduct in terms of **s 163** - for PE to buy MWRK's 49% shareholding in HLB at a purchase price equivalent to the highest of 49% of the present market value of the property or for the purchase price paid for the property plus an escalation of 8% per year compounded from 6 March 2017 (the equitable application).

[3] The high court refused to wind up the solvent HLB, but held that the action of HLB and its majority shareholder, PE, is unfairly prejudicial, unjust and inequitable to the minority shareholder, MWRK, as contemplated in **s 163** of the **Companies Act. It** held that '[t]he most equitable remedy lies in ascertaining the value of the [MWRK's] shares, and realising the same effectively and timeously'. The high court ordered the sale of the property, in the first place by way of private treaty, or otherwise by way of public auction. The first order, against which there was no appeal, reads as follows:

'1. The parties are directed forthwith to mandate at least three registered estate agents to procure the sale of the relevant immovable property, Erf 3726, Benoni Extension 10, Ekurhuleni.

2. If [MWRK] and [PE] are unwilling or unable to agree on and accept an offer to purchase within three months of this order, then Erf 3726 must be sold by public auction.

3. The aforesaid public auction must be held within two months of the expiry of the three-month period referred to in paragraph 2 above.
4. The net proceeds of the sale of Erf 3726 must be distributed between [MWRK] and [PE] *pro rata* according to their respective shareholdings.
5. [HLB] and [PE] are directed to pay interest on [MWRK's] share of the purchase price at the prescribed rate, calculated from 14 March 2019 until the date of final payment.
6. [MWRK] is directed to pay the wasted costs occasioned by the matter standing down on 21 May 2019.
7. [HLB and PE], jointly and severally, are directed to pay the costs of this application.'

[4] A dispute arose as to the meaning of the first order. MWRK's interpretation of the order was that the property must be sold 'free of any lease relating to the property' and HLB's interpretation (and also that of PE) was that the high court's first order is clear and unambiguous and did not require to be clarified and corrected by having regard to the high court's reasons for the first order or the background facts that preceded the litigation and order.**[1]** The order meant that the property was to be sold subject to the lease. HLB leased the property to Certified Master Auditors Inc – now HLB CMA South Africa Inc (CMA). MWRK, therefore, instituted a second application against HLB and PE in which it sought the clarification and correction of the first order by the inclusion in the relevant paragraphs thereof of the phrase that the sale of the property by private treaty or public auction is to be 'free of any lease relating to the property' (the correction application). It was opposed only by HLB, and not by the majority shareholder, PE.

[5] By order dated 21 September 2020, the high court interpreted and corrected its first order (the second order). It reads thus:

'1. The judgment and order of this Honourable Court dated 15 November 2019 under the above case number is clarified to stipulate that the sale and auction envisaged in

respectively paragraphs 1 and 2 of the order of 15 November 2019 should not be subject to the lease agreement which was signed between [HLB] and [CMA].

2. The first and second orders *(sic)* [paragraphs] are hereby varied to read:

"1. The parties are directed forthwith to mandate at least three registered estate agents to procure the sale of the relevant immovable property Erf 3726, Benoni Extension 10, Ekurhuleni, the said sale to be free of any lease relating to the property;

2. If [MWRK] and [PE] are unwilling or unable to agree on and accept an offer to purchase within three months of this order, then Erf 3726 must be sold by public auction, which sale must be free of any lease relating to the property."

3. The costs of this application are to be paid by [HLB] on the scale as between attorney and client.' (Underlining added.)

[6] The appeal, with the leave of the high court, is against the second order. It bears emphasis that the first order is not on appeal before us and we are therefore not required to consider the correctness thereof. This appeal only concerns the high court's interpretation and correction of the first order in terms of the second order.

[7] It is necessary to place the first order in proper perspective and to consider the context in which it was made.**[2]** Ms Lesley Anne Reynolds is the sole shareholder and director of MWRK. She is married to Mr Michael Wayne Reynolds, a chartered accountant who conducted his practice through a professional personal liability company, MWRK Accountants & Auditors Inc. (MWRKAA), until 1 March 2017. Mr Marius Johannes Maritz is the chairperson, a director of, and a shareholder in CMA. The MJMN Trust (the trust) holds 99.999% shares and Mr Maritz holds 0.0001% shares in PE. Mr Maritz and his daughter, Ms Nadine van Dyk, are beneficiaries of the trust. Mr Maritz was the sole director of PE until he resigned on 6 November 2017, on which date Ms van Dyk was appointed its sole director.

Rule 37 pre-trial-Rule 37(4) pre-trial questionnaire which resulted in an order granted in the absence of the respondents-Whether there were any Rule 37(8) directives issued and whether the respondents could compel compliance therewith

[1] This is a full court appeal against the judgment wherein an order was made striking out the respondent's defence in the action between the parties and directing the respondent to pay the costs of the application on attorney and client scale as well as the order of the dismissal of the respondent's counter-application for rescission of an earlier order granted by another Judge. The appellants were granted leave to appeal to the full court.

THE ISSUES

[2] The issues to be determined are:

(a) Whether the respondents were entitled, by virtue of the provisions of Rule 30A to compel compliance with Rule 37(4) pre-trial questionnaire which resulted in an order granted in the absence of the respondents.

(b) Whether there were any Rule 37(8) directives issued and whether the respondents could compel compliance therewith.

(c) Whether the delivery of formal notices and replies thereto in terms of Rule 37(4) constituted an abuse of the court process.

(d) Whether the appellant was entitled to rescission of the order in terms of the provisions of Rule 42(1)(a) by virtue of the fact that it was erroneously sought and granted in the absence of the appellant.

(e) Whether the court correctly exercised its discretion to strike out the appellant's defence.

(f) Whether the court correctly exercised its discretion to award punitive costs against the appellant.

[3] The appellant's case was that the court erred by striking out the appellant's defence where such an order constituted the most drastic relief that a court could grant, and that Rule 30A did not apply by virtue of the fact that Rule 37 provided its own remedy for non-compliance. The case was further that the court had erred in dismissing the appellant's application for rescission of an order in that the

respondents were not procedurally entitled to the relief obtained pursuant their application in terms of Rule 30A.

[4] The respondents' case was that in this Division Rule 30A may be used to compel compliance with directives made by Judges at Rule 37(8) conferences and in particular so where the directive made concerned a step agreed to between the parties in writing. It is the respondents' case further that the appellant incorrectly sought to rely on Rule 42(1)(a) for rescission of the judgment granted in their favour and that there was no procedural irregularity in respect of the order of the court.

[5] The respondents are trustees in the insolvent estate of AF Malan whose estate was finally sequestrated on 26 February 2015. Malan was a dairy farmer. Malan entered into a sale agreement with the appellant in 2011 wherein he purchased 317 jersey dairy cows. In line with the terms of the sale agreement, five head of cattle were delivered by the appellant to Malan monthly and an agreed monthly payment was also accordingly made. In terms of the agreement, ownership of the cattle would vest in the appellant until the full purchase price was paid. In the event that Malan was to default on the terms of the agreement, the parties agreed that the appellant would be entitled to take delivery of the cows delivered to Malan.

[22] Rule 37(8)(c) provides:

"37 Pre-trial Conference

(8)(c) The judge may, with the consent of the parties and without any formal application, at such conference or thereafter give any direction which might promote the effective conclusion of the matter, including the granting of condonation in respect of this or any other rule."

[23] In my view, Allie J could not competently, under the circumstances, make the alleged directives without the consent of the appellant. The further reason, outside non-compliance with the time frames, was that the appellant could not be legally compelled to answer to or to make admissions during the pre-trial conference proceedings [*Kriel v Bowels* **2012 (2) SA 45** (ECP) at par 16]. If Allie J made no directives, the respondents were not entitled to the relief that they obtained. Be it as

it may, the 13 December 2019 order was not made during pre-trial conference proceedings within the realm of Rule 37.

[24] The directions which the respondents alleged, in any event, were not the ones envisaged in Rule 37A Judicial Case Management proceedings. The respondents' alleged directions, by Allie J, were those as envisaged in Rule 37 Pre-trial Conference proceedings. These are not directions covered by Rule 30A, when one reads the rule speaking for itself in its own terms. Rule 37(2) makes it very clear that pre-trial conference proceedings are applicable to cases not subject to judicial case management. The scope of the matters to be dealt with, at a pre-trial conference, are set out in Rule 37(5) which refers to subrules (4) and (6) which respectively lists the matters. The list simply comprises matters that are intended to be dealt with at the pre-trial conference [*Fransch v Premier Gauteng* **2019 (1) SA 247** (GJ) at para 10].

[25] The list cannot inexplicably and suddenly change into a request for further particulars as envisaged in Rule 21 at the respondents' pleasure. This is simply because Rule 37(4)(b) specifically provides for the listed matters to be those not included in the request for further particulars for trial. Rule 37(4)(c) specifically narrows the matters on the list to be those which a party will raise for discussion. The discussion is clearly during the pre-trial conference [*Rungasamy v Road Accident Fund* (6585/09) [2009] ZAKZDHC 58 (23 October 2009) para 7]. The list was procedurally clothed as a Rule 37 list and substantively unleashed as a Rule 21 request for further particulars [*Kriel* para 16 at 49C-D]. The respondents had no legal basis to utilize the general Rule 30A remedy for its defective request. The respondents were not entitled, procedurally, to the relief pursuant the application of Rule 30A.

[26] Rule 37(4) makes no provision for a request and the entire Rule 37 makes no provision for a party to be compelled to reply to the list as envisaged in Rule 37(4). It

seems to me that the respondents' Rule 30A notice and all the proceedings anchored thereon, were based on the respondents' self-created rules, and not the Uniform Rules of Court. In *Fransch* the court said at para 11:

"[11] The remedy available to any party who is frustrated by a lack of co-operation or *bona fides* on the part of his opponent, is to request that the conference be held before the judge in chambers".

In *MT v CT* **2016 (4) SA 193** (WCC) at para 27 the court considered another alternative for a frustrated party and said:

"In the event that a party is in default of a procedural step, eg has failed to file a reply to a request for trial particulars, or claims that certain documents are not discoverable, the pre-trial procedure is held in abeyance while the parties take the dispute to the motion court for resolution there: the rule 37(8) procedure is not geared to the resolution of pre-trial disputes which invariably require the filing of affidavits and heads of argument."

[27] The remedy in *Fransch* is discerned from a reading of Rule 37(8)(a); 37(8)(c); 37(8)(d); 37(9); 37(10) and 37(11). In my view, where a party had availed themselves of the Rule 37(8)(a) procedure and had requested a judge to hold or continue with a pre-trial conference in chambers, the trial court is obliged, at the hearing of the matter, to consider whether or not a special order as to costs should be made against a party or its attorney because such party or the party's attorney did not attend a pre-trial conference or failed to a material degree to promote the effective disposal of the litigation [*Erasmus: Superior Courts Practice* at DI-501]. These are the special remedies available in Rule 37 Pre-trial Conference proceedings.

[28] Rule 42(1)(a) provides:

"42 Variation and Rescission of Orders

(1) The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:

(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;"

[29] Rule 30A did not apply to directions issued in terms of Rule 37(8)(c) and in this case no such directives were made in any event. The formal request purportedly delivered in terms of Rule 37(4) was not procedurally competent and amounted to an abuse of process. The respondents abused Rule 37 and delivered a notice which was in essence a request for further particulars and demanded a response thereto, both of which were not envisaged in the Rule. The respondents were not entitled, in law, to the relief sought and granted on 13 December 2019. The order was incorrectly granted. It was an order granted without a legal foundation. It was an order erroneously granted [*Athmaram v Singh* **1989 (3) SA 953** (D & CLD) at 956J-957A; *Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz and Others* **1996 (4) SA 411** at 417G-H].

RESCISSION

[30] A judgment incorrectly recorded against the appellant fell to be rescinded in terms of Rule 42(1)(a) [See *Custom Credit Corporation Ltd v Bruwer & Others* **1969 (4) SA 564** (D & CLD) at 566D; *Topol and Others v LS Group Management Services (Pty) Ltd* **1988 (1) SA 639** (WLD) at 648F-J. In *Freedom Stationary v Hassam* **2019 (4) SA 459** (SCA) at para 18 it was said:

"As Streicher JA explained in *Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd* **2007 (6) SA 87** (SCA) **[2007] ZASCA 85)** paras 25-27, the phrase 'erroneously granted' relates to the procedure followed to obtain the judgment in the absence of another party and not the existence of a defence to the

claim. See also *Colyn v Tiger Food Industries Ltd t/s Meadow Feed Mills (Cape)* **2003 (6) SA 1** (SCA) ([2003] **2 All SA 113**; **[2003] ZASCA 36)** paras 6 and 9. Thus, a judgment to which a party was procedurally entitled cannot be said to have been erroneously granted in the absence of another party."

[31] The striking out of a defence is extremely drastic and meant that the defendant's plea will not be referred to at trial [*Langley v Williams,* **1907 T.H. 197].** It should be resorted to only if the court considered that a party had deliberately and contemptuously disobeyed its order to furnish particulars [*Wilson v Die Afrikaanse Pers Publikasies (Edms) Bpk* **1971 (3) SA 455** (T) at 462H-463B]. The application to strike out the appellant's defence in this matter was conceived, predicated and pronounced upon a wrong legal footing. In my view, the decisions to strike out the appellant's defence and to award a punitive cost order, under the circumstances, were not based on a discretion correctly and judicially exercised.

[32] In conclusion, it needs to be stated that in granting the application for leave to appeal, the court a *quo* acknowledged that it did not deal with the issue whether the remedy provided under Rule 30A was applicable where there has been non-compliance with a Rule 37 direction. For these reasons I would make the following order:

(a) The appeal is upheld.

(b) The order of the court *a quo* is set aside and replaced with the following order:

"(i) The order granted against the respondent on 13 December 2019 is rescinded.

(ii)The application to strike out the respondent's defence is dismissed.

(iii) The applicants to pay the costs, jointly and severally, the one to pay the other to be absolved"

(c)The respondents to pay the costs on appeal, including the costs occasioned by the employment of two counsel.

Advertising Regulatory Board NPC and others v Bliss Brands (Pty) Ltd [2022] JOL 52815 (SCA)

Jurisdiction-powers of advertising regulatory board and effect of submission to jurisdiction

The Advertising Regulatory Board NPC (ARB) decided a complaint lodged by Colgate in which Bliss Brands was accused of exploiting the advertising goodwill and imitating the packaging architecture of Colgate's Protex soap. The ARB found against Bliss Brands which then applied for review in the High Court. That court found the ARB's Memorandum of Incorporation unconstitutional and invalid because it permits the ARB to decide complaints concerning advertisements of non-members. It held that the ARB has no jurisdiction over non-members in any circumstances, and may not issue any rulings in relation to non-members or their advertising. That led to the ARB appealing to the Supreme Court of Appeal.

Schippers, JA emphasises the requirement that a court should decide only the issues before it, as pleaded by the parties [paras 9-10]; and confirms that a failure to raise any objection to jurisdiction and subsequent participation in proceedings is sufficient to demonstrate submission to jurisdiction [paras 11-13].

Court also discusses powers of ARB discussed, and the right to freedom of association and dissociation.

"… the right to dissociate does not give Bliss Brands the unfettered right to dictate to the ARB and its members how they should exercise their rights of association" [para 48].

Appeal upheld.

Oppressed ACSA Minority 1 (Pty) Ltd and another v Government of the Republic of South Africa and others [2022] JOL 52861 (SCA)

Locus standi- resolution adopting the settlement agreement, and office-bearers who signed the agreement lacked authority, the settlement agreement and the consent order were invalid.

Appellants, as minority shareholders in the Airports Company of South Africa (ACSA), approached the High Court for an order directing ACSA to acquire their 1.8% stake at fair value. The parties entered into a settlement agreement which was made a consent order. The court referred the matter to a referee to determine the value of the applicants' shares. ACSA was dissatisfied with the valuation received and applied for review. While that was pending, the Government (a major ACSA shareholder) obtained rescission of the consent order, leading to appellants' appealing.

Dambuza, JA considers Government's standing to seek rescission [paras 19-21]; and ACSA's standing to participate in the appeal in light of its having elected to abide by the High Court's order [paras 22-23]. Requirements for rescission set out [para 24].

As ACSA Board never passed a resolution adopting the settlement agreement, and office-bearers who signed the agreement lacked authority, the settlement agreement and the consent order were invalid. Appeal failing.

Mmm

BAYPORT SECURITISATION LTD AND ANOTHER v UNIVERSITY OF STELLENBOSCH LAW CLINIC AND OTHERS 2022 (2) SA 343 (SCA)

Credit agreement — Consumer credit agreement — Cost of credit — 'Collection costs' — Whether collection costs as defined including all legal costs incurred in enforcing credit agreement — National Credit Act 34 of 2005, s 1 sv 'collection costs' and ss 101(1)(*g*) and 103(5).

Credit agreement — Consumer credit agreement — Cost of credit — Limit — Whether s 103(5) of NCA applying for as long as consumer remaining in default of

credit obligations, from date of default to date of collection of final payment owing in order to purge default, irrespective of whether judgment in respect of default been granted or not during this period — National Credit Act 34 of 2005, s 103(5).

In terms of s 101(1) of the National Credit Act 34 of 2005 (NCA), a credit agreement must not require payment by the consumer of any money or other consideration, except the principal debt and the costs of credit set out in paras *(b)* – *(g)*. One such cost of credit (para *(g)*) is 'collection costs', which is defined in s 1 as 'an amount that may be charged by a credit provider in respect of enforcement of a consumer's monetary obligations under a credit agreement but does not include a default administration charge'. Section 103(5) of the NCA provides that the amounts contemplated in s 101(1)*(b)* – *(g)* that 'accrue during the time that a consumer is in default under the credit agreement may not, in aggregate, exceed the unpaid balance of the principal debt under that credit agreement as at the time that the default occurs'. In an application brought before the Western Cape High Court, the respondents (as cited in the present appeal) — which included the University of Stellenbosch Law Clinic (the Law Clinic) and Summit Financial Partners (Pty) Ltd (Summit) (first and second respondents, respectively) — obtained an order to, inter alia, the following effect:

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

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

In the present appeal before the Supreme Court of Appeal, the first and second appellants, Bayport Securitisation Ltd and the Law Society of South Africa, respectively, contested the interpretation as reflected in the above declaratory orders, and in particular that 'collection costs' properly defined included legal fees.

Held, as to *(a)*, that South African courts had over many years drawn a distinction between collection costs and litigation costs. It was trite that a statutory provision should not be interpreted so as to alter the common law more than was necessary, unless the intention to do so was clearly reflected in the enactment, whether expressly or by necessary implication. (See [15].) Nothing in the NCA suggested an intention on the part of the legislature to depart from that construction (see [16]). It followed that collection costs, as defined and referred to in s 101(1)*(g)*, should be given the same meaning as it was in the common law. (The SCA referred with approval to the case of *D & DH Fraser Ltd v Waller* 1916 AD 494, which stressed that costs of collection referred to those costs incurred in collecting a debt by means other than legal processes (see [15]). Further, the respondents' submission that the NCA put a maximum limit on the amount of legal costs that could be recovered from a consumer would lead to some glaring absurdities. What militated against such a construction was that the award of costs generally involved the exercise of a judicial discretion. To hold that collection costs included legal costs would be to oust or severely fetter the discretion of a court to make appropriate costs orders, including where necessary punitive costs orders. (See [18].) Finally, had the legislature intended collection costs to include legal costs, it could easily have said as much. The language used by the legislature demonstrated that collection costs were not intended to include litigation costs. (See [19].)

Held, as to *(b)*, that the charges contemplated in s 101(1)*(b)* – *(g)* were not post-judgment charges. The judgment entered was thus for the capital sum fixed at a particular date together with interest. It followed that, even had it been correctly found that s 103(5) found application, it did not apply post-judgment. (See [26].)

Held, in conclusion, that the High Court's interpretation of collection costs in s 1, and its application to ss 101(1)*(g)* and 103(5) of the NCA, which culminated in the declaratory orders granted, could not be supported. Accordingly, the appeal had to be upheld.

ARUM TRANSPORT CC v MKHWENKWE CONSTRUCTION CC AND ANOTHER 2022 (2) SA 503 (KZP)

Summary judgment — Time for — Under amended rules of court — Plaintiff filing application for summary judgment within 15 days after defendants entered plea — However, before filing application, and after filing of defendants' plea, plaintiff filing replication — Plaintiff, in taking further procedural step after delivery of plea, waiving right to apply for summary judgment — Uniform Rules of Court, rule 32.

The present matter, heard before the Pietermaritzburg High Court, concerned an application for summary judgment brought by the plaintiff against the defendants. As per the requirements of the amended Uniform Rule 32, the plaintiff filed the application within 15 days after the defendants had entered their plea. However, after the defendants had filed their plea, and before filing its application for summary judgment, the plaintiff had taken 'another procedural step' by filing a replication. Under the previous rules governing summary judgments, if a plaintiff took a further procedural step after the delivery of a plea, they waived their right to apply for summary judgment. Was this still the position under the new rule? The court held that it was. (See [10], [15], [24].) In this regard, the court referred with approval to case authority to the effect that there was little reason for extending the scope of summary judgment by allowing amplification of the cause of action in either form of summons, if one considered that summary judgments had always been viewed as extraordinary and stringent remedies, and based upon a reading of the rules themselves (see [15] and [24]).

The court accordingly found that the plaintiff had waived its right to apply for summary judgment (see [24]). The court found it would in any event have refused the application for summary judgment, as the defendants had shown there were triable issues (see [25]). Application dismissed (see [32]).

HLOPHE v FREEDOM UNDER LAW, AND OTHER MATTERS 2022 (2) SA 523 (GJ)

Pleadings — What are — Affidavit in motion proceedings — Affidavit did not qualify as pleading for purposes of rule 18 — Uniform Rules of Court, rule 18.

Hlophe JP, at the conclusion of disciplinary proceedings that the Judicial Service Commission (the JSC) had undertaken against him on the basis of claims that he had sought to suborn two justices of the Constitutional Court to pervert their judgment to favour ex-President Jacob Zuma, was found guilty of gross misconduct. He brought an application to review and set aside that decision, citing the JSC, the President of the Republic, the Minister of Justice and the Speaker of Parliament, of which only the JSC opposed. The present matter, heard in the Johannesburg High Court, dealt with various interlocutory applications in that main review, inter alia:

- an application brought by Freedom Under Law (FUL) to be joined as a party; and

- an application brought by Hlophe JP, in terms of Uniform Rule 30, to set aside as an irregular step FUL's replying affidavit that had been filed in response to Hlophe JP's answering affidavit [in the joinder application], on the ground it failed to comply with the prescripts of Uniform 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'.

Held

The rule 30 application

Whether the rule 30 application should be granted, or not, depended on whether rule 18, which was headed 'Rules relating to pleading generally', applied to *affidavits* (see [17]). That in turn depended on the question whether 'pleading' in rule 18 included an 'affidavit' (see [17]).

In none of the number of judgments relied upon by Hlophe JP to argue that an affidavit did indeed qualify as a pleading, to which rule 18 applied, was an affidavit in fact equated to a pleading. The common thread throughout the cases was a

discussion of the forensic function performed by an affidavit in motion proceedings. The various remarks addressed the dynamics of litigation and, in the course thereof, dealt with the necessity in any legal proceedings to identify the issues for decision. What was said was that in motion proceedings an affidavit served the purpose that a pleading performed; because pleadings by implication were absent, therefore, by force of circumstance, affidavits, in addition to encapsulating the evidence, functioned to identify the issues too. This was a far cry from suggesting that the word 'pleading' in rule 18 included an affidavit. (See [25].) When reading a reference to a term or a phrase appearing in a judgment in one context, it could not be simply understood to mean the exact same thing in a different context. It was not feasible to airlift the meaning of a word out of one sentence in a given context and then parachute that meaning into a sentence using the same word in another context. (See [25].)

On a reading of the Uniform Rules themselves, it was plain that rule 18 had no application to motion proceedings (see [28]). Rule 6 was the primary rule that regulated applications. After an extensive array of prescripts, it was provided in rule 6(14) that '(t)he provisions of rules 10, 11, 12, 13, and 14 apply to all applications'. Prominently absent from the list was any reference to rule 18. Were rule 18 to apply to affidavits it could not have been omitted here. Its omission under these circumstances pointed away from the notion that, by implication, the term 'pleading' when used in rule 18 had any application to an affidavit. (See [28].)

Accordingly, considering that the sole rationale upon which the rule 30 application was brought was invalid, the application to set aside the replying affidavit had to be dismissed (see [33]).

The joinder application

FUL had demonstrated its credentials as a bona fide public interest organisation, acknowledged to be so by our courts, whose objectives were the upholding of constitutional norms through participation in litigation of constitutional significance. The issue in the review was of a question of profound constitutional importance. FUL had been engaged in this case at earlier stages of its evolution. (As early as 2009, when the JSC declined to refer allegations of gross misconduct for an enquiry, FUL successfully sought an order overturning the non-referral, and thereupon an order

directing the JSC to undertake the disciplinary enquiry (see [9]).) The merits or demerits of its stance on the controversy — Hlophe JP had resisted the application on the basis that, inter alia, FUL had exhibited a hostile stance against him in its various public statements, in a manner that was against the public interest — were irrelevant to the joinder question. On grounds of its own legal interest evidenced by its prior involvement in the series of cases and as an agent of the public interest, FUL had shown proper grounds to be joined. (See [47].)

VAN DEN BOS NO v MOHLOKI AND OTHERS 2022 (2) SA 616 (GJ)

Execution — Special executability — Whether creditor may obtain declaration of special executability on judgment obtained in Magistrates' Court — Uniform Rules of Court, rule 46A.

In each of a pair of matters a creditor (an administrator of a body corporate) obtained judgments for arrear contributions from debtors (owners of sectional title units). The creditors had duly obtained writs of execution but the sheriff's returns indicated that no attachable movables could be found (see [4]).

Theron, on strength of the magistrates' courts' orders, the creditor applied to the High Court for declarations of special executability in respect of the debtors' immovable properties (see [6]). This under Uniform Rule of Court 46A.

The issue this raised was whether a High Court could grant such declarations on the back of judgments given in the magistrates' court where execution had been initiated in that court (see [7]).

The High Court held that there was no basis on which it could do so: not under its inherent jurisdiction in that there was no lacuna to fix (special executability was available in the magistrates' court) (see [13] and [22] – [23]); and not by way of process in aid, the requirements for which were unfulfilled (see [23]). Moreover, the creditor was bound to the forum he had chosen (see [24]).

The second issue was whether Uniform Rule 46A applied only to a primary residence (see [27]).

The court, on interpretation, held that the rule applied to all residential properties, but with additional requisites where the residence concerned was primary, and that here,

even the lesser requirements in respect of a non-primary residence were not satisfied (see [28] – [30]).

Applications accordingly dismissed (see [32]).

WESBANK v RALUSHE 2022 (2) SA 626 (ECG)

Credit agreement — Consumer credit agreement — Debt enforcement — Preliminary procedures — Notice of default — Delivery — Proof — Section 129(7) of NCA creating presumption of delivery where postal service confirms delivery to relevant post office in writing — Track-and-trace report sufficient — Delivery or reception of notification slip legally irrelevant but could be presumed on overall probabilities — National Credit Act 34 of 2005, s 129(7).

Section 129 of the National Credit Act 34 of 2005 requires a credit provider to notify a defaulting consumer of its default in writing before taking further steps. Three new subsections, s 129(5) – (7), were added to s 129 in 2015 to clarify the notification process in the light of the Constitutional Court's judgments in *Sebola* and *Kubyana.* Crucially, s 129(7) stipulates that delivery by registered mail is satisfied by 'written confirmation by the postal service . . . of delivery to the relevant post office or postal agency'.

In the present case the delinquent consumer (the defendant) denied that the credit provider (the plaintiff) had sufficiently proved compliance with s 129. He specifically denied having received the post-office slip informing him of the delivery of the s 129 notice to his local post office. It was common cause that the s 129 notice had arrived at the correct post office and that the defendant did not receive (or collect) the s 129 notice. It was similarly common cause that the same s 129 letter together with proof of posting and a track-and-trace report was attached to the summons served on the defendant a few months later.

The issues before court were (i) whether the plaintiff had sufficiently complied with s 129; (ii) the issue of proof of delivery of the notice; (iii) the consequence of the defendant's evidence of non-receipt of the delivery slip; and (iv) whether the attachment of a s 129 notice constituted sufficient compliance with s 129.

Held

The s 129 notice retained its warning function, affording the consumer an opportunity to rectify default to avoid legal action. Section 129's 'gateway' role meant that non-compliance could not be cured by attaching the notice to a summons. (See [18], [24] – [26].)

While s 129 did not specifically deal with the issue of proof of non-receipt, the presumption in s 129(7) — that proof of delivery was satisfied by 'written confirmation by the postal service . . . of delivery to the relevant post office' — was rebuttable only by facts showing failure of the prior fact, ie 'written confirmation', on a balance of probabilities. In the present case the plaintiff's track-and-trace report of delivery to the relevant post office was sufficient. Whether the defendant received a notification slip or whether it was delivered to him was legally irrelevant: once delivery to the correct post office was proved and not rebutted, that was the end of the matter (See [40], [54] – [55], [60].) The defendant's statement that he did not receive the postal slip was, if at all relevant, insufficient to dislodge the overwhelming probabilities in the plaintiff' favour that it was indeed delivered to the defendant's address. (See [66] – [67].)

Since the defendant failed to rebut the presumption of delivery, the plaintiff established compliance with s 129 and would prevail (see [67], [69]).

Deltamune (Pty) Ltd and others v Tiger Brands Limited and others
[2022] 2 All SA 26 (SCA)

Class action – Subpoena duces tecum – Requirements of relevance and specificity – Rule 18(4) of Uniform Rules of Court requires that pleadings contain a clear and concise statement of the material facts upon which the pleader relies – Pleader is only required to set out the material facts, and in context of a class action, an added consideration is that the certification order sets the parameters within which the issues in the pleadings should be considered – Where evidence sought to be obtained through subpoenas is extraneous to certified class action, subpoenas too wide and fell to be set aside.

An outbreak of listeriosis in South Africa between January 2017 and 3 September 2018 saw a number of people across the country contracting an infection of the bacterium *Listeria monocytogenes* ("L. *mono*") as a result of consuming contaminated ready-to-eat meat products produced by the respondents ("Tiger Brands"). A class action was brought against the company. In response, Tiger Brands issued subpoenas which required the recipients thereof to produce an array of documents, items and other things, mainly in respect of test results conducted for the L. *mono*. The appellants in turn brought applications in the High Court, for setting aside of the subpoenas. The grounds for the applications were that the documents were not relevant to the issues arising in the class action; the breadth of the requests constituted an abuse of the court process; the subpoenas amounted to a fishing expedition; and the information in the requested documents was confidential and private. The court's upholding the validity and enforceability of subpoenas led to the present appeals.

Held – Relevance in respect of a subpoena *duces tecum* is not only necessary, but appropriate. The second pertinent issue was that of specificity.

Rule 18(4) of the Uniform Rules of Court requires that pleadings contain a clear and concise statement of the material facts upon which the pleader relies. The particularity required in that rule relates only to the material facts of the party's case. Thus, the pleader is only required to set out the material facts – with due regard to the distinction that should be maintained between the facts which must be proved in order to disclose the cause of action (*facta probanda*) and the facts or evidence which prove the *facta probanda* (*facta probantia*). The latter should not be pleaded at all, whereas the former must be pleaded together with the necessary particularity. In the context of a class action, there is an added consideration: the certification order sets the parameters within which the issues in the pleadings should be considered. What this suggests is that even where *facta probantia* are pleaded, as is the case here, a court is enjoined to distil the real issues between the parties, within the confines of the certification order. This it can only do if it ignores the unnecessarily pleaded pieces of evidence and focuses on the *facta probanda* of the case before it.

Tiger Brands attempt to cast doubt on whether it was the sole source of the outbreak was not the purpose of a subpoena *duces tecum*. The focus of the class

action was only on those whose damages resulted from consuming products from Tiger Brands' meat processing facility at Polokwane. It was therefore irrelevant for purposes of the class action, whether other persons might have been harmed by the consumption of products manufactured by anyone other than Tiger Brands through its Polokwane facility. Having regard to the certification order, the reference to possible cross-contamination was extraneous to the certified class action.

The appeals were upheld.

Knuttel NO and others v Bhana and others [2022] 2 All SA 201 (GJ)

Applications – Founding affidavit – Commissioning of affidavit – Regulation 3(1) requires that a deponent sign the declaration in the presence of a commissioner of oaths – Non-compliance with regulations does not per se invalidate an affidavit if there was substantial compliance with the formalities in such a way as to give effect to the purpose of obtaining a deponent's signature to an affidavit.

Property – Eviction application – Enrichment lien – Possession required by lienholder is known as possessio naturalis, comprising both a physical and a mental element, the latter being an intention to hold the property as against the owner's claim to preserve as security for a claim against the owner – Enrichment lien exercised by informal occupier of property not in existence at time seller was entitled to vacant possession of property due to absence of intention to hold possession.

In an application for eviction of the first respondent and others from property owned by a trust in which the applicants were trustees, the court had to decide whether there was substantial compliance with the requirements for the commissioning of the founding affidavit, and whether the second respondent had an enrichment lien over the property. Because the deponent to the founding affidavit was infected with Covid-19 at the time, the affidavit was commissioned via a Whatsapp video call.

Based on concessions made by the first respondent after papers were filed, the matter eventually distilled to an application for eviction from the property of the first respondent, and through her the second respondent and his family, which the first

and second respondents contest on the basis of a right of retention (*ius retentionis*) in favour of the second respondent arising out of the alleged unjust enrichment of the applicants by the cost occasioned to the second respondent of effecting improvements to the property and of the alleged increase in value of the property as a result of the improvements.

Among the defences raised by the respondents was that the founding affidavit was not signed by the deponent in the presence of the commissioner of oaths, which was in conflict with the Regulations Governing the Administering of an Oath or Affirmation.

Held – Regulation 3(1) of the above Regulations requires that a deponent sign the declaration in the presence of a commissioner of oaths. Non-compliance with the regulations does not *per se* invalidate an affidavit as the regulations are just directory and non-compliance does not invalidate an affidavit if there was substantial compliance with the formalities in such a way as to give effect to the purpose of obtaining a deponent's signature to an affidavit. In this case, the court was satisfied that there was substantial compliance with regulation 3(1).

The existence of an enrichment lien was the only defence persisted with on the merits. Critically, possession required by a lienholder is known as *possessio naturalis*, which comprises both a physical and a mental element, the latter being an intention to hold the property as against the owner's claim to preserve as security for a claim against the owner. At the time the enrichment lien was set up by the respondents, the applicants had already been entitled to vacant occupation of the property as against both the first respondent and the second respondent for over a month. The applicants' right to vacant occupation of the property, which they were entitled to from as far back as 5 November 2020, remained undisturbed by the second respondent's assumption of the role of lienholder for the first time on 8 December 2020 in the answering affidavit. That disposed of the defence based on the lien.

The lease agreement between the trust and the first respondent required the latter to obtain the applicants' consent before effecting any improvements. The second respondent attempted to avoid that requirement by claiming that the relevant contractual term did not extend to him as a non-party to the agreement of sale. He

also relied on the oral consent that he alleged the trustees had given him for the improvements. The Court referred to case authority stating that a third party with knowledge of the terms of a contract between two other parties (in this case, the second respondent), may be held bound by those terms. Explaining the nature of and requirements for a right of retention, the court rejected the defence of an enrichment lien.

The eviction order was accordingly granted.

Makate v Joosub NO and another [2022] 2 All SA 226 (GP)

Review applications – Review of determination made by expert valuer – Applicable standard of review – Decision of expert valuer is reviewable only if judgment was exercised unreasonably, irregularly or wrongly so as to lead to a patently inequitable result – Where determination was based on incorrect information and relevant facts were not considered, decision reviewed and set aside by court.

Whilst employed by the second respondent ("Vodacom"), the applicant came up with an idea involving a telephonic concept. That led to the development of the company's most successful product – the "Please Call Me" ("PCM") product. Prolonged litigation then ensued between Makate and Vodacom culminating in a Constitutional Court order directing Vodacom to negotiate in good faith reasonable compensation to be paid to Makate for PCM. Failing an agreement being concluded, the court further ordered that the matter be submitted to the Chief Executive Officer ("CEO") of Vodacom to determine the amount to be paid. The determination by current CEO, Shameel Joosub, led to a review application by Makate.

Makate also brought an application to strike out a major portion of an explanatory affidavit filed by the CEO, setting out the reasons for his determination. According to Makate, the voluminous explanatory affidavit and the supplementary explanatory affidavit, filed by the CEO, were a facade for the CEO to advance further reasons to bolster his determination.

Held – A court faced with an application to strike out has a discretion whether to strike out or not. The evidence sought to be struck out was not prejudicial to Makate and in fact advanced his allegations. The application to strike out was refused.

As the parties were not *ad idem* concerning the CEO's role, the court examined the facts and found that the parties were in agreement that the CEO had to gather information, and having done so, objectively evaluate same taking into account the issue of fairness. Ultimately, the determination or decision reached had to be just and equitable. While the parties conceded that the decision of the CEO was reviewable, they differed on the designation to be ascribed to the CEO as deadlock-breaker. Makate saw the role of the CEO as akin to that of an arbitrator, whilst Vodacom submitted that the CEO's role was rather that of an expert valuer. The Court agreed that the CEO was to be considered as an expert valuer. The standard to be applied in reviewing the decision of an expert valuer, is that the decision is only reviewable if the valuer exercised his judgment unreasonably, irregularly or wrongly so as to lead to a patently inequitable result.

Having regard to the information considered by the CEO, and the reasons for his determination, the court found numerous misdirections committed in the course of making the determination. The determination could therefore not stand.

Declining to substitute its own decision for that of Vodacom, the court remitted the matter to the company for fresh consideration of the issue.

Theodosiou and others v Schindlers Attorneys and others [2022] 2 All SA 256 (GJ)

Legal Practice – Contingency fee agreements – Contingency Fees Act 66 of 1997, section 4(1) – Non-compliance – Effect on settlement agreements and court orders flowing from invalid contingency fee agreement – A null contingency fee agreement does not invalidate any related settlement agreement made an order of court without justus error, fraud or public policy considerations – Where particulars of claim failing to disclose a cause of action for relief sought, exception raised by defendants upheld.

The first defendant (“Schindlers”) had represented the plaintiffs in several litigious matters, and had agreed to do that on a contingency basis. Settlement agreements in some of the matters were made orders of court. The plaintiffs sought the setting aside of two court orders, one incorporating the two settlement agreements and the other a consent to a money judgment, due to non-compliance with the Contingency Fees Act 66 of 1997 (the “Act”).they contended that as the contingency fee agreement was illegal and void due to the said non-compliance, all agreements and orders flowing from that agreement were also void. In the alternative, the plaintiffs pleaded a case for rescission of same.

That led to the second and third defendants raising an exception to the claim on the basis that it lacked the necessary averments to sustain a cause of action; alternatively, that it was vague and embarrassing. The excipients averred that there is no basis in law for a High Court to review an order of the High Court, with the result that it must either be rescinded or appealed. Secondly, it was contended that a void contingency agreement or non-compliance with section 4 of the Act does not, without more, render compromises or orders of the court illegal and void.

Held – Section 4(1) prescribes that any offer of settlement made to any party who has entered into a contingency fees agreement may only be accepted after the legal practitioner has filed an affidavit with the court, if the matter is before court, and provided that the other provisions of section 4 are complied with.

Referring to the general principles of pleading in the context of exceptions, the Court turned to consider the effect the invalid contingency fee agreement had on the underlying settlement agreements. Non-compliance with the Act rendered the contingency fee agreement invalid and void, and the *condictio ob turpem vel iniustam causam* was an available cause of action to pursue against Schindlers. The exception concerned whether the relief sought to set aside the two court orders and the settlement agreement was permissible in law.

Public policy requires that parties comply with contractual obligations, even where to one’s detriment. The party who seeks to avoid enforcement of the contract bears the onus to prove that a contract is offensive to public policy. Section 4(1) of the Act gives the court a discretion to enquire into the merits of the settlement agreement and make it an order of court. However, its power to enter the merits of the

settlement interferes with the parties' right to agree to their bargain freely and is therefore limited to prevent extortion of a plaintiff through an illegal contingency fee agreement or fraud upon a defendant. A null contingency fee agreement does not invalidate any related settlement agreement made an order of court without *justus error*, fraud or public policy considerations.

The plaintiffs claimed repayment of their performance under the settlement agreements and money judgment based on enrichment principles. However, they could not rely upon enrichment without pleading the extent of the defendants' enrichment at their expense.

The validity of the agreements and second court order could be challenged only in terms of rule 42(1)(b) or the common law, and rescission could not be obtained without a *bona fide* defence to the merits of the compromised claims.

Concluding that particulars of claim failed to disclose a cause of action for the relief sought in six of the prayers, the court upheld the exception and struck out the offending paragraphs.

END-FOR NOW