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CASES

BARNARD LABUSCHAGNE INC v COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE AND ANOTHER 2022 (5) SA 1 (CC)

Practice — Judgments and orders — Rescission — Tax judgment in terms of s 172, read with s 174, of Tax Administration Act — Whether susceptible of rescission — Scope of bona fide defences available to applicant in rescission proceedings — Tax Administration Act 28 of 2011, ss 104(2), 105, 170, 172 and 174.

Revenue — Assessment to tax and decision — — Dispute — Forum for dispute of assessment or decision — Whether complaint, that certified statement filed by Sars in terms of s 172 of Tax Administration Act (TAA) disregarded payments made in respect of self-assessments, was grievance within scope of ch 9 of TAA — Tax Administration Act 28 of 2011, ss 104(2) and 105.

In terms of s 172(1) of the Tax Administration Act 28 of 2011, '(i)f a person has an outstanding tax debt, Sars may . . . file with the clerk or registrar of a competent court

a certified statement setting out the amount of tax payable and certified by Sars as correct'. In terms of s 174 of the TAA, '(a) certified statement filed under s 172 must be treated as a civil judgment lawfully given in the relevant court in favour of Sars for a liquid debt for the amount specified in the statement'. In this matter Sars, the first respondent, had filed such a statement in the Western Cape High Court recording that the applicant Barnard Labuschagne Inc (BLI), an incorporated firm of attorneys, owed it an amount of R804 747. BLI had subsequently approached the High Court for an order to rescind this 'tax judgment', arguing that the statement — which had arisen from BLI's self-assessments for VAT, employees' tax, unemployment insurance fund contributions and skills development levies — was wrong because BLI had made payments which Sars had failed to appropriate to the relevant assessed taxes.

The High Court refused BLI's application. It held that the tax judgment against BLI *was not susceptible of rescission*. Both the High Court and the SCA refused BLI leave to appeal, so it approached the Constitutional Court. The principal issue identified by the CC for argument was whether a certified statement filed with a court in terms of s 172 read with s 174 of the TAA was in principle susceptible of rescission. If it were, a further question was whether the applicant's attack on the certified statement in its rescission application, ie an attack that the certified statement disregarded payments allegedly made in respect of the self-assessments, was a grievance within the scope of ch 9 of the TAA, which provided for a forum for the resolution of disputes concerning an 'assessment' or a 'decision' in terms of s 104.

Jurisdiction — The CC held that BLI's application, on the question of rescindability, raised an arguable point of law of general public importance, because several recent High Court judgments, of which the High Court's judgment in the present matter was the third, appeared to have failed to apply binding precedent, a core component of the rule of law, which was a founding value of the Constitution. This, the court added, was an issue which this court had to redress. The court thus had jurisdiction. (See [6].)

The question of rescindability — The CC highlighted various judgments decided by the Constitutional Court, the Appellate Division, as well as the full bench of the High Court, between 1965 and 2011, dealing with various repealed provisions of the Income Tax (58 of 1962) and Value-Added Tax (89 of 1991) Acts that were forerunners of the present TAA's ss 172(1) and 174 and other sections relevant to the question of the rescindability of a tax judgment. (See [12] – [21].) These cases made statements to the effect that *tax judgments were susceptible of rescission*. Such authorities, the CC

asserted, were binding on the High Court in the present case (see [28]); yet the High Court, despite their being referred to its attention, failed to discuss them and either follow them or explain why it thought they were distinguishable (see [29]). The High Court instead chose to follow recent provincial-division cases that in themselves had failed to address binding authority (see [22] – [26]). The High Court's approach in this regard was unacceptable (see [29]).

The respondents had sought to distinguish the earlier cases referred to above on the basis that they had dealt with different legislation (see [32]). The CC held that, since the now repealed provisions of the IT Act and VAT Act were the forerunners of the relevant provisions of the TAA, the earlier cases were only distinguishable if the new provisions brought about substantive changes bearing on the question of rescindability (see [32]). They had not done so, the CC held (see [33] – [39]). The CC concluded that the position thus remained that a tax judgment in terms of the TAA was susceptible of rescission, in terms of s 36(1)*(a)* of the Magistrates' Courts Act or, in the High Court, in terms of the common-law jurisdiction to rescind judgments taken in the absence of the other party. (See [40].)

The CC, however, stressed that the scope of bona fide defences which a taxpayer could raise in an application to rescind a tax judgment was narrowed in the light of the following features of the TAA:

- Section 170 provided that the production of a document issued by Sars purporting to be a copy of or an extract from an assessment was conclusive evidence of the making of the assessment; and, except in proceedings on appeal against the assessment, that all the particulars of the assessment are correct. Accordingly, an applicant would not be able to contest the making and correctness of the assessment in rescission proceedings. (See [8], [15] and [41].)
- Chapter 9 of the TAA provided for a dispute-resolution process initiated by an 'objection', and in terms of which a taxpayer may only object to an 'assessment' or 'decision' of the kind specified in s 104(2). Importantly, if the taxpayer's grievance concerned an 'assessment' or 'decision', s 105 stipulated that the taxpayer may only dispute such assessment or decision in proceedings under ch 9 of the TAA, unless a High Court otherwise directed, ie those relatively rare situations where a High Court regarded it appropriate to grant declaratory relief on legal questions relating to assessments. (See [41].)

Rescindability in the present case — The CC held that the dispute in this case was not covered by the 'conclusive evidence' provisions of s 170, nor was it excluded by s 105. As to s 170, BLI was not challenging the correctness of the self-assessments; *the question was whether they had been paid*. As to s 105, BLI was complaining about neither an 'assessment' nor a 'decision' as defined in s 104(2) of the TAA. Paragraphs *(a)* and *(b)* of s 104(2) were obviously inapplicable. Paragraph *(c)* covered 'any other decision that may be objected to or appealed against under a tax Act'. There was no provision in any relevant tax legislation stating that a dispute about whether an assessment had been paid was subject to objection or appeal. (See [42].) The CC held that the payment dispute was a defence that was indeed available to a taxpayer in rescission proceedings (see [44]). It followed, the CC concluded, that the High Court should have found that the tax judgment was susceptible of rescission and should have considered whether BLI had made out a case for rescission at common law (see [46]). The CC upheld the appeal, set aside the High Court's decision, and remitted BLI's application for rescission to the High Court for hearing before a different judge in order to determine the merits of the application (see [48] – [51]).

COMMERCIAL STEVEDORING AGRICULTURAL AND ALLIED WORKERS UNION AND OTHERS v OAK VALLEY ESTATES (PTY) LTD AND ANOTHER 2022 (5) SA 18 (CC)

Constitutional law — Labour relations — Right to strike — Final interdictory relief against striking employees engaging in actual or threatened unlawful conduct — Only competent if striking employees factually linked to reasonable apprehension of actual or threatened infringement of clear right — Mere participation in strike in which there was unlawful conduct not sufficing to establish required link — Constitution, ss 17 and 23(2)*(c)*.

Labour law — Strike — Right to strike — Final interdictory relief against striking employees engaging in actual or threatened unlawful conduct — Only competent if striking employees factually linked to reasonable apprehension of actual or threatened infringement of clear right — Mere participation in strike in which there was unlawful conduct not sufficing to establish required link — Constitution, ss 17 and 23(2)*(c)*.

The applicants in this unopposed appeal to the Constitutional Court were the Commercial Stevedoring Agricultural and Allied Workers' Union (CSAAWU) and 173 striking workers who were employed by respondent Oak Valley Estate (Pty) Ltd. They sought to appeal a final interdict obtained by Oak Valley — in the Labour Court and upheld on appeal by the Labour Appeal Court — prohibiting them from unlawfully interfering with Oak Valley's operations.

One of the defences that the Labour Court rejected was that Oak Valley had failed to link any of the unlawful conduct complained of to the respondents. The Labour Appeal Court agreed, holding that imposing such a requirement on employers seeking interdictory relief would be 'a bridge too far' in the 'fraught context of an industrial relations dispute'.

In the present case, a further application for leave to appeal to the Constitutional Court, the main issue was again whether an employer, faced with unlawful conduct committed during a protected strike, could interdict employees participating in that strike *without linking each employee to the unlawful conduct*.

Held

Plainly, if the evidence was insufficient to establish any link between the respondent and the actual or threatened injury, the apprehension of injury could not be reasonable. It followed that there must be *some* link between the respondent and the alleged actual or threatened injury. On a conspectus of jurisprudence, our law required that, notwithstanding the 'fraught context of industrial relations', for interdictory relief to be competently granted a factual link between an individual respondent and the actual or threatened unlawful conduct must be shown. (See [20] and [39].)

Mere participation in a strike, protest or assembly in which there was unlawful conduct did not suffice to establish the required link; if it did, inevitably innocent participants in strike or protest action would get caught in the net of an interdict. Being implicated in a contempt application, whether or not such application was likely to succeed, was prejudicial to innocent bystanders and would have a chilling effect on the exercise of the constitutional rights to strike (s 23(2)*(c)*) and to protest (s 17). A person who lawfully exercised their right to protest, strike or assemble, but was nonetheless placed under interdict, would impermissibly be denuded of their constitutionally protected rights. That mere participation in a strike was an insufficient link could also be distilled from this court's jurisprudence. (See [20] – [23], [41] – [42] and [44].)

Oak Valley did not allege that any person or subgroup within the striking workers was responsible for this conduct, had associated with it or even failed adequately to dissociate from it — and so failed to establish the required link. It therefore also failed to show that it had a reasonable apprehension that it would suffer injury at their hands if they were not placed under interdict. Its case did not sustain a final interdict against them. Accordingly, the appeal in this regard would succeed. (See [62] and [65 – [66].)

CENTRAL ENERGY FUND SOC LTD AND ANOTHER v VENUS RAYS TRADE (PTY) LTD AND OTHERS 2022 (5) SA 56 (SCA)

Constitutional practice — Courts — Powers — Declaration of invalidity — Remedial powers — Just and equitable relief — Where contract invalidated — Guiding principles — No profit for either party, no loss for innocent party — Compensation for out-of-pocket expenses — Not creating new category of compensation beyond remedies under principle of legality and PAJA — Award of compensation where corrupt government contract cancelled — Constitution, s 172(1)*(b);* Promotion of Administrative Justice Act 3 of 2000, s 8(1)*(c)*.

Minerals and petroleum — Strategic national crude oil reserves — Sale of by Central Energy Fund and Strategic Fuel Fund — Review under principle of legality and PAJA — High Court's declaration of invalidity on grounds of irregularity, irrationality and corruption upheld — High Court did not, in awarding compensation to innocent contracting parties, create new category of compensation beyond remedies under principle of legality and PAJA — Innocence of contracting parties and seriousness of irregularities committed by state requiring that contracting parties be compensated for out-of-pocket expenses — Appeal dismissed — Constitution, s 172(1)*(b)*; Promotion of Administrative Justice Act 3 of 2000, s 8(1)*(c)*.

In 2015 the Strategic Fuel Fund (SFF — the second appellant), a subsidiary of the Central Energy Fund (the CEF — the first appellant), acting through its CEO, Mr Sipho Gamede, sold the country's entire 10 million barrels' crude-oil reserves in corrupt fashion and on risky terms. * There were three individual sales: (i) to Taleveras Petroleum (the third respondent); (ii) to Vitol Energy (the seventh respondent) and its local partner, Vesquin Trading (the sixth respondent); and (iii) to Venus Rays, which played no part in these proceedings. The sales were financed by Contango Trading

SA (the fourth respondent) and Natixis SA (the fifth respondent). In terms of a separate agreement, Taleveras transferred all its rights to the oil to Contango on the understanding that Taleveras would later repurchase them.

By February 2016 the CEF was aware of these transactions and their irregular nature but it took no action at all until September 2017, when it and the SFF gave notice of their intention to have them reviewed in court. In March 2018 they implemented the review notice by binging a review application — on materially incomplete papers — in the Western Cape High Court. The SFF sought self-review under the doctrine of legality while the CEF relied on the Promotion of Administrative Justice Act 3 of 2000. Taleveras did not oppose review but Contango, Natixis and Vitol asked for the application to be dismissed with costs. Alternatively, they sought to be compensated for their losses. For its part, Taleveras denied having engaged in collusion or corruption in the sale of the oil.

The High Court (per Rogers J) heard the matter in July 2020. It declared the SFF's decisions to sell invalid due to their clear illegality in the light of Gamede's misrepresentations and corrupt motives. Rogers J found, inter alia, that the SFF had failed to follow a proper tender process and that Gamede's manner of disposal of the oil and insistence on private negotiation rather than competitive bidding were irrational. Gamede had accepted over R20 million in bribes, paid into his bank accounts in cash instalments of between R15 000 and R20 000, and obtained ministerial approval by falsely stating that the transactions had been properly assessed by the SFF. The SFF was *itself* culpable due to the passivity of its senior management, which lamely approved Gamede's corrupt dealings. The Minister, who failed to apply her mind to the SFF's decision before in turn approving it, and the CEF, which for a long time did nothing to challenge the transactions, had likewise failed in their duties. Taleveras' denials of corruption were far-fetched and untenable, the bribes to Gamede having been paid to advance its interests.

Rogers J therefore rescinded the decisions to sell and the resultant transactions. He found that Contango and Vitol were innocent third parties and ordered the appellants to compensate them for their out-of-pocket expenses (not lost profits). The judge chose this remedy because it was fair to the innocent parties and effectively vindicated the rights violated by the impugned decisions and transactions.

In an appeal to the Supreme Court of Appeal, Contango and Vitol accepted that the rescission of the transactions required the oil to be restored to the SFF, and the

purchase price and storage fees (plus interest) repaid. The dispute related to whether the SFF should, in addition, be directed to pay the expenses Contango and Vitol had incurred in reliance on the transactions, that is, their out-of-pocket expenses, including hedging losses, insurance, letters of credit and the costs of inspections. The appellants opposed this on the ground that Contango and Vitol had failed to do basic due diligence and were thus not innocent parties. They also argued that Rogers J did not properly consider the public interest when he granted the compensation order.

Held

Section 172(1)*(b)* of the Constitution gave courts a wide discretion to craft just and equitable relief pursuant to declarations of constitutional invalidity, whether under the principle of legality or under PAJA. Section 8(1) of PAJA gives effect to the wide remedial discretion conferred by s 172. The relief it permits is not narrower than that available under a court's original remedial discretion and the listed orders did not comprise a closed list. (See [36] – [38].)

Two principles applied where a contract was set aside: the corrective principle, which states that neither party should benefit from what was performed under such a contract, and the 'no-profit-no-loss' principle, which states that parties should neither benefit nor suffer a loss because of the invalidation of an unlawful contract. The law drew a distinction between parties who were complicit in maladministration, impropriety, or corruption, on the one hand, and those who are not, on the other. The category into which a party fell had a significant impact on the appropriate just and equitable remedy a court could grant; parties who were complicit in maladministration, impropriety or corruption were not only precluded from profiting from an unlawful tender but could also be required to suffer losses. (See [39] – [42].)

The exercise of a remedial discretion under s 172(1)*(b)* of the Constitution and s 8(1) of PAJA constituted a discretion in the true sense. For the present court to interfere, the appellants had to show that the High Court's remedial order was clearly at odds with the law. (See [43].)

The appellants' contention that Contango and Vitol were not entitled to compensation for their out-of-pocket expenses was based on the misconception that it amounted to compensation akin to damages for the loss of the contracts in question. But requiring the SFF to repay those expenses was *restitution*: it restored Contango and Vitol — who were innocent of any wrongdoing and had relied on the appellants' repeated assurances that Contango's title to the oil was good — to the *status quo ante*. Another

factor in favour of restitution was the appellants' unexplained and egregious delay in instituting review proceedings, which substantially increased the costs incurred by Contango and Vitol. (See [45], [48] – [49].)

A compensation order would, contrary to the appellants' contentions, serve the public interest. Penalising innocent third parties like Contango and Vitol when the state acted unlawfully would deter international financial institutions from financing transactions crucial to the economy, not only in oil but also in infrastructure and capital projects. (See [58] – [60].)

The no-profit-no-loss principle required Contango and Vitol to be compensated for their out-of-pocket expenses (including hedging costs) incurred in reliance on the relevant agreements and transactions, but not for lost profits. Doing so would restore them to the position in which they would have been had they never contracted with the SFF. (See [63].)

Lastly, Rogers J's order did not create a new category of compensation to make up for the harshness of a setting-aside order. The appellants elected to launch the review application under both the principle of legality and PAJA. Having done so, it was not open to them to criticise the judge for considering the remedies available under both. (See [71] – [72].) Appeals dismissed.

TRUSTEES, BURMILLA TRUST AND ANOTHER v PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS 2022 (5) SA 78 (SCA)

Constitutional law — Human rights — Right of access to courts — Claim for constitutional damages against state respondents for participating in rendering Southern African Development Community Tribunal, where appellants had claim pending, inoperative — Whether facts alleged disclosing cause of action — Constitution, ss 34 and 172(1)*(b)*.

International law — International agreements, treaties and conventions — International tribunal — Power to interfere with municipal court orders effecting judicial expropriation — International tribunal not bound by such orders and could reach different conclusion on proper grounds — Denial of justice not requirement for such interference.

In 1988 Lesotho, a signatory to the Southern African Development Community Treaty (the SADC Treaty), granted five mining leases to Swissborough Diamond Mines (Pty) Ltd (Swissborough), a company incorporated in Lesotho and controlled by one Mr Van Zyl. Swissborough subsequently ceded and transferred all its rights, title and interest, in and to any claim of whatever nature it might have against Lesotho, to the Burmilla Trust (BT).

Only one of the mining leases was directly relevant to the present matter, namely one that pertained to the Rampai area. It transpired that this area would largely be submerged by the execution of the Lesotho Highlands Water Project, a joint venture in terms of a treaty between the second respondent and Lesotho. During 1995 the Lesotho Highlands Development Authority applied in the Lesotho High Court for an order declaring the lease void ab initio, based upon the allegation that under Lesotho law the grant of any rights to land was subject to the consent of the relevant chiefs, and that such consent had not been obtained. The Lesotho High Court granted the relief sought, and during 2000 its order was upheld by the Lesotho Court of Appeal.

Mr Van Zyl and BT had claimed before the Southern African Development Community Tribunal (the SADC claim) that Lesotho had violated the SADC Treaty by expropriating their validly granted mining leases without compensation, in breach of its obligations under the treaty and of customary international law; and that the Lesotho court decisions constituted a denial of justice under international law. On this basis they claimed compensation from Lesotho, inter alia, for the value of the mining leases at the time, and Mr Van Zyl for 'moral damages'.

By 15 February 2011 the SADC claim was ripe for hearing, but by then the SADC Tribunal was rendered inquorate by an earlier resolution by the summit of SADC — consisting of the heads of all the member states — not to renew the terms of office of five SADC Tribunal judges, thereby effectively suspending the SADC Tribunal. On 20 May 2011 the summit decided not to reappoint SADC Tribunal judges, rendering the SADC Tribunal defunct and unable to hear and determine the SADC claim. The summit, with the participation of the then President of South Africa, subsequently replaced the SADC Protocol with one strictly limiting the jurisdiction of the SADC Tribunal to disputes between states. Aspects of the protracted litigation that followed between the parties were decided by the Supreme Court of Appeal in *Van Zyl and Others v Government of the Republic of South Africa (Van Zyl SCA*; see '' below).

BT and Mr Van Zyl subsequently instituted an action in the High Court for constitutional and moral damages, respectively, as well as interest and costs against the first respondent, the President, in his official capacity as head of state, and the Government of the Republic of South Africa. This on the basis that the now defunct SADC Tribunal would have awarded the claimed amounts, had it not been unlawfully shuttered and dismantled by the SADC summit, with the participation and signature of the then President. The claim for constitutional damages was made under s 172(1)*(b)* of the Constitution, as a just and equitable remedy for the violation of the appellants' constitutional access-to-court-rights (s 34) — based on the state respondents' alleged involvement in a conspiracy to prevent the prosecution of the SADC claim before the SADC Tribunal.

The High Court upheld exceptions that their particulars of claim disclosed no cause of action. It dealt with their claim for constitutional damages as a loss of profit claim, and reasoned that it was bound by *Van Zyl SCA* (as well as the judgment of the Pretoria High Court); and that BT could not escape the consequences of the Lesotho court decisions that the lease had been void ab initio.

The present case concerned their appeal to the Supreme Court of Appeal, where the overarching issue was whether the facts alleged by the appellants disclosed a cause of action in law; and in particular whether the SADC Tribunal could have held that the lease was valid and judicially expropriated by the Lesotho court decisions, despite the absence of a denial of justice.

Held*

The court in *Van Zyl SCA* was not called upon (and was not clothed with jurisdiction) to decide whether the Lesotho court decisions withstood scrutiny under international law or constituted judicial expropriation. *Van Zyl SCA* did not determine the same relief on the same cause of action as in this matter, and it followed that it did not bar the present action (see [51]).

The court a quo erroneously regarded claim A as a claim for loss of profits. The factual averments in the particulars of claim iro constitutional damages (such as 'no compensation paid' and 'prevention of prosecution of the SADC claim') constituted a cause of action in our law. It must be accepted as a matter of law that the deliberate and collusive preclusion of the prosecution of the SADC claim would constitute a violation of s 34 rights. Undisputedly, judicial expropriation of valid rights without compensation would constitute a violation of the SADC Treaty. There was no doubt

that in principle the SADC Tribunal could have awarded compensation to BT based on the value of the Rampai lease. (See [14], [24] – [25].)

Under international law an international tribunal may differ from the conclusion of a national court on the validity of property rights under municipal law if there were proper ground for doing so; and an indirect expropriation may be effected by a court order (judicial expropriation). The SADC Tribunal may therefore have interfered with the Lesotho court decisions — despite the absence of a denial of justice — if there were a proper ground for doing so, or Lesotho formally admitted before an international tribunal that a right that was allegedly expropriated was valid, despite decisions of its courts to the contrary (as it admitted in documents before the SADC Tribunal). The SADC Tribunal could therefore have held, on the pleaded case, that the admittedly, or proven, valid lease was judicially expropriated. The particulars of claim accordingly disclosed a cause of action in respect of the constitutional damages claim. The exception should not have been allowed in respect thereof. In the result, BT's appeal in this regard would be upheld. (See [31], [35], [39] – [40], [42], [52] and [62].)

Mr Van Zyl's claim for moral damages was brought on the basis that the SADC Tribunal would have allowed such claim. However, the SADC Treaty (articulating a trite principle of international law) provided that '(n)o natural or legal person shall bring an action against a State unless he or she has exhausted all available remedies or is unable to proceed under the domestic jurisdiction'. It was clear from the particulars of claim that Mr Van Zyl did not prosecute this claim against Lesotho in the Lesotho courts. It followed as a matter of law that the SADC Tribunal would have dismissed the claim for moral damages, and therefore the particulars of claim disclosed no cause of action for moral damages. (See [53] – [54].)

CHANGING TIDES 17 (PTY) LTD NO v KUBHEKA AND OTHERS 2022 (5) SA 168 (GJ)

Mortgage — Foreclosure — Judicial execution — Primary residence — Reserve price — Reconsideration — Application for — Requirements — Discussion — Uniform Rules of Court, rule 46A(9)*(c), (d)* and *(e)*.

Mortgage — Foreclosure — Judicial execution — Primary residence — Reserve price — Reconsideration — Application for — Requirements — Service — Form — Discussion.

Mortgage — Foreclosure — Judicial execution — Primary residence — Reserve price — Reconsideration — Application for — Requirements — Sheriff's report — Consequences where absence of sheriff's report — Uniform Rules of Court, rule 46A(9)*(d)*.

Uniform Rule 46A requires that, in applications for execution against residential immovable property, a court must consider whether a reserve price should be set. Subrule (9)*(c) – (e)* sets out the process that must be followed when that reserve price is not achieved at a sale in execution and calls for the court to *reconsider* the reserve price and determine how the execution is to proceed. In the present matter in the Johannesburg High Court, Judge Fisher was called to determine four cases brought by the applicant under rule 46A(9)*(c) – (e)* in each of which was sought the amendment of the reserve price that had been set in the respective original successful foreclosure application. The relief was sought by way of an approach to the judge in her chambers. The request for relief took the form simply of a 'submission' by the attorney representing the applicant judgment creditor, on the latter's behalf, along with supporting documents of the sheriff. Such documentation was not filed of record in proceedings, nor served on the judgment debtor. In respect of one of the applications, there was no sheriff's report attached as contemplated in rule 46A(9)*(d)*. The applicant argued that there was no requirement in the rules that the relief envisioned under rule 46A(9)*(c) – (e)* be sought by way of a formal application supported by an affidavit, or on notice to the judgment debtor. Various questions arose out of this (see [24]), the court held. What form should the process under rule 46A(9)*(c)*, *(d)* and *(e)* take? Should there be service on the judgment debtor and, if so, what form should such service take? And, also, can an application be considered in the absence of a proper sheriff's report?

Held, that, at the minimum, an application for reconsideration should —

- take the form of a notice of motion in which was sought specific relief, supported by an affidavit deposed to by a person having personal knowledge of the facts or having ascertained them;
- satisfy the court that the auction was properly advertised, at least, in accordance with the rules;

• assert that there were, to the best of the deponent's belief, no reasons other than the reserve price being too high, which could rationally be said to be a reason for the failure to achieve a bid at the reserve;

• be brought as interlocutory to the main application so that the court be afforded access to all documents in the main application and all other interlocutory matters;

• be brought as soon as possible after the sheriff's report was issued;

• explain any failure to hold the sale within six months of the handing-down of the foreclosure order (if held more than six months after the foreclosure order was handed down, a court may wish to be furnished with a fresh sworn valuation);

• place before the court any additional reliable evidence of the true value of the property in question which could assist in the reconsideration process — for example, information relating to other recent property sales in the area. (See [37] and [38].)

Held, that an application for reconsideration had to be on notice to the judgment debtor, and personal service was required. (See [47] and [48].)

Held, further, that the report of the sheriff comprised both a return of service and an aid to the court. Unless the deponent to the affidavit had personal knowledge of what occurred at the sale, the sheriff's report would have to be submitted. This would always be the best evidence and the absence of such a report would have to be fully explained. (See [39].) If an applicant sought an order that the property be sold at the highest bid received at the auction, the absence of the report would be fatal to the application. If the sheriff's report was non-compliant with the rules, a court would be justified in refusing the relief. (See [40].)

Held, that the cases placed before the judge did not constitute applications and were irregular steps. No order would be granted in respect of any of them. (See [49].)

FIRSTRAND BANK LTD v BRIEDENHANN 2022 (5) SA 215 (ECGq)

Practice — Applications and motions — Affidavit — Attestation of — Commissioner of oaths — Administering of oath — Declaration by deponent — Requirement that deponent sign declaration in presence of commissioner of oaths — 'In presence of' — Meaning of — Whether requirement met where oath administered in 'virtual' meeting

between deponent and commissioner — Justices of the Peace and Commissioners of Oaths Act 16 of 1963, Regulations Governing the Administering of an Oath or Affirmation, published under GN R1258 in GG 3619 of 21 July 1972, reg 3(1).

Words and phrases — 'In presence of' — Meaning of in reg 3(1) of Regulations Governing the Administering of an Oath or Affirmation, which requiring that deponent sign declaration to affidavit in presence of commissioner of oaths — Justices of the Peace and Commissioners of Oaths Act 16 of 1963, Regulations Governing the Administering of an Oath or Affirmation, published under GN R1258 in GG 3619 of 21 July 1972, reg 3(1).

This was an application for default judgment arising from the breach by the defendant of a mortgage loan agreement it had entered into with the plaintiff. At the hearing of the matter, the presiding judge, Goosen J, raised a concern relating to the affidavit filed by the plaintiff required in terms of rule 14A of the Eastern Cape Rules. Regulation 3(1) of the Regulations Governing the Administration of an Oath, promulgated in terms of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963, provided, in regard to the oath or affirmation that had to be taken, that: 'The deponent shall sign the declaration *in the presence of the commissioner of oaths*.' In the instant case, the affidavit was commissioned by way of a 'virtual conference', conducted via the video-meeting application Microsoft Teams, between the deponent and the commissioner — they were not in each other's physical presence — during the course of which the deponent took the prescribed oath and appended his electronic signature to the affidavit, and the commissioner in turn appended his. [This approach was motivated in part by the desire to avoid the safety risks of face-to-face meetings, given the prevalence of the Covid-19 virus in South Africa.] The question was whether such a 'virtual' administration of the oath met the requirements of reg 3(1). This formed the focus of the court's attention.

Held, that reg 3(1) — having regard to the language used, in particular the use of the phrase 'in the presence of', read in the context of the Regulations as a whole, as well as the essential purpose of the Regulations to provide assurance to a court receiving an affidavit that the deponent, properly identified as the signatory, had taken the oath — required that the deponent append their signature to the declaration *in the physical presence or proximity of the commissioner*. (See [25].)

Held, further, that the plaintiff's argument, that 'presence' may nevertheless be achieved by sight and sound, and that, on this basis, the 'virtual' presence achieved by the technology used in this case fell within the ambit of the meaning of the phrase 'in the presence of', stood to be rejected. (See [26] – [29].) The plain meaning of the expression did not support such an interpretation (see [29]). The regulation did not therefore cover a deposition in the 'virtual presence' of a commissioner. (The court acknowledged the role innovative technologies could play in transforming and improving justice systems. However, it stressed that adaptation of the process for the commissioning of affidavits, through the use of innovative technologies such as video-conferencing applications, was a task — involving as it did questions of policy — best suited to the legislature. (See [28] and [53] – [55].))

Held, that the Regulations, save where couched in negative terms, were directory. Accordingly, where those regulations had not been followed and adhered to, a court had a discretion whether or not to admit the affidavit. In such circumstances the court would determine whether there has been substantial compliance with the regulations. That determination was one of fact, having regard to the circumstances of the case. (See [48].)

Held, that it was not open to a person *to elect* to follow a different mode of oath administration to that which was statutorily regulated. The Regulations stipulated that the declaration was to be signed in the presence of the commissioner. Unless that could not be achieved, the Regulations had to be followed. The fact that the regulation was directory did not mean that a party could set out to achieve substantial compliance with such regulation rather than to comply with its requirements. (See [51].)

Held, accordingly, that the court would be disinclined to receive the affidavit, given the elected non-compliance with the rules. However, the discretion with which the court was vested had to be exercised judicially, upon consideration of all the relevant facts and in the interests of justice. (See [56].) In this case, the purpose of reg 3(1) had been met. The deponent did take the prescribed oath and affirmed doing so. To refuse the affidavit, and demand that the plaintiff seek afresh default judgment on affidavit properly commissioned, would serve no purpose other than to delay finalisation of the matter and increase costs, and would not be in the interests of justice. Therefore, in the circumstances it was accepted that the affidavit complied in substance with the Regulations, and could be admitted. (See [57] – [58].) (The court went on to grant default judgment in terms set out in [58].)

Frantzen v Road Accident Fund [2022] 3 All SA 657 (SCA)

Civil Procedure – Evidence – Expert evidence – Correct approach – Expert evidence must be weighed as a whole and it is the exclusive duty of the court to make the final decision on the evaluation of expert opinion.

Personal Injury/Delict – Claim for compensation for damages allegedly relating to injury sustained in accident – Factual causation – Whether, on a balance of probabilities, it was more probable than not that impairment suffered by appellant was caused by an accident which occurred ten months previously – Evidence not establishing that injury was linked to accident.

The appellant ("Mr Frantzen") instituted a claim against the Road Accident Fund, for compensation for damages resulting from bodily injury caused by a motor vehicle accident in which he was involved on 8 April 2007. It was common cause that he sustained a soft tissue injury of the neck, commonly known as whiplash injury, in the 2007 accident. It was also common cause that the appellant suffered from an involuntary movement disorder, dystonia, which manifested 10 months after the 2007 accident. The core issue between the parties was whether the dystonia was caused by the whiplash injury. The High Court's finding that a causal link between the accident and the movement disorder had not been established was the subject of Mr Frantzen's appeal.

Prior to the 2007 accident, Mr Frantzen had been involved in two other motor vehicle accidents, in which he also sustained whiplash injuries. However, he stated that those injuries resolved within a few weeks of each accident and he resumed his normal daily work without any difficulty. That was not the case with the 2007 accident, which was alleged to have led to Mr Frantzen's permanent incapacitation.

Held – The question of factual causation had to be decided by showing that but for the 2007 accident, the appellant would not have suffered from dystonia. The enquiry was whether it was more probable than not that the involuntary movements suffered by the appellant were caused by the accident. The standard of proof is a balance of probabilities.

The correct approach in evaluating expert evidence requires the court to be satisfied that the evidence has a logical basis. Expert evidence must be weighed as a whole and it is the exclusive duty of the court to make the final decision on the evaluation of expert opinion. Isolated statements made by experts should not too readily be accepted, especially when dealing with a field where medical certainty is virtually impossible. In this case, Mr Frantzen called a neurologist as his expert witness, while the respondent called a neurosurgeon and an orthopaedic surgeon as its expert witnesses. The experts agreed on many issues, with the main difference between them related to the issue of factual causation. Mr Frantzen's witness relied on medical literature in advancing his opinion on the accident being the cause of the appellant's dystonia. While it is acceptable for an expert to rely on medical literature, an expert must by reason of his own training, affirm the correctness of the statements made in the article, at least in principle, and such work relied upon must be written by a person of established repute or proved experience in that field.

Evaluating the evidence, the court found that it was not shown, on a balance of probabilities, that the soft tissue injury of the neck and back that Mr Frantzen sustained in the 2007 accident was causally connected to the involuntary movement disorder that manifested 10 months later.

The appeal was dismissed with costs.

Cloete Murray NO and others v Ntombela and others; *In re*: Ntombela and another v Cloete Murray NO and others [2022] 3 All SA 689 (FB)

Civil Procedure – Leave to appeal – Test – Section 17 of the Superior Courts Act 10 of 2013 – Leave to appeal may only be given, inter alia, where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success.

Liquidators-election of the liquidators not to ratify the contract –review application

In the main application before the court, the applicants (the "Ntombelas") were a family which had purchased immovable residential property from a close corporation ("Phehla") prior to its liquidation. The applicants, in terms of rule 53 of the Uniform Rules of Court, sought the review and setting aside of the election of the liquidators not to ratify the contract. The liquidators delivered a Notice in terms of rule 6(5)(d)(iii).

The court provisionally set aside the filing of the Notice in terms of rule 6(5)(d)(iii) pending the finalisation of the process prescribed in rule 53 dealing with reviews. In the liquidators' application for leave to appeal, the present Court identified the issues for determination as the reviewability of the decision of the liquidators in the circumstances of this case and the ruling on the rule 6(5)(d)(iii) Notice.

Regarding the decision not to proceed with the sale agreement entered into by Phehla, the liquidators maintained that they did not have a record of how the decision was taken and they also did not offer any reasons for their decision.

Held – The liquidators could pursue the rule 6(5)(d)(iii) proceedings only once the rule 53 process was finalised. The record had not yet been filed and the rule 53 process could not continue if the record was not supplied. The liquidators were granted permission to access the court on the same papers duly supplemented after the rule 53 process had been finalised.

The core issue in the application for leave to appeal was the liquidators' contention that the decision not to proceed with the sale agreement was not legally reviewable. Having regard to the potential negative effects of the liquidators' stance, the court pointed to the need to protect vulnerable consumers in such scenarios. While the Constitution does not protect against homelessness in absolute terms, it provides that no one may be evicted from his home without an order of court made in consideration of all relevant circumstances. That demands judicial oversight of the decisions of the liquidator.

In deciding whether to grant leave to appeal, the court is called upon to consider whether another court may reach a different conclusion. That requires a careful analysis of both the facts and the law that have supported the judgment *a quo* and a consideration of the possibility that another court may differ either in relation to the facts or the law or both.

Section 17 of the Superior Courts Act 10 of 2013 provides that leave to appeal may only be given, *inter alia*, where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success. The section is peremptory in that it imposes a mandatory requirement that leave may not be granted if there is not a reasonable prospect that the appeal will succeed. It must be a reasonable prospect of success, and not that another court may hold another view.

Finding the test to have been met, the Court granted leave to appeal.

MEC for Finance, Economic Development, Environmental Affairs and Tourism (Eastern Cape) and others v Legal Practice Council and others (Chance at Life and another as *amici curiae*) [2022] 3 All SA 730 (ECG)

Civil Procedure – Interim interdict – Suspension of judgments – Requirements for interdictory relief – In absence of prima facie right to relief sought being established, interdictory relief denied.

Local government – Judgments against provincial department – Application to suspend judgments based on impact such judgments had on service delivery – Where relief sought amounted to substantive and far-reaching variation of orders obtained against the provincial department, such relief could not be granted.

The applicants sought an interim interdict suspending the execution of all judgments by judgment creditors having delictual damages awards arising from medico-legal claims. It was alleged that such awards had a deleterious effect on the Eastern Cape Department of Health's finances.

Held – Section 27 of the Constitution provides for everyone to have a right to access to health care services, including reproductive health care. It imposes an obligation on the State to take reasonable legislative, and other measures within its available resources, to achieve the progressive realisation of such rights. Health services is a functional area of concurrent national and provincial legislative competence.

In order to fulfil its obligations and to deliver services to the people of the Eastern Cape, the Eastern Cape Government is funded, partly by its equitable share and allocation of revenue from national government and partly by funds it raises. All money received by a provincial government must be paid into the Provincial Revenue Fund ("PRF") which is controlled by the Provincial Treasury. Money may only be withdrawn from the PRF in terms of an appropriation by a provincial act. In the context of judgment debts, the system of financial and risk management, and the prescribed or agreed periods for payment emerge from the State Liability Act 20 of 1957 which lays out the structural scheme created to ensure satisfaction of a judgment debt against the State.

The Court examined the cause of the applicants' financial predicament. It found that the management of the finances of the Eastern Cape Government, and in particular the Eastern Cape Department of Health, falls far short of the standard demanded by the Public Finance Management Act 1 of 1999.

The relief sought by the applicants amounted to a variation of orders obtained against the provincial department. Rule 42 provides for the variation or rescission of judgments. The judgments in issue were not wrong and were not erroneously sought or granted. The variations sought were considerably more substantive and far-reaching, and would change the terms of the relevant orders.

The prayer for periodic payments constituted a special defence to the "once and for all" rule, which must be properly pleaded. Such defence was not raised at the trial and could not be raised after the issues had been finally decided.

Setting out the requirements for an interim interdict, the Court found that the applicants had not established a *prima facie* right to the relief sought. The application was held to be misconceived and was dismissed.

MEC for the Department of Public Works and others v Ikamva Architects and others [2022] 3 All SA 760 (ECB)

Civil Procedure – Attachment of property of State organ in satisfaction of debt – Issuing of writ in terms of the Uniform Rules of Court can only find application to the extent that it is not in conflict with prescripts of section 3 of State Liability Act 20 of 1957 – Uniform Rule 45(8) authorises attachment of a particular class of property (incorporeal rights) but does not give judgement creditor right to choose which of the judgment debtor's movable property must be attached.

Civil Procedure – Striking out of defence – Validity of order — Only when court has opportunity to decide that grounds exist for striking out of a defence that application for default judgment may be made – Court's discretion to strike out a defence should only be exercised after the defendant has been given an opportunity to be heard in compliance with the audi alteram partem rule – That court's power to strike out was incorrectly exercised not rendering order invalid, and orders stands until set side.

The first and second applicants (the “Departments”) sought the urgent setting aside of two notices of attachment, a writ of attachment, and the attachment of the Department of Health’s bank account. The first respondent’s attempted execution stemmed from a default judgment granted in December 2015 after their defence had been struck out due to their failure to timeously reply to a Rule 35(3) Notice. The Departments brought an urgent application to set aside the first writ and an order, by agreement, stayed the execution of the writ pending the determination of the self-review application. In the wake of the dismissal of that application, the first respondent (“Ikamva”) issued a further writ of attachment for the sum of the default judgment, this time specifically in respect of the second applicant’s bank account (the “second writ”), prompting the present urgent application.

Held – The first issue related to the validity of the default judgment. The order striking out the Departments’ defence was erroneous as envisaged in Uniform Rule 42(1)(a) as it followed a one- as opposed to two-stage procedure. Uniform Rule 35(7) does not contemplate the striking out of a defence automatically but rather on application on the same papers, amplified if necessary. It is only when a court has had the opportunity to decide that grounds exist for the striking out of a defence that an application for default judgment may be made. A court’s discretion to strike out a defence should only be exercised after the defendant has been given an opportunity to be heard in compliance with the *audi alteram partem* rule. That did not happen in this case.

That led to the question of whether the default judgment, which was granted in consequence of the wrongly granted striking out order, was a valid order capable of enforcement by way of execution. The striking out order was found not to fall within the category of orders that may, on the face of it, be regarded as being invalid. An order is not invalid simply because it is erroneous as contemplated in Uniform Rule 42(1)(a). Uniform Rule 35(7) gives the court the power to strike out a defence. That such power was incorrectly exercised did not, *per se*, render the order invalid. The order existed in fact and continued to have legal effect until it was set aside. Similarly, the default judgment could not be disregarded as a nullity. Consequently, the issues raised in these proceedings arising from the execution of the default judgment were addressed on the basis that the judgment was capable of execution.

Section 3 of the State Liability Act 20 of 1957 obliges State departments to pay a judgment debt. When the department fails to do so, it obliges the relevant treasury to pay the debt on behalf of the department. It is only after there has been a total failure to pay the judgment debt that the judgment creditor may seek to attach the property of the department. The issuing of a writ in terms of the Uniform Rules of Court can only find application to the extent that it is not in conflict with the section 3 prescripts.

The Departments argued that attachment of a State organ's bank account is impermissible, and is inconsistent with section 226 of the Constitution. Examining the authorities, the court found those contentions to be unsustainable.

However, the writ and the attachment made pursuant thereto could not stand. The writ was issued in terms of rule 45(1). Uniform Rule 45(8) authorises attachment of a particular class of property (incorporeal rights) but does not give the judgment creditor the right to choose which of the judgment debtor's movable property must be attached. The circumstances favoured a stay of execution of the attachments pending finalisation of the self-review process.

Minister of Police v Manyoni [2022] ZAGPJHC 613 at [31]-[51]

Judge- Judicial officers – Bias – Reasonable apprehension of bias – Double reasonable test – Comments made about plaintiff and investing award – Unlawful arrest claim.

Facts: In the early hours of the morning the complainant was attacked by an intruder with his face covered. She bit his fingers during the attack and he then fled. Mr Manyoni was arrested because he had a bandage on his hand. He remained in custody for several months while DNA tests were done and the charges were later withdrawn.

Appeal: The Minister appeals the High Court's judgment finding that the arrest and detention were unlawful and awarding R25,600 for loss of earnings and R600,000 as damages.

Discussion: The alleged bias of the presiding officer and that he expressed sympathy for the plaintiff; that the Judge suggested that plaintiff take the money to a large

company for investment purposes; the accusation from defendant's counsel that the Judge was acting like a financial advisor; the concept of "reasonable apprehension of bias"; the double reasonable test formulated by the Constitutional Court; and the reference to the plaintiff as an innocent person being incarcerated for a period of 240 days.

Findings: The appellants have not proved actual bias on the part of the court a quo. However, the remarks by the court a quo were unfortunate and were of concern. It was probable that a reasonable person would have had a reasonable apprehension of bias on the part of the court a quo.

Order: The appeal is upheld. The judgment and orders are set aside and the trial hearing is to commence and be heard de novo by another Judge.

Sustaining the Wild Coast v Minister of Mineral Resources [2022] ZAECMKHC 55 at [75]-[139]

Review – Decision to grant exploration right – Seismic survey off West Coast – Bias and exhaustion of internal remedies – Decision reviewed and set aside – Promotion of Administrative Justice Act 3 of 2000.

Facts: In October 2021 SLR Consulting at the instance of Shell, as operator of an exploration right, gave notice of Shell's intention to commence with a sesmic survey along the Wild Coast. The survey is conducted by a seismic vessel sailing off the coastline, towing a 6-kilometres-long array of airguns behind it. It was common cause that Impact and Shell have secured no environmental authorisation to undertake the impugned survey and exploration.

Application: Applicants obtained an interim interdict preventing the respondents from undertaking the survey and Part B is now before the court. Applicants seek orders reviewing the decision granting the exploration right, including the renewals thereof.

Discussion: The contention by the applicants that environmental authorisation in terms of the National Environmental Management Act 107 of 1998 is necessary for exploration activities; the intervention; whether there has been an unreasonable delay; the Promotion of Administrative Justice Act 3 of 2000; the exhaustion of internal remedies; the Mineral and Petroleum Resources Development Act 28 of 2002; procedural unfairness; failure to take into account relevant considerations; and failure to comply with applicable legal prescripts.

Findings: The Minister has tendered a bald denial to the allegations of bias, offered no explanation for his change of mind, and sudden opposition to Part A of the application, for having publicly criticised interest groups who challenged the survey and maintaining his refusal to review Shell's exploration rights. The public statements made by the Minister give rise to a reasonable apprehension of bias against the applicants and relieve the applicants and the intervening parties of the duty to exhaust their internal remedies as such appeal would have been an exercise in futility.

It was demonstrably clear that the decisions were not preceded by a fair procedure; the decision-maker failed to take relevant considerations into account and to comply with the relevant legal prescripts.

Order: The decision taken by the Minister granting the exploration right is reviewed and set aside, as well as the decision to grant the renewal and further renewal.

Seriti NO v Corruption Watch [2022] 81368-2016 (GP) at [14]-[34]

Appeal – Leave to appeal – Condonation – Excessive delay – Review and setting aside of findings of Arms Commission – Appeal triggered by complaint before Judicial Services Commission – Constitution, s 177.

Facts: Judge Seriti was the Chairperson of the Arms Deal Commission and Judge Musi a member. The Commission was set up to investigate allegations of fraud and corruption in the Strategic Defence Procurement package.

Application: For leave to appeal the judgment of 21 August 2019 which reviewed and set aside the findings of the Commission.

Discussion: Condonation and the excessive delay in applying for leave to appeal; that the applicants did not react to the judgment, but some 21 months later they received a complaint of gross misconduct from the Judicial Service Commission (JSC) at which point they changed their minds; and that a further four months elapsed before they filed an application for leave to appeal.

Findings: The court in the review application found that the Commission failed to gather relevant material to properly consider and investigate matters so arising, to admit evidence which was highly material to the inquiry which was in its possession, to seek and gain information or material evidence from key witnesses, to test the evidence of witnesses who appeared before it by putting questions to them with the

required open mind and to carry out the tasks assigned to it under the Constitution and within the principles of legality. None of this was about misconduct as envisioned in section 177 of the Constitution. The JSC was required to apply a totally different test. No basis has been laid for the court to grant condonation of a filing of an application for leave to appeal which is more than two years late. And further, there was no basis by which there were prospects of success, nor was there a point of law which required the attention of a higher court.

Order: The application for leave to appeal is dismissed.

Standard Bank v Tchibamba [2022] ZAWCHC 169 at [37]-[44]

Execution – Residential immovable property – Reserve price – Reconsideration – Where reserve price not achieved at auction – Lacunae in subrule as to procedure to obtain reconsideration – Uniform Rule 46A(9).

Facts: In 2018 default judgment was granted against the defendants for R955,411.72 based on arrear payments on their mortgage loan. In 2019 the property was declared executable and a reserve price of R973,032.05 was fixed by the court. At the sale in execution, the highest bidder offered R700,000 and no more, because he considered the property to be in poor condition and because of the prospects of a costly eviction of the foreign nationals living there. The Sheriff compiled a report mentioning that the property was in a poor condition on the inside and would require substantial renovation.

Application: For the reconsideration, in terms of Uniform Rule 46A(9), of a reserve price, when such price is not achieved at auction.

Discussion: The shortcomings in the wording of subrule (9) recognised in Erasmus and in the Changing Tides case; the lack of uniformity among practitioners in the means of obtaining a reconsideration of the reserve price; how to bring about the reconsideration in paragraph (9)(c) and the reconsideration of the factors in (9)(b); the directive issued by the Judge President on 1 June 2022; that the reconsideration prescribed by Rule 46A(9)(c) is a procedural requirement and is not a process that can be opposed; that the rule is deficient in that it does not provide for how the parties are to be given notice of the reconsideration, or in what manner, and by when they should exercise their right to adduce evidence or address argument.

Findings: Subrule 46A(9) is deserving of further consideration by the Rules Board. At para [41] is it proposed that the registrar would determine in consultation with the Judge President (i) to which judge the Sheriff's report should be referred (ii) the date upon which the reconsideration in terms of Rule 46A(9)(c) would be heard in open court (iii) the date(s) by which the interested parties would be required to file supplementary affidavits and heads of argument; and issue a notice to the interested parties timeously informing them of the aforegoing. An interval of 3-4 months should ordinarily be adequate between the date of the filing of the Sheriff's report and the reconsideration of the reserve price in open court.

Order: Directions are given for the defendants to secure a private sale of the property which they have arranged, failing which the sale in execution is to proceed and if the highest bid does not exceed the highest bid at the earlier sale, the property shall be deemed to be sold to that bidder at R700,000. A copy of the judgment is to be sent to the Secretary of the Rules Board.

Ray v Ray [2022] ZAWCHC 170

Exception – Particulars containing various causes of action – Elaborate scheme – Foreign foundations used as investment vehicles – 14 of 25 exceptions upheld.

Facts: Plaintiff and the first defendant were married in 2006 in England. First defendant proposed that they establish the Cavingut Foundation in Liechtenstein into which they would both pay an equivalent amount of their respective fortunes. Various further transactions ensued, including the establishment of the Blue Elephant Foundation in terms of the laws of Panama. The first defendant failed to pay his share into the Cavingut Foundation and the plaintiff later instituted divorce proceedings.

Claim: Plaintiff claims specific performance, being for first defendant to make his contribution to the Cavingut Foundation, alternatively for declaratory relief based on the first defendant's fraud, cancellation of the agreement and damages. As a result of the elaborate scheme created by the plaintiff and the first defendant, the court was faced with hydra-headed particulars of claim, which included widespread causes of action ranging from specific performance to unjust enrichment based on fraud. The first defendant raised 25 grounds of exception.

Discussion: The general approach of the courts to exceptions; the claim of specific performance of a contract and payment of GBP 5 million into the Gavingut Foundation;

that the plaintiff did not plead the applicable laws of either Liechtenstein or Panama; the doctrine of election; plaintiff's locus standi to make claims on behalf of the Cavingut Foundation; that no date for payment was stipulated; the effect of plaintiff's election to cancel the agreement; and the grounds of exception premised on the plaintiff seeking declaratory relief in circumstances where no dispute has arisen.

Findings: The plaintiff has locus standi to claim enforcement of the agreement. As to date of payment, the judgment debt would be payable immediately or on such date as determined by a trial court. Plaintiff was entitled to utilise the double-barrel procedure, but the wording in the particulars was at odds with the submission that the plaintiff had not yet made her election. Plaintiff has failed to prove not only the rules and regulations governing the Cavingut Foundation but also the applicable foreign legislation relevant to the removal of beneficiaries where a separate legal entity had been established. (See the further exeptions at [49]-[108].)

Order: Fourteen grounds of exception are upheld and the plaintiff is afforded 20 days to amend her particulars of claim.

Moodliyar & Bedhesi Attorneys v Madatt [2022] ZAGPJHC 630

Prescription – Claim for legal fees – Mandate terminated and case given to new attorneys – When prescription begins to run – Prescription Act 68 of 1969, s 12(1).

Facts: In 2006, Mr and Mrs Madatt, in their personal capacity, and in their representative capacity on behalf of their minor daughter, signed a power of attorney with the firm of attorneys to institute an action against the MEC for Health for negligence during the birth of their child. The mandate was terminated by the parents in 2012 and they procured the services of a new firm of attorneys, who prosecuted the principal claim successfully.

Claim: For fees and disbursements, the bill of costs being taxed and allowed in the amount of R381,831.75. The original particulars of claim cited the parents only in their personal capacities and a notice of intention to amend was later served to cite the defendants in their representative capacity. The defendants raised special pleas of prescription.

Discussion: Section 12(1) of the Prescription Act 68 of 1969; when the debt became due – at the time when the mandate was terminated, or earlier, during the course of the mandate, as and when the work was done and disbursements made; the two

powers of attorney signed by the parties; whether the powers of attorney were in substance contingency fee agreements; defendant's contention that the notice of amendment to cite them in their representative capacity was served more than three years after commencement of prescription.

Findings: The court follows the case of Blakes Maphanga and that an attorney is entitled to payment of fees on performance of the mandate or the termination of the relationship, which is when prescription started running. The amendment sought to introduce a new party to the proceedings. Where a debt is owed in a representative capacity, it cannot be recovered from that person in a personal capacity. The defendants, in their representative capacity, were added only when the amendment was effected.

Order: In the claim against the parents in their personal capacity, the special plea is dismissed. In the claim against the parents in their representative capacity, the special plea is upheld.

Sebogodi v Eskom Holdings (SOC) Ltd and Another (2020/11637) [2022] ZAGPJHC 593 (23 August 2022)

Rule 35(7) of the Uniform Rules of Court – Application is intended to compel further and better discovery of the notice of discovery in terms of Rule 35(3) –

The applicant brought an application in terms of Rule 35(7) of the Uniform Rules of Court – Application is intended to compel further and better discovery of the notice of discovery in terms of Rule 35(3) – The applicant's claim is based on remarks made by the second respondent who is alleged to have wrongfully fabricated and published false information to the employees of the first respondent – Whether the applicant made out a case for discovery in its founding affidavit? – Whether the first respondent should be compelled to discover the Assurance & Forensic Report if it exists? – Whether the first respondent may be compelled to reply to a request of discovery that was not originally made in the of Rule 35(3) Notice? – In view of finding that the applicant having made out a case for discovery it follows that the first respondent be compelled to discover the information requested in relation to the A and F Department documents referred to in their discovery affidavit, the applicant's audio recordings relating to her interview as well as the psychometric test results which the first

respondent indicated had been furnished after the application was lodged. www.saflii.org/za/cases/ZAGPJHC/2022/593.html

Miya v Matlhko-Seifert [2022] ZAGPJHC 638 at [54]-[69]

Eviction – Jurisdiction of magistrate's court – Value of right of occupation – Jurisdiction conferred by PIE regardless of value – Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, s 9 – Magistrates' Court Act 32 of 1944, s 29(1)(b).

Facts: The respondent purchased a property in 2020 for R500,000 and her claim of ownership was supported by the deed of transfer and corroborated by the history leading to her acquisition of the property. The appellant occupies the property and contends that she purchased the property in 2007 from one of the previous owners. She supports her contention with a one-page document described as a deed of sale.

Appeal: Against the eviction order granted in the magistrate's court.

Discussion: That respondent's real right of ownership, although arising later, would prevail over the appellant's prior personal right; the appellant's contentions that she has effected improvements on the property; that the appellant's occupation of the property is unlawful, as envisaged in section 4(7) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE); the doctrine of notice; the contention by the appellant that the magistrate's court did not have jurisdiction to grant the order with reference to section 29(1)(b) of the Magistrates' Court Act 32 of 1944 and ejectment where the value of the right of occupation does not exceed R200,000 for a district court; and section 9 of PIE pertaining to the jurisdiction of magistrates courts under the provisions of PIE.

Findings: The provisions of PIE expand on the magistrate's court's jurisdiction and a magistrate would have jurisdiction to grant an eviction order in terms of section 4 of PIE, whatever the value of the right of occupation. Given that many unlawful occupiers, who would fall within the ambit of the protection afforded by PIE in preventing illegal evictions, would not have access to extensive legal resources, it makes sense that a magistrate's court would have jurisdiction in respect of any order to be granted under the Act. The magistrate had jurisdiction to grant the eviction order.

See paras [70]-[80] on how even if the magistrate's court did not have jurisdiction to grant the eviction order, it did not prevent the High Court on appeal in doing so in circumstances where the unlawful occupier should otherwise be evicted

Order: The appeal is dismissed, save for the amendment of the date of vacation and the directions for the Sheriff.

Ngwenya v Trustees, Sishen Iron Ore Community Trust [2022] ZALCJHB 246

Costs-attorney to pay de bonis propriis

Following an alleged dismissal from employment, the attorney advised the client to launch an application in terms of section 77(3) of the Basic Conditions of Employment Act. But there was no contract of employment upon which the claim could be based. The attorneys of the respondents wrote a detailed letter and indicated clearly that the application was moot and hopeless. The attorney testified that he could not heed a call from the respondents since he does not take instructions from them. The legal representative recklessly advised his client to launch what was a frivolous and vexatious application. Only a reckless attorney would foray to court with such an unarguable case. The attorney is to pay the costs de bonis propriis.

Multisure Corporation (Pty) Ltd v KGA Life Limited and Others (2780/2021) [2022] ZAECQBHC 24 (30 August 2022)

Urgency – The approach to adopt when dealing with an urgent application is governed by Uniform Rule 6(12) – Whether there must be a departure at all from the usual process – Held, the operation of the order granted by the Honourable Madam Justice Schoeman, delivered on 15 March 2022, is not suspended pending the outcome of the first respondent's appeal to the Supreme Court of Appeal, or any subsequent appeal.

Multisure entered into a written intermediary agreement for KGA to underwrite the funeral policies of its clients – That intermediary agreement incorporates a 'Master Policy' – Multisure cancelled the intermediary agreement on 5 July 2021 and entered into a new agreement for the third respondent to provide underwriting services to its clients, in place of KGA – KGA refused to give effect to the transfer without individual notification, from each client, of cancellation – Non-joinder – The test for a plea of non-joinder or misjoinder is whether or not a party has a 'direct and substantial interest' in the subject matter of the action, that is, a legal interest in the subject matter of the litigation which may be affected prejudicially by the judgment of the court – See Henri Viljoen (Pty) Ltd v Awerbuch Bros 1953 (2) SA 151 – The requirement for Multisure to demonstrate that it will suffer 'irreparable harm' if the relief it seeks is not granted is,

in this instance, closely linked to the consideration of exceptional circumstance – Urgency – The approach to adopt when dealing with an urgent application is governed by Uniform Rule 6(12) – Whether there must be a departure at all from the usual process – Held, the operation of the order granted by the Honourable Madam Justice Schoeman, delivered on 15 March 2022, is not suspended pending the outcome of the first respondent's appeal to the Supreme Court of Appeal, or any subsequent appeal. www.saflii.org/za/cases/ZAECQBHC/2022/24.html

Interwaste (PTY) Ltd and Another v ABSA Bank Ltd and Others (24005/2022) [2022] ZAGPJHC 607 (26 August 2022)

Rescission application-Court order-reconsideration if order given in absence-– Court persuaded that the applicants were not entitled to the relief they sought against the tenth and thirteenth respondents

On the 13th July 2022 Manoim J, granted an anti-dissipation order in favour of the applicants pending finalisation of the relief sought in Part B of the application in which the applicant seeks an order that an amount of R24 350 781.05 be paid to them – It is common cause that the seventh respondent admitted committing fraudulent acts whilst in the employ of the applicants which acts of fraud resulted in the loss of the amount of over R24 million Rand – The reconsideration application – There is nothing in the applicant's papers to show that any amount in the bank account of the tenth or thirteenth respondents are part of the amount fraudulently paid out by the seventh or eighth respondent – Court persuaded that the applicants were not entitled to the relief they sought against the tenth and thirteenth respondents – They failed to demonstrate that they had a quasi-vindicatory claim against the tenth and thirteenth respondents accordingly the tenth and thirteenth respondents are entitled to a reconsideration of the order granted in their absence – Held, the order granted by Manoim J is reconsidered in accordance with Rule 6(12)(c) of the Uniform Rules of Court.www.saflii.org/za/cases/ZAGPJHC/2022/607.html

Africa Best Foods (PTY) Ltd v DSV South Africa (PTY) Ltd (42576/2021) [2022] ZAGPJHC 616 (29 August 2022)

Exception-legal test- of an extra-contractual legal duty outside the agreement – Plaintiff's claim is one for pure economic loss, masquerading as a lack of duty of care – conclusion of law for which the plaintiff contends in its particulars of claim

cannot be supported upon every reasonable interpretation that can be put upon the facts-exception is dismissed.

The plaintiff entered into an agreement with the defendant for the transportation of wild mushrooms from South Africa to Italy by sea freight – Flowing from a dispute arising out of this business relationship the plaintiff issues summons against the Defendant alleging that the defendant failed to exercise its duty of care resulting in the Plaintiff suffering damages – In response the Defendant raises an exception to the plaintiff's particulars of claim submitting that it is bad in law or lacks averments to sustain a cause of action – The defendant contends that the plaintiff has failed to plead the basis in fact and or law for the existence and or imposition of an extra-contractual legal duty outside the agreement – Plaintiff's claim is one for pure economic loss, masquerading as a lack of duty of care – If properly construed the claim is based on the defendant's breach of contractual obligations in terms of the agreement – The legal test on exception – The test on exception is for the excipient to satisfy the court that the conclusion of law for which the plaintiff contends in its particulars of claim cannot be supported upon every reasonable interpretation that can be put upon the facts – See H v Fetal Assessment Centre 2015 (2) SA 193 – Court is of the view that since the risk of damage to the mushrooms was within the contemplation of the parties, the defendant has failed to demonstrate that the contract between the parties is unambiguous and that the particulars of claim are excipiable on every interpretation – Held, the exception is dismissed.
www.saflii.org/za/cases/ZAGPJHC/2022/616.html

Metrovincial Properties v Valuation Appeal Board for Bitou Municipality [2022] ZAWCHC 178 at [24]-[39]

Review – Delay – Condonation – Municipality – Valuation of property – When applicant had all the information necessary to launch review proceedings – Promotion of Administrative Justice Act 3 of 2000, s 7(1).

Facts: The Valuation Appeal Boards at the municipality valued the applicant's property at R14 million and categorised it as "business and commercial" for the purposes of the 2013 general valuation roll and valued the property at R16 million for the purposes of the 2017 general valuation roll. The decisions were taken according to section 229 of the Constitution and the Local Government: Municipal Property Rates Act of 6 of 2004.

Application: For the review and setting aside of decisions by the respondents in relation to the levying of municipal rates.

Discussion: Section 7(1) of the Promotion of Administrative Justice Act 3 of 2000 and unreasonable delay; the factors in assessing whether to extend the 180-day period; that the applicant exhausted the internal remedies available to it under the Rates Act; that over the years there was regular correspondence between the parties; when the applicant had all of the information necessary to launch review proceedings; the reasons for the delays such as non-availability of counsel and the illness and travel and business commitments of one of the applicant's directors.

Findings: The applicant had everything it required (including a complaint in relation to the manner in which the process had been conducted) at its disposal to launch review proceedings in terms of PAJA by the end of 2013. It should have instituted such proceedings by mid-2014 at the latest. And for the 2017 valuation it had all of the information necessary by October 2018. In applying the relevant factors identified in the Aurecon case in considering whether condonation should be granted, the court finds that granting condonation would not be in the interests of justice.

Order: The application is dismissed with costs.

Orange Flamingo v MEC for Public Works, Eastern Cape [2022] ZAECBHC 24 at [13]-[26]

Claim- Counterclaim – Delay – After trial commenced – Prejudicial to plaintiff – Application in terms of Uniform Rule 24(1) must be launched before trial commences.

Facts: Orange Flamingo instituted action proceedings against the MECs for Public Works and Education based on a contract where Orange Flamingo was appointed as architects and principal agent for the construction of a school. The pleadings closed and after all the pre-trial procedures had been finalised the parties were allocated a trial date and signed the case flow management Form 2 dated 2 August 2022. It was only on 12 August 2022 when a letter was addressed by the defendants' attorneys requesting permission to file a counterclaim. This was refused. At the close of the second day of the planned three-day trial, the defendants' counsel applied to be allowed to file a counterclaim.

Application: The defendants seek condonation for their failure to file the counterclaim timeously and leave in terms of Uniform Rule 24(1) to file the counterclaim.

Discussion: The contention that there was a bona fide mistake caused by an oversight on the part of the defendants' legal team, especially given that the issue of overpayment was clearly set out in the defendants' amended plea; the plaintiff's contention that the sudden application to file a counterclaim after observing and hearing the plaintiff's evidence in chief in the trial was irregular and prejudicial to it; and the requirements of Uniform Rule 24(1) on counterclaims.

Findings: At the latest, immediately on refusal by the plaintiff's team for the belated filing of the counterclaim, the defendants should have launched the application in terms of Rule 24(1) before the trial had actually commenced. The Rule merely refers to the court allowing the counterclaim to be delivered at a later stage. That later stage cannot go beyond the commencement of the actual trial. To allow the trial to start and proceed on the issues as defined in the pleadings, only to change (or add) horses midstream by allowing a counterclaim at that late stage would be unfair, unjust and prejudicial to the plaintiff, which would have shaped its case and evidence on the pleadings as they stand to deal with the issues as defined.

Order: The application is dismissed with costs.

Industrial Development Corporation of South Africa v Reddy and Others (5159/2021) [2022] ZAGPJHC 632 (2 September 2022)

Default judgment- absence of an answering affidavit-circumstances prohibit default judgment

Application for default judgment – Judgment was sought against the first to fifth respondents as guarantors in respect of various claims for significant monetary amounts – The applicant contended that it was entitled to default judgment in the absence of an answering affidavit, whilst the respondents sought an order striking the application from the roll, together with punitive costs – Ultimately a party in the position of the respondents is left with a choice, either to deliver its affidavit without the documents or to seek to extend the time periods for filing, pending the finalisation of the application to compel – The respondents did not exercise their remedies – Court not persuaded that in the circumstances of this matter default judgment should be granted – It would not be in the interests of justice to deprive the respondents of an appropriate opportunity to protect their interests and exercise the remedies at

their disposal – Held, the application is postponed sine die.
www.saflii.org/za/cases/ZAGPJHC/2022/632.html

Evrigard (PTY) Ltd and Another v Select PPE (PTY) Ltd and Others (2021/21896) [2022] ZAGPJHC 653 (7 September 2022)

Applications-delivering of documents rule 35 applicable

In the main application the applicants sought interdicts against the respondents on the grounds of alleged unlawful competition – Upon respondents delivering their answering affidavit, applicant delivered two rule 35 (12) notices, calling upon respondents to discover certain documents referred to in the answering affidavit – Respondents took the view that the notices constituted an irregular step, and delivered notices in terms of rule 30 of the Uniform Rules – Rule 35 (12) – It is not necessary for a party to obtain an order in advance, authorizing the giving of notice in terms of this rule – Once a party refers to a document in its affidavit, the other party is entitled to see that document, and to call for it in terms of rule 35 (12) – Held, both applications in terms of rule 30 are dismissed with costs.
www.saflii.org/za/cases/ZAGPJHC/2022/653.html

Mit Mak Motors CC 2005/028211/23 v Zitha and Others (29653/19) [2022] ZAGPPHC 650 (2 September 2022)

Declarotory order-vehicle bought but was stolen- plaintiff seeks an order declaring the agreement of sale null and void and authorising the third defendant to debit or withdraw the amount of R105 000 from both defendants' bank accounts and pay it over to the plaintiff

The plaintiff is suing the defendants for the amount of R105 000 – The amount was paid pursuant to an oral agreement concluded by the parties in April 2019 for the sale of a motor vehicle – Soon after purchasing the vehicle, the plaintiff suspected that its VIN may have been tempered with – An inspection by members of the South African Police Service, confirmed the plaintiff's suspicions – The vehicle was impounded on the evening of the day of the sale – Further in-depth inspection by SAPS confirmed that the vehicle had been stolen and cloned, using the identity of an original vehicle owned by one Mr Booysen – The plaintiff seeks an order declaring the agreement of sale null and void and authorising the third defendant to debit or withdraw the amount

of R105 000 from both defendants' bank accounts and pay it over to the plaintiff – Whether the vehicle sold by the defendants to the plaintiff had been stolen and or cloned – Whether the agreement of sale was null and void – The plaintiff's case is upheld – The third defendant is ordered to transfer or withdraw from the first and second defendants' bank account, the full amount of R105 000 and pay it to the plaintiff's attorneys' trust account. www.saflii.org/za/cases/ZAGPPHC/2022/650.html

Kwadukuza Municipality v Tiger Tales [2022] ZAKZPHC 46

Default judgment – Property attached – Rescission application by owner who was not defendant – Locus standi – Legal interest in the action – Uniform Rule 42(1)(a)-owner had to go interpleader route

Facts: Summons was issued by Tiger Tales (trading as K9 Security) against Simsi Construction for payment for security services which had been rendered. Simsi did not defend the matter and default judgment was granted. A warrant of execution was issued and the sheriff attached various movables, which included tools, machinery and building material. The sheriff advertised his intention to sell the attached goods.

Appeal: The municipality launched an urgent application for the stay of the warrant and the sale in execution, pending an application for the rescission of the default judgment, contending that it was the owner of the goods that had been attached and that consequently it was a person affected by the judgment and entitled to apply for a rescission of the judgment. The magistrate dismissed the application for a stay and for rescission (both were heard together). The municipality now appeals.

Discussion: The magistrate's reasoning that there was no point in rescinding the judgment if nobody was going to defend the action, and that the municipality would not have been able to join the action as a defendant and that its real remedy with regard to the attachment of its property would have been interpleader proceedings; that counsel for the municipality referred to a number of cases in which it was held that a person whose property was attached pursuant to a default judgment granted against someone else was a person affected by the judgment and could apply for it to be rescinded; the approach in the United Watch case on the wording of Uniform Rule 42(1)(a); and the applicant's locus standi.

Findings: The municipality had no legal interest in the Tiger Tales action against Simsi for payment for services rendered. It therefore had no locus standi to apply for the rescission of the default judgment.

Order: The appeal is dismissed with costs.

BBT Electrical and Plumbing Construction and Maintenance t/a BBT Construction v Setshabelo Trading 647 (Pty) Ltd (3367/2019) [2022] ZAFSHC 221 (2 September 2022)

Particulars of claim-when contract cancelled-damages

Plaintiff issued summons against the defendant claiming payment of R400 000-00, interest a tempora morae and costs – Defendant in its plea denied being indebted in the aforesaid amount – To proof its case plaintiff called two witnesses – Defendant did not adduce any evidence resulting therein that this Court must determine whether plaintiff proved its case – The evidence and the pleadings are ad idem that plaintiff on learning defendant's breach, cancelled the agreement – Having cancelled the agreement it was incumbent on plaintiff to prove its damages, either by way of positive or negative interesse, but most definitely the plaintiff cannot claim payment of the R400 000-00 balance in terms of the agreement – The R400 000-00 did not constitute damages per se – Held, absolution of the instance is ordered with costs. www.saflii.org/za/cases/ZAFSHC/2022/221.html

S v S (born R) [2022] ZAGPJHC 683

Court orders – Variation of – Actio communi dividundo – Divorce order "by default" against defendant at variance with relief claimed in summons – Defendant applying in terms of Uniform Rule 42(1)(a) for judgment to be varied so that judgment accord with relief sought in summons – Rule 42(1)(a) operates where order granted by court different to the one sought by plaintiff – Also an order is granted erroneously if it is vague – Application granted.

Legal Practice Council v Teffo [2022] ZAGPPHC 666

Advocate – Misconduct – Numerous complaints of unprofessional behaviour – Not dealing with complaints despite opportunity – Name struck from roll.

Facts: The Legal Practice Council (LPC) received a number of complaints against Advocate Teffo. The LPC informed the him about these complaints and he replied by filing an answering affidavit.

Application: The LPC seeks an order to have Advocate Teffo struck from the roll of legal practitioners, alternatively that he be suspended from practice until such time as he satisfies the court that he is a fit and proper person to practice as such.

Discussion: The LPC's contentions that Advocate Teffo contravened various rules of the legal profession, the Legal Practice Act, the Code of Conduct, and the Rules of the LPC; that the the complaints included: that he placed a matter on an unopposed roll to secure a default judgment knowing that the matter was opposed; assaulted and intimidated a police officer; is being investigated for corrupt activities; misled the Labour Court; failed to cooperate with the LPC; breached a court order; accepted instructions and payments directly from clients; the charging exorbitant and unreasonable amounts; and that he used the details of attorneys without their consent.

Findings: After a detailed analysis of the incidents and that Advocate Teffo had not attempted to deal with the complaints levelled against him, the court finds that the various aberrations have been established on a preponderance of probabilities. Advocate Teffo lacks the sense of responsibility, honesty and integrity that are the attributes of an advocate. In the circumstances the removal of his name from the roll of legal practitioners is justified.

Order: Advocate Teffo is removed from the roll of legal practitioners. He is prohibited from operating his banking accounts and a curator bonis is appointed.

[121] The Respondent went even further by taking money from vulnerable and desperate clients given their situations. He took an advantage of their situation by exerting position of power in that he actually demanded that they pay him upfront knowingly that he will never render the service as expected. . . . When inquiries or follow-up are done by the complainants, he does not respond he simply threatens them. That's an abuse and exploitation at its best. . . .

G v N : In re: N v G (2021/44477) [2022] ZAGPJHC 688 (6 September 2022)

Court order-settlement agreement-divorce- a case on a balance of probabilities and demonstrated that she has a reasonable explanation why the judgment by default was

granted – It is appropriate that the matter be referred back to the divorce court for determination.

The applicant seeks a rescission of the order granted where a decree of divorce was granted incorporating a settlement signed by the applicant and respondent – The applicant believing that the respondent assured her he was disclosing all the information he would have to disclose in court and she had the best information, persuaded the applicant to sign the settlement agreement – He also assured her that her amendments would be honoured despite not forming part of the agreement – This agreement was made an order of court – After the divorce order was granted the respondent removed her from his medical aid, and reneged on the verbal agreements they had made – He contends that the agreements outside of the settlement agreement were merely transitional and supplementary agreements and were not substantial – Counsel for the applicant argued that the applicant was prejudiced when the respondent made the settlement agreement an order of the court without incorporating the verbal agreements – The applicant was unaware of the law applicable, moreover the verbal agreements entered into did not form part of the settlement agreement – See Chetty v Law Society Transvaal 1985(2) 756 – Having regard to the common law requirement the Court is satisfied that the applicant has made out a case on a balance of probabilities and demonstrated that she has a reasonable explanation why the judgment by default was granted – It is appropriate that the matter be referred back to the divorce court for determination – Held, the judgment granted by Segal AJ on 12 November 2021 is rescinded – The respondent's counterapplication seeking an order to refer the rescission application to oral evidence is dismissed with costs.
www.saflii.org/za/cases/ZAGPJHC/2022/688.html

Plaatjies v Meintjies [2022] ZAWCHC 185

Eviction – Locus standi – Contractual right to receive transfer of ownership of the property – Not the status of person in charge of land – Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, s 4(1).

Facts: The respondent purchased the property from his parents. While they still owned the property they moved to Johannesburg and the appellant offered to maintain the property, while paying the rates and taxes by way of rental. Appellant erecting a Wendy

house in the yard in which to accommodate a family with children and allowed the running of a small spaza shop from a shipping container placed on the property.

Appeal: Against the eviction order granted by the magistrate's court in terms of section 4(8) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

Discussion: The appellant's contentions that he is a disabled pensioner, that he was indigent and would be rendered homeless in the event of eviction, that he has cancer, which is in remission, and he suffers from diabetes; the lack of initial ownership and the respondent's locus standi; whether the respondent, who has a mere contractual right to receive transfer of ownership of the property, can on that basis alone acquire the status of a person in charge of land as contemplated in PIE; whether the lack of locus standi could be cured; the validity of the notice of termination of the lease; and the contention that the magistrate's failed to take proper account of the appellant's personal circumstances in considering a just and equitable order.

Findings: The respondent did not have locus standi in terms of section 4(1) of PIE to institute the eviction application at the time that he did. His lack of locus standi could not be ratified. The respondent could also not have legally terminated the alleged lease. The magistrate failed to consider that the appellant lives from hand to mouth and affirmed that he cannot afford alternative rental and other accommodation. The magistrate erred in not taking into consideration all relevant circumstances into account.

Order: The appeal is upheld and the eviction order granted by the magistrate is set aside.

Careline Clinic (Pty) Ltd v AL-Kant Opbergers en Verpakkers CC and Others (1572/2022) [2022] ZANCHC 46 (9 September 2022)

Interdict- from laying electricity cables or erecting service connection below the ground on its premises

Careline Clinic (Pty) Ltd approached this Court on an urgent basis for an order that the respondents, and any person acting through them be interdicted from laying electricity cables or erecting service connection below the ground on its premises – The relief which lies at the heart of the contestations is that of prohibiting the respondents from

connecting electrical cables to what the applicant alleges to be its ring main unit (RMU) – It should be considered whether the RMU, that is situated in the applicant's premises, belongs to it or the municipality – If it is found that the RMU belonged to the applicant, it follows that the municipality could not give consent to Al-Kant and MVD to dig the trenches, as it did, at the perimeter fence and to lay cables to the RMU of the applicant for purposes of connecting electricity, without the applicant's knowledge and its concurrence – The municipality's action, in granting permission to Al-Kant and MVD to acquire electricity from the applicant's RMU without affording the applicant an opportunity to be heard, in the present constitutional setting, is untenable – Held, the first, second and third respondent, and any person acting through them, are interdicted from directly or indirectly connecting- electrical cables to the ring main unit of the applicant or part thereof. www.saflii.org/za/cases/ZANCHC/2022/46.html

Neale N.O. and Others v Pipeflo (Pty) Ltd (23970/21) [2022] ZAGPPHC 667 (19 September 2022)

Interlocutory application – The plaintiffs seek leave to amend their particulars of claim – The first issue for determination is whether the plaintiffs' late filing of the application for leave to amend should be condoned – In exercising its judicial discretion this court is required to take into account all the relevant factors in order to consider whether good cause has been shown – Jurisdictional factors considered includes not only the lateness but whether the opposing party has been prejudiced and whether it is in the interest of justice – Absence of authority – Mr Wayne Visser, deposing the affidavit lacked the necessary authority to act on behalf of the Trust – Court of the view that the amendments, as they stand, goes to the very root cause of the action – Held, the deponent is duly authorized to represent the Trust in these proceedings – The late filing of the plaintiffs' leave to amend is condoned – The plaintiffs' application for leave to amend is dismissed with costs. www.saflii.org/za/cases/ZAGPPHC/2022/667.html

United Democratic Movement v Lebashe Investment Group [2022] ZACC 34 at [41]-[75]

Appeal– Appealability of interim interdicts — interdict to cease allegations pending an action for damages for defamation and injuria – Interests of justice — Superior Courts Act 10 of 2013, s 16(1)(a).

Facts: Mr Holomisa is President of the United Democratic Movement (UDM) and wrote a letter to the President of the country describing corruption involving the Public Investment Corporation, the Government Employee Pension Fund and the respondent companies. The letter was published on the official website of the UDM and his Twitter account. Mr Holomisa also gave a television interview on the topic.

Appeal: The respondents approached the High Court for an interdict restraining the applicants from making or repeating any defamatory allegations defaming or injuring their dignity pending the institution of an action for damages for defamation and injuria. The interim interdict was granted and the applicants were granted leave to appeal to the Supreme Court of Appeal (SCA). There, in a in a three-two split the application was struck off the roll on the grounds that the interdict was interim in nature and therefore unappealable.

Discussion: The applicants' contention that the order directing that the letter be taken down from the UDM's website and social media accounts was final and definitive in effect; the submissions by the respondents that the order made by the High Court does not satisfy any part of the test in the Zweni case and the interim order was not appealable; the powers of the Supreme Court of Appeal to interfere with the decision of the High Court to grant leave to appeal; appealability of an interim order; justification for the granting of interim interdictory relief; common law defamation; whether the statement was defamatory; wrongfulness; truth and public interest; the balance of convenience; and the freedom of expression.

Findings: The respondents succeeded in establishing a prima facie right, injury actually committed and reasonably apprehended, and the lack of adequate alternative remedy. They were correctly granted an interim interdict. The court decides not to remit the matter back to the SCA, but to determine the appeal.

Order: The appeal against the order of the SCA striking the appeal from the roll is upheld. The order of the SCA is set aside and substituted with one dismissing the appeal against the order of the High Court.

Lion Ridge Body Corporate v Alexander [2022] ZAGPJHC 713

Judgment-Sectional titles – Arrear levies, water and electricity – Body corporate seeking judgment – Seeking disconnection of electricity and restriction of water until judgment debt satisfied – Relief affecting constitutional rights – Not competent unless

authorised by an applicable Management or Conduct Rule or agreed to by the body corporate member.

Facts: Lion Ridge is a body corporate and each of the respondents is a member of Lion Ridge, because they own a unit in the scheme out of which Lion Ridge was established.

Application: Lion Ridge seeks judgment against each respondent for amounts it claims are owes in arrear levies, water and electricity charges. It also seeks an order disconnecting the electricity to each unit and limiting the water supplied to each unit to not more than six kilolitres per month, until the judgment amounts are paid in full.

Discussion: The contention by Lion Ridge that it is empowered by section 4 of the Sectional Titles Act 95 of 1986 to do to do all things reasonably necessary for the enforcement of the rules and for the management and administration of the common property; that the relief claimed implicates constitutional rights, such as against arbitrary deprivation of property, sufficient water, access to adequate housing, and the public law right to receive electricity from a municipality, even where the electricity is transmitted through an intermediary such as a landlord or a body corporate; and that Lion Ridge's founding papers do not address its powers to limit or disconnect the respondents' utilities.

Findings: Neither the Sectional Titles Act nor the standard Management and Conduct Rules promulgated under it empower a body corporate to interfere with a member's utility supply, and Lion Ridge does not allege any other common law or statutory power to do so. It follows that Lion Ridge has not identified the source of its alleged right to disconnect or limit the respondents' utilities.

Order: The applications are dismissed.

Nedbank v Uphuhliso Investments and Projects [2022] ZAGPJHC 723

Summary judgment – Divergence in defences raised in affidavit and plea – Not bona fide if lacking explanation for inconsistency – Advancing defences not raised in plea – Amended Uniform Rule 32.

Facts: Nedbank concluded an agreement with Uphuhliso that provided for an overdraft facility as well as a medium-term loan facility in the amount of R1,6 million, which was to be used to finance the purchase of a News Café in Maponya Mall in Soweto.

Nedbank contends that Uphuhliso exceeded the limit and failed to meet its obligations, despite demand.

Claim: Nedbank seeks summary judgment against Uphuhliso and against the second to fourth defendants as sureties.

Discussion: The marked divergence between the defences raised by the defendants in their affidavit resisting summary judgment and what was contained in their plea; the blanket denials in the plea, apart from admitting the terms of the agreement; the amended Rule 32; that the defendant may not raise defences in the affidavit resisting summary judgment that are not pleaded; that the new Rule is intended to level the playing field by requiring both the plaintiff and the defendant to commit to a version of the facts; when the defence raised in the affidavit resisting summary judgment is inconsistent with the plea, it cannot in the absence of an explanation for the inconsistency be said to be bona fide; the grounds raised regarding the Conventional Penalties Act; and the defence related to the cancellation and claim for specific performance.

Findings: The defendants cannot now advance defences in opposing summary judgment proceedings that were not raised in their plea. To permit them to do so would undermine the amended summary judgment procedure and prejudice the plaintiff who was entitled to deal with those defences in its supporting affidavit. The defendants have failed to satisfy the court that they have a bona fide defence to the action.

Order: Judgment is granted against the defendants.

Imperatech Solutions v Columbus Consulting [2022] 26465-2020 (GP)

The plaintiff seeks to compel the defendant to furnish documents in terms of Rule 35. Plaintiff alleges the documents are relevant to its claim for contractual damages on the alleged repudiation of an oral agreement.

Discussed: The rules and the process if a party is not satisfied with the other side's discovery; the contents of the relevant pleadings; the ambit of the dispute; whether the documents are relevant to the issues in question; that the party who is not satisfied with the discovery has the onus of proving that the documents exist and are relevant; and the meaning of the words used in Rule 35(3).

Findings and order: The applicant has not described the document under request with sufficient accuracy to be able to be identified and is not entitled to a better discovery affidavit from the respondent. The application to compel discovery is dismissed.

Coetzee and Another v Master of The Free State High Court, Bloemfontein and Others (3148/2021) [2022] ZAFSHC 225 (15 September 2022)

Rule 30 (1) -Interlocutory application instituted by the fourth and fifth respondents, that the main application launched by the applicants be declared irregular and be set aside in terms of Rule 30 (1)- challenge a misjoinder

Discussed: The court has to determine whether the proceedings in terms of Rule 30 (1) were irregular and whether the complaints as raised by the fourth and fifth respondents are permissible; whether the applicants will suffer prejudice unless the irregular step is removed; whether or not Uniform Rule 30 is a mechanism that can be utilized to challenge a misjoinder; there has to be a balance by what is fair to all parties; see Northern Assurance Co Ltd v Somdaka 1960 (1) SA 588; where the notice of motion does constitute an irregularity and the irregularity is not of such a nature that it requires the whole action to be set aside, in terms of Rule 30 (3) the Court can make an appropriate order that will enable the applicants to amend their papers.

Order: Applicants' notice of motion and application are declared irregular and are set aside in terms of Rule 30(1); applicants are afforded 15 days in which to substitute their notice of motion and application.

Diseko v Anthony Berlowitz Attorneys and Others (1580/2020) [2022] ZAFSHC 231 (7 September 2022)

Rescission- of cost orders in personal capacity- de boniis propriis-

Applicant seeks rescission of two cost orders granted by Musi JP against her in her personal capacity; the applicant contends that the two cost orders were erroneously sought or were granted in the absence of the applicant; Rule 42(1) provides that the court may on application rescind a judgment erroneously sought or granted in the absence of a party affected thereby or a judgment where there is an ambiguity, error or a mistake common to both parties.

Discussed: A judgment is erroneously granted if there existed at the time of its issue a fact of which the court was unaware of, which would have prevented the granting of the judgment and which would have precluded the court, if aware of it, not to grant the judgment; the first respondent opposes this application on the basis that the applicant has failed to make a case for the rescission of judgment; in view of the Court, the parties were 'present' because their documents were properly before Court; the Court cannot find that the order granted was erroneous; the contention that the order was granted in the absence of the applicant is disingenuous.

Order: The application is dismissed.

Zurich Insurance v Gauteng Provincial Government [2022] ZASCA 127 at [19]-[72]

Prescription- Insurance – Tunnel construction – Whether rock mass part of property insured – Order of High Court that liability of insurer subject to terms and conditions of policy.

Insurance contract – damage to rock mass when tunnels for Gautrain Rapid Rail System constructed – whether insured's claim had prescribed – whether rock mass surrounding tunnel void part of property insured – whether order declaring insured's right to indemnification, and to be paid such amounts as are later proved, an effective order.

Facts: In a joint venture the province granted Bombela Concession Company a concession to run the Gautrain rail system. Insurance was taken out for the construction of the tunnels and the leaking of water was an engineering concern. The province discovered what it believed to be damage to parts of the tunnel system and made a claim in terms of the policy, that Zurich pay for the repairs, but the insurer repudiated.

Appeal: By Zurich against the High Court's finding that Zurich was obliged to indemnify the province for the cost of replacing or repairing the damage to the tunnels.

Discussion: The background to the Gautrain project; whether the province's claim against Zurich had prescribed; whether the rock mass that surrounds the void of the tunnels is part of the property insured; the propriety and effectiveness of the High Court's order; the contention that the province must have been aware of the damage because it had a support team in place to monitor the construction of the tunnels; the

policy and its terms; the expert testimony on the rock mass and tunnelling; that the order made Zurich's liability subject to "all the terms and conditions of the policy"; and Zurich's contention that the order did not draw a clear distinction between the merits and quantum.

Findings: The province's claim had not prescribed. The property insured by the policy includes the rock mass that surrounds the void created by the process of excavation. The order of the High Court was clear, unambiguous and enforceable.

Grobler v Phillips and Others [2022] ZACC 32

Eviction-Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 — section 4(7) — factors to be taken into account — eviction not unlawful

On 20 September 2022 at 10h00, the Constitutional Court handed down judgment in an application for leave to appeal against an order and judgment of the Supreme Court of Appeal, wherein that Court dismissed the appeal brought by the applicant for an eviction order against the first and second respondents. The appeal before this Court concerned whether it would be just and equitable to relocate the first and second respondents from their current dwelling to alternative accommodation which is within a 5 km radius of their current residence.

In the proceedings before this Court, the applicant is Mr Willem Grobler (Mr Grobler), the registered owner of the property currently occupied by the first and second respondents. The first respondent is Mrs Clara Phillips (Mrs Phillips), an 84-year-old widow who occupies a residential house on the property together with her son, Mr Adam Phillips (Mr Phillips), who suffers from a disability. Mr Johan Venter N.O., is the curator bonis of Mr Phillips. The second respondent filed a notice to abide the outcome of the proceedings before this Court and had not opposed any of the proceedings in the Somerset West Magistrates' Court (Magistrates' Court), the Western Cape Division of the High Court, Cape Town (High Court) and the Supreme Court of Appeal. The third respondent, the Helderberg Municipality of Somerset West also filed a notice to abide the outcome of these proceedings.

Mr Grobler purchased a residential property situated in Somerset West at an auction. The property was registered in his name on 15 September 2008. Mrs Phillips has been residing on the property since 1947. Mr Grobler requested Mrs Phillips to vacate

the property. Mrs Phillips refused to vacate the property, allegedly, on the ground that she enjoyed a right of life-long habitatio granted to her by a previous owner which she sought to enforce against Mr Grobler. Mr Grobler made various offers to Mrs Phillips in an attempt to reach a compromise, including paying for relocation costs and offering alternative accommodation. These offers were declined. Mr Grobler then approached the Magistrates' Court and launched an eviction application which was later referred to trial.

Before the trial commenced, the parties concluded an oral pre-trial agreement to the effect that the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) were applicable to the proceedings and that the only issue for determination was whether Mrs Phillips held some title of occupancy and whether her occupancy was lawful or not in terms of PIE. The Magistrates' Court held that Mrs Phillips had no registered interest in the property, whether in the form of habitation or a usufruct. Furthermore, the Court held that Mrs Phillips is an unlawful occupier as she had no tacit and/or express consent from Mr Grobler to occupy the property. It granted the eviction order and determined that the eviction date would be 30 August 2017.

Mrs Phillips appealed to the High Court. The High Court set aside the eviction order issued by the Magistrates' Court and upheld the appeal with costs. The High Court held that Mr Grobler had not established that Mrs Phillips was an unlawful occupier as defined in PIE. The High Court took the view that Mrs Phillips was also entitled to rely on the Extension of Security of Tenure Act 62 of 1997 (ESTA), which was raised for the first time on appeal to that Court.

The High Court held that Mr Grobler had not discharged the onus of establishing that the provisions of ESTA did not apply. The Court further held that even if Mrs Phillips were an unlawful occupier, and even if ESTA did not apply, it would not be just and equitable to grant an eviction order having regard to her advanced age, the period for which she had resided on the property, and the fact that her household was occupied by a disabled person.

Mr Grobler subsequently launched an application for leave to appeal against the order and judgment of the High Court to the Supreme Court of Appeal. The Supreme Court

of Appeal dismissed the appeal holding that the High Court was entitled to exercise a discretion not to grant an eviction order in spite of the unlawful occupation, and that there was no misapplication or misdirection of the law, or any misdirection on the facts. The Court further held that this was a situation in which the full exercise of ownership had to give way to the right of vulnerable persons to a home.

Mr Grobler appealed to this Court. He submitted that this Court's jurisdiction is engaged as the matter concerns the Supreme Court of Appeal's incorrect application of the provisions of section 4(7) of PIE. Mr Grobler further submitted that the matter raised an arguable point of law of general public importance as there is no jurisprudence which supportted the Supreme Court of Appeal's decision that an unlawful occupier may not be evicted even in circumstances where alternative accommodation has been offered.

Mr Grobler further submitted that the decision of the Supreme Court of Appeal was in conflict with this Court's judgment in Blue Moonlight because he is now expected to provide free housing to the Mrs Phillips for an indefinite period. Moreover, Mr Grobler submitted that the Supreme Court of Appeal overlooked the fact that Mrs Phillips would not have been rendered homeless as alternative accommodation had been made available to her.

Mrs Phillips submitted that this matter did not raise an arguable point of law of general public importance because the Supreme Court of Appeal's judgment does not establish the general principle that an unlawful occupier of a residential property who has resided in a property for a lengthy period cannot be evicted. According to Mrs Phillips, the circumstances of the case were exceptional.

In a unanimous judgment penned by Tshiqi J, the Court held that its jurisdiction is engaged because as held by it in Machele, eviction from one's home will always raise a constitutional issue. Additionally, the Court held that another ground which strengthened its jurisdiction was that the issues raised concerned the interpretation of the provisions of section 4(7) of PIE.

The Court held that apart from relevant factors that have to be taken into account in eviction proceedings, the Supreme Court of Appeal also took into account Mrs Phillips wishes that she preferred to remain in occupation of the property and did not place

sufficient weight on the offers of alternative accommodation. An unlawful occupier's wishes, the Court held, is not a relevant consideration as an unlawful occupier such as Mrs Phillips does not have a right to refuse to be evicted on the basis that she prefers or wishes to remain in the property which she is occupying unlawfully.

The Court went on to highlight that when dealing with considerations of justice and equity, the capacity of a landowner to provide alternative accommodation and the peculiar circumstances of an evictee are relevant. But, in these circumstances, the fact that Mr Grobler had repeatedly made offers of alternative accommodation to Mrs Phillips should not be construed as creating any obligation on him as a private landowner to offer alternative accommodation. Having regard to the competing interests of both parties, the Court held that it would be just and equitable to grant the eviction order. In granting the eviction order, the Court stated that an eviction order in these circumstances would not render Mrs Phillips homeless. Mrs Phillips would essentially only be required to relocate from one home to another in the same immediate community within Somerset West.

Accordingly, the Court granted leave to appeal, upheld the appeal on its merits and set aside the Supreme Court of Appeal's order and substituted it with an order of its own.

The Commissioner for The South African Revenue Services v Porrit N.O and Others (9260/2013) [2022] ZAKZPHC 48 (16 September 2022)

Particulars of claim-amendment- introduces a new cause of action only if no prejudice is occasioned thereby

This is an opposed application to amend the particulars of claim of the plaintiff in terms of Uniform rule 28(4) – The first, second and third defendants objection to the amendment is based on the grounds that the amendment seeks to abandon the plaintiff's claim for payment and intends to now substitute same with a claim that is tantamount to declaratory relief – The court has a discretion to allow an amendment which introduces a new cause of action only if no prejudice is occasioned thereby – Tomassini v Dos Remandos and another 1961 (1) SA226 – In exercising a judicial discretion whether or not to grant the amendment, the Court is guided by provisions of Rule 28(3) to consider the grounds upon which the opposition is premised in the

notice for objection – There is no reason to conclude that the proposed amendment is mala fide, or will cause prejudice to the defendants since the parties remain the same and the cause of action remains the same, such amendment would not unduly enlarge the scope of the inquiry – Held, the plaintiff's amendment is granted. www.saflii.org/za/cases/ZAKZPHC/2022/48.html

Van Wyk Van Heerden Attorneys v Gore N.O and Another (828/2021) [2022] ZASCA 128 (30 September 2022)

Attorneys trust account-payments made on behalf of client-Impeachable transactions-dispositions without value as contemplated by s 26(1)(b) of the Insolvency Act 24 of 1936 read with s 340 of the Companies Act 61 of 1973- deposit into attorney's account –attorneys paying out on instructions of client- attorneys unaware of client's scheme-when attorneys operate on their trust accounts, they do so as principals and not as agents- section 26(1)(b) is the requirement that the party to whom the disposition was made is put to the proof that 'immediately after the disposition was made, the assets of the insolvent exceeded his liabilities'. – section 26 (1) (b) person on whom that obligation rests is only one who 'benefited by the disposition'. –this section 's construction does not allow for liability to attach to one who did not benefit by it. – attorneys did not benefit from the R1 250 000 – In turn, Utexx benefited by that amount - As regards the deposit of R1.25 million, the attorneys acted in accordance with the instruction of their client.- the deposits of R75 000 and R200 000? They were not paid on to a third party-taken as fees - they clearly benefited from the deposit of those two amounts. This despite their not having breached the principles governing the operation of the trust account.-must pay.

Attorneys- remarks by judge in court a quo was not objective- It remains to mention a matter of grave concern which, if not corrected, could have serious adverse ramifications for the attorneys. In the judgment on both the application and the application for leave to appeal, the learned acting judge made strongly deprecatory comments and drew adverse inferences concerning the conduct of the attorneys. Counsel representing the liquidators made it plain before us that the papers did not support any such adverse remarks or inferences. I agree. There is nothing in the record which in any way warrants an adverse comment or inference of improper conduct on the part of the attorneys. It is important that this Court makes it clear that it dissociates itself from those undeserved criticisms.

Judges-remarks not objective- the learned acting judge made strongly deprecatory comments and drew adverse inferences concerning the conduct of the attorneys. Counsel representing the liquidators made it plain before us that the papers did not support any such adverse remarks or inferences. I agree. There is nothing in the record which in any way warrants an adverse comment or inference of improper conduct on the part of the attorneys. It is important that this Court makes it clear that it dissociates itself from those undeserved criticisms.

On appeal from: Western Cape Division of the High Court, Cape Town (Magona Acting Judge, sitting as court of first instance): This appeal concerns the application of the provisions of s 26(1)(b) of the Insolvency Act 24 of 1936 (the Act) to trust accounts of attorneys.[1] Three deposits were made into the trust account of the appellant, a firm of attorneys (the attorneys). Two were made on 23 February 2018 and one on 30 April 2018. The first two were of R1 250 000 and R75 000 respectively and the third of R200 000. All three were made from the account of Brandstock Exchange (Pty) Ltd (Brandstock). The sole director of Brandstock was one Bruce Robert Philp (Philp). Brandstock was provisionally wound up on 3 July 2018 and finally wound up on 20 August 2018. The deposits excited the attention of the respondents who are the liquidators of Brandstock (the liquidators). They applied to have them set aside under s 26(1)(b) of the Act. Their contention was that the deposits into the trust account amounted to dispositions to the attorneys.

Chronological: Deposits: 23 February 2018 and 30 April 2018.

Brandstock provisionally wound up 3 July 2018 and finally wound up on 20 August 2018.

BRP Livestock CC (BRP) on 3 November 2017 and finally wound up on 8 March 2018.

[2] The application was brought in the Western Cape Division of the High Court, Cape Town (the high court). It found favour with Magona AJ, who declared the deposits to have been dispositions to the attorneys and set them aside. Pursuant to that declaration, the attorneys **were ordered to pay R1 525 000** to the liquidators, along with interest and costs. The high court dismissed an application by the attorneys for leave to appeal. The appeal is before us with the leave of this Court.

[5] It is necessary to sketch the plain, unvarnished, material facts of the application. At the time of the deposits, the attorneys acted for Philp and another entity

controlled by him, BRP Livestock CC (BRP). The attorneys neither represented, nor even knew of the existence of Brandstock. BRP was provisionally liquidated on 3 November 2017 and finally wound up on 8 March 2018 by an order of court. At the time the three deposits were made, Philp was confronting a sequestration application.

[6] The insolvency proceedings against Philp and BRP were pursued by an acknowledged creditor, the **Utexx Trust (Utexx).** The attorneys were involved in negotiations for a person well-disposed to Philp to **purchase its claims against BRP and Philp.** Philp indicated to the attorneys that a certain Muir would be the purchaser. The attorneys were requested to draft a cession and sale agreement to that effect.

[7] On **13 February 2018,** the attorneys transmitted the first draft to attorneys representing Utexx. They had been informed that Muir had not decided which of his corporate entities would purchase the claims and were to leave the identity of the purchaser blank. The purchase price was R1.25 million. Utexx's attorneys sent back an amended draft. This reflected (incorrectly, but the attorneys did not notice it) that the attorneys represented the purchaser. Utexx also required payment to be made from the trust account of the attorneys.

[8] On 23 February 2018, the attorneys informed Utexx that the purchase price of R1.25 million had been deposited into their trust account. The agreement was signed by both parties on 26 February. It is unclear from the affidavit of the attorneys at what point they realised that the purchaser was one Sandra Pratt (Pratt) rather than Muir. They explained:

'On 23 February 2018, I advised [Utexx's attorney] that the purchaser was in Johannesburg and would only be able to sign the Agreement on 24 February 2018 and provide me with a copy of it by 26 February 2018. I pause to mention that, at this point in time, I was still under the impression that Muir would be purchasing the claim of [Utexx]. On 21 February 2018, I transmitted an e-mail to Philp again requesting him to complete the details of the purchaser. On 23 February 2018, I addressed a letter to Philp requesting the aforesaid payment upon which Philp responded by confirming in writing that the purchaser disclosed in the Agreement had made payment of the purchase consideration and attached the proof of payment to his aforesaid letter. It

was only upon receipt of the signed Agreement from Philp that I noticed that Muir was not the purchaser but instead Sandra Pratt's details were included as the purchaser.'

[9] After seeing the signed agreement, the attorneys sought clarification from Philp. According to them, 'he indicated that Pratt was his aunt and that she had offered to purchase the **claim from [Utexx**] and to then allow him some additional time to repay the indebtedness of BRP to her.' **What is clear is that Philp misled, or at best for him failed to tell, the attorneys that the funds deposited into their trust account came from Brandstock.** On the contrary, he informed them that the funds were those of the purchaser. The attorneys transferred the R1.25 million purchase price to Utexx on 27 February. It is accepted by the liquidators that the attorneys were entirely unaware of the existence or involvement of Brandstock at this time.

[10] The other two amounts of R75 000, deposited on 23 February, and of R200 000, **deposited on 30 April, were used by the attorneys to settle their fees, counsel's fees and further disbursements.** These all related to the attorneys' representation of Philp and BRP.

[11] It is against this factual backdrop that the claims by the liquidators against the attorneys under s 26(1)(b) fall to be considered.

[12] In support of their contention that the deposits amounted to impeachable dispositions to the attorneys, the liquidators relied on a line of cases. These cases have held that, when attorneys operate on their trust accounts, they do so as principals and not as agents.[3] They submitted that this demonstrated that the dispositions were made to the attorneys as envisaged under s 26(1)(b).

[13] On the other hand, the attorneys called in aid a dictum of this Court concerning a deposit into the trust account of an attorney who acted for the nominated payee.[4] In that matter, this Court held that 'the disposition was to Iprolog [the payee on whose behalf it was received] and occurred . . . when the money was paid into the attorney's trust account'.[5] They further relied on a series of cases where trustees or liquidators of insolvent estates sought unsuccessfully to contend that amounts deposited in bank accounts were dispositions to the banks.[6]

[14] I shall deal more fully with both sets of contentions with reference to the cases relied on. Before doing so, however, it is worth rehearsing some of the legal principles concerning the position of bank accounts in general and trust bank accounts of attorneys in particular. General banking principles are clear that the bank owns the money deposited into accounts held with it. A debtor-creditor relationship is established as was explained by Holmes JA in S v Kearney:[7]

'[I]t has long been judicially recognised in this country that the relationship between bank and customer is one of debtor and creditor. When a customer deposits money it becomes that of the bank, subject to the bank's obligation to honour cheques validly drawn by the customer . . .'.

Under the banker-customer relationship, the bank is indebted to the customer. The bank owns the money but is obliged to comply with instructions of the account holder concerning a positive balance in the account. Account holders thus have the power of disposal over the credit balance of funds held by the bank on their behalf.

[15] This holds no less true of trust bank accounts held by attorneys. Money deposited into attorneys' trust accounts gives rise to the same relationship with the bank as with any account holder. The bank owns the money, but becomes obliged to give effect to instructions by the attorney holding the account. It is indebted to the attorney and to no other party. No one else is entitled to instruct the bank on how to deal with it.

[16] **At the same time, the credit balance in trust accounts is held by the attorney on behalf of particular clients.** A similar debtor-creditor relationship obtains between the attorney and the client. The attorney is obliged to give effect to instructions of clients concerning the credit balance held for them. But vis-a-vis the bank, the attorney has the power of disposal over credit balances in the trust account. This is at least partly why our courts have held that, when attorneys deal with funds in a trust account, they generally do so as principals and not as agents.

[17] Section 86(2) of the Legal Practice Act 28 of 2014 (the LPA) applies to attorneys:

'Every trust account practice must keep a trust account at a bank with which the Fund has made an arrangement as provided for in section 63(1)(g) and must deposit therein,

as soon as possible after receipt thereof, money held by such practice on behalf of any person.'

Trust accounts of attorneys held with banks have, for a considerable time, enjoyed special characteristics. Chief among these is that reflected in s 88(1) of the LPA, which provides:

'(a) Subject to paragraph (b), an amount standing to the credit of any trust account of any trust account practice-

(i) does not form part of the assets of the trust account practice or of any attorney, partner or member thereof or of any advocate referred to in section 34(2)(b); and

(ii) may not be attached by the creditor of any such trust account practice, attorney, partner or member or advocate.

(b) Any excess remaining after all claims of persons whose money has, or should have been deposited or invested in a trust account referred to in paragraph (a), and all claims in respect of interest on money so invested, are deemed to form part of the assets of the trust account practice concerned.'

This echoes similar provisions in prior legislation governing attorneys' trust accounts.[8] It can be seen that these provisions circumscribe the rights of attorneys and their creditors in relation to trust accounts.

[18] The rights of banks are similarly curtailed by s 91 of the LPA, the relevant part of which reads:

'. . . a bank at which a trust account practice keeps its trust account, or any separate account forming part of a trust account, does not, in respect of any liability of the trust account practice to that bank not being a liability arising out of, or in connection with, any such account, have or obtain any recourse or right, whether by way of set-off, counter-claim, charge or otherwise, against money standing to the credit of that account.'

[19] With that in mind, I turn to the cases called in aid by the parties. The first, relied on by the liquidators….

[23] From the above examples, it is clear **that attorneys operate on their trust accounts as principals and not as agents.** This is because they, and only they, can instruct a bank to dispose of amounts to the credit in that bank account since clients have no legal relationship with the bank concerning that account. When attorneys operate on a trust bank account in accordance with their instructions, however, they may function at two levels. In the first place, because only they have the right to dispose of funds to the credit in that account pursuant to the banker-customer relationship, they do so as principal. In the second place, however, if they give effect to a mandate from the client in whose name the moneys are held in trust, they do so as agent. **What is relevant for present purposes, however, is that the power to operate a trust account does not determine whether a deposit into that account amounts to a disposition to the attorney. The contention of the liquidators to this effect must therefore be rejected.**

[25] ……The whole scenario envisaged by the plaintiff is, in my view, repugnant to logic and law as it would create a situation where a principal could visit liability on his agent for performing precisely the mandate which it had given to its agent.'[20]

This reasoning strikes me as unassailable and equally applicable to an attorney who is merely instructed to make a payment.

[30] The approach in our law to what constitutes an impeachable disposition is a matter of interpretation. It is now trite that, when it comes to interpretation:

'A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document . . . The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'[33]

[31] As to language, it will be recalled s 26(1)(b) provides in its relevant parts:

‘Every disposition of property not made for value may be set aside by the court if such disposition was made by an insolvent –

… (b) within two years of the sequestration of his estate, and the person claiming under or benefited by the disposition is unable to prove that, immediately after the disposition was made, the assets of the insolvent exceeded his liabilities’. …

[32] At the heart of s 26(1)(b) is the requirement that the party to whom the disposition was made is put to the proof that ‘immediately after the disposition was made, the assets of the insolvent exceeded his liabilities’. The person on whom that obligation rests is only one who ‘benefited by the disposition’. **The construction of the section does not allow for liability to attach to one who did not benefit by it.** The plain language requires the disponee to have benefited.

[33] This is buttressed by a sensible and businesslike approach. As Goldblatt J held in Zamzar, to hold a party liable who simply acted as an intermediary and gave effect to instructions by the client but did not benefit from the disposition gives rise to an absurd and unbusinesslike outcome. In that regard**, an attorney would generally have the same lack of knowledge of the source of the funds deposited as would a bank. Where they on-pay those funds to a third party as instructed by their client, they also function purely as intermediaries.**

[34] And the purposive approach articulated so clearly in Hollicourt lends further strength to this interpretation. This applies no less in our law since s 26(1)(b) is clearly aimed at only the person who benefits from (or claims under) the disposition. It is also not envisaged that there is a ‘double disposition’ where successive persons both become subject to the section. **Where attorneys give effect to pay the third party nominated by their clients without themselves benefiting, it can be said that they simply function as conduits.** This situation must be distinguished from that in Kaplan. There Katz did not give effect to instructions from clients when he appropriated moneys held on their behalf to pay his gambling debts. As a result of his having utilised those funds for his personal purposes, his estate was thereby benefited.[34]

[35] Finally and decisively, this Court held in Reynolds that, ‘a disposition without value which is liable to be set aside is one in which the person who benefited by the disposition runs the risk of having such disposition being set aside in certain specified situations’.[35] This forms part of the ratio of that judgment and, unless we are

convinced that it is clearly wrong, binds us in this matter. On the contrary, that position accords with the above reasoning and interpretation.

[36] This then is the relevant touchstone for liability under s 26(1)(b). In our law, the clear language of the provision requiring benefit fortifies the purposive approach to interpretation in the unitary interpretative exercise. This is consistent with the context of banking law and that relating to the operation of trust accounts of attorneys. It all points to the need for the person to whom the disposition is made for the purpose of s 26(1)(b) to have benefited from it.

[37] This brings into sharp focus the essential enquiry in the present matter. The attorneys were unaware of the source of the deposits into their account. A client had instructed them to pay the R1.25 million to Utexx as the purchase price under the agreement. They complied with that mandate. Moneys of whose origin they were unaware were deposited into their trust account as was the case with the bank in Zamzar. They paid them to Utexx as instructed by their client, Philp. They testified **without challenge that it was 'common cause that [the attorneys] did not receive any benefit or retain any portion of the purchase consideration.'**

[38] Who then benefited from the disposition? During argument, the parties were ad idem that Utexx benefited by the deposit of R1.25 million which was thus hit by the provisions of s 26(1)(b). This must be correct. Utexx received moneys of Brandstock without Brandstock receiving value since it was not party to the transaction**.** In turn, Utexx benefited by that amount since its claim for the purchase price under the agreement was satisfied.

[39] As regards the deposit of R1.25 million, the attorneys acted in accordance with the instruction of their client. As was said of the bank in Zamzar: 'If the defendant was authorised to make the payments, then it was authorised and entitled to debit plaintiff's account with the moneys paid and was merely a conduit or 'neutral payment functionary' through which a disposition was made to Sferopoulos by the plaintiff itself.'[36]

In giving effect to their mandate, therefore, the attorneys acted as a conduit in the onward transmission to Utexx and for its benefit. The disposition of Brandstock was one to Utexx. Since the attorneys did not benefit, they did not attract the onus to show the solvency of Brandstock immediately after the deposit was made. The deposit into

their account was not a disposition to the attorneys and was thus not impeachable under s 26(1)(b).

[40] What, then, of the deposits of R75 000 and R200 000? They were not paid on to a third party. On the other hand, they were dealt with in accordance with the principles governing trust accounts. Unlike in Kaplan, there was no breach of mandate by the attorneys. Attorneys are entitled to account to their clients for fees and disbursements and to then appropriate moneys held in trust for that purpose. This is what was done by the attorneys. This does not, however, necessarily render them immune to the machinery of s26(1)(b). The same enquiry governs the outcome of these two deposits. Who benefited from those deposits?

[41] The attorneys made them part of their assets when they appropriated them to settle their fees and pay disbursements incurred on behalf of their clients. **As such,** they clearly benefited from the deposit of those two amounts. This despite their not having breached the principles governing the operation of the trust account. As between the attorneys, BRP and Philp, the application of these funds to settle fees and disbursements was lawful and appropriate. If BRP or Philp had deposited these amounts, they would have received value for them. But the deposit was made by Brandstock, which did not receive value. When applied to amounts due by BRP and Philp, these two deposits became dispositions which fall within the provisions of s 26(1)(b). Before us the attorneys only argued faintly to the contrary.

[42] As regards those two dispositions, then, the onus rested on the attorneys to prove that, at the relevant times, the assets of Brandstock exceeded its liabilities. This is clearly a full onus and not a mere duty to adduce evidence. If unable to discharge the onus, the section provides that the disposition is void and must be set aside.

[43] Because the deposits were made on different dates, the onus operates for each such date. It was candidly conceded in argument that, as regards the R200 000 deposited on 30 April 2018, the attorneys could not discharge the onus. This concession was well made. At that time, the liabilities of Brandstock clearly exceeded its assets. This was clear from the claim of one Louw, the creditor at whose instance Brandstock was liquidated. That claim arose during April 2018.

[44] The attorneys submitted, however, that the position on 23 February 2018 was different. Both parties accepted that Brandstock had cash of R102 308 in its account

after 23 February 2018. The liquidators testified as follows concerning that date in the founding papers:

'Brandstock had no assets. . . Brandstock was indebted to Brodie Farming (Pty) Ltd at the date of the disposition, in the amount of R1 052 055.84 which indebtedness arose on 19 February 2018.

This was responded to by the attorneys as follows: 'I deny that Brandstock was factually insolvent on 23 February 2018 . . . Brandstock had livestock in its possession and had enough assets including its claims against BRP, Philp and Pratt and cash reserves which exceeded its liabilities which according to the Applicants were in any event only 1 (one) creditor being Brodie Farming (Pty) Ltd. This Honourable Court is reminded of the fact that Brodie Farming (Pty) Ltd is not an approved creditor of Brandstock and full legal arguments will be presented at the hearing of this application in this regard.'

None of these averments carries much evidential weight. Possession of cattle does not equate to ownership. One does not know what the financial relationships between Brandstock, BRP, Philp and Pratt were at the time. The fact that Brodie Farming had not proved a claim in the estate of Brandstock does not negate the existence of the claim testified to by the liquidators. There are any number of reasons why creditors refrain from proving claims in an insolvent estate. At least one is that the creditor might be required to contribute to the costs of the administration of the insolvent company instead of receiving payment of the whole or a portion of their claim.

[45] Before us the attorneys conceded that these averments did not amount to positive evidence that, on 23 February 2018, the assets of Brandstock exceeded its liabilities. They amounted to little more than surmise. They agreed that the best evidence of the state of affairs of a company is to produce and prove books of account showing the assets and liabilities of a company. Although they were not in possession of such books, **the machinery of the Uniform Rules of Court was available to the attorneys to require discovery of any such books by the liquidators.** I do not believe that what was asserted by the attorneys gave rise to a factual dispute. But, if it did so, since the attorneys bore the onus and did not request that any such dispute be resolved by way of oral evidence or trial, it must be resolved in favour of the liquidators. This all means that the attorneys failed to discharge the requisite onus

under s 26(1)(b). It follows that these two dispositions, totalling R275 000, were correctly set aside by the high court, albeit for different reasons.

[46] Since the attorneys have succeeded before us in setting aside the order for repayment of R1.25 million, they are entitled to the costs of the appeal. The liquidators conceded that, in view of the complexity of the matter and the importance of the issues, the costs of two counsel would be warranted. I view that as a correct concession. As to costs in the high court, the liquidators were obliged to go to court to obtain payment of the R275 000 and were thus entitled to costs of the application. The costs order in the high court must therefore stand.

[47] It remains to mention a matter of grave concern which, if not corrected, could have serious adverse ramifications for the attorneys. In the judgment on both the application and the application for leave to appeal, the learned acting judge made strongly deprecatory comments and drew adverse inferences concerning the conduct of the attorneys. Counsel representing the liquidators made it plain before us that the papers did not support any such adverse remarks or inferences. I agree. There is nothing in the record which in any way warrants an adverse comment or inference of improper conduct on the part of the attorneys. **It is important that this Court makes it clear that it dissociates itself from those undeserved criticisms.**

ORDER: To the extent set out in paragraph 2 hereof, the appeal is upheld with costs, including costs of two counsel. Paragraphs 2 and 3 of the order of the high court are set aside and substituted with the following: It is declared that the following payments made by Brandstock Exchange (Pty) Ltd to the respondent: On 23 February 2018 in the sum of R75 000; On 30 April 2018 in the sum of R200 000;are dispositions without value as contemplated by s 26(1) of the Insolvency Act 24 of 1936 read with s 340 of the Companies Act 71 of 1973 and they are set aside.
The respondent is ordered to pay to the applicants the sum of R275 000.'

END FOR NOW