IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NUMBER: 14038/2021

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES:NO
(3) REVISED: NO

21/04/2022 **.....**

DATE **SIGNATURE**

In the matter between:-

ANTONYS THEODOSIOU	First Plaintiff
DIMETRYS THEODOSIOU	Second Plaintiff
SOTYRIS CHRISTOS THEODOSIOU	Third Plaintiff
KYRIAKOS ANDREAS THEODOSIOU	Fourth Plaintiff
HYDE PARK 103 PROPERTIES (PTY) LTD	Fifth Plaintiff
UNIVERSAL RETAIL MANAGEMENT (PTY) LTD	Sixth Plaintiff
EDUCATED RISK INVESTMENTS 54 (PTY) LTD	Seventh Plaintiff
OAKDENE SQUARE PROPERTIES (PTY) LTD	Eight Plaintiff
INVESTAGE 173 (PTY) LTD	Nineteenth Plaintiff
KYALAMI EVENTS AND EXHIBITIONS (PTY) LTD	Tenth Plaintiff
MOTOR MALL DEVELOPMENTS (PTY) LTD	Eleventh Plaintiff
UNIVERSAL PROPERTY PROFESSIONALS (PTY) LTD	Twelfth Plaintiff
UNIVERSAL RETAIL HOLDINGS (PTY) LTD	Thirteenth Plaintiff

SOTYRIS CHRISTOS THEODOSIOU N.O.	Fourteenth Plaintiff
JACQUES JOHAN MOOLMAN N.O.	Fifteenth Plaintiff
ANTONYS THEODOSIOU N.O.	Sixteenth Plaintiff
JACQUES JOHAN MOOLMAN N.O.	Seventeenth Plaintiff
DIMETRYS THEODOSIOU N.O.	Eighteenth Plaintiff
JACQUES JOHAN MOOLMAN N.O.	Nineteenth Plaintiff

and

SCHINDLERS ATTORNEYS	First Defendant
IMPERIAL LOGISTICS LIMITED	Second Defendant
NEDBANK LIMITED	Third Defendant
RICHARD KEAY POLLOCK, N.O.	Fourth Defendant
MARYNA ESTELLE SYMES, N.O.	Fifth Defendant
OLGA KOTZE, N.O.	Sixth Defendant

The Fourth to Sixth Defendants, in their capacity as the duly appointed joint liquidators of Farm Bothasfontein (Pty) Ltd (in liquidation)

Summary: **Leave to appeal** – Section 17(1) of the Superior Courts Act, Act 10 of 2013 - Appellant faces a high and stringent threshold.

JUDGEMENT

BOOYSEN AJ

INTRODUCTION

[1] The plaintiffs seek to leave to appeal against my Judgment in which I upheld the 2nd and 3rd defendant's exceptions. In my Judgment, I concluded that the

plaintiffs: -

1.1 can only attack the validity of the Imperial Settlement Agreement or the second van der Linde order on the strength of non-compliance with the Contingency Fees Act 66 of 1997 ("the Act"), in terms of Rule 42(1)(b) or the common law;

1.2 cannot alter the contractual or statutory link to Nedbank or Imperial or the basis for the Imperial Settlement Agreement and the second van der Linde order to an enrichment action (Collectively "*the settlement agreements"*);

1.3 cannot obtain a rescission without a *bona fide* defence to the merits of the compromised claims; and

1.4 cannot rely upon enrichment in the absence of pleading the extent of the defendant's enrichment at the expense of the plaintiff's impoverishment.

[2] I accordingly upheld the exceptions and found that the plaintiffs' particulars of claim failed to disclose a cause of action for the relief sought in:-

2.1 prayer 2 for an order that it be declared "the first van der Linde order" is a nullity and invalid and falls to be set aside;

2.2 prayer 3 (alternatively to prayer 2), for an order that "the first van der Linde order" be rescinded in terms of the common law, alternatively Rule 42;

2.3 prayer 4.1, for an order that it be declared that the Imperial settlement agreement is invalid, a nullity and unenforceable;

2.4 prayer 7, for an order that "the second van der Linde order" be rescinded in terms of the common law, alternatively Rule 42 of the Rules; and

2.5 prayers 8 and 9, for an order that Nedbank (the third defendant) be ordered to pay the amount of R20 826 320.80 with interest to the plaintiffs.

Leave to Appeal

[3] Section 17(1) of the Superior Courts Act, Act 10 of 2013 provides that there are two legs to an application for leave to appeal: (a) (i) the appeal "*would*" have a reasonable prospect of success; or (ii) there is some other compelling reason why the appeal should be heard.

[4] The plaintiffs apply for leave on the first leg. However, Mr Hellens SC appearing for the plaintiffs submitted leave should also be granted in terms of Section 17(1)(ii) of the Superior Courts Act.

[5] **Section 17(1)(a)(i)** of the Supreme Courts Act: - In **Smith v S** 2012 (1) SACR 567 (SCA), paragraph 7, the Supreme Court of Appeal considered what constituted "*reasonable prospects of success*" in section 17(1)(a)(i) and held: -

"What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."

[6] Section 17 of the Supreme Courts Act raised the bar for granting leave to appeal, as held by Bertelsmann J in **Mont Schevaux Trust (IT2012/28) v Tina Goosen and 8 Others** as follows:-

"*It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion. See Van Heerden v Cronwright and Others 1985 (2) SA 342 (D) at 343H. The use of the word 'would' in the new statute indicates a measure of certainty that another court would differ from the court whose judgment is sought to be appealed against*".

[7] The *onus* to demonstrate "*a reasonable prospect of success of appeal*" was also considered in **Golden Falls Trading 116 (Pty) Ltd v Minister of Energy, National Government** 2015 JDR 1824 (GP), which held in paragraph 11 as follows:-

> "*[11] This section amends the Common Law test that has been applicable in approaching the application for leave to appeal. The new test, as provided in the statute replaces the word 'might' in the Common Law test with the word 'would'. It is thus clear that the test as outlined by statute is more stringent."*

[8] The Appellate Division of the North Gauteng High Court, Pretoria in **The Acting National Director of Public Prosecution and 2 Others v The Democratic Alliance**, case number 19577/09, quoted the Judgment by Bertelsmann J with approval. Similarly, in **Thobani Notshokovo v The State**, case number 157/15, in paragraph 2 of the Judgment, the Supreme Court of Appeal held that an appellant faces a higher and more stringent threshold.

[9] Schippers AJA in **MEC Health, Eastern Cape v Mkhitha (**2016) ZASCA 176 (25 November 2016) noted that:

> *"[16] Once again it is necessary to say that leave to appeal, especially to this court, must not be granted unless there truly is a reasonable prospect of success. Section 17(1)(a) of the Superior Courts Act 10 of 2013 makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success; or there is some other compelling reason why it should be heard.*

> *[17] An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal."*

[10] Therefore, there must exist more than just a mere possibility that another court will find differently on both the facts and the law. See also **Malao Inc v Investec Bank Limited and Others** (60617/2020) [2021] ZAGPPHC 20 (6 January 2021) at [36].

Appealability

[11] I first need to consider if the order is appealable before venturing into the merits of the Grounds for Leave to Appeal.

[12] **Maize Board v Tiger Oats Ltd And Others** 2002 (5) SA 365 (SCA) in paras [13]-[14] held that if parties wish to obtain a final decision on an issue raised by an exception (whichever way the decision of the Court goes) they should make use of the Special plea procedure provided for in Rule 33. **Labuschagne v Labuschagne; Labuschagne V Minister van Justisie** 1967 (2) SA 575 (A) confirms that upholding a special plea is final in effect.

[13] **Maritz v Knoesen and another [2020] JOL 46492 (FS)** in par [4] held it is trite that exceptions are not appealable. However, the authority relied upon was **Thulamela Municipality and another v T Tshivhase and others**

(78/2014) [2015] ZASCA 57 (30 March 2015), dealing with the dismissal of an exception. Whereas **Brisen Commodities (Pty) Ltd v Farmsecure (Pty) Ltd and others** [2015] JOL 34557 (FB) held in par [38], it is trite law that the upholding of exceptions based on the failure to disclose a cause of action is in principle appealable, whereas the upholding of those found on vagueness and embarrassment is in principle non-appealable relying on the authority of **Trope and Others v South African Reserve Bank** 1993 (3) SA 264 (A) at 270F-H which held: -

> "***Where an exception is granted on the ground that a plaintiff's particulars of claim fail to disclose a cause of action, the order is fatal to the claim as pleaded and therefore final in its effect***. *(Liquidators, Myburgh, Krone & Co Ltd v Standard Bank of South Africa Ltd and Another 1924 AD 226 at 229, 230.)* ***Leave to amend will be of no avail to a plaintiff in such a case unless he is able to amend his particulars of claim in such a way as to disclose a cause of action***. *On the other hand, where an exception is properly taken on the ground that the particulars of claim are vague and embarrassing, by its very nature the order would not be final in its effect. All that a plaintiff would be required to do in such a case would be to set out his cause of action more clearly in order to remove the source of embarrassment*."

[14] **Trope** relied on **Group Five Building Ltd v Government of The Republic of South Africa (Minister of Public Works and Land Affairs)** 1993 (2) SA 593 (A), which confirmed that the upholding of an exception is similar to absolution from the instance:-

> *As long ago as 1915, Bristowe J put the position thus:*

'As was said by Innes CJ in Coronel v Gordon Estate GM Co Ltd (1902 TS F 112 at 115) "the effect of a successful exception is that the entire declaration is quashed", meaning as I understand that it is an absolute bar to any relief being obtained on that declaration. But it does not take the declaration off the file or place the case in the same position as though no declaration had been delivered. Otherwise the proper order when an exception is upheld would be to extend the time for filing a declaration, not to give leave to amend. ***Leave to amend presupposes that there is something which can be amended****.* ***Still less can it be said that a successful exception destroys the action****. If this were so then the case of Curry v Germiston Municipality (1910) LLR 122, where an order for absolution under Rule 41 was granted after a declaration had been successfully excepted to and had not been amended, would have been wrongly decided.* ***It seems to me therefore that the action in the present case is still on foot and that there is a declaration in existence***.'

[15] **Miller and Others v Bellville Municipality** 1971 (4) SA 544 (C) held:

"An exception founded upon the contention that a plea lacks the averments necessary to sustain a defence is designed to obtain a decision on a point of law which will dispose of the case in whole or in part. If it is not to have that effect the exception should not be entertained (see ***Kahn v Stuart and Others****, 1942 CPD 386,* ***and Miller v Muller****, 1965 (4) SA 458 (C) at p. 468).*

[16] The test, if the upholding of a no cause of action exception is akin to disposing of the case in whole or in part, is the same as the test of whether a judgment is appealable, as decided in **Zweni v Minister of Law and Order** 1993 (1) SA 523 (A) at 531B-D. **Trope and Others v South African Reserve Bank** summarised the position as follows: -

"*Leave to appeal is of course only one of the jurisdictional requirements for a civil appeal from a Provincial or Local Division sitting as a Court of first instance. The other is that the decision appealed against must be a 'judgment or order' within the meaning of those words in the context of s 20(1) of the Supreme Court Act 59 of 1959 (**Zweni v Minister of Law and Order** 1993 (1) SA 523 (A) at 531B-D). The question whether a decision is an appealable 'judgment or order' is not always easy to determine, as appears from a number of authorities referred to in the Zweni Judgment. It will serve no purpose to re-examine those authorities. It has been held in Zweni's case supra at 532J-533B:*

> *'A "judgment or order" is a decision which, as a general principle, has three attributes, first, the decision must be final in effect and not susceptible of alteration by the Court of first instance; second, it must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings (**Van Streepen & Germs (Pty) Ltd** case supra [1987 (4) SA 569 (A)] at 586I-587B; **Marsay v Dilley** 1992 (3) SA 944 (A) at 962C-F). The second is the same as the oft-stated requirement that a decision, in order to qualify as a judgment or order, must grant definite and distinct relief (**Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue and Another** 1992 (4) SA 202 (A) at 214D-G).'*

The decision of the Court a quo and its effect must therefore be considered in order to determine whether it qualifies as an appealable 'judgment or order'.

[17] **Pretoria Garrison Institutes v Danish Variety Products (Pty), Limited** 1948 (1) SA 839 (A) distinguished between interlocutory orders and final relief. It held a preliminary or procedural order is a simple interlocutory order and not appealable unless it *'dispose of any issue or any portion of the issue in the main action or suit*'. It held from page 853 onwards:-

'The general principle of the Roman-Dutch law is that an interlocutory order is an order made during the progress of a suit. If the interlocutory order disposed completely of the claim it was regarded as an order equivalent to a definitive sentence, and could be appealed from. ***If the order did not completely debar the plaintiff from continuing his suit, then as a rule it was regarded as an interlocutory order not having the force of a final judgment,*** *and could not be appealed from without leave of the higher Court. Gradually, however, exceptions were engrafted upon this rule, but the general principle enunciated above is to my mind the test that we should apply to new cases.* ***If, therefore, an order is made during the progress of a suit which leaves the plaintiff's claim intact and not decided upon, it is prima facie an order which has not the force of a definitive sentence and therefore not appealable****.*

DE VILLIERS, J.P., in Steytler's case at p. 338. These are his words:

> *'So far it is not clear what is meant by such interlocutory sentences, but, whatever may be the meaning of these words it is quite clear that the test of whether an appeal would lie or not,* ***is whether or not the grievance or gravamen can be repaired in the final sentence****. And it will be shown that throughout the history of the law on the subject this is the sole test in so far as purely interlocutory orders are concerned, or rather, as it is more correctly expressed in the Ampliatie (Art. 3),* ***'whether the execution of the interlocutory order is or is not reparable in the definitive sentence'****.'*

… in the case of Bell v Bell (1908, T.S. 887) said that the difficulty still remained of deciding whether any particular order was purely interlocutory or had the force of a definitive decree, and he adopted the following rule as the test for deciding that point (see p. 304):

> *'Whether on the particular point in respect of which the order is made* ***the final word has been spoken in the suit*** *or whether in the ordinary course of the same suit the* ***final word has still to be spoken.****'*

INNES, J.A., declined to adopt a universal test but said (p. 313) that it was sufficient for the purposes of that case to say

> *'when an order incidentally given during the progress of litigation* ***has a direct effect upon the final issue, when it disposes of a definite portion of the suit, then it causes prejudice which cannot be repaired at the final stage, and in essence it is final****, though in form it may be interlocutory'.*

LAWRENCE, J. (p. 326) regarded orders dealing with procedure generally as interlocutory (purely interlocutory) and not as orders having the effect of a definitive sentence. MAASDORP, J.P., expressed no opinion on the point beyond a general agreement. DE VILLIERS, J.P., said (p. 338):

'If the interlocutory sentence is of such a nature that when once it has been executed ***it cannot any more be remedied in the final sentence*** *it may be said to have the force of a definitive sentence.'*

The matter came up again in the case of Blaauwbosch Diamonds Ltd v Union Government (1915 AD 599) in which INNES, C.J. at p. 601 said the characteristics of a purely interlocutory order as distinguished from one having the effect of a definitive sentence were fully discussed in the case of Steytler v Fitzgerald and that it had been

> *'laid down that a convenient test was to enquire whether the final word in the suit had been spoken on the point; or as put in another way whether the order made was reparable at the final stage'.*

… this immediately suggests that procedural interlocutory orders are not included in the class of appealable orders, but can only be appealed against with the leave of the Court a quo under section (c) of the Rhodesian Statute. WESSELS, J.A., who presided said (p. 153):

> *'Now judgments which are not final in form or in effect are clearly the interlocutory judgments which are dealt with in cases like Mears's case (1908, T.S.), Bell's case (1908, T.S. 887) and Lombard's case*

(1911 TPD 881). In a long series of judgments this Court and other superior Courts of South Africa have held that ***interlocutory judgments or orders are not appealable as of right if they are delivered during the progress of litigation and are merely incidental to the main dispute.*** *If, however, an order or Judgment disposes of the whole or of a definite portion of the suit, then it is final in its essence or effect even though it may be interlocutory in form - Steytler v Fitzgerald (per INNES, J.A., 1911 AD at pp. 312, 313).*'

[18] **Maize Board v Tiger Oats Ltd and Others** 2002 (5) SA 365 (SCA) held a decision on point of law is not final, relying on **Blaauwbosch Diamonds Ltd v Union Government (Minister of Finance**) 1915 AD 599 at 601 in support of the conclusion that for an exception to be the final say on the issue it must be converted to a Rule 33 special plea. However, this was once again in the context of a dismissed exception:-

[8] *In* ***Blaauwbosch Diamonds Ltd v Union Government (Minister of Finance****) 1915 AD 599 at 601 Innes CJ said in respect of the question whether an order dismissing an exception was final:*

'The characteristics of purely interlocutory orders were fully considered in that case, and most of the South African decisions were discussed. It was then laid down that a convenient test was to inquire whether the final word in the suit had been spoken on the point; or, as put in another way, whether the order made was reparable at the final stage. And regarding this matter from that standpoint, one would say that an order dismissing an exception is not the final word in the suit on that point [in] that it may always be repaired at the final stage. All the Court does is to refuse to set aside the declaration; the case proceeds; there is nothing to prevent the same law points being re-argued at the trial; and though the Court F is hardly likely to change its mind there is no legal obstacle to its

doing so upon a consideration of fresh argument and further authority.'

[12] *The mere fact that the issue to be decided in an exception is purely a matter of law does not, however, convert an exception into a stated case. When it has to be decided whether a declaration or particulars of claim disclose a cause of action or whether a plea discloses a defence the issue often is whether in law that is the case.* ***A decision on that point of law is not final****. Blaauwbosch is clear authority to that effect. The point may be re-argued at the trial in the event of the exception being dismissed. The position would have been different if the Court a quo had, at the request of the parties or of its own accord, made an order in terms of Rule 33(4) of the Uniform Rules directing that the issue raised by the exception be finally disposed of.*

[19] Mr Steyn, appearing with Mr Hellens SC, brought the authority of **Lion Match Company (Pty) Ltd v Commissioner for the South African Revenue Service** (301/2017) [2018] ZASCA 36 (27 March 2018) to my attention which confirms: -

19.1 It is trite that a dismissal of an exception (save an exception to the court's jurisdiction), presented and argued as nothing other than an exception, is not appealable.

19.2 Jurisdictional challenges should be raised either by exception or special plea depending on the grounds upon which the challenge arises. In either event, the issue must necessarily be disposed of first because it determines the court’s power to make any further order.

19.3 An appeal lies not against the reasoning but the substantive order of

a court. See also **Neotel (Pty) Ltd v Telkom SOC & Others** (605/2016) [2017] ZASCA 47 (31 March 2017) confirming this propostion.

[20] My conclusions, having considered the authorities summarised above, are that: -

20.1 Upholding exceptions based on the failure to disclose a cause of action is in principle appealable. In contrast, sustaining those based on vagueness and embarrassment is, in principle, non-appealable.

20.2 The fact that upholding an exception might be appealable does not mean it is determinative of the point the Court was called upon to determine.

20.3 A decision on a point of law is not the final say on the issue. To be the final say, it requires evidence in the form of a stated case, or the exception had to be treated as a Special Plea.

20.4 Granting leave to amend, at least *prima facie*, creates the presumption that upholding the exception was not the final say on the issue.

20.5 The test of whether a judgment on exception is appealable is as held in **Zweni v Minister of Law and Order**. See also **Neotel (Pty) Ltd v Telkom SOC & Others** (605/2016) [2017] ZASCA 47 (31 March 2017)

20.6 An incidental order that directly affects the final issue and disposes of a definite portion of the suit causes prejudice that cannot be repaired at the final stage and is, in essence, final, albeit in form interlocutory.

[21] In light of my summary, it seems that a court faced with an application for leave to appeal should err on the side of caution. When in doubt, the Court should instead treat the matter as appealable and consider the application on its merits.

[22] I agree with Mr Hellens' submission that the order effectively squashes the plaintiffs' claims (at least as pleaded) and disposes of the claims as asserted by the plaintiffs, even though the plaintiffs can amend it if they so choose.

Grounds for Appeal

[23] Ground 1 to 4, 7, 8, and 10 of the Application for Leave to Appeal relate to the plaintiffs' case that non-compliance with Section 4 of the Act or a void contingency fee agreement renders the settlement agreements and subsequent orders of Court null and void.

[24] **First Ground: -**

24.1 *The Court erred in paragraph 54 of the Judgment in finding that: "It is clear from the authorities above that the court has minimal discretion to enter the* ***merits of the settlement*** *or into the fray, which should preferably be by curator ad litem instead of the court".* **[emphasis**

added]

24.2 *The Court's finding does not consider the peremptory requirements of section 4 of the Contingency Fees Act, 66 of 1997 ("the Act") and does not accord with the binding authorities, including* ***Tjatji and Others v Road Accident Fund*** *[2012] ZAGPJHC 198,* ***Mofokeng v Road Accident Fund*** *[2012] ZAGPJHC 150 and* ***South African Association of Personal Injury Lawyers v Minister of*** *Justice* and Constitutional Development CCT123/13.

24.3 *In* ***Mofokeng****, at paragraphs 53 and 54, Mojapelo, DJP held the "[53] The critical provision is in section 4(3).* ***This section makes it obligatory for the settlement to be made an order of court once the matter, in respect of which a contingency fees agreement has been signed, is before court. It seems to me therefore that there cannot be an out of court settlement in a pending litigation where one of the parties is a party to a contingency fees agreement in respect of the proceedings before court.*** *[54] The purpose must be to ensure that the supervisory or monitoring process of the court is present whenever matters litigated under the Contingency Act are settled or finalised."* **[emphasis added]**

[25] **Second Ground: -** *The Court erred in its finding in paragraph 55 of the Judgment that it has a discretion to decide not to require affidavits as contemplated by section 4 of the Act, when such affidavits are a peremptory requirement for a* ***valid settlement agreement*** *where a contingency fees*

agreement (such as is the case in the present matter), had been concluded and for the making of a valid order of Court. **[emphasis added]**

[26] **Third Ground: -** *The Court erred in its finding in paragraphs 56 and 57 of the Judgment that the applicant's remedies lay in section 5 of the Act and that given that such remedies exist, the settlement agreements and court orders, i.e., the first Van der Linde Order and the second Van der Linde Order as referred to in the particulars of claim, cannot be challenged through non-compliance with the Act, on the basis that it is illegal and void.*

[27] **Fourth Ground: -** *The Court erred in its finding in paragraph 58 of the Judgment, that it would be virtually impossible for plaintiffs such as the excipients, to conclude settlement agreements for money judgments, as so frequently happens.*

[28] **Seventh Ground: -**

28.1 *The Court erred in finding that a rescission based on Rule 42 was unavailable to the applicants even though the dictum in* ***Botha v Road Accident Fund*** *2017 (2) SA 50 SCA expressly relates only to cases where a* ***valid settlement agreement*** *had been reached which is not the case in casu.* **[emphasis added]**

28.2 *… There having been no valid settlement agreements concluded since the contingency fees agreement, the Court's finding is mistaken. In addition, section 4 of the Act prevented the making of the settlement agreements orders of court.*

[29] **Eight Ground: -** *The Court erred in its findings in paragraph 79.1 of the Judgment given that the first and second Van der Linde orders are nullities.*

[30] **Tenth ground: -** *The Court erred in its findings in paragraph 79.3 of the Judgment for the same reason indicated under the eighth ground, namely that the first and second Van der Linde orders are nullities.*

[31] I essentially held the settlement agreements and court orders are valid and can be set aside in terms of the principles applicable to rescission or contract (restitution) or enrichment (*condictio ob turpem vel iniustam causam* in the case of an illegal contract and the *condiction* indebiti in the case of an invalid agreement).

[32] The plaintiffs argue the settlement agreements and court orders are illegal, invalid and void. Accordingly, they have to say no more and can ignore the principles applicable to rescission or restitution or enrichment. No authority for the proposition was submitted.

[33] There is no authority for the proposition that non-compliance with the Contingency Fees Act or a void contingency fee agreement renders the settlement agreement a legal nullity and void. The judgments relied upon all dealt with void contingency fee agreements and not illegal or void settlement agreements. As emphasised above, the only Judgment that commented on the settlement agreement is **Mofokeng**, in paragraphs 53 and 54. However, it says that settlements must be made Court orders, where a contingency fee arrangement has been signed.

[34] The Judgment in **Mfengwana v Road Accident Fund** 2017 (5) SA 445 (ECG) confirms the Court has the discretion to make a settlement agreement an order of the court, despite finding the contingency fee agreement to be void. In other words, the settlement agreement survives a void contingency fee agreement. If it survives a void contingency fee agreement, why would it not survive non-compliance with Section 4 of the Contingency Fees Act, especially in light of the remedies available in Section 5 of the Contingency Fees Act?

[35] Accordingly, I find that there is no reasonable possibility that another Court will find that non-compliance with Section 4 of the Act or a void contingency fee agreement renders the settlement agreements and subsequent orders of Court null and void.

The 5th, 6th and 9th grounds

[36] **Fifth Ground -** *The Court erred in its reasoning in paragraph 59 of the Judgment that the legislature could not have intended to alter the contractual relationship or statute despite the clear and peremptory words of section 4 of the Act and despite the binding authorities referred to in paragraph 24.2 above.*

[37] **Sixth Ground: -**

37.1 *The Court erred in its reasoning in paragraph 60 of the Judgment, since the postulate on which it relied in coming to its finding did not serve on the papers before the Court.*

37.2 *The Court ventured into a terrain which it was not asked to determine.*

37.3 *There was no suggestion on the papers that an enrichment action was contemplated either by the applicants or the respondents.*

[38] **The ninth ground -** *The Court erred in its findings in paragraph 79.2 of the Judgment having regard to the fact that the applicants did not seek to alter the contractual or statutory link to the second or third respondents or the basis for the Imperial settlement agreement and the second Van der Linde order to an enrichment action.*

[39] Mr Louw SC, at the hearing of the exception, submitted the plaintiffs' cause of action is an enrichment claim, i.e. as the settlement agreements were nullities, payments made according to it were *sine causa*.

[40] There is no reasonable possibility that another court will find that the plaintiffs can: -

40.1 rely upon enrichment in the absence of pleading the extent of the defendant’s enrichment at the expense of the plaintiff's impoverishment; or

40.2 alter the contractual or statutory link to Nedbank or Imperial or the basis for the Imperial Settlement Agreement and the second van der Linde order to an enrichment action.

[41] Suppose I accept that non-compliance with Section 4 of the Act or a void

contingency fee agreement renders the settlement agreements null and void. In that case, the plaintiffs still had to make a case for rescission, restitution, or enrichment, which it failed to do.

[42] So even if my reasoning is wrong, the particulars of the claim will remain excipiable. There is no reasonable possibility that another Court will come to a different conclusion, i.e. a conclusion other than to uphold the exception. See **Neotel (Pty) Ltd v Telkom SOC & Others** (605/2016) [2017] ZASCA 47 (31 March 2017)

[43] **Section 17(a)(ii) -** Superior Courts Act**:** - The parties agree that the test as summarised in **Erasmus, Superior Court Practic**e is as per the latest authorities on this section. Erasmus summarised it as follows: -

43.1 If the court is not persuaded of the prospects of success, it must still enquire whether there is a compelling reason for the appeal to be heard. The applicant for leave to appeal must demonstrate a compelling reason why the appeal should be heard. However, the merits of the prospects of success remain vitally important and are often decisive.

43.2 Other compelling reasons include that the decision involves an important question of law. The administration of justice, either generally or in the particular case concerned, requires the appeal to be heard. A discrete issue of public importance that will affect future matters, even where an appeal has become moot, also constitutes a compelling reason.

43.3 The merits of the appeal, however, remain vitally important. In this regard, the Supreme Court of Appeal stated the following in **Minister of Justice and Constitutional Development v Southern Africa Litigation Centre** 2016 (3) SA 317 (SCA) at 330C21: -

> '*That is not to say that merely because the High Court determines an issue of public importance it must grant leave to appeal. The merits of the appeal remain vitally important and will often be decisive.'.*
>
> See **Nwafor v Minister of Home Affairs** (unreported, SCA case no 1363/2019 dated 12 May 2021) at para [29].

[44] The plaintiffs' Application for Leave has not advanced any compelling reasons. I have already concluded that the plaintiffs have not passed the higher hurdle for leave as required by Section 17(a)(i) of the Superior Courts Act.

[45] Accordingly, the application for leave to appeal is dismissed with costs, including the cost occasioned by the employment of senior and junior counsel.

AJR Booysen

Acting Judge of the High Court,
Gauteng Local Division, Johannesburg

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal

representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 21 APRIL 2022

Heard on: Thursday 14 April 2022

Delivered: Thursday 21 April 2022

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