IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NUMBER: 14038/2021

1) REPORTABLE: YES
2) OF INTEREST TO OTHER JUDGES: YES
3) REVISED: NO
4) Date: 19 January 2022

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)

Coram: Booysen: Acting Judge of the High Court of South Africa

Heard on: Wednesday 17 November 2021

Delivered: Signed electronically on 19 January 2022 and sent by e-mail to the parties' attorneys of record.

Summary: **Exception**.

The plaintiffs seek to set aside two Court orders, one incorporating two settlement agreements and the other consent to a money judgement, due to non-compliance with the Contingency Fees Act 66 of 1997 ("the Act").

The plaintiffs' case is that:-

- Due to the lack of compliance with the Act, the contingency fee agreement is illegal and void.
- Once the contingency fee agreement is illegal and void, the subsequent settlement agreement and court orders are illegal nullities, void and unlawful.

- When the Court made the settlements and money judgment orders, there was no compliance with section 4 of the Act.
- All agreements and court orders flowing from the settlements forming the subject matter of an illegal and void contingency fee agreement or after non-compliance with section 4 of the Act are void and unlawful.
- The plaintiffs are entitled to repayment of their performance under such settlements and money judgment based on enrichment principles.

The second and third defendants raised an exception to the claim on the basis that it lacks the necessary averments to sustain a cause of action; alternatively, it is vague and embarrassing. The excipients submitted that:-

- There is no basis in law for a High Court to review an order of the High Court. Therefore, it must either be rescinded or appealed.
- A void contingency agreement and/or non-compliance with section 4 of the Act does not, without more, render compromises and/or orders of the court illegal and void.

Contingency Fees Act 66 of 1997 ("the Act")

Section 4 - Non-compliance with Section 4 and the consequences of such non-compliance: -

- A client can vary or rescind the settlement made an order of the court on the strength of non-compliance with the Act in terms of Rule 42(1)(b) or the common law. However, to rely upon common law rescission, the plaintiff has to allege error or good cause, i.e. a *bona fide* defence to the merits.
- Non-compliance with the Act does not alter the parties' cause of action, contractual or statutory relationship.
- Client's remedies for non-compliance with the Act or an invalid contingency fee agreement lie against their attorneys.

Court's discretion in Section 4(1): -

- Interferes with the parties' right to agree to their bargain freely.
- Is interpreted restrictively and limited to prevent extortion of the plaintiff through an illegal contingency fee agreement or fraud upon the defendant, such as the Road Accident Fund.

An invalid contingency fee agreement: -

- A null contingency fee agreement does not invalidate any related settlement agreement made an order of the court without *justus error*, fraud or public policy considerations.
- The attorney is entitled to a reasonable fee where the contingency fee agreement is invalid.
- A third party cannot challenge an implemented agreement.
- Counterparty has no right or obligation to inquire into the existence - or the validity - of a contingency fee agreement when it settles the dispute.

A contract offensive to public policy: -

- Public policy demands that contracts freely and consciously entered into must be honoured.
- A court will declare invalid a contract *prima facie* inimical to a constitutional value or principle or otherwise contrary to public policy.
- Where a contract is not *prima facie* contrary to public policy, but its enforcement in particular circumstances is, a court will not enforce it.
- The party who attacks the contract or enforcement bears the onus to establish the facts.
- A court will use the power to invalidate an agreement or not enforce it, sparingly and only in the clearest of cases where harm to the public is substantially incontestable.

Enrichment: - Plaintiff cannot rely upon enrichment in the absence of pleading the extent of the defendant's enrichment at the expense of the plaintiff's impoverishment.

Compromise: -

- The parties to a settlement cannot proceed with the compromised cause of action.
- A compromise can be set aside on the grounds of fraud or justus error. However, the error must rescind, nullify or void consent and cannot relate to the dispute's merits or the reason for the settlement.

Rescission of Judgment – The court cannot, under Rule 42(1), rescind a court order which records the terms of a valid settlement agreement made an order of the court in the parties presence.

Peremption – Principles restated.

JUDGEMENT

BOOYSEN AJ

[1] The plaintiffs issued summons to set aside two orders granted by the late Mr Justice van der Linde on the 14th of November 2018 on the strength of an illegal contingency fee agreement and non-compliance with section 4 of the Contingency Fees Act 66 of 1997 ("the Act").

[2] The second and third defendants, Nedbank Limited ("Nedbank") and Imperial Holdings ("Imperial") (collectively the "excipients"), raised an exception to the particulars of claim on the basis that it lacks the necessary averments to sustain a cause of action, alternatively, that it is vague and embarrassing.

The Exception

[3] The relief sought against Nedbank and Imperial relates to when the plaintiffs and the defendants settled several litigious matters dating as far back as 14 November 2018. Two settlement agreements and a draft order contained the terms of the settlements. The late Mr Justice van der Linde made the settlement above orders of the court as follows: -

3.1 The draft order under case number 2016/19943 made the settlement agreements "X" and "Y" attached to it, being the "***Imperial***

Settlement Agreement" and "***Schindlers Settlement Agreement***" concluded between Nedbank, Imperial, Schindlers, Educated Risk Investments 54 (Pty) Ltd (the 7th plaintiff) and several of the other plaintiffs, orders of the Court. The "***first van der Linde order***"; and

3.2 The draft order in a consolidated action under case numbers 2012/36890 and 2013/09463 in which Nedbank was the plaintiff was made an order of the court. The "***second van der Linde order***".

[4] The plaintiffs seek the following relief in respect of Imperial and Nedbank:-

4.1 in prayer 2, that the first van der Linde order be declared a nullity, invalid and set aside;

4.2 in prayer 3 (alternatively to prayer 2), that the first van der Linde order be rescinded in terms of the common law, alternatively in terms of Rule 42 of Uniform Rules of Court;

4.3 in prayer 4.1, that the Imperial settlement agreement be declared invalid, a nullity and unenforceable;

4.4 in prayer 7, that the second van der Linde order be rescinded in terms of the common law alternatively in terms of Rule 42 of the Uniform Rules of Court; and

4.5 in prayers 8 and 9, an order that Nedbank pays the amount of R20 826 320.80 with interest to the 7th plaintiff (Educated Risk).

[5] The grounds for the exception are as follows:-

5.1 there is no basis for the relief sought in prayer 2, and it is unsound in law;

5.2 the relief sought in prayer 2 based on the Honourable Justice van der Linde's alleged absence of jurisdiction, is not supported by any averments that could sustain such relief and is bad in law;

5.3 there is no basis for a rescission of the first van der Linde order since the parties, in the plaintiffs' presence, by consent made the court orders, so the plaintiffs' peremption precludes any objection to the orders;

5.4 there is no basis for a rescission of the second van der Linde order since the orders were not made in the plaintiffs' absence. The orders were made by consent and the plaintiffs' peremption precludes any objection to the orders;

5.5 the averments made by the plaintiffs do not establish error, good cause or any other basis for rescission of the first van der Linde order;

5.6 the averments made by the plaintiffs do not establish error, good cause or any other basis for rescission of the second van der Linde order; and

5.7 there is no basis for the relief in prayers 5, 8, and 9. In prayer 5, the

plaintiff seeks repayment of amounts paid to the first defendant (Schindlers attorneys). The first defendant has not raised an exception to this relief. However, its basis is the same as the relief against Nedbank to repay amounts made pursuant to the Imperial settlement agreement.

The particulars of claim

[6] Paragraphs 46 to 48, 56 to 61 and 66 to 69 of the particulars of claim support the relief sought, as follows:-

46. Section 4 of the Contingency Act applies to 'Any offer of settlement made to any party who has entered into a Contingency Fees Agreement' and prescribes the requirements to be met for the valid conclusion of a settlement agreement.

47. In the absence of compliance with the requirements of section 4 of the Contingency Act, no valid settlement agreement is or can be concluded and no Court order can be made in respect thereof.

48. The Imperial settlement agreement and the Schindlers settlement agreement were both settlement agreements as contemplated by the provisions of the Contingency Act. Accordingly, the validity of each agreement was dependent on compliance with the provisions of the Contingency Act, in particular section 4 thereof.

First van der Linde order

56. At the time of the first van Der Linde order being made:

56.1 the section 38 application was not set down for hearing before the Court as contemplated by section 4 of the Contingency Act;

56.2 the Imperial settlement agreement and the Schindlers settlement agreement were dependent for their validity on compliance with section 4 of the Contingency Act;

56.3 although not aware of the oral "on risk" contingency fee agreement as amended by the 2015 oral "on risk" extension, the Court was aware of the 2016 Contingency Fee Agreement by virtue of the postponement application;

56.4 because the section 38 application was not before the Court, Justice Van der Linde had no jurisdiction to make the first Van der Linde order.

57. Accordingly, the Plaintiffs are entitled to an order declaring that the first Van der Linde Order is a nullity.

58. In the alternative to that which is pleaded in paragraphs 56 and 57 above, Justice Van der Linde was precluded from making the Imperial settlement agreement and the Schindlers settlement agreement an order of Court by virtue of the fact that there was no compliance with any of the peremptory requirements of section 4(1)(a) to (g) and/or section 4(2) of the Contingency Act. Accordingly, the Plaintiffs are entitled to an order rescinding the first Van der Linde order in accordance with Rule 42 of the Uniform Rules of Court, alternatively the common law.

59. Further alternatively to that which is pleaded in paragraphs 56 to 58 above, had Justice Van der Linde known of the nullity of the 2016 Contingency Fees Agreement he would not have made the first Van der Linde order. Accordingly, the first Van der Linde order was erroneously sought, alternatively erroneously granted and should be rescinded in accordance with Rule 42 of the Uniform Rules of Court.

60. In the further alternative to that which is pleaded in paragraphs 56 to 59

above, Nedbank and Schindlers were not procedurally or otherwise entitled to obtain the first Van der Linde order by virtue of there being no compliance with any of the peremptory requirements of section 4(1)(a) to (g) and/or section 4(2) of the Contingency Act. Accordingly, the first Van der Linde order should be rescinded in accordance with Rule 42 of the Uniform Rules of Court.

61. By virtue of there being no compliance with the peremptory requirements of section 4(1)(a) to (g) and/or section 4(2) of the Contingency Act, the Imperial settlement agreement and the Schindlers settlement agreement are both invalid, a nullity and unenforceable.

Second van der Linde order

66. The second Van der Linde order records that it was "by agreement between the parties".

67 At the time of the conclusion of the second Van der Linde order:

67.1. the Imperial settlement agreement and the Schindlers settlement agreement were entered into concurrently;

67.2. Nedbank, Imperial and Schindlers were parties to the Imperial settlement agreement;

67.3. Nedbank, Imperial and Schindlers were aware that the first Van der Linde order was being made an order of Court simultaneously with the second Van der Linde order;

67.4. the Plaintiffs were informed by Schindlers, Nedbank and Imperial that the conclusion of the Imperial settlement agreement, the Schindlers settlement agreement and the making of the first and second Van der Linde orders Court orders, was required to give effect to a holistic settlement of the various disputes between Schindlers, Nedbank and Imperial on the one hand and the

Plaintiffs' Group on the other, which, on a proper construction was collectively intended to provide for a unitary agreement;

67.5. the Court was aware of the existence of the 2016 Contingency Fees Agreement;

67.6. Nedbank, Imperial and Schindlers were aware that:

67.6.1. the definition of "Matters" (in clause 1.1 of the 2016 Contingency Fees Agreement) included reference to inter alia, "the claims by Nedbank Ltd in relation to, inter alia, Hyde Park 103 Properties (Pty) Ltd, Universal Retail Management (Pty) Ltd and others and any counter claims that may exist in relation thereto";

67.6.2. clause 3 of the 2016 Contingency Fees Agreement recorded that:

"… in the opinion of Schindlers, on the strength of information obtained from the 'Clients' (as defined on the first page of the 2016 Contingency Fees Agreement), there are reasonable prospects that the Clients may be successful in the Matters and Schindlers undertakes, with effect from 12 July 2016, other than as contemplated in the written settlement agreement between the Parties executed simultaneously herewith, to recover no fees from the Clients unless: -

3.1 the Clients are successful in one or more or all of the Matters, in the event of which fees in all of the Matters shall become recoverable upon success of any one matter; or

3.2 one or more of the Clients or a duly authorised

representative of one or more of the Clients prematurely terminates this agreement, in which event Schindlers will be entitled to recover fees in accordance with normal fees charged by Schindlers, which fees are more fully detailed in the Memorandum and Schedule of Fees of Schindlers, annexed hereto and marked Annexure "A"; or

3.3 the provisions of clause 6, 10 or 11 apply."

67.6.3. in terms of the Schindlers settlement agreement, Schindlers were being paid fees in the amount of R22 750 000.00;

67.6.4. by virtue of the interwoven nature of the Schindlers settlement agreement, the Imperial settlement agreement, the first and second Van der Linde orders and the 2016 Contingency Fees Agreement, section 4 of the Contingency Act was equally applicable to the second Van der Linde order and was required to be adhered to;

67.6.5. at the time of the second Van der Linde order being made an order of Court, there was no compliance with any of the peremptory requirements of section 4(1)(a) to (g) and/or section 4(2) of the Contingency Act."

68. Accordingly, the second Van der Linde order was also regulated by section 4 of the Contingency Act and compliance with such peremptory requirements was necessary before it could be made an order of Court.

69. There having been no compliance with any of the peremptory requirements of section 4 of the Contingency Act, the Plaintiffs are, in the circumstances, entitled to:

69.1. an order declaring that the second Van der Linde order is a nullity

in that Justice Van der Linde had no jurisdiction to grant same;

alternatively,

69.2. an order rescinding the second Van der Linde order in accordance with Rule 42 of the Uniform Rules of Court, alternatively in terms of the common law.

70. In consequence of the second Van der Linde order, Nedbank was paid the amount of R20 826 320.80 by Educated Risk which amount, by virtue of what is set out above, falls to be repaid to Educated Risk.

The plaintiffs' submissions

[7] I am indebted to counsel for their detailed submissions, the salient of which I repeat herein. The plaintiffs' Heads of Argument summarised the plaintiffs' case and the relevant authorities on the Act, as follows:-

7.1 Schindlers Attorneys (the first defendant) represented the plaintiffs in litigation over many years.

7.2 During the period July 2013 to October 2014, Schindlers was aware that the Plaintiffs' Group was impecunious and unable to afford the professional services of Schindlers in respect of the litigious matters. This state of affairs gave rise to Schindlers agreeing to act "*on risk*" for the Plaintiffs' Group and in the conclusion of what is referred to as the "*oral on risk contingency fee agreement*" during or about June to July 2013. Such oral on risk contingency fee agreement is, of course, in the light of the provisions of Section 4 of the Act and the authorities referred to above, an illegal nullity.

7.3 One of the litigious matters in which the first- to fifth plaintiffs were involved concerned litigation instituted by Nedbank under case numbers 2012/36890 and 2013/09463 against such plaintiffs as are reflected on “the second Van der Linde Order”. Such action had been consolidated with the action under case number 19943/2016 (and is referred to in the particulars of claim as the “*consolidated action*”).

7.4 Further litigation in which the seventh plaintiff, together with Nedbank and Imperial, and the fourth- to sixth defendants (the liquidators of Farm Bothasfontein) were engaged under case number 19943/2016 (“*the section 38 application*”), had been instituted by the liquidators. The section 38 application called into question the manner in which each of Nedbank and Imperial had acquired their shares in Farm Bothasfontein (*the former owner of the Kyalami Race Circuit*) and, more particularly whether or not the acquiring of their shares contravened section 38 of the 1973 Companies Act.

7.5 On 28 July 2016, Schindlers and various companies and Trusts together with the first to third plaintiffs (the Theodosiou brothers), concluded the 2016 Contingency Fees Agreement. This, in the words of Boruchowitz, J in **Tjatji and Others v Road Accident Fund [2012] ZAGPJHC 198 (19 October 2012)**, “*cannot be done” as “it is trite that an agreement which is a nullity cannot be rectified so as to become a valid contract.”*

7.6 On 14 November 2018:-

(a) the consolidated action having been set down for trial on 12 November 2018, came before Mr Justice Van der Linde;

(b) the section 38 application was not set down, did not serve before Justice Van der Linde and was not before Court, it not having been enrolled for hearing, nor were the fourth- to sixth plaintiffs present at Court;

(c) the Imperial settlement agreement and the Schindlers settlement agreement were concluded;

(d) the conclusion of the Imperial settlement agreement, the Schindlers settlement agreement and the making of the first- and second Van der Linde orders were required to give effect to a holistic settlement of the various disputes between Schindlers, Nedbank and Imperial on the one hand, and the Plaintiffs' Group on the other, which were intended to provide for a unitary agreement;

(e) the 2016 Contingency Fees Agreement was then in existence, albeit illegal and a nullity as aforesaid;

(f) Schindlers were, in terms of the Schindlers settlement agreement, to be paid fees in the amount of R22 750 000.00;

(g) section 4 of the Act was applicable to the Schindlers settlement agreement, the Imperial settlement agreement and the first- and second Van der Linde orders. There was no compliance with any of the peremptory requirements of section 4(1)(a) to (g) and/or section 4(2) of the Act; and

(h) the non-compliance with Section 4 renders the Schindlers settlement agreement, the Imperial settlement agreement and the first and second Van der Linde orders illegal and nullities.

7.7 In the alternative to the case pleaded that the Schindlers settlement agreement, the Imperial settlement agreement and the first- and second Van der Linde orders are illegal and nullities, the plaintiffs plead a case for the rescission of same. Orders in line with the case pleaded and for related relief are claimed.

7.8 There can be no doubt that a valid cause(s) of action is made out in the particulars of claim. It raises triable issues with clarity, alleges all of the material facts with the degree of particularity required by Rule 18(4), and enables the defendants (Nedbank and Imperial included) to plead thereto as required by Rule 22.

7.9 The plaintiffs' case is firmly founded on section 4 of the Act, which provides as follows:-

"(1) Any offer of settlement made to any party who has entered into

a contingency fees agreement stating –

(a) the full terms of the settlement;

(b) an estimate of the amount or other relief that may be obtained by taking the matter to trial;

(c) an estimate of the chances of success or failure at trial;

(d) an outline of the legal practitioner's fees if the matter is settled as compared to taking the matter to trial;

(e) the reasons why settlement is recommended;

(f) that the matters contemplated in paragraphs (a) to (e) were explained to the client, and the steps taken to ensure that the client understands the explanation; and

(g) that the legal practitioner was informed by the client that he or she understands and accepts the terms of the settlement.

*(2) The affidavit referred to in subsection (1) **must** be accompanied by an affidavit by the client, stating –*

(a) that he or she was notified in writing of the terms of the settlement;

(b) that the terms of the settlement were explained to him or her, and that he or she understands and agrees to them; and

his or her attitude to the settlement.

(3) Any settlement made where a contingency fees agreement has been entered into, shall be made an order of Court, if the matter was before Court."

7.10 As is apparent from section 4(1) of the Act, it prescribes in clear and

unequivocal terms, that any offer of settlement made to any party who has entered into a contingency fees agreement may only be accepted after the legal practitioner has filed an affidavit with the Court, if the matter is before Court, and provided that the other provisions of section 4 are complied with.

7.11 The Act has formed the subject matter of various judgments. The most important of these judgments, for present purposes, are dealt with below. Such judgments leave no doubt as to the peremptory nature of the Act's provisions, in particular section 4, the resultant nullity of any settlement agreements concluded in breach thereof and the nullity of any court orders granted where there was no compliance therewith.

7.12 The Act is one of general applicability. It was introduced after a report in November 1996 by the South African Law Commission on Speculative and Contingency Fees, mainly to provide access to justice for those persons who were unlikely to be able to prosecute their claims and pay for their own legal fees as found in **De La Guerre v Ronald Bobroff & Partners Inc and Others(22645/2011) ZAGPPHC 33 (13 February 2013)** ("*the Bobroff judgment*").

7.13 In **Pricewaterhouse Coopers Inc v National Potato Co-op Limited 2004 (6) SA 66 (SCA)** Southwood AJA at paragraph [41] held the following:-

"*The Contingency Fees Act 66 of 1997 (which came into*

operation on 23 April 1999) provides for two forms of contingency fee agreements which attorneys and advocates may enter into with their clients. The first, is a "no win, no fees" agreement (s2(1)(a)), and the second is an agreement in terms of which the legal practitioner is entitled to fees higher than the normal fee if the client is successful (s2(1)(b)). The second type of agreement is subject to limitations. Higher fees may not exceed the normal fees of the legal practitioner by more than 100% and in the case of a claim sounding in money this fee may not exceed 25% of the total amount awarded or any amount obtained by the client in consequence of the proceedings, excluding costs (s2(2)). The Act has detailed requirements for the agreement (s3), the procedure to be followed when a matter is settled (s4) and gives the client a right of review (s5). The professional controlling bodies may make rules which they deem necessary to give effect to the Act (s6), and the Minister of Justice may make regulations for implementing and monitoring the provisions of the Act (s7). The clear intention is that contingency fees be carefully controlled. The Act was enacted to legitimise contingency fee agreements between legal practitioners and their clients which would otherwise be prohibited by the common law. Any contingency fee agreement between such parties which is not covered by the Act is therefore illegal."

7.14 The Act seeks to strike a balance between the vices of contingency fee agreements on the one hand and their virtue on the other and is concerned with making justice accessible to people who might otherwise not have access to justice. Such finding was made in **South African Association of Personal Injury Lawyers v Minister of Justice and Constitutional Development (CC) Unreported case no CCT 122/13, CCT 123/13, 20-2-2014)** ("*the Personal Injury*

Lawyers judgment").

7.15 In the Bobroff judgment, Fabricius J in delivering the judgment on behalf of the Full Court, stated the following in paragraph [14], with reference to the frequently endorsed decision of the Pricewaterhouse Coopers judgment and the other judgments therein referred to:-

> "*It is my view that the abovementioned decisions were correct in finding the following:*
>
> *14.1 at common law a contingency agreement between an attorney and his client was unlawful;*
>
> *14.2 the Contingency Fees Act is exhaustive on its stated object, and any contingency fee agreement not in compliance with it is invalid.*"

7.16 In **Tjatji and Others v Road Accident Fund [2012] ZAGPJHC 198 (19 October 2012)** ("*the Tjatji judgment*"), Boruchowitz J concluded that a contingency fee agreement that did not comply with the Act was unlawful and unenforceable. He held the following in this regard at paragraphs [12] and [15] respectively:-

> "*[12] The phrase: "Notwithstanding anything to the contrary in any law or the common law …" which appears in s 2(1), and the long title of the Act, make it plain that the Act was intended to be exhaustive of the rights of legal practitioners to conclude contingency fee agreements with their clients. There is no room whatever for a legal practitioner to enter into a contingency fee agreement with a client outside the*

parameters of the Act or under the common law… A contingency fee agreement which does not comply with the provisions of the Act is illegal.

[15] Although the Act does not state in express terms that a failure to fulfil the statutory requirements will render the contingency fee agreement null and void, There are clear indications that this was indeed the legislature's intention. The primary object of the Act was to legitimise contingency fee agreements which were otherwise prohibited by the common law. The purpose was also to encourage legal practitioners to undertake speculative actions for their clients in order to promote access to the courts but subject to strict control so as to minimise the disadvantages inherent in the contingency fee system and to guard against its abuse (see the report of the South African Law Commission, Chapters 2, 3 and 4; KG Druker op cit, Chapters 6 and 7). The safeguards introduced to prevent such abuses include ss 2 and 3 of the Act. As these sections are not enabling but prescriptive in nature, it would undoubtedly have been the intention of the legislature to visit nullity on any agreement that did not comply with these provisions."

7.17 At paragraph [25] of the Tjatji judgment, Justice Boruchowitz found as follows:-

"*[25] There is also an additional and different reason why, in my view, the new contingency fee agreements are invalid. In each of the cases under consideration, the intention in entering into the new contingency fee agreement was to retrospectively validate the contingency fee agreements that were entered into in violation of the Act. This cannot be done. It is trite that an agreement which is a nullity cannot be rectified so as to become a valid contract."*

7.18 In giving effect to the controls in the Act as identified in the Pricewaterhouse Coopers judgment, the courts have, in formulating safeguards in line with the Act, deemed it necessary to ensure that the supervisory or monitoring process of the courts is present whenever matters litigated under the Act are settled or finalised.

7.19 This approach was endorsed in **Mofokeng v Road Accident Fund, Makhuvele v Road Accident Fund, Mokatse v Road Accident Fund, Komme v Road Accident Fund (2009/22649, 2011/19509, 2010/24932, 2011/20268) [2012] ZAGPJHC 150 (22 August 2012)** ("*the Mofokeng judgment*") and has since been followed.

7.20 In fact, so significant did the Court in **Mofokeng** regard its monitoring function, that Deputy Judge President Mojapelo issued the following Practice Directive which formed part of the judgment, which applied with effect from the date of the Court's judgment (handed down on 22 August 2012), and was to be complied with in every matter where a settlement agreement or draft order was made an order of the South Gauteng High Court (as it then was):-

"*Practice directive*

1. *Whenever a court is required to make a settlement agreement or a draft order an order of Court, before the Court makes such an order –*

   1.1 the affidavits referred to in s 4 of the Contingency Fees Act must be filed if a contingency fees agreement, as defined in the Act, was entered into;

1.2 *if no such contingency fees agreement was entered into, the attorney and his client must file affidavits confirming that fact;*

1.3 where a contingency fees agreement was entered into, in addition –

1.3.1 counsel shall confirm to the Court that counsel has read such agreement and advise the Court whether same complies with the Act or not;

1.3.2 the Court may in its discretion call for the submission to it of the contingency fees agreement for examination by the Court.

1.4 In addition to the matters contemplated in s 4(1) and (2) of the Act –

1.4.1 the affidavit of the attorney must confirm that the attorney has explained to the client the client's right to take the agreement and the fees charged in terms thereof for review as contemplated in s 5 of the Act; and

1.4.2 the affidavit of the client must confirm the explanation and that the client has understood such explanation and, further, that the client is in possession of the name, address and contact details of the relevant controlling professional body or bodies.

2. The Court may require compliance with the directive set out above at the end of the trial and whenever the Court is required to make an order for payment of capital or part thereof in favour of the client."

7.21 In the **Personal Injury Lawyers** judgment it was found that section 4 "*provides, in essence, that such a matter may only be settled after*

affidavits from the legal practitioner and client have been filed, with court or if the matter is not before court, with the relevant professional body".

7.22 In specifically addressing the settlement of matters in which a contingency fees agreement features, Mojapelo, DJP found as follows in the **Mofokeng** judgment:-

"*Settlement and the Affidavits (s 4)*

[51] With regard to the settlement, the Act provides that an offer of settlement made to any party who has entered into a contingency fees agreement, may be accepted after the legal practitioner has filed an affidavit with the Court, if the matter is before Court (s 4(1)). The purpose appears to me to lay down conditions under which an offer may be accepted. An offer may thus not be accepted before the legal practitioner has filed the affidavit. If the matter is before Court, the affidavit in question must be filed with the Court. If not, the affidavit must then be filed with the professional controlling body (that is the Law Society in respect of attorneys and the Society of Advocates in respect of advocates). The subsection further specifies what the affidavit must contain (s 4(1)(a) to (g)).

[52] The attorney's affidavit is the main or primary one. It has to be accompanied by an affidavit by the client (s 4(2)); and the Act specifies or prescribes the contents of the affidavit of the client. On this point, I agree with and accept the submission by Mr Den Hartog that the provisions are peremptory and the Court may not make an order until the provisions of the two subsections have been complied with. In other words the filing of the affidavits is a prerequisite before the Court can

make the settlement an order of Court inasmuch as the acceptance of the offer has to be preceded by the filing of the affidavits. At the very least the affidavits must be filed when the settlement is sought to be made an order of Court. Absent such filing of the affidavits, the Court may not endorse the acceptance by making the settlement an order of Court.

[53] The critical provision is in section 4(3). The 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."

The excipients' submissions

[8] The excipients' submissions are as follows: -

8.1 Whilst there is authority for the contention that a judgment given by a court not having jurisdiction to grant such judgment is a nullity and may be disregarded, or otherwise considered of no effect, that is not authority that an application may be brought in the High Court to declare its judgment a nullity.

8.2 In **Wallach v High Court of South Africa**, **Witwatersrand Local Division, and Others 2003 (5) SA 273 (CC)** at para [5], it was made

clear by the Constitutional Court that it is not competent to apply to court for an order declaring a judgment to be a nullity and that an appeal had to be pursued through the normal process of an application to the High Court for leave to appeal.

8.3 In the circumstances, the relief sought in prayer 2 is unsound in law in as much as there is no basis in law for approaching the court by way of an action or application to declare a judgment or order of the High Court a “nullity”, “invalid” or that it “falls to be set aside”. There is no basis in law for a High Court to review an order of the High Court, which is what prayer 2 purports to do.

8.4 There is no other basis in law for setting aside a judgment other than by means of rescission (whether under the Rules or the common law) or an appeal.

8.5 In the event of the parties disagreeing as to the status of an impugned judgment, the Court should be approached for a rescission of the judgment. This approach was approved by the Supreme Court of Appeal in **Travelex v Maloney** (Unreported, SCA case no 823/2015 dated 27 September 2016 at para [16]).

8.6 Prayer 3 purports to be the prayer in support of the rescission of “the first Van der Linde order”.

8.7 Prayer 2 would accordingly be superfluous insofar as a rescission purports to be the ground upon which such relief is sought.

8.8 In any event, there is no proper basis for, or purpose served in declaring that an order of the High Court is a "nullity", "invalid" or that it "falls to be set aside", without any consequent relief and actually setting it aside. Such an order would be academic and does not fall to be granted.

8.9 Rule 42(1) provides as follows:-

> *"(1) The Court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary:*
>
> *(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;*
>
> *(b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;*
>
> *(c) an order or judgment granted as the result of a mistake common to the parties.*"

8.10 The bases upon which judgments can be set aside at common law were summarised as follows in **Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA)** at par [4]:-

> *"The guiding principle of the common law is certainty of judgments. Once judgment is given in a matter it is final. It may not thereafter be altered by the Judge who delivered it. He becomes functus officio and may not ordinarily vary or rescind his own judgment (Firestone SA (Pty) Ltd v Genticuro AG1977 (4) SA*

298 (A) at 306F - G). That is the function of a Court of appeal. There are exceptions.

After evidence is led and the merits of the dispute have been determined, rescission is permissible only in the limited case of a judgment obtained by fraud or, exceptionally, justus error. Secondly, rescission of a judgment taken by default may be ordered where the party in default can show sufficient cause. There are also, thirdly, exceptions which do not relate to rescission but to the correction, alteration and supplementation of a judgment or order."

8.11 The common law requirements for an application for rescission of a default judgment (i.e., in the absence of the party thereto) include the following:-

(a) the applicant for rescission must give a reasonable explanation for his default. If it appears that his default was willful or due to gross negligence the court should not come to his assistance;

(b) the applicant's application must be made *bona fide* and not with the intention of merely delaying the plaintiff's claim; and

(c) the applicant must show that he/she/it has a *bona fide* defence to plaintiff's claim. It is sufficient if the applicant makes out a *prima facie* defence in the sense of setting out averments which, if established at the trial, would entitle the applicant to the relief asked for.

8.12 A defendant, who knew that judgment was to be taken against him/her/it and did not demur but allowed the plaintiff to take this course, was presumed to be in willful default and was not entitled to rescission of the judgment.

8.13 The averments made by the plaintiffs in their particulars of claim do not sustain a cause of action for rescission, or are, at the very least, vague and embarrassing in that:-

(a) no case of fraud or *justus error* has been made out and the averments made by the plaintiffs do not establish that "the first Van der Linde order" was sought or granted in the absence of any of the plaintiffs who had an interest in "the first Van der Linde order";

(b) as appears from the above principles governing rescission of judgment, it is essential for relief in terms of Rule 42(1)(a) and the grounds relied upon for purposes of rescission of a default judgment at the common law, that the order should have been granted in the absence of the plaintiffs or their representatives. There is no allegation that any of these orders were taken in their absence;

(c) *in casu*, the relevant plaintiffs, cognisant of the "the oral "on risk" contingency fee agreement", "the 2015 oral "on risk" extension" and the "the 2016 Contingency Fees Agreement", expressly consented to "the first Van der Linde order". The

order cannot be regarded as having been erroneously sought or granted in such circumstances;

(d) by consenting to "the first Van der Linde order" the plaintiffs acquiesced in the order and cannot seek to rescind it on the grounds that the order was erroneously sought or granted, and no other grounds are articulated for rescinding "the first Van der Linde Order" that is valid in law;

(e) in law, such acquiescence may also occur before the judgment or order is actually given;

(f) in **Dabner v South African Railways and Harbours** 1920 AD 583 at 594 Innes J stated:-

> *"The rule with regard to peremption is well settled, and has been enunciated on several occasions by this Court. If the conduct of an unsuccessful litigant is such as to point indubitably and necessarily to the conclusion that he does not intend to attack the judgment, then he is held to have acquiesced in it. But the conduct relied upon must be unequivocal and must inconsistent with any intention to appeal. And the onus of establishing that position is upon the party alleging it. In doubtful cases acquiescence, like waiver, must be held non- proven."*

(g) in **Maujean t/a Audio Video Agencies v Standard Bank of SA Ltd 1994 (3) SA 801 (C)** the applicant consciously, deliberately and intentionally acquiesced in the obtaining of

default judgment. His application for rescission was dismissed;

(h) in addition to having acquiesced in the granting of "the First Van der Linde order", the plaintiffs in the present matter have furthermore perempted any rescission of "the First Van der Linde order" in that:-

(i) they allege in paragraph 62 of their particulars of claim that they performed in terms of "the first Van Der Linde order" by performing in terms of the Schindlers settlement agreement – which, as is clear from clause 5.3 of the Schindler's settlement agreement, was to be settled from the proceeds due to the plaintiffs from Farm Bothasfontein in terms of the Liquidation and Distribution Account, which would follow from the so-called Imperial settlement agreement; and

(j) their conduct is such as to point indubitably and necessarily to the conclusion that they did not intend to attack the judgment and they acquiesced in it.

8.14 In the premises the particulars of claim lack averments to sustain a cause of action, alternatively is vague and embarrassing in respect of prayers 2 to 4, alternatively 3 and 4 and paragraphs 46 to 48 and 58 to 61 of the particulars of claim, alternatively such provisions fall

to be struck out, since they fail to disclose a cause of action, alternatively the particulars of claim is vague and embarrassing.

8.15 The plaintiffs seek in prayer 7 an order rescinding "the second Van der Linde order". "The second Van der Linde order" is a money judgment embodied in a draft order, which was granted by consent in the presence of the legal representatives of all parties before court.

8.16 Again, the above legal principles governing applications for rescission of judgment find application.

8.17 The submissions above were repeated *mutatis mutandis* with reference to "the second Van der Linde order".

8.18 As expressly recorded in "the second Van der Linde order" each of the five defendants were duly represented by legal representatives who were present in Court on 14 November 2018 when judgment was entered against them, by agreement and with their consent, in terms of "the second Van der Linde order".

8.19 Remarkably, no attempt has been made by the plaintiffs in their particulars of claim to disclose any defence whatsoever to the actual indebtedness as expressly recorded in "the second Van der Linde order".

8.20 The plaintiffs have simply not made any averments in their

particulars of claim which could possibly form the basis for an order rescinding “the second Van der Linde order”, and the objective facts contained in their particulars of claim together with the annexures thereto conclusively prove that no such basis exists.

8.21 In addition to having acquiesced in the granting of “the second Van der Linde order”, the plaintiffs have perempted any rescission of “the second Van der Linde order” in that:-

(a) they allege in paragraph 70 of their particulars of claim that in consequence of “the second Van der Linde order”, Nedbank was paid the amount of R20 826 320.80 by the Plaintiffs’ Group; and

(b) the plaintiffs’ conduct is such as to point indubitably and necessarily to the conclusion that they did not intend to attack the judgment and they acquiesced in it.

8.22 In the premises the particulars of claim lacks averments to sustain a cause of action, alternatively is vague and embarrassing in respect of prayer 7, and paragraphs 67 to 69 read with paragraphs 46 to 48 and 58 to 61 of the particulars of claim, alternatively such provisions fall to be struck out, since they fail to disclose a cause of action, alternatively the particulars of claim is vague and embarrassing.

8.23 In addition to what is stated above, the averments made by the plaintiffs in paragraphs 46 to 48 and 58 to 61 of the particulars of

claim, as quoted above, do not establish any error, good cause, or any other basis, for rescission of “the first Van der Linde order”.

8.24 On any reasonable interpretation of the Schindlers settlement agreement, it was a settlement (*transactio*) or compromise in terms of which the parties thereto fully and finally settled all matters related to any and all claims that may have arisen or may arise among any of them related to the Specified Contracts and the rendering of legal professional services and legal representation by Schindlers to the plaintiffs.

8.25 The Specified Contracts include the disputed contracts, including the alleged contingency fee agreements, raised in the particulars of claim.

8.26 It is clear that any and all such disputes in respect of the alleged contingency fee agreements that may be regulated by the Contingency Fees Act 66 of 1997 (“the Act”) were compromised and replaced by the Schindlers settlement agreement.

8.27 As a matter of law, a compromise is binding on the parties even though the original contract was invalid or even illegal.

8.28 In **Mathimba and Others v Nonxuba and Others 2019 (1) SA 550 (ECG)** damages claims were prosecuted on the plaintiff’s behalf by his attorneys, purportedly on the basis of one or more contingency agreements. After finalisation of the claims and payment of the

capital amounts into the plaintiff's attorney's trust account by the respective defendants, disputes arose between the plaintiff and his attorneys as to the amount to be paid over to the plaintiff and as to the validity of the contingency fee agreements. Thereafter a settlement, in the form of a draft order, was reached with regard to the capital amount to be paid to the plaintiff by his attorneys, but the terms of this settlement were subsequently challenged by the plaintiff. The Court declared the contingency fee agreements invalid and held that the subsequent draft order (in terms of which the dispute between the plaintiff and his attorneys was settled in part), was binding between the parties.

8.29 The attack on the alleged contingency fee agreements in the particulars of claim is accordingly irrelevant, as all such claims were compromised.

8.30 In the circumstances, by the time "the first Van Der Linde order" was made, there was no longer any contingency fee agreement in place as contemplated by the Act, as all such agreements had been compromised.

8.31 In any event, as regards the Imperial settlement agreement and insofar as "the first Van der Linde order" relates to the Imperial settlement agreement, and even if the provisions of section 4 of the Act did apply:-

(a) there was, on any reasonable interpretation of the particulars

of claim, by virtue of the contents of the Schindlers settlement agreement, substantial compliance with section 4(1) and 4(2);

(b) further and in any event:-

(i) on a proper interpretation, alternatively any reasonable interpretation, of section 4 of the Act, a settlement agreement made an order of Court without there having been compliance with sections 4(1) and 4(2) of the Act, is not void or a nullity or automatically required to be rescinded. The purpose of sections 4(1) and 4(2) of the Act is to prevent overreaching by the client's own attorney. The client has remedies under section 5 of the Act and should the contingency fees agreement not comply with the provisions of section 3 of the Act, the contingency fees agreement can also be declared void on application to Court as was done in Mathimba.

(ii) The purpose of the Act is clearly not to render automatically void a settlement agreement between a plaintiff and a defendant, which had been made an order of Court without there having been compliance with sections 4(1) and 4(2) of the Act, the purpose of the latter procedure being judicial oversight specifically in respect of the relationship between the plaintiff and

his own attorney.

(iii) As explained by the Constitutional Court in **Steenkamp and others v Edcon Ltd 2016 (3) SA 251 (CC)**, the mere use of the words 'shall' or 'must' in a statute was not sufficient to justify a conclusion that a thing done contrary to it was a nullity. The proper approach was to ascertain the purpose of the legislation, which required an examination of the relevant provisions of the statute.

(iv) Even insofar as a court may find that it is entitled, despite the absence of fraud or *justus error*, to set aside such a settlement agreement on the grounds of it being voidable, and/or rescind its order, good cause must still be demonstrated.

(v) In order to demonstrate good cause the plaintiffs will have to allege facts that demonstrate the alleged non-compliance caused them prejudice, at the very least by demonstrating that but for the settlement agreement there was a realistic prospect of a better outcome.

(vi) The plaintiffs have failed to allege any such good cause or prejudice.

8.32 The plaintiffs aver in paragraph 62 of the particulars of claim that notwithstanding *"the Schindlers settlement agreement being invalid,*

a nullity and unenforceable, Schindlers were paid the amount of R22 750 000.00 in terms of the Schindlers settlement agreement", and they assert they are entitled to repayment in paragraph 63.2.

8.33 Furthermore, the plaintiffs aver in paragraph 70 of the particulars of claim that in "*consequence of the second Van der Linde order, Nedbank was paid the amount of R20 826 320.80 by the Plaintiffs' Group which amount, by virtue of what is set out above, falls to be repaid to the Plaintiffs' Group*".

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

8.35 No or insufficient averments are made to sustain a claim for repayment against the third defendant, alternatively the allegations are vague and embarrassing in that it is not apparent on what basis the assertion is made.

8.36 As mentioned above, the plaintiffs have not disclosed any defence to the indebtedness recorded in the draft order forming part of "the second Van der Linde order". The draft order is not an instrument which gave rise to the liability. It expressly recorded the extent of the agreed underlying existing liability forming the subject matter of the consolidated action, as well as the defendants' (in those matters) express consent to judgment being granted against them for the agreed amounts. As such, the draft order constitutes an unequivocal

acknowledgement that payment was due. Consequently, independent of the fact that the draft order was made an order of Court in terms of "the second Van der Linde order", the objective facts contained in the plaintiffs' summons and annexures thereto reveal that when payment was subsequently made, the payment reduced an existing liability and was clearly not *sine causa*.

8.37 In the circumstances the plaintiffs, should they seek to contend that their claim is based on unjustified enrichment, could not, and have not alleged that:-

(a) the relevant defendants were enriched at the plaintiffs' expense;

(b) the plaintiffs were impoverished;

(c) the payment was unjustified / was made *sine causa;*

(d) the payment was made in error and that the error was reasonable – i.e., that the mistake must be excusable in the circumstances of the case; and

(e) in any event, insofar as it is apparent that all parties have performed fully under the alleged invalid agreements, any claim based on any of the *condictiones* is no longer available because the enrichment, if any, would not have been unjust, and neither would the impoverishment.

8.38 To the extent that the plaintiffs may seek to contend that their claim is based on *restitutio in integrum*, this is not only not clear from the pleadings, but they have not tendered to restore all benefits received under the alleged invalid settlement agreements.

(a) It is evident that the performance in terms of the Schindlers settlement agreement was as a consequence of the performance of the Imperial settlement agreement.

(b) A party who has benefited by a contract must tender to return what he has gained if he seeks to rescind the contract upon a ground recognised by law.

(c) A tender for restitution in this regard is required, but has not been pleaded.

[9] Mr Botha SC, on behalf of the excipients, upon the authority of **Mfengwana v Road Accident Fund** 2017 (5) SA 445 (ECG) ("**Mfengwana**"), submitted that where the contingency fee agreement was invalid for its failure to comply with section 2(2) of the Act, the common law applied. Accordingly, the attorney was only entitled to a reasonable fee for work performed, and an order confirming the settlement, which appeared to be fair, was made without the required affidavits.

[10] In **Mfengwana,** after considering the contingency fee agreement, the Court held it to be invalid and made the settlement agreement a court order. However, the facts in the present matter are different. Judge van der Linde

did not make any ruling regarding the contingency fee agreement. Everybody, including Judge van der Linde, was aware of the contingency fee agreement, but he did not apply his mind to the fairness or validity of such agreement on the pleadings before me.

[11] The conclusion in **Mfengwana** was that if the contingency fee agreement is invalid, then Schindlers is only entitled to a reasonable fee. Accordingly, the plaintiffs' claim would be for having paid more than a reasonable fee, if any. Put differently, the relationship between Schindlers and the plaintiffs remains a contractual one, irrelevant to the law of enrichment.

[12] Mr Louw SC relying upon **Yarona Healthcare Network (Pty) Ltd v Medshield Medical Scheme** 2018 (1) SA 513 (SCA) ("**Yarona**"), submitted that *restitutio in integrum* does not find application where no contract came into existence, as in the present matter. **Yarona** held that there is no clear authority that a party who institutes a *condictio indebiti* in respect of performance made under a putative or void contract must tender to return what he received from the defendant, still less that he must prove the value of what he received. Accordingly, Mr Louw SC submitted, the plaintiffs are not required to restore or tender to restore what they received.

[13] The plaintiffs' case is that both settlements, the first van der Linde Order, the contingency fee agreement and money judgment court order, i.e. the second van der Linde order, are all void due to the lack of compliance with the Act. First, Mr Louw SC explained that once the contingency fee agreement is illegal and void, the settlement agreement and subsequent court orders are

void and unlawful. Secondly, he submitted that all the agreements and court orders flowing from the settlements and forming the subject matter of the contingency fee agreement is illegal and void once there was non-compliance with section 4 of the Act.

Exceptions

[14] The general principles of pleading in the context of exceptions are well settled. See **Jowell v Bramwell-Jones and Others** 1998 (1) SA 836 (W) at 899C - E at page 899, relying on **Trope and Others v Southern Africa Reserve Bank** 1993 (3) SA 264 (A).

[15] An exception is a procedure to avoid leading unnecessary evidence or dispose of a case in whole or in part expeditiously or cost-effectively. See **Dharumpal Transport (Pty) Ltd v Dharumpal** 1956 (1) SA 700 (A) at 706; **Colonial Industries Ltd v Provincial Insurance Co Ltd** 1920 CPD 627 at 630:

> *"…the form of pleading known as an exception is a valuable part of our system of procedure if legitimately employed: its principal use is to raise and obtain a speedy and economical decision of questions of law which are apparent on the face of the pleadings: it also serves as a means of taking objection to pleadings which are not sufficiently detailed or otherwise lack lucidity and are thus embarrassing.*"

[16] An exception must be determined on the pleading as it stands, assuming the facts stated therein to be true. No facts stated outside the pleading can be brought into the issue. See **Plascon-Evans Paints (Transvaal) Ltd v Virginia Glassworks (Pty) Ltd & Others** 1983 (1) SA 465 (O) at 471C – D.

[17] I must accept that 1) the contingency fees agreement attempted to rectify the previous verbal on risk agreements, which was impermissible and falls short of the requirements of the Contingency Fees Act as argued and held in **Tjatji v Road Accident Fund** *supra* and that 2) there was no compliance with Section 4 of the Act when the two van der Linde orders were made.

Does an invalid contingency fee agreement or non-compliance with section 4 of the Act taint the underlying settlements, i.e. is both court orders illegal and therefore unenforceable?

[18] The first issue is whether the invalidity of the contingency fee agreement or the non-compliance with section 4 of the Act renders the Imperial settlement agreement, and the first and second van der Linde orders illegal nullities and consequently unenforceable.

[19] The Supreme Court of Appeal in **Headermans (Vryburg) (Pty) Ltd v Ping Bai** 1997 (3) SA 1004 (SCA) confirmed the difference between a contract that is void for want of compliance with essential formalities and one which is invalid for some other reason and held: -

> "*It was common cause that in principle a sale of land, which complies with the requirements of the Alienation of Land Act, may be rectified by substituting for the description of the land another description which gives effect to the parties' true common intention. See* ***Magwaza v Heenan*** *1979 (2) SA 1019 (A). It was also not contended that rectification was necessarily excluded where the contract was on the face of it invalid on grounds other than the absence of required formalities. In such a case the contract is formally in order, but in substance (in the present case because it relates to a sale of erven in*

an unproclaimed township) it is invalid. The difference, for purposes of rectification, between a contract which is void for want of compliance with essential formalities, and one which is invalid for some other reason, was stated as follows by Didcott J in ***Spiller and Others v Lawrence*** *1976 (1) SA 307 (N) at 312B-D: F*

> *'The two situations are fundamentally different. In the one …, when the question of validity relates to the substance of the transaction and not its form, nullity is an illusion produced by a document testifying falsely to what was agreed. In the other ... the cause of nullity is indeed to be found in the transaction's form. When it is said to consist of a failure to observe the law's requirement that the agreement be reflected by a document with particular characteristics, the document itself is necessarily decisive of the issue whether the stipulation has been met; for it has been only if this emerges from the document.*'

See also ***Litecor Voltex (Natal) (Pty) Ltd v Jason*** *1988 (2) SA 78 (D) at 82A--83F and* ***Republican Press (Pty) Ltd v Martin Murray Associates CC and Others*** *1996 (2) SA 246 (N). In the latter case the minority judgment accepted the correctness of the above passage from the Spiller case (at 258G--I) but the majority judgment did not need to deal with it."*

[20] **Tecmed (Pty) Ltd v Hunter and Another** 2008 (6) SA 210 (W) dealt with the consequence of non-compliance with the Contingency Fees Act at paragraph [29] as follows:-

> "[29] *To be valid, such an agreement must comply with the Contingency Fees Act 66 of 1997, which became operational on 23 April 1999. From the first respondent's letters quoted above, it is clear that they simply recorded what had been agreed upon. According to the Act, such an agreement must be in writing and in the form prescribed by the Minister of Justice. It must also be signed by the client. The contract must contain certain details*

according to s 3(3). I need not repeat these requirements, since it is abundantly clear that the records of what had orally been agreed upon do not amount to a signed agreement. ***The pactum de quota litis is, accordingly, unlawful and void****. Whatever was paid in accordance with the pactum is recoverable by the applicant by way of the* ***condictio ob turpem vel iniustam causam****. Given the position of a lay client vis-à-vis an attorney, I have no doubt that public policy dictates an exception to the rule in pari delicto potior est conditio defendentis. In* ***Jajbhay v Cassim*** *1939 AD 537 Stratford CJ stated as follows:*

> *"With this brief survey of the law as hitherto developed in this country (and with grateful acknowledgement of my Brother's researches) I am now in a position to formulate some conclusions. The first is that we must definitely reject the English law as expounded in the English decided cases. In my humble view many of them do not rest on any sound principle nor are they harmonious (see Street's Law of Gaming ch 6). The second is that the rule expressed in the maxim in pari delicto potior est conditio defendentis is not one that can or ought to be applied in all cases, that it is subject to exceptions which in each case must be found to exist only by regard to the principle of public policy. Thirdly, I have considered the desirability of expressing in the form of a general rule all possible exceptions to the application of the rule itself. It cannot, of course, be said (as Lord Thurlow said) that a restitutio in integrum should always be allowed, for this, as Story points out, nullifies the maxim. Following Hailsham's statement of the law one might say, speaking generally, that* ***restitution will be granted in cases where the illegal contract has not been substantially carried out, and not in those cases where the contract has been substantially performed.*** *But such a rule, though affording us some guidance, must be subordinated to the overriding consideration of public policy (which I repeat does not disregard the claims of justice between man and man). Thus I reach my third conclusion, which is that Courts of law are free to reject or grant a prayer for restoration of something given under an illegal contract, being guided in each case by the principle which underlies*

> *and inspired the maxim. And in this last connection I think a Court should not disregard the various degrees of turpitude in delictual contracts. And when the delict falls within the category of crimes, a civil court can reasonably suppose that the criminal law has provided an adequate deterring punishment and therefore, ordinarily speaking, should not by its order increase the punishment of the one delinquent and lessen it of the other by enriching one to the detriment of the other. And it follows from what I have said above, in cases where public policy is not foreseeably affected by a grant or a refusal of the relief claimed, that a Court of law might well decide in favour of doing justice between the individuals concerned and so prevent unjust enrichment."* [Own Emphasis]

[21] The requirements of the *condictio ob turpem vel iniustam causam* are that 1) there must have been a transfer of money or property, 2) the ownership of the property must have passed with the transfer, 3) the transfer must have taken place in terms of an illegal agreement, an agreement that the conclusion, performance or object of which is prohibited by law or is contrary to good morals or public policy. See **First National Bank of Southern Africa Ltd v Perry** 2001 (3) SA 960 (SCA) 968–971 ("**Perry**").

[22] In **Perry's** case, money obtained through fraud was paid into an account with the defendant bank. The defendant bank became the owner of the money mixed with other money because ownership passes by operation of law. Consequently, the remedy of a *rei vindication* was not available to the owner. Nevertheless, although the defendant bank was unaware of the fraud when it took transfer of the money, the Supreme Court of Appeal held that the owner could recover the amount by which the bank had been enriched through the condictio *ob turpem vel iniustam causam* since the bank became aware of the illegality of the underlying transaction while the money was still

in its possession.

[23] The *condictio ob turpem vel iniustam causam* finds application only when the agreement is void for illegality. Agreements that are void because they are illegal must be distinguished from agreements that are void because of a failure to comply with the formalities prescribed for their conclusion – e.g. writing. In the case of an agreement that is void on formal grounds, the action is the *condictio indebiti*, not the *condictio ob turpem vel iniustam causam*. On the other hand, where an illegal contract is void, the *condictio ob turpem vel iniustam causam* is applicable.

[24] One must distinguish between statutory and common-law illegality. In the case of statutory illegality, a statute may prohibit a contract and expressly void it. In such a case, the *condictio ob turpem vel iniustam causam* applies if all the action requirements have been satisfied. However, a statute may also prohibit a contract and be silent on the issue of whether the contract is void, or it may prescribe particular behaviour in entering into a contract and be silent whether the conduct in contravention of the statute renders the contract void. Then it is a matter of statutory interpretation as to whether the legislature intended the contract to be void, in which case the *condictio ob turpem vel iniustam causam* can reclaim performances.

[25] The starting point interpreting statutes to determine whether their effect is to void a contract entered into in contravention of the terms of a statute is Innes CJ's dictum in **Schierhout v Minister of Justice** 1926 AD at page 99: "*It is a fundamental principle of our law that a thing done contrary to the direct*

prohibition of law is void and of no effect" and the *locus classicus* **Standard Bank v Estate van Rhyn**, 1925 AD 266, where Solomon A at 274 held:-

> *'The contention on behalf of the respondent is that when the Legislature penalises an act, it impliedly prohibits it and that the effect of the prohibition is to render the Act null and void, even if no declaration of nullity is attached to the law. That, as a general proposition, may be accepted, but it is not a hard and fast rule universally applicable. After all, what we have to get at is the intention of the Legislature, and, if we are satisfied in any case that the Legislature did not intend to render the act invalid, we should not be justified in holding that it was. As Voet, 1.3.16, puts it -* ***'but that which is done contrary to law is not ipso jure null and void, where the law is content with a penalty laid down against those who contravene it'****. Then, after giving some instances in illustration of this principle, he proceeds: 'The reason of all this I take to be that in these and the like cases greater inconveniences and impropriety would result from the rescission of what was done, than would follow the act itself done contrary to the law' These remarks are peculiarly applicable to the present case …'* [Own emphasis]

[26] In the end, it depends in each case on what the legislature intended. In making this determination, the courts make "*choices based upon the justice of the individual case and public policy considerations, and balancing these factors against each other*". See **LAWSA** at para 217 relying on MacQueen & Cockrell in Zimmermann, Visser & Reid Mixed Legal Systems 143 148.

[27] **Pottie v Kotze** 1954 4 All SA 77 (A); 1954 3 SA 719 (A) dealt with a legislative provision that prescribed, on pain of a criminal sanction, that any person disposing of a vehicle must first obtain a certificate of roadworthiness. The Court held that the sanction attached to the

contravention was sufficient for the legislature and did not intend to render an agreement in violation of the prohibition void. See also **Standard Bank v Estate Van Rhyn** 1925 AD 266; **Eland Boerdery (Edms) Bpk v Anderson** 1966 4 All SA 403 (T); 1966 4 SA 400 (T) and **Swart v Smuts** 1971 2 All SA 153 (A); 1971 (1) SA 819 (A) at pp 829 to 830:-

> *"Die regsbeginsels wat van toepassing is by beoordeling van die geldigheid of nietigheid van 'n transaksie wat aangegaan is, of 'n handeling wat verrig is, in stryd met 'n statutêre bepaling of met verontagsaming van 'n statutêre vereiste, is welbekend en is alreeds dikwels deur hierdie Hof gekonstateer (sien Standard Bank v. Estate Van Rhyn, 1925 AD 266; Sutter v. D Scheepers, 1932 AD 165; Leibbrandt v. South African Railways, 1941 AD 9; Messenger of the Magistrate's Court, Durba v. Pillay, 1952 (3) SA 678 (AD); Pottie v. Kotze, 1954 (3) SA 719 (AD), Jefferies v. Komgha Divisional Council, 1958 (1) SA 233 (AD); Maharaj and Others v. Rampersad, 1964 (4) SA 638 (AD)). Dit blyk uit hierdie en ander tersaaklike gewysdes dat wanneer die onderhawige wetsbepaling self nie uitdruklik verklaar dat sodanige transaksie of handeling van nul en gener waarde is nie, die geldigheid daarvan uiteindelik van die bedoeling van die Wetgewer afhang. In die algemeen word 'n handeling wat in stryd met 'n statutêre bepaling verrig is, as 'n nietigheid beskou, maar hierdie is nie 'n vaste of onbuigsame reël nie. Deeglike oorweging van die bewoording van die statuut en van sy doel en strekking kan tot die gevolgtrekking lei dat die Wetgewer geen nietigheidsbedoeling gehad het nie. Daar is in hierdie verband verskeie indiciae en interpretasiereëls wat van diens is om die bedoeling van die Wetgewer vas te stel. Dit is bv. beslis, na aanleiding van die bewoording van die wetsvoorskrif self, dat die gebruik van die woord "moet" (Engels "shall"), of enige ander woord van 'n gebiedende aard, 'n aanduiding is van 'n nietigheidsbedoeling; en dat 'n soorgelyke uitleg van toepassing is in gevalle waar die wetsbepaling negatief ingeklee is, d.w.s. in die vorm van 'n verbod.*

Selfs in sodanige gevalle kan daar ander oorwegings wees wat desondanks tot 'n geldigheidsbedoeling lei. As 'n strafbepaling of soorgelyke sanksie ten opsigte van 'n oortreding van die statutêre bepaling bygevoeg word, dan ontstaan natuurlik die vraag of die Wetgewer dalk volstaan het met die oplegging van die straf of sanksie dan wel daarbenewens bedoel het dat die handeling self as nietig beskou moet word. Soos BOWEN, L.J., die saak in 'n Engelse gewysde, Mellias and Another v. The Shirley and Freemantle Local Board of Health, (1885) 16 Q.B.D. 446 te bl. 454, gestel het –

> *"... in the end we have to find out, upon the construction of the Act, whether it was intended by the legislature to prohibit the doing of a certain act altogether, or whether it was only intended to say that, if the act was done, certain penalties should follow as a consequence*".

In hierdie verband moet die doel van die wetgewing, en veral die kwaad wat die Wetgewer wou bestry, in oorweging geneem word. Aandag moet ook gewy word aan die volgende vraag: verg die verwesenliking van die Wetgewer se doel die vernietiging van die strydige handeling, of sal die oplegging van die straf of sanksie daardie doel volkome verwesenlik? Die volgende uitlating van Hoofregter FAGAN in Pottie v. Kotze, supra te bl. 726H, is hier tersake:

> *"The usual reason for holding a prohibited act to be invalid is not the inference of an intention on the part of the legislature to impose a deterrent penalty for which it has not expressly provided, but the fact that recognition of the act by the Court will bring about, or give legal sanction to, the very situation which the legislature wishes to prevent."*

Nog 'n belangrike oorweging wat hier ter sprake kom is die feit dat nietigheld soms groter ongerief en meer onwenslike gevolge "(greater inconveniences and impropriety" - soos die gewysdes dit stel) kan veroorsaak as die verbode handeling self."

See also **Metro Western Cape (Pty) Ltd v Ross** 1986 2 All SA 288

(A); 1986 (3) SA 181 (A), which held the absence of a required license by a trader did not invalidate the contracts between such trader and its customers.

[28] There is no question of any *condictio* regarding performance in terms of the agreement if the agreement is valid despite the illegality. See **Taljaard v TL Botha Properties** 2008 3 All SA 453 (SCA); 2008 (6) SA 207 (SCA) which also held in paragraph [8]:-

> "[8] ***<u>It is well established that legislation is to be construed so as to interfere as little as possible with established rights</u>***. *While it might indeed seem anomalous that an estate agent is prohibited from enforcing a claim for remuneration that has become due, but may retain that remuneration if it has been paid, that apparent anomaly arises as no more than an incident of the purpose of the section. Had it been intended to confer a right of action upon a client for recovery of moneys that became contractually due it would have been a simple matter to do so in express terms. Absent the express conferral of a right of action I do not think it is conferred by necessary implication."* [Own emphasis]

[29] **Hubbard v Cool Ideas** 1186 CC 2013 (5) SA 112 (SCA) followed the principle in paragraph [8] of **Taljaard v TL Botha Properties** that legislation is to be construed so as to interfere as little as possible with established rights, which is in line with the common law in respect of the validity of a contract contrary to public policy, as the Appellate Division dealt with in **Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A)** at page 9 and held that:-

> *"The power to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and*

indiscriminate use of the power. One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness. In the words of Lord Atkin in Fender v St John-Mildmay 1938 AC 1 (HL) at 12 ([1937] 3 All ER 402 at 407B - C),

> *'the doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds'*

(see also Olsen v Standaloft 1983(2) SA 668 (ZS) at 673G). Williston on Contracts 3rd ed para 1630 expresses the position thus:

> *'Although the power of courts to invalidate bargains of parties on grounds of public policy is unquestioned and is clearly necessary, the impropriety of the transaction should be convincingly established in order to justify the exercise of the power.'*

In grappling with this often difficult problem it must be borne in mind that public policy generally favours the utmost freedom of contract, and requires that commercial transactions should not be unduly trammelled by restrictions on that freedom.

> *'(P)ublic policy demands in general full freedom of contract; the right of men freely to bind themselves in respect of all legitimate subject-matters'*

(per Innes CJ in Law Union and Rock Insurance Co Ltd v Carmichael's Executor (supra at 598) - and see the much-quoted aphorism of Sir George Jessel MR in Printing and Numerical Registration Co v Sampson (1875) LR 19 Eq 462 at 465 referred to in inter alia, Wells v South African Alumenite Company 1927 AD 69 at 73. A further relevant, and not unimportant, consideration is that 'public policy should properly take into account the doing of simple justice between man and man' – per Stratford CJ in Jajbhay v Cassim1939 AD 537 at 544. It is in

the light of these principles that the validity of the deed of cession must be considered."

[30] Non-compliance with section 3 of the Act renders the contingency fee agreement invalid and void, i.e. as held by Didcott J in **Spiller and Others v Lawrence,** a "*nullity is an illusion produced by a document testifying falsely to what was agreed*". Accordingly, the *condictio ob turpem vel iniustam causam* is an available cause of action to pursue against Schindlers. Whether the plaintiffs ought to have pursued this claim on the *condictio indebeti* or the basis that Schindlers is entitled to a reasonable fee-only, what such fee should be and who bears the onus to prove a reasonable fee does not concern this exception.

[31] This exception concerns if the relief sought to set aside the two Court orders and the settlement agreement are permissible in law, which depends primarily upon interpreting the Contingency Fees Act.

The Contingency Fees Act ("The Act")

[32] As submitted by the plaintiffs, the legislature intended to strike a balance between the vices of contingency fee agreements on the one hand and their virtue on the other and is concerned with making justice accessible to people who might otherwise not have access to justice.

[33] The excipients submitted the purpose of sections 4(1) and 4(2) of the Act is to prevent overreaching by the client's own attorney. The client has remedies under section 5 of the Act, and the contingency fees agreement can be declared void on application to the court should it not comply with the

provisions of section 3 of the Act, in which case the attorney can claim a reasonable fee.

[34] Sections to 5 of the Contingency Fees Act read as follows:-

> *"5 Client may claim review of agreement or fees*
>
> *(1) A client of a legal practitioner who has entered into a contingency fees agreement and who feels aggrieved by any provision thereof or any fees chargeable in terms thereof may refer such agreement or fees to the professional controlling body or, in the case of a legal practitioner who is not a member of a professional controlling body, to such body or person as the Minister of Justice may designate by notice in the Gazette for the purposes of this section.*
>
> *(2) Such professional controlling body or designated body or person may review any such agreement and set aside any provision thereof or any fees claimable in terms thereof if in his, her or its opinion the provision or fees are unreasonable or unjust."*

[35] Section 4 of the Contingency fees Act reads as follows:-

> *"4 Settlement*
>
> *(1) Any offer of settlement made to any party who has entered into a contingency fees agreement,* ***may be accepted after the legal practitioner has filed an affidavit with the Court****,* ***if the matter is before Court****, or has filed an affidavit with the professional controlling body, if the matter is not before Court, stating*
>
> *(a) -the full terms of the settlement;*

(b) an estimate of the amount or other relief that may be obtained by taking the matter to trial;

(c) an estimate of the chances of success or failure at trial;

(d) an outline of the legal practitioner's fees if the matter is settled as compared to taking the matter to trial;

(e) the reasons why settlement is recommended;

(f) that the matters contemplated in paragraphs (a) to (e) were explained to the client, and the steps taken to ensure that the client understands the explanation; and

(g) that the legal practitioner was informed by the client that he or she understands and accepts the terms of the settlement.

*(2) The affidavit referred to in subsection (1) **must be accompanied by an affidavit by the client**, stating –*

(c) that he or she was notified in writing of the terms of the settlement;

(d) that the terms of the settlement were explained to him or her, and that he or she understands and agrees to them; and

his or her attitude to the settlement.

*(3) Any settlement made where a contingency fees agreement has been entered into, **shall be made an order of Court**, if the matter was before Court."* [Own emphasis]

[36] There is no legal principle in which third parties have a more substantial right than the contracting parties to enforce the cancellation of an effective agreement. A third party cannot challenge an agreement implemented and

persisted with by the parties. See **ABSA Bank Bpk v C L von Abo Farms BK en Andere** 1999 (3) SA 262 (O) at 274D and **Nedcor Investment Bank Ltd v Visser NO and Others** 2002 (4) SA 588 (T) at 954. So the excipients had no right to inquire into the validity of the contingency fee agreement when the settlements were concluded.

Court's discretion to apply judicial oversight into settlements

[37] The consequences of a compromise and the court's discretion to enquire into the merits of the settlement form the subject matter of an appeal to the Supreme Court of Appeal in the matter of Taylor vs the Road Accident Fund in this Court under case number 37986/2018. I am indebted to - and benefitted from - Messrs AP Joubert SC and NJ Horn's submissions filed, on behalf of the Personal Injury Lawyers Association, as *Amicus Curiae*, in the application for leave to appeal.

[38] Subsection 3 obligates the Court ("shall") to make any settlement agreement an order of Court. Subsection 3 seems contrary to subsection 1, which affords the Court a discretion to make the settlement agreement an order of Court or to accept ("may accept") the settlement agreement after the attorney has filed the required affidavit, accompanied by the client's affidavit, as required by subsection 2, as was done in **Mfengwana.**

[39] Section 34 of the Republic of South Africa's Constitution, Act 108 of 1996 ("the Constitution") provides that everyone has the right to have any dispute (that the application of law can resolve) decided in a fair public hearing before a court or, where appropriate, another independent and impartial

tribunal or forum.

[40] Section 165(2) of the Constitution provides that judicial authority of the Republic of South Africa is vested in the courts, which courts are independent and subject only to the Constitution and the law, which the courts must apply impartially and without fear, favour or prejudice.

[41] The essence of freedom and dignity is regulating one's affairs by contract. Therefore, public policy requires that parties comply with contractual obligations, including settlements and even contractual obligations agreed to one's detriment. See: **Barkhuizen v Napier** 2007 (5) SA 323 (CC) at para [57].

[42] The party who seeks to avoid enforcement of the contract bears the onus to prove that a contract is offensive to public policy. See: **Beadica 231 CC and Others v Trustees, Oregon Trust and Others** 2020 (5) SA 247 CC at para [37], [82] and [91]. Para [82] being the most relevant: -

> *[82] There has, in fact, largely been general uniformity of principles between the two courts. In Pridwin, the Supreme Court of Appeal set out what it views as the 'most important principles' governing the judicial control of contracts through the instrument of public policy. It said:*
>
> > *'(i) Public policy demands that contracts freely and consciously entered into must be honoured;*
> >
> > (ii) *a court will declare invalid a contract that is prima facie inimical to a constitutional value or principle, or otherwise contrary to public policy;*

(iii) where a contract is not prima facie contrary to public policy, but its enforcement in particular circumstances is, a court will not enforce it;

(iv) the party who attacks the contract or its enforcement bears the onus to establish the facts;

(v) a court will use the power to invalidate a contract or not to enforce it, sparingly, and only in the clearest of cases in which harm to the public is substantially incontestable and does not depend on the idiosyncratic inferences of a few judicial minds;

(vi) a court will decline to use this power where a party relies directly on abstract values of fairness and reasonableness to escape the consequences of a contract because they are not substantive rules that may be used for this purpose."

[43] A court's interference with the terms of compromises, absent a dispute to its respective obligations or validity, will interfere with the parties' contractual freedom to regulate their affairs.

[44] Everyone is equal before the law and entitled to equal protection and benefit of the law, and no party has an enhanced or diminished status compared to the other. Accordingly, all litigants have equal standing when asserting their rights in a court of law. See **Biowatch Trust v Registrar, Genetic Resources and Others 2009** (6) SA 232 (CC) para 17.

[45] However, the court is the custodian of persons who lack the capacity to act, such as a child or a person incapable of managing their affairs. Where the

parties have the capacity and ability to act, an impartial court cannot act as custodian for one of them. If it does, the parties would not be equal before the court. Where one of the parties cannot litigate, judicial approval or oversight of a settlement is required. In such instances, a curator *ad litem* is necessary to represent the party that lacks capacity to enable the court to remain impartial.

[46] Where the parties agree, on appeal, to set aside a judgment concerning status, a court must be satisfied that a settlement accords with the case's merits. See **Airports Company of South Africa v Big Five Duty-Free (Ply) Ltd and Others** 2019 (5) SA 1 (CC) at para [1]:-

> *"[1] This judgment makes clear two legal propositions. The first is that a judgment in rem may not be set aside by only a settlement agreement between the litigating parties in an appeal against that judgment. For a judgment in rem to be set aside by a settlement agreement, the court hearing the appeal must give its sanction to the agreement being made an order of court on the basis that the setting-aside is justified by the merits of the appeal. The second is that the court sanctioning the settlement agreement should give its reasons for doing so."*

[47] The court's function is to adjudicate disputes between the parties. If the parties settled their differences by consent through a compromise, then the disputes no longer exist. However, suppose the court (and not the parties) challenge the compromise. In that case, a dispute arises between the parties and the court and the court's obligation to be independent and apply the law impartially and without fear, favour or prejudice is compromised, i.e., the court compromises the right to a fair public hearing before an impartial court.

[48] Once settled, a court has no residual jurisdiction over the compromised claim, even an enrolled action. As a result, parties frequently settle at the doors of the court. They do so for their reasons, which are unknown to the judge. Typically, both parties consider the settlement better than litigation and cost consequences. The risk of an adverse credibility finding might lead to a payment despite the poor merits of the claim.

[49] If the court cannot competently endorse the agreement, it may insist on changes or reject it. As held in **Eke v Parsons** at paras [34] and [36]:-

> [34] "*The less restrictive approach that I prefer does not mean any settlement order proposed by the parties should be accepted. The court must still act in a stewardly manner that ensures that its resources are used efficiently. After all, its 'institutional interests … are not subordinate to the wishes of the parties. Where necessary, it must 'insist that the parties effect the necessary changes to the proposed terms as a condition for the making of the order'. It may even reject the settlement outright."*
>
> *[36] In sum, what all this means is that, even with the possibility of an additional approach to court, settlements of this nature do comport with the efficient use of judicial resources. First, the original underlying dispute is settled and becomes res judicata. Second, what litigation there may be after the settlement order will relate to non-compliance with this order, and not the original underlying dispute. Third, matters that culminate in litigation that precedes enforcement are fewer than those that don't.*

[50] If the concerns raised by the court are not adequately addressed, the court must refuse to endorse the proposed order and leave it to the parties to elect to either be content with their agreement or to proceed to trial. Notably, the

court's refusal to make an order does not destroy the settlement agreement. **PL v YL** at para [49]

> *[49] If the concerns raised by the court are not adequately addressed, and it is not prepared to grant the order agreed upon, it must refuse to endorse the proposed order and leave it to the parties to elect to either be content with their agreement or parts thereof not being incorporated into the court's order, or to proceed to trial. By reason of the fact that the proposed order as envisaged in s 7(1) of the Divorce Act is based on an agreement between the parties, and the jurisdiction of the court is limited to the relief which the parties seek before it on an unopposed basis, what the court cannot do, and should refrain from doing, is to proceed to make an order that would amount to it unilaterally altering the terms of the settlement agreement. With regard to the welfare of the minor children, an issue that for the reasons stated earlier 102 falls within the exclusive jurisdiction of the court, I am of the view that should the court decline to make an order in accordance with the agreement of the parties, ie that it is not satisfied that on the evidence placed before it the agreement best reflects the interests of the minor children, both parties should at the very least be given an opportunity to place further evidence before the court before a final order is made."*

[51] Once the parties have settled the issues, their settlement ends the litigation, and the matters settled become *res judicata*. However, courts will not enforce illegalities, and if the illegality appears from the transaction itself or all the facts are before it, the court can take the point of illegality *mero motu*, as explained in **Yannakou v Apollo Club** 1974 (1) SA 614 (A) at 623G: -

> "*It is true that it is the duty of the court to take the point of illegality mero motu, even if the defendant does not plead or raise it; but it can and will*

only do so if the illegality appears ex facie the transaction or from the evidence before it, and, in the latter event, if it is also satisfied that all the necessary and relevant facts are before it."

[52] Where the documents before a judge raise questions regarding the claim's legitimacy, the court must investigate and, if needed, call for evidence. The Supreme Court of Appeal, in **Motswai v Road Accident Fund** 2014 (6) SA 360 (SCA) at para [46], explained this obligation as follows:

"[46] But apart from the irregularity and unfairness of the proceedings before the first judgment, the judge's reasoning is wrong. She drew inferences from the documents that were before her without calling for any further evidence. In this regard our courts have stated emphatically that charges of fraud or other conduct that carries serious consequences must be proved by the 'clearest' evidence or 'clear and satisfactory' evidence or 'clear and convincing' evidence, or some similar phrase. In my view the documents before the judge raised questions regarding the efficacy of the claim and the costs incurred in the litigation to date – no more. The judge was entitled – indeed obliged – to investigate these questions and if necessary to call for evidence. But she was not entitled to draw conclusions that appeared obvious to her only from the available documents. As was said in the well-known dictum of Mergarry J in John v Rees [John v Rees; Marlin v Davis; Rees v John [1970] 1 Ch 345 ((1969] 2 All ER 274) at 402 (Ch) and 390F (All ER]:

> *'Everybody who has anything to do with the law well knowns, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.'"*

[53] The discretion, in subsection 4(1), affords the court the right or obligation to inquire into the merits of the settlement. Firstly, to protect the client from extortion or concluding a compromise, not in the client's best interest, i.e., preventing the attorney from forcing a compromise to earn the contingency fee. Secondly, to protect state-owned defendants, such as the Road Accident Fund, from overreaching by collusion between its and the plaintiff's legal representatives, which unfortunately happens. Put differently, subsection 1 gives the Court discretion to enquire into the merits of the settlement agreement and make it an order of court or not.

[54] 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 a *curator ad litem* instead of the court.

[55] The discretion to enter the merits interferes with the parties' right to agree to their bargain freely. Accordingly, it must be restrictively interpreted and limited to prevent the plaintiff's extortion through an illegal contingency fee agreement or fraud upon the defendant, especially a public entity such as the Road Accident Fund and only in the clearest of cases. Accordingly, this discretion must include the Court to, in its discretion, decide not to require affidavits, in a case such as the present, where the owners and trustees of the entities involved, the financiers, other shareholders and the liquidators, in the related disputes, achieved a comprehensive commercial settlement.

[56] In terms of Section 5 of the Act, the plaintiffs' remedies for non-compliance with the Act lie against their attorneys, not against Nedbank and Imperial.

Moreover, the excipients were not concerned with and had no *locus standi* to inquire into the validity of the contingency fee agreement when the settlements were concluded.

[57] Given the remedies under Section 5 of the Act, I find that the settlement agreements and court orders cannot be challenged through non-compliance with the Act on the basis that it is illegal and void. The Act's primary intention is to regulate contingency fee arrangements and not the settlement agreement, albeit that the Act empowers courts with limited discretion to inquire into the settlement agreement to protect the rights of the plaintiff and/or defendant.

[58] The plaintiffs effectively argue that the excipients had an implied obligation to inquire if the plaintiffs entered into a contingency fees agreement and to insist on compliance with Section 4 of the Act. If this were so, then it would mean that in every commercial dispute, where a party entered into a contingency fees agreement, the Court has to inquire into the merits of the settlement agreement, even if it is a straightforward commercial settlement for payment of arrear rental or debt, for example. It would also mean, having entered into a contingency fees agreement, a party can, after the fact, challenge such settlement, made an order of court, based on non-compliance with Section 4 of the Act, despite the avenues available under Section 5 of the Act. For example, a party facing eviction after consenting to judgment can apply to court for a stay on the mere allegation that when the Court made the order by consent, there was a verbal contingency fee agreement, which is invalid and renders the consent to judgment a nullity. It

would be virtually impossible for plaintiffs, such as the excipients, to conclude settlement agreements for money judgments, as it so frequently happens.

[59] If the settlement is in favour of the plaintiffs, I accept that the invalidity of the contingency fee agreement or the non-compliance with section 4 of the Act tainted the settlement agreements and the second van der Linde Order, the legislature could not have intended to alter the contractual relationship or statute which formed the subject matter of the various causes of actions, in the settled matters, to reciprocal enrichment claims, as suggested in **Yarona Healthcare Network (Pty) Ltd v Medshield Medical Scheme** 2018 (1) SA 513 (SCA) at para [54]:-

> *"[54] I have no quibble with the proposition that in cases of bilateral performances by P and D under non-existent or unenforceable contracts, our law of unjustified enrichment would be lacking if the end result were not, at least generally, a netting-off of gains, but the question is how one reaches this result. The correct solution in my view is that P and D should each use the condictio indebiti to recover from each other. If this were done in the same proceedings, the end result would be set-off pursuant to the procedure provided for in rule 22(4) of the Uniform Rules. The party with the higher enrichment liability would have to pay the difference to the party with the lower enrichment liability.*"

<u>Enrichment actions</u>

[60] Suppose the correct approach was that the plaintiffs claim for repayment from Nedbank should be met with a counterclaim on the *condictio indebiti.* In

that case, it follows that Nedbank could no longer rely upon the originally settled cause for the debt but must prove its impoverishment instead of its previous contractual entitlement. Before the judgment, Nedbank was presumable and most likely entitled to agreed interest, cost and to prove its claims by statements or certificates of balance. To destroy the original cause of action and the associated contractual rights could not have been the legislature's intention.

[61] The general principles applicable to enrichment actions still applies, even if the plaintiffs had a claim based on enrichment, as held in **Kudu Granite Operations (Pty) Ltd v Caterna Ltd** 2003 (5) SA 193 (SCA) and **Laco Parts (Pty) Ltd T/A Aca Clutch V Turners Shipping (Pty) Ltd** 2008 (1) SA 279 (W) followed in **Yarona**. **Yarona,** on my reading, only confirms that where there is no contract, the law of contract, i.e. restitution is not relevant, and one must look at the law of enrichment. *Yarona* does not say the requirements for an enrichment action does not have to be complied with, even a general enrichment action if such action exists. Instead, *Yarona* confirms that the contractual obligation to tender restitution does not apply to enrichment actions.

[62] **Kudu Granite Operations (Pty) Ltd v Caterna Ltd** held:

> *[15] Kudu's first contention is well-founded. There is a material difference between suing on a contract for damages following upon cancellation for breach by the other party (as in Baker v Probert 1985 (3) SA 429 (A), a judgment relied on by the Court a quo) and having to concede that a contract in which the claim had its foundation, which has not been breached by either party, is of no force and effect. The first-*

mentioned scenario gives rise to a distinct contractual remedy: Baker at 439A, and restitution may provide a proper measure or substitute for the innocent party's damages. The second situation has been recognised since Roman times as one in which the contract gives rise to no rights of action and such remedy as exists is to be sought in unjust enrichment, an equitable remedy in which the contractual provisions are largely irrelevant. As Van den Heever J said in Pucjlowski v Johnson's Executors 1946 WLD 1 at 6:

> *'The object of condiction is the recovery of property in which ownership has been transferred pursuant to a juristic act which was ab initio unenforceable or has subsequently become inoperative (causa non secuta; causa finita').'*

The same principle applies if the contract is void due to a statutory prohibition (Wilken v Kohler 1913 AD 135 at 1–9 - 50), in which case the condictio indebiti applies. There is no reason why contractual and enrichment remedies should be conflated. Cate'na's case was one of a lawful agreement which afterwards failed without fault because its terms could not be implemented. The intention of the parties was frustrated. The situation in which the parties found themselves was analogous to impossibility of performance since they had made the fate of their contract dependent upon the conduct of a third party (KPMG) who was unable or unwilling to perform. In such circumstances the legal consequence is the extinction of the contractual nexus: see De Wet and Van Wyk, Kontraktereg en Handelsre[g] 5th ed vol 1 at 172 and the authorities there cited. The law provides a remedy for that case in the form of the condictio ob causam finitam, an offshoot of the condictio sine causa specialis. According to Lotz, in Joubert (ed) The Law of South Africa vol 9 (1s reissue) para 88, the purpose of this remedy is the recovery of property transferred under a valid causa which subsequently fell away. See De Vos Verrykingsaanspreeklikheid in die Suid-Afrikaanse Re[g] 3rd ed at –5 - 6; cf Holtshausen v Minnaar (1905) 10 HCG 50; Hughes v Levy 1907 TS 276 at 279; Snyman v Pretoria

Hypotheek Maatschappij 1916 OPD 263 at 2–0 - 1; Pucjlowski v Johns'on's Executors (op cit). It is sometimes suggested that the condictio causa data causa non secuta is the appropriate remedy. See para 85 of The Law of South Africa (supra). Indeed in Cantiere San Rocco v Clyde Shipbuilding and Engineering Co 1923 SC (HL) 105, a case of a contract frustrated by the outbreak of war which made performance legally impossible, the Judicial Committee after an exhaustive consideration found that that was the remedy. Of this conclusion Professor Evans-Jones commented 'n 'The Claim to Recover what was Transferred for a Lawful Purpose Outwith Contract (condictio causa data causa non secuta)' 1997 Acta Juridica 139 at 15':

> *'The unhappy application of the condictio causa data causa non secuta in Cantiere … possibly resulted from the fact that the condictio ob causam finitam had no profile in Scots law at the time the case arose.'*

The last-mentioned writer also notes, 'n 'Unjust Enrichment, Contract and the Third Reception of Roman Law in Scotland' (1993) 109 LQR 663 at 66':

> *'If the impossibility were seen to extinguish the contract from the moment of the impossibility, the remedy would be condictio ob causam finit'm.'*

[16] Except that the condictio causa data causa non secuta appears to apply to cases where a suspensive condition or the like was not fulfilled, the identification of the cause of action is not of importance since there appears to be no difference in the requirements of proof of the two condictiones. The essential point is that Cate'na's claim is covered by one or the other remedy for unjust enrichment.

[17] It follows that to assess that claim one has to consider whether the following general enrichment elements are present:

(i) whether Kudu had been enriched by its nominee's receipt of the

granite;

(ii) whether Caterna had been impoverished by procuring that Ruenya deliver the blocks from its stock;

(iii) whether K'du's enrichment was at the expense of Caterna;

(iv) whether the enrichment was unjustified.

The Law of South Africa vol 9 (1st reissue) para 76. The quantum of K'du's enrichment claim is the lesser of the amounts of (i) and (ii).

[63] **Laco Parts (Pty) Ltd T/A ACA Clutch v Turners Shipping (Pty) Ltd** held:

[22] Counsel for the respondent, relying on a dictum in Davidson v Bonafede 1981 (2) SA 501 (C): dictum at 51–A - C applied submitted further that a plaintiff is not obliged or required to attach a label to his cause of action; all he need do is satisfy the Court that the facts pleaded and proved entitle him to the claims which he makes.

To adopt this approach would in my view blur the distinction between a claim for restitution and an enrichment claim. Although there is no general action based on enrichment in South African law there are certain general requirements for any action based on enrichment which have to be satisfied. These are:

(a) whether the appellant was enriched;

(b) whether the respondent was impoverished;

(c) whether the appellant's enrichment was at the expense of the respondent; and

(d) whether the enrichment was unjustified (sine causa). The need to establish these four requirements was endorsed in McCarthy Retail

Ltd v Shortdistance Carriers CC 2001 (3) SA 482 (SCA): dictum at 490D applied and Kudu Granite Operations"

Rescission of judgment

[64] The plaintiffs are not prevented from setting aside an order on the strength of the common law, as held in **Colyn v Tiger Food Industries Ltd** *supra,* relied upon by the excipients. First, however, the plaintiffs must comply with the common law requirements mentioned in paragraph 8.11 above, which require setting out good cause, a defence of *Justus error* or fraud, for example.

Rule 42(1)

[65] Rule 42(1) of the Uniform Rules of courCourtvides as follows:-

> *"(1) The Court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary:*
>
> *(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;*
>
> *(b) an order or judgment in which there is an ambiguity, or a* ***patent error or omission, but only to the extent of such ambiguity, error or omission;***
>
> *(c) an order or judgment granted as the result of a mistake common to the parties.*" [Own Emphasis]

[66] The Supreme Court of Appeal in the matter of **Botha v Road Accident**

Fund 2017 (2) SA 50 (SCA) held that a court order which recorded the terms of a valid settlement agreement could not be rescinded under Rule 42(1), in paragraph [13] of the judgment, the court held:

> *[13] Confronted with all these difficulties the submission on behalf of the appellant was that this Court should use its discretion under rule 42(1) to set aside the judgment even if the settlement agreement was binding. In* ***Theron NO v United Democratic Front (Western Cape Region) and Others*** *1984 (2) SI32 (C) at 536G the Court held that a court has a discretion whether or not to grant an application for rescission under rule 42(1). But where, as here, 'he Court's order recorded the terms of a valid settlement agreement, there is no room for it to do so.*

[67] **Theron NO v United Democratic Front (Western Cape Region) and Others** 1984 (2IA 532 (C) at 536G dealt with the issue as follows:-

> *"Rule 42 (1) entitles any party affected by a judgment or order erroneously sought or granted in his absence, to apply to have it rescinded. It is a procedural step designed to correct an irregularity and to restore the parties to the position they were in before the order was granted. The Court's concern at this stage is with the existence of an order or judgment granted in error in the applicant's absence and, in my view, it certainly cannot be said that the question whether such an order should be allowed to stand is of academic interest only. In any "event, it is very doubtful" whether it is necessary to establish that a reversal would confer a benefit upon applicant. See Featherstonehaugh v Suttie 1913 TPD 171 at 178.*
>
> *The Court has a discretion whether or not to grant an application for rescission under Rule 42 (1). In my view the Court will normally exercise that discretion in favour of an applicant where, as in the*

present case, he was, through no fault of his own, not afforded an opportunity to oppose the order granted against him, and when, on ascertaining that an order has been granted in his absence, he takes expeditious steps to have the position rectified."

[68] Rule 42(1)(b) allows the plaintiffs to apply to vary or rescind the order to the extent that the omission of non-compliance with Section 4 of the Act has influenced the court orders.

Settlement or compromise

[69] In summary, a settlement or compromise (transactio) is: -

69.1 "*an agreement between litigants for the settlement of a matter in dispute*" between them;

69.2 *"A transaction is an agreement between two or more persons, who, for preventing or ending a law suit, adjust their differences by mutual consent, in the manner which they agree on; and which every one of them prefers to the hopes of gaining, joined with the danger of losing*." And with the effect of *res judicata."*

69.3 *"A transactio, whether extra-judicial or embodied in an order of Court, has the effect of res judicata."*

69.4 *"It is obvious that, like any other contract (and like any order of Court), a transactio may be set aside on the ground that it was fraudulently obtained. There is authority to the effect that it may also be set aside on the ground of mistake, where the error is Justus"*

See: **Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd and Others** 1978 (1) SA 914 (A) ("**Gollach &**

Gomperts ") at 92–C and 922C - approved in **Moraitis Investments (Ply) Ltd and Others v Montie Dairy (Ply) Ltd** 2017 (5) SA 508 (SCA) at para 14

[70] The parties to a settlement cannot proceed with the compromised cause of action. See: **Van Zyl v Niemann** 1964 (4) SA 661 (A) 669H-670A.

[71] A compromise, like a contract, can be set aside on the grounds of fraud or justus error. However, the error must rescind, nullify or void consent and cannot relate to the disputed merits or the reason for the settlement, i.e. the purpose of compromise. See: **Gollach & Gomperts** at 922C and 923H to 924B. When the mistaken belief was not induced or known to the other party, "*the scope for a defence of unilateral mistake is very narrow, if it exists at all. At least the mistake (error) would have to be excusable (justus) and it would have to be pleaded*." See **Gollach & Gomperts** supra at 926H to 927A.

[72] In **Slabbert v MEC for Health and Social Development of Gauteng Provincial Government** (432/2016) [2016] ZASCA 157 (3 October 2016), the MEC settled the merits of a medical negligence suit, which the Court made an order of the court. However, during preparation for the quantum hearing, the MEC discovered new evidence regarding the claim's merits. Accordingly, the Court granted an application for setting aside the consent order. The Appeal Court held at paras [7], [8], [16] and [17] that:

> *"[7] An agreement of compromise creates new rights and obligations as a substantive contract that exists independently*

from the original cause. The purpose of a compromise is twofold: (a) to bring an end to existing litigation and (b) to prevent or avoid litigation. When a compromise is embodied in an order of court the order brings finality to the lis between the parties and it becomes res judicata. The court order changes the terms of a settlement agreement to an enforceable court order – through execution or contempt proceedings. Thus, litigation after the consent order will relate to non-compliance with the consent order and not the underlying dispute.

[8] This being said, a transactio (compromise) is made by consent between parties and like any contract or order of court made by consent, it may be set aside on the ground that it was fraudulently obtained. It may also be set aside on the ground of justus error, 'provided that such error vitiated true consent and did not merely relate to motive or to the merits of a dispute which it was the very purpose of the parties to compromise.' A compromise agreement may also be set aside if the parties to the agreement laboured under a common mistake. However, a unilateral mistake on the part of one party that does not flow from a misrepresentation by the other does not allow for the former party to resile from a consent agreement. The question thus is whether one of these grounds exists for the MEC to resile from the compromise agreement.

[16] The court a quo was correct that a court cannot ignore facts placed before it, but these facts must sustain one of the established grounds on which a compromise agreement can be rescinded. Although a High Court has inherent discretion, it can never exercise it against recognised principles of substantive law. Our constitutional dispensation does not afford courts a carte blanche to ignore substantive law and grant orders couched as being in the 'interests of justice'. Moreover, certainty and finality are key elements of justice. Parties to a

compromise agreement accept an element of risk that their bargain might not be as advantageous to them as litigation might have been. This element of risk is inherent in the very concept of compromise. It, however, does not afford parties the right to go back on the bargain for unilateral mistakes. Settlement agreements have as their underlying foundation the benefit of orderly and effective administration of justice. Courts cannot allow for consent orders to be set aside for reasons not sanctioned by applicable legal principles.

[*17*] *A court also does not have a discretion to set aside a consent order where there are no grounds for setting aside the underlying agreement of compromise pursuant to which the consent order was made. In Botha this court found as follows (para 13):*

> *'In Theron NO v United Democratic Front (Western Cape Region) & others 1984 (2) SA 532 (C) at 536G this court held that a court has a discretion whether or not to grant an application for rescission under rule 42(1). But where, as here, the court's order recorded the terms of a valid settlement agreement, there is no room for it to do so.' (Footnote omitted.)"*

[73] Parties to a compromise accept an element of risk that their bargain might not be as advantageous to them as litigation might have been. This element of risk is inherent in the very concept of compromise. It does not afford parties the right to go back on their bargain for unilateral mistakes. The Constitutional Court in **Eke v Parsons** 2016 (3) SA 37 (CC) ("**Eke v Parsons**") confirmed this at para [21]:

> "*Like the rest of the compromise, it is a result of give and take. Sometimes it is more than what the court is likely to have awarded*

> *the wife had there been none and, in return for a concession elsewhere, she has won by contract what she could not have expected from the litigation. On other occasions it is less, but some contractual benefit the court would never have decreed has compensated her for the difference.*"

[74] The Constitutional Court in **Eke v Parsons** at para [23] further approved the following dictum in **PL v YL** 2013 (6) SA 28 (ECG): -

> *"The policy underlying the favouring of settlement has as its underlying foundation the benefits it provides to the orderly and effective administration of justice. It not only has the benefit to the litigants of avoiding a costly and acrimonious trial, but it also serves to benefit the judicial administration by reducing overcrowded court rolls, thereby decreasing the burden on the judicial system."*

[75] Therefore, the validity or enforceability of a settlement agreement is not dependent on the relative strengths and weaknesses of the original cause of action; instead, it creates contractual obligations freely and voluntarily.

[76] Accordingly, a compromised claim can be challenged on the strength of the common law and only on the limited basis of *justus error* or fraud.

Peremption

[77] Peremption (not to be confused with pre-emption) is not a word we hear every day and means at common law that a party must make up his mind and cannot equivocate by acquiescing in a judgment and later on deciding to appeal such judgment. The general rule is that a litigant who has deliberately abandoned a right to appeal will not be permitted to revive it. Peremption is

one aspect of a broader policy that there must be finality in litigation in the interest of the parties and for the proper administration of justice. It is open to a court to overlook the acquiescence if it would not be in the broader interests of justice, bearing in mind the policy underlying the rule. In **President of the Republic of South Africa v Public Protector** 2018 (2) SA 100 (GP), the Full Court held (at 146G–H) that the President's acceptance of and acquiescence to the remedial action amounted to a peremption of his right to review the remedial action and held: -

"[176] The legal principles pertaining to peremption are well established. In Dabner v South African Railways and Harbours 1920 AD 583 at 594, Inne' J stated:

*'The rule with regard to peremption is well settled, and has been enunciated on several occasions by this Court. If the conduct of an unsuccessful litigant is such as to point indubitably and necessarily to the conclusion that he does not intend to attack the judgment, then he is held to have acquiesced in it. But the conduct relied upon must be unequivocal and must be inconsistent with any intention to appeal**. And the onus of establishing that position is upon the party alleging it. In doubtful cases acquiescence, like waiver, must be held non-proven.**'* [Own emphasis]

[177] In Gentiruco AG v Firestone SA (Pty) Ltd 1972 (1) SA 589 (A) at 600A – B Troll'p JA said:

'The right of an unsuccessful litigant to appeal against an adverse judgment or order is said to be perempted if he, by unequivocal conduct inconsistent with an intention to appeal, shows that he acquiesces in the judgment or order ….'

[178] What emerges from these cases is that the common-law doctrine of

peremption applies to judgments or orders of Court. ***Peremption, like waiver, is not lightly presumed, and the onus is upon the party alleging peremption to establish conduct that clearly and unconditionally demonstrates acquiescence in and a decision to abide by the judgment or order.****"* [Own emphasis]

See also **Minister of Defence v South African National Defence Force Union** (unreported, SCA case no 161/11 dated 30 August 2012) at para [23], citing **Government of the Republic of South Africa v Von Abo** 2011 (5) SA 262 (SCA) at 270E–G; **South African Revenue Service v Commission for Conciliation, Mediation and Arbitration** 2017 (1) SA 549 (CC) at 562D–563A.

[78] The onus would be on the excipients to prove peremption. Accordingly, a plea and evidence are required to decide whether the plaintiffs acquiesce (perempted) their dispute with the defendants and can not be decided at the exception stage.

Conclusion

[79] I conclude that the plaintiffs: -

79.1 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 Act in terms of Rule 42(1)(b) or the common law;

79.2 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;

79.3 cannot obtain a rescission without a *bona fide* defence to the merits

of the compromised claims; and

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

[80] In the premise, I find that the plaintiff's particulars of claim failed to disclose a cause of action for the relief sought in:-

80.1 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;

80.2 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;

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

80.4 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

80.5 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.

I, therefore, make the following order:-

1.) The second and third defendants' exception is upheld with costs, which costs include junior and senior counsel costs.

2.) Paragraphs 47, 48, 56 to 61, 63.1, 67.6.4, 67.6.5, 68 to 70 and prayers 2, 3, 4.1, 7, 8 and 9 of the plaintiffs' particulars of claim are struck out.

3.) The plaintiffs are afforded 20 (twenty) days to amend their particulars of claim.

AJR Booysen
Acting Judge
19 January 2022

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