

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**



(1) Reportable: No
(2) Of interest to other Judges: No
(3) Revised

Date: 11/07/2023

A Maier-Frawley

CASE NO: 2021/22775

In the matter between:

MALEBYE MOTAUNG MTEMBU ATTORNEYS

Applicant

and

ONGA NTOZINI
FIRST NATIONAL BANK LTD
STANDARD BANK OF SOUTH AFRICA LTD
ABSA LTD
L MBANJWA INCORPORATED
ZAZI NTOZINI
LETHABO GAILELE
BUSISIWE PHELEU
ST. STITHIAN COLLEGE
REALTY 1

First Respondent
Second Respondent
Third Respondent
Fourth Respondent
Fifth Respondent
Sixth Respondent
Seventh Respondent
Eighth Respondent
Ninth Respondent
Tenth Respondent

J U D G M E N T

MAIER-FRAWLEY J:

1. The applicant is a firm of attorneys who previously employed the first respondent in the position of candidate attorney.¹ In such position, the first

¹ After his articles of clerkship expired, the first respondent remained employed at the applicant, performing professional legal duties as candidate attorney as he had yet not yet completed all the relevant competency examinations in order to qualify for admission as an attorney of the High Court.

respondent inter alia conducted litigation on behalf of clients of the applicant.

2. The fifth respondent is the first respondent's attorneys of record in these proceedings. The fifth respondent holds an amount of R118 000.00 in its trust account on behalf of the first respondent, which amount the first respondent tendered in his answering affidavit to pay to the applicant in partial satisfaction of its claim for the recovery of funds that had been stolen by the first respondent. The fifth respondent filed a notice to abide the court's decision in this matter and no order for costs was sought against the fifth respondent in the applicant's amended notice of motion filed of record.
3. The applicant initially sought relief in terms of its amended notice of motion filed of record.² However, at the conclusion of oral argument tendered at the hearing of the matter, certain claims, amongst others, those against the third and fourth respondents (relating to stolen funds that the first respondent had transferred into his Standard bank account and into the eighth respondent's Absa Bank account respectively) and those against the ninth and tenth respondents were abandoned, with no order for costs being sought against the second to tenth respondents.
4. Only the first respondent opposed the application. None of the other respondents participated in these proceedings.
5. The relevant undisputed or unrefuted background factual matrix is uncontentious. By his own admission, the first respondent hatched a fraudulent plan to misappropriate monies belonging to a client of the

² The relief the applicant sought included declaratory orders; payment of amounts standing to the credit of the first, sixth, seventh and eighth respondents' bank accounts held either at FNB, Standard Bank or Absa Bank; payment of the sum of R118 000.00 held by the fifth respondent in its trust account on behalf of the first respondent; a claim against the ninth respondent for the repayment of tuition fees that had been paid by the first respondent from the proceeds of funds stolen by him; a claim against the tenth respondent in respect of rental that had been paid by the first respondent from the proceeds of funds stolen by him; and claims for the return or attachment of movable assets that had been purchased by the first respondent from the proceeds of funds stolen by him.

applicant. The applicant was mandated to represent Eskom in litigation instituted against it by one Grace Nzimande. The first respondent was in charge of the matter, ostensibly under the supervision of his principal, Ms Malebye, the deponent to the applicant's affidavits.

6. In furtherance of his devious plan, the first respondent advised Eskom to settle the action instituted against it in the amount of R3.6 million. Eskom agreed to do so. To that end, the first respondent drafted a bogus settlement agreement, inter alia setting out the terms of payment of the amount of R3.6 million by Eskom to Ms Nzimande, one of which called for Eskom to pay the said sum directly to Ms Nzimande and into her designated bank account. The first respondent himself signed the fabricated settlement agreement, purporting to be the Plaintiff. He then forwarded same to Eskom for authorisation, thereby falsely and intentionally representing to Eskom that Ms Nzimande had accepted the proposed settlement and had signed the agreement as plaintiff. In truth and reality, Ms Nzimande had no knowledge of the purported settlement, nor the contents of the settlement agreement, which she had also not signed. Likewise, Eskom was blissfully unaware that no settlement had in fact been agreed to with Ms Nzimande. It is common cause that the settlement amount was authorised by Eskom, however, it is unclear from the papers as to why the first respondent had in fact himself also signed the settlement agreement on behalf of Eskom. However, nothing turns on that fact.
7. It is at this point that the first respondent's devious plan went somewhat awry, Whilst the fabricated settlement agreement provided for payment of the settlement amount to be made directly to the plaintiff, Ms Nzimande, the fact that Eskom chose not to do so is evidenced by its deposit of that sum into the applicant's trust account, ostensibly for onward distribution by the applicant of such sum to the plaintiff on behalf of the applicant's client (Eskom). I imagine that the first respondent had to think fast about how to

overcome this hurdle, which he seemingly had no difficulty in doing. When asked by his principal to inform her of the plaintiff's designated account number, he forged a letter on a First National Bank (FNB) letterhead in which the bank account number and account holder details of an account represented therein to be that of Ms Nzimande, were certified. Unbeknown to Ms Nzimande, FNB or Ms Malebye of the applicant, the account number listed in the forged letter belonged to the account held by the first respondent at FNB. Upon receipt of the forged letter and on 21 December 2020, Ms Malebye duly transferred the sum of R3.6 million into the designated account, being the first respondent's bank account, having been deceived by the first respondent into believing that she was effecting payment to the plaintiff in settlement of the action as mandated by Eskom.

8. The upshot of the foregoing is that Eskom was deceived by the first respondent into agreeing to effect payment to the plaintiff in settlement of the plaintiff's claim in the action. Eskom deposited the settlement amount into the applicant's trust account for such purpose. The funds were provided by Eskom to the applicant under the false pretence of a non-existent settlement agreement that was fabricated by First Respondent with the intention of misappropriating the monies for his personal benefit. Ms Malebye of the applicant, in turn, having likewise been deceived into believing that the settlement of the action was genuine and valid, effected payment of the funds provided to the applicant by Eskom into an account that was intentionally and falsely represented by the first respondent to be that of the plaintiff, whilst the bank account was in truth and in fact that of the first respondent.
9. After the first respondent's account at FNB was credited with the sum of R3.6 million, he transferred a portion of the stolen funds into the bank accounts of the 6th, 7th and 8th respondents. He also used part of the stolen funds to settle personal debts and to purchase assets. Between the date of

the deposit (21 Dec 2020) and 13 March 2021, he had utilised and/or dispersed an amount of approximately R2.6 million.

10. After the theft and fraud was discovered by the applicant, during March 2021, the applicant sought and obtained an interim order, amongst others, freezing the funds standing to the credit of the first respondent's bank account held at FNB and interdicting him from accessing, withdrawing, or transferring the funds standing to the credit of his account. The 2nd respondent (FNB) was also ordered to release the first respondent's bank statements to the applicant. Upon receipt of the bank statements, the applicant was able to trace various transfers of the stolen funds made by the first respondent to various parties, including the 6th, 7th and 8th respondents, as alluded to in paragraph 9 above. On 9 April 2021, a final order was granted in favour of the applicant. In terms of that order, the applicant was directed to institute legal proceedings for the recovery of the stolen funds within 20 days from date of such order. This ultimately culminated in the launch of these proceedings.
11. In the answering affidavit, the first respondent admitted having 'unlawfully appropriated the sum of R3.6 million from Eskom under false pretences.' Implicit in such admission is the concession that the first respondent knew that he was not entitled to the stolen funds.³ In his heads of argument, the first respondent admitted to having defrauded Eskom of the sum of R3.6 million and that the funds in the various accounts listed in the notice of motion originated from the R3.6 million that he defrauded Eskom of. It is not in dispute that the first respondent had, after receipt of the amount of R3.6 million in his FNB account, transferred a portion of the stolen funds into his personal bank account held at Standard Bank, as well as into the sixth and

³ This is consistent with what is stated in par 16.1 of the answering affidavit, where the following was said: *'I never denied stealing the money, and ever since the theft was discovered, I and my family... pleaded with Ms Malebye to allow us access to...Eskom' to 'make submissions on how to repay the money to Eskom.'* In par 16.4, the first respondent went on to state that *'I accept full responsibility to assist Ms Malebye in returning the money back to her client...'*

seventh respondents' respective bank accounts at FNB, including the eighth respondent's Absa bank account.⁴

12. On the unrefuted version of the applicant, Eskom did not want to be involved in this matter, as evidenced by an email addressed by Krishan Chaithoo of Eskom to the applicant, in which he stated that 'the matter regarding recovery is between your company and your employee. Eskom should not be involved in this.'⁵ As the applicant is still Eskom's attorneys of record, and as monies were given to the Applicant by Eskom in relation to a settlement that was a fabrication by the First Respondent, the applicant avers that it is the responsibility of the Applicant to recover the monies and pay it to Eskom.

First Respondent's opposition

13. Although the first respondent raised various points *in limine* in his answering affidavit in opposition to the relief sought by the applicant, only one was ultimately pursued at the hearing of the matter, which is that the applicant lacks *locus standi* in the matter and therefore, so the argument went, Eskom ought to have been joined as a party to the proceedings. As regards the merits of the applicant's claim for return of the stolen funds, which funds, as was common cause, have been identified, traced and retained in the bank accounts of the 1st, 6th and 7th respondents, the first respondent offers no defence apart from the suggestion that he has been sued by the wrong persona.

Lack of locus standi

14. The first respondent relies on the contents of clause 3.1(i) of the fabricated settlement agreement which provides that 'Eskom shall in respect of the Settlement Amount and within 10 (ten) Business Days after Signature Date,

⁴ The applicant subsequently discovered that there are no longer funds standing to the credit of the first respondent's Standard Bank account or the eight respondent's Absa Bank account, and it is for that reason that the claims against Standard Bank and Absa Bank for the restitution of the stolen funds deposited by the first respondent into those bank accounts, were abandoned.

⁵ Per annexure 'MMM18' to the applicant's papers.

make payment by way of electronic funds transfer to Grace's designated account, without any deduction or set off of the sum of R3,600 000.00.' (emphasis added)

15. The first respondent submits in his heads of argument that ex facie the above provision, Eskom did not include its attorneys (applicant) 'as agents for the settlement'. In other words, the applicant's trust account was not the mandated account for payment, nor did Ms Nizimande designate the applicant's account as the account for payment. Thus, he submits that '*the Applicant was never mandated to receive into its trust account the sum of R3.6 million. As such it never became the lawful possessor of the funds. There was never an intention on the part of Eskom that the funds would go to the trust account of the Applicant. This is evident from the afore-cited paragraph 3.1.1 of Annexure MMM5.*' This submission is a repeat of what is contained in paragraph 12.4 of the answering affidavit, save that in the answering affidavit the first respondent went on to contend that '*There is therefore no basis for the Applicant to state that it was entrusted with the sum of R3.6 million by Eskom*'.
16. In my view, the first respondent has wholly misconstrued the issue of legal standing. The *locus standi* challenge is not brought on the basis that the applicant had insufficient interest in the relief sought. *Locus standi in iudicio* concerns the sufficiency and directness of a litigant's interest in proceedings which warrants his/her/it's title to prosecute the claim asserted. In *Four Wheel Drive Accessory Distributors CC v Rattan NO 2019 (3) SA 451 (SCA)*, par 7, the court held that 'Generally, the requirements for *locus standi* are these. The plaintiff must have an adequate interest in the subject matter of the litigation, usually described as a direct interest in the relief sought; the interest must not be too remote; the interest must be actual, not abstract or academic; and it must be a current interest and not a hypothetical one.'

17. The fabricated settlement agreement in question cannot be relied on in support of the contention that the applicant lacks *locus standi* on the basis that the applicant was not mandated in terms of the impugned agreement to receive the funds comprising the settlement amount. Apart from the fact that the entire document had been fabricated and the plaintiff's signature forged by the first respondent, including the fact that no settlement had in reality been concluded, there was also, for obvious reasons, no meeting of the minds between Ms Nzimande and Eskom. In consequence, the agreement was not legally valid and of no force and effect.⁶
18. Reliance was placed by the first respondent on the case of *Leysath*⁷ for the submission that it was incumbent upon the applicant to prove that the funds were 'entrusted' to it by Eskom, as 'entrustment' according to the first respondent, was a 'necessary part' of the applicant's case. He submitted that '*if the Applicant wants to be declared a lawful possessor of trust funds it must prove that such funds were entrusted to it.*'
19. *Leysath* involved a claim by the appellant, a practicing advocate, in terms of section 26(a) of the Attorneys Act, 53 of 1979⁸ for recovery from the

⁶ A valid contract is created provided that two or more persons seriously and deliberately give their consent to be contractually bound in a lawful undertaking. Once created, the legally valid contract gives rise to *iusta causa debendi*, that is, the legal ground from which the duty to render performance arises. Performance carried out in fulfilment of a valid contractual obligation is said to be rendered with *iusta causa*, whilst performance made in the absence of a valid contract may, by contrast, be said to have been rendered *sine causa*, in which case an action (*condictio*) arises for the recovery of what was given or done *sine causa* or *turpis causa* or *iniusta causa*.

⁷ *Leysath v Legal Practitioners' Fidelity Fund Board of Control* (770/2021) [2022] ZASCA 115 (28 July 2022) at par 24.

In any event, in *British Kaffrarian Savings Bank Society v Attorneys, Notaries and conveyancers Fidelity Gaurentee Fund Board of Control* 1978 (3) SA 242 (E), it was said that 'entrustment' comprises two elements namely: '(a) to place in the possession of something, (b) subject to a trust. As to the latter element, this connotes that the person entrusted is bound to deal with the property or money concerned for the benefit of others . . . '.

In the context of the factual matrix of this case, monies deposited by Eskom were entrusted to the Applicant, and, as soon as the monies were paid into the applicant's trust account, it became the possessor of the funds and it was only the Applicant who could further deal with such funds, for it was the applicant who then retained control of the funds and only the applicant could use the funds for the directed purpose of the funds.

⁸ Section 26(a) of the Attorneys Act reads as follows:

Attorneys Fidelity Fund, money that was held in trust on his behalf by the attorneys' firm, M F Martins Costa Attorneys (Costa Attorneys), as cover for his fees and which had been misappropriated by the firm. The Supreme Court of appeal held that the appellant was required to prove, by advancing such claim, that: (a) he had suffered pecuniary loss; (b) by reason of theft committed by Mr Costa; (c) of money entrusted by or on the appellant's behalf; (d) in the course of Mr Costa's practice.

20. The case of *Leysath* offers no support to the first respondent on the *locus standi* point or non-joinder point. Firstly, it is distinguishable on its facts and secondly, it involved an entirely different cause of action.
21. The present case (that is, pursuant to the abandonment of certain claims by the applicant) involves, amongst others, a claim by the applicant against the bank (FNB) for the restitution to it of funds that were held by the applicant in its trust account on behalf of Eskom at the time that the funds were ultimately stolen by the first respondent through fraudulent means. Such a claim lies against the bank that is enriched by the receipt of stolen funds and is therefore under a duty to restore the traceable proceeds of the stolen money.⁹ Such a claim is brought by way of one of the conditions.
22. In *Nissan*,¹⁰ a case that concerned credit balances on bank accounts, the court found that a bank which credited its customer's account is not liable to

'Subject to the provisions of this Act, the fund shall be applied for the purpose of reimbursing persons

who may suffer pecuniary loss as a result of –

(a) theft committed by a practising practitioner, his candidate attorney or his employee, of any money or other property entrusted by or on behalf of such persons to him or to his candidate attorney or employee in the course of his practice or while acting as executor or administrator in the estate of a deceased person or as a trustee in an insolvent estate or in any other similar capacity.'

⁹ See: *FirstRand Bank Limited v The Spar Group Limited* [2021] ZASCA 20. There the SCA reiterated what courts had previously held, namely, that that it is the bank (not the thief) that is enriched by the receipt of stolen funds and is therefore under a duty to restore the traceable proceeds of the stolen money to the claimant. If stolen money is paid into a bank account to the credit of the thief, the thief has as little entitlement to the credit representing the money so paid into the bank account as he would have had in respect of the actual notes and coins paid into the bank account

¹⁰ *Nissan South Africa (Pty) Ltd. v Marnitz NO and Others (Stand 186 Aeroport (Pty) Ltd. Intervening)* (27/2004) [2004] ZASCA 98; [2006] 4 All SA 120 (SCA); (1 October 2004), paras 16 & 28.

pay the amount to the customer if the customer came to the money by theft or fraud. In that case the customer knew that it was not entitled to the money credited to its account. Its appropriation of it subsequently amounted to theft. As far as the credit balance remaining on the account was concerned the court said the following:

'I agree ... that our law would be deficient if it did not provide a remedy for recovery of stolen money direct from the bank which received that money to the credit of the thief's account, for as long as the amount stands to the credit of the thief.'

23. In *Lombard*,¹¹ the court explained, in relation to what was said in *Nissan*, as follows:

"The implication is that the amount standing to the thief's credit may be recovered by condition, but not the amount that discharged a debt owed by the thief to the bank. *Nissan* was concerned with a credit balance on the perpetrator's account. The bank had no duty to account to its customer. Nor did the customer have a contractual or other right to the stolen funds. The bank, by remaining in possession of the funds without any corresponding liability to account to its customer, was enriched and liable to make restitution to the owner. Generally, where a customer deposits money in his account the customer becomes entitled to repayment but this is so only where the instruction given to the bank to collect or pay on his account pursuant to the general bank and customer contract is enforceable, not where it is *contra bonos mores*. The effect of *Nissan* is that where a thief deposits stolen money into his account any instruction disposing of the funds is unenforceable. Hence, there is no obligation on the bank to account to the customer. Consequently, the *bank* retaining the funds could well be enriched because it is not liable to account to its customer, but retains the funds. The account holder, well knowing that he is not entitled to the funds, would thus not

¹¹ *Absa Bank Ltd v Lombard Insurance Company Ltd, Firstrand Bank Ltd v Lombard Insurance Company Ltd* 2012 (6) SA 569 (SCA), par 14.

have been entitled to dispose of the funds credited to his account because any act of disposition would have been tantamount to theft.¹² (emphasis added)

24. In *Crots*,¹³ the Supreme Court of Appeal held that the *condictio furtiva* is a delictual action for the recovery of patrimonial loss as a result of theft. It is available to an owner or anyone who has an interest in the stolen thing, against a thief or his heirs.
25. The question then arises as to whether the applicant, who is not the owner of the funds, nonetheless has an interest in the stolen funds and the recovery thereof.
26. In respect of monies deposited in the trust account of an attorney's practice by a client (the trust creditor) the practice exercises exclusive control over the funds as trustee, agent or stakeholder or in any other fiduciary capacity.¹⁴ The nature of a trust account has been discussed in several cases. I need mention only a few. In *Wypkema v Lubbe* 2007 (5) SA 138 (SCA) the court endorsed what had been said about the nature of an attorney's trust account

¹² In *FirstRand Bank Limited v The Spar Group Limited* [2021] ZASCA 20, the court remarked that it is a key feature of the regime developed in the *Perry*, *Nissan* and *Lombard* cases that the claim to the credit balance in the thief's bank account lies against the bank rather than the thief herself. In the absence of any indebtedness to its client, his bank is enriched by the receipt of the funds.

In par 63, the following was said:

"It must be acknowledged, as *Perry NO's* case illustrates, that there is no small measure of difficulty in determining what *condictio* would be of application. But the general principle is clear. Once the bank has no liability to its customer in respect of the deposits made, the bank is enriched. The bank owns the deposits, and its assets have increased at the expense of the third party, whose funds were deposited. The third party is thereby impoverished. Absent an order upon the bank to make payment to the third party, the court would countenance the bank's unjust enrichment. The recognition of this unjust state of affairs has led our courts to recognise a remedy against the bank to pay to the third party the amount standing to the credit of its customer's account, as was done in *Joint Stock*. That remedy is, in this case, appropriate too.

As pointed out in *First National Bank of Southern Africa Ltd v Perry NO and Others* (100/99) [2001] ZASCA 37; [2001] 3 All SA 331 (A) (26 March 2001) at par 24, "...I think that the *Digest* provides an appropriate point of departure. Book 12 title 5 is devoted to this *condictio*. D 12.5.6 in the Watson edition attributes the following to Ulpian:

"Sabinus always said the early jurists were right in holding that the *condictio* would go for anything in someone's hands on an unlawful basis. Celsus shares that view."

¹³ *Crots v Pretorius* 2010 (6) SA 512 (SCA) par 3. See *John Bell & Co Ltd v Esselen* 1954 (1) SA 147 (A) for the requirements of the claim, and further discussed in *First National Bank of southern Africa Ltd v East Coast Design CC and others* 2000 (4) SA 137 (D).

¹⁴ Section 86(4) of the Legal practice Act, 28 of 2014.

in *Fuhri*,¹⁵ namely, that trust creditors have no control over the attorney's trust account; ownership in the money in the account vests in the bank or other institution in which it has been deposited (*S v Kotze* 1965 (1) SA 118 (A) at 124); and it is the attorney who is entitled to operate on the account and to make withdrawals from it (*De Villiers NO v Kaplan* 1960 (4) SA 476 (C)); The only right that trust creditors have, is the right to payment by the attorney of whatever is due to them, and to that extent they are the attorney's creditors. Such right to payment arises from the relationship between the parties and has nothing to do with the way in which the attorney handles the money in his account. The court in *Wypkema* thus endorsed the proposition that the attorney has full control and responsibility concerning trust account monies. Significantly, the court held that 'when an attorney draws a cheque on his trust account, he exercises his right to dispose of the amount standing to the credit of that account and does so as principal and not in a representative capacity.'

27. An attorney however remains obliged to account to his client for trust funds and does so as principal.¹⁶ An attorney who holds an amount of money in his trust account on behalf of a client is obliged to use it for no other purpose than instructed by the client.¹⁷

28. The applicant remains duty bound to account to its client for the misappropriated funds that were ultimately not utilised for the benefit of the client, specifically in circumstances where the client had not authorised use of the trust funds for payment to the first respondent personally. The fact

¹⁵ *Fuhri v Geyser and Another* 1979 (1) SA 747 (N) at 749 C-E

¹⁶ See: *Potgieter v Capricorn Beach Homeowners Association and Another* [2012] ZAWCHC 66.

¹⁷ See: *Frikkie Pretorius Inc and Another v Glass* 2011 (2) SA 407 KZP at par 19 and authority there cited. See too: *Law Society of the Cape of Good Hope v Appie* (549/11) [2011] ZANHC 34 (25 November 2011), where the following was said:

"The principle emerging from our jurisprudence is that the utilisation of the funds in a trust account without the authority of the person on whose behalf the funds are held for purposes which do not benefit the beneficiary and in circumstances where the beneficiary or the benefactor has not authorised such use amounts to misappropriation of trust money, which in turn is a form of theft or even fraud. See *Law Society of the Cape of Good Hope v Budricks* supra at 17G-H; *Cape Law Society v Parker* 2000 (1) SA 582 (C) at 586I-J and the definition of theft and or misappropriation in *Law Society, Cape v Koch* 1985 (4) SA 379 (C) at 382C-I."

that the applicant was defrauded by the first respondent into believing that payment was being made in respect of a genuine settlement and into the plaintiff's account,¹⁸ will not release the applicant from its obligation, as principal, to account to its client for the funds.¹⁹ In my view, the applicant has established a direct and substantial interest in the subject matter of the application, including the declaratory relief sought. The applicant's case has always been that 'by virtue of the money being in trust, then the firm is solely responsible for the money, and the manner in which it is paid over' and that the first respondent was well aware that 'without the mandate given by Eskom to the applicant, it would not have been possible to succeed in the unlawful transaction.'

¹⁸ The first respondent's denial that he defrauded the applicant is untenable. He falsely misrepresented that a genuine settlement had been concluded in terms of which the applicant's client had agreed to make payment to Ms Nzimande. The misrepresentation was false and made deliberately, and induced the applicant to transfer trust funds to the first respondent pursuant to his forgery of the FNB letter in which he certified his own bank account as the designated account for payment. That this unlawful conduct is what induced the applicant to erroneously pay the funds into the wrong account, to its prejudice, permits of no dispute. The first respondent intended that result and was well aware that he had no entitlement to the funds.

¹⁹ See *Fourie v Van der Spuy and De Jongh Inc. and Others* (65609/2019) [2019] ZAGPPHC 449; 2020 (1) SA 560 (GP) (30 August 2019) par 31 and the authority cited in par 21 of that judgment.

29. As regards the declaratory relief sought, it is trite that the grant of declaratory relief is discretionary.²⁰ The jurisdictional prerequisites for the grant of declaratory relief were discussed in *Cordiant Trading*.²¹
30. From the various authorities quoted above, ultimately the capital amount deposited by a client into the trust account of an attorney remains the property of the client. The applicant never contended otherwise. The attorney merely is a custodian of the trust funds and invests or uses the money, as principal, in terms of the client's wishes. The applicant took

²⁰ Section 21(1)(c) of the Superior Courts Act, which provides:

"Persons over whom and matters in relation to which Divisions have jurisdiction

21 (1) A Division has jurisdiction over all persons residing in or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognizance, and has the power –

(c) in its discretion, and at the instances of any interested person, to enquire into and determine any existing, future, or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination." (Emphasis added)"

As pointed out by the Constitutional court in *JT Publishing (Pty) Ltd & Another v Minister of Safety & Security*:

"I interpose that enquiry because a declaratory order is a discretionary remedy, in the sense that the claim lodged by an interested party for such an order does not in itself oblige the Court handling the matter to respond to the question which it poses, even when that looks like being capable of a ready answer. A corollary is the judicial policy governing the discretion thus vested in the Courts, a well-established and uniformly observed policy which directs them not to exercise it in favour of deciding points that are merely abstract, academic or hypothetical ones. I see no reason why this new Court of ours should not adhere in turn to a rule that sounds so sensible. Its provenance lies in the intrinsic character and object of the remedy, after all, rather than some jurisdictional concept peculiar to the work of the Supreme Court or otherwise foreign to that performed here."

²¹ *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* 2005 (6) SA 205 (SCA) para 16-18, where the following was said:

"[16] Although the existence of a dispute between the parties is not a prerequisite for the exercise of the power conferred upon the High Court by the subsection, at least there must be interested parties on whom the declaratory order would be binding. The applicant in a case such as the present must satisfy the court that he/she is a person interested in an 'existing, future or contingent right or obligation' and nothing more is required (*Shoba v Officer Commanding, Temporary Police Camp, Wagendrif Dam* 1995 (4) SA 1 (A) at 14F)..."

[17] It seems to me that once the applicant has satisfied the court that he/she is interested in an 'existing, future or contingent right or obligation', the court is obliged by the subsection to exercise its discretion. This does not, however, mean that the court is bound to grant a declarator but that it must consider and decide whether it should refuse or grant the order, following an examination of all relevant factors..."

[18] Put differently, the two-stage approach under the subsection consists of the following. During the first leg of the enquiry the court must be satisfied that the applicant has an interest in an 'existing, future or contingent right or obligation'. At this stage the focus is only upon establishing that the necessary conditions precedent for the exercise of the court's discretion exist. If the court is satisfied that the existence of such conditions has been proved, it has to exercise the discretion by deciding either to refuse or grant the order sought. The consideration of whether or not to grant the order constitutes the second leg of the enquiry."

possession of funds entrusted by Eskom to it when payment was made by its client into the applicant's trust account²² and it is the applicant who thereafter retained control over the funds, to be used only by it albeit as instructed by the client. The applicant has established that it is a person interested in an 'existing, future or contingent right or obligation'. The declaratory relief will also be binding on interested parties such as the first respondent, the applicant, Eskom and the 3rd, 4th, 6th and 7th respondents.

31. I am persuaded that the applicant has established its locus standi in these proceedings and its entitlement to the reduced relief, including the declarator sought in paragraph 1 of the draft order handed up to court at the hearing of the matter. As regards the declarator and further order sought in paragraphs 2.1 and 2.2 of the draft, I am not persuaded that such relief is necessary having regard to the relief provided for in paragraphs 2.4 to 2.7 of the draft order.
32. As regards the issue of costs, the first respondent sought to oppose these proceedings on unjustifiable grounds. Although he did not pursue other technical points raised in his answering affidavit, it is clear that he misconceived the legal basis upon which the applicant exercised legal standing in this matter. He ought never to have opposed these proceedings and the applicant should therefore not be out of pocket for the costs it occurred in vindicating its claim. I see no basis to depart from the general rule that costs are to follow the result.
33. Accordingly the following order is granted:

ORDER:

26.1 It is declared that an amount of R3,600 000.00 (Three million and six hundred thousand rand) paid into the Applicant's Nedbank Trust

²² See fn 7 above. See too: *Incorporated Law Society, Transvaal v Viljoen* 1958 (4) SA 115 (T) where the court held that when trust money is handed to a firm, it is the duty of the firm to keep it in possession and to use it for no other purpose than that of the trust. In the context of the present case, this means that trust monies held by the applicant were for the purpose directed by its client - Eskom.

account number 1014 508 428 on 17 December 2020 by Eskom Holdings Soc Limited was in the lawful possession of the Applicant until 21 December 2020 when the applicant paid such amount to the first respondent's First National Bank Account Number 6270 286 1073;

- 26.2 The Second Respondent is ordered to forthwith transfer the frozen funds in an amount of R1,061 827.61 (one million sixty one thousand eight hundred and twenty seven rand and sixty one cents) plus interest, (being the balance of standing credit in the First Respondent's FNB Account, number 6270 286 1073) to the Applicant's Nedbank Trust Account Number 1014 508 428;
- 26.3 The Fifth Respondent is ordered to forthwith transfer the sum of R118 000.00 (which amount is held on behalf of the first respondent in the Trust Account of Mbanjwa Inc Attorneys at First Rand Bank, Account number 0000 0620 6007 1231) to the Applicant's Nedbank Trust Account Number 1014 508 428 in accordance with the first respondent's tender to pay same to the applicant;
- 26.4 The Second Respondent is ordered to forthwith transfer funds in the amount of R400,000.00 (Four hundred thousand rand) plus interest, (being the balance of standing credit in the Sixth Respondent's FNB Account, number 6253 2459 717) to the Applicant's Nedbank Trust Account Number 1014 508 428;
- 26.5 The Second Respondent is ordered to forthwith transfer funds in the amount of R400,000.00 (Four hundred thousand rand) plus interest, (being the balance of standing credit in the Seventh Respondent's FNB Account, number 6251 9174 884) to the Applicant's Nedbank Trust Account Number 1014 508 428;
- 26.6 The First Respondent is ordered to pay the costs of this application;
- 26.7 There shall be no order of costs against the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth and Tenth respondents.

**AVRILLE MAIER-FRAWLEY
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, JOHANNESBURG**

Date of hearing: 11 April 2023
Judgment delivered 11 July 2023

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on Caselines and release to SAFLII. The date and time for hand-down is deemed to be have been at 10h00 on 11 July 2023.

APPEARANCES:

Counsel for Applicants: Ms R Baboolal-Frank (advocate)
Instructed by: Malebye Motaung Mtembu Attorneys

For Third Respondent: Ms L. Mbanjwa (attorney)
Attorneys for first respondent: L. Mbanjwa Incorporated Attorneys