THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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

Date: **21 April *2022*** Signature:

CASE NO: 34636/2020

In the matter between:

CZOYE CROSSMAN	Applicant
And	
CAPITAL ALLIANCE GROUP RISK A DIVISION OF LIBERTY GROUP LIMITED	First Respondent
IEMAS FINANCIAL SERVICES LIMITED	Second Respondent
TSA ADMINISTRATION (PTY) LTD	Third Respondent
GARETH BEZUIDENHOUT	Fourth Respondent

Coram: NICHOLS AJ

Delivered: 21 April 2022 – This judgment was handed down electronically by circulation to the parties' representatives *via* email, by being uploaded to the *CaseLines* system of the GLD and by release to SAFLII. The date and time for hand-down is deemed to be 11H00 on 21 April 2022.

JUDGMENT AND ORDER

NICHOLS AJ,

Introduction

[1] This application concerns an Umbrella Group Death, Accidental Death, Educator and Permanent Disability Benefits Policy issued by the first respondent, Capital Alliance Group Risk, a division of Liberty Group Ltd (Capital Alliance) to the third respondent, TSA Administration (Pty) Ltd (TSA) as the sponsor (the Policy). The second respondent, Iemas Financial Services Ltd (IEMAS) is a participating employer as contemplated in the Policy. The applicant, Ms Czoye Crossman (Crossman) contends that she is the correct beneficiary nominated by Mr Gregory Bezuidenhout (the deceased) to receive his death benefits payable in terms of the Policy as opposed to the fourth respondent, Mr Gareth Bezuidenhout (Gareth) to whom these benefits were instead paid.

[2] Crossman accordingly seeks a declaratory order and money judgment as follows:
(a) That the 2019 Nomination by the deceased in favour of Gareth be declared to be invalid, null and void;

(b) That the 2014 Nomination submitted by the deceased to IEMAS be declared to be the only valid nomination of a beneficiary by the deceased;

(c) That the benefits paid to Gareth are declared to have been incorrectly paid to him.

(d) An order that Capital Alliance, IEMAS and Gareth are jointly and severally liable to Crossman for payment of the sum of R 1 901 267.28, plus interest and costs on an attorney and client scale.

[3] In the alternative, Crossman seeks an order that the matter be referred back to Capital Alliance to deliberate an equitable distribution of the death benefits payable in terms of the Policy.

[4] No relief is sought against TSA which is cited as an interested party only and a party to the contract relied upon by Crossman.

The relevant common cause facts

[5] The deceased was employed by IEMAS from December 2002 until his death on 6 July 2019. At the time of his death, Crossman had been the deceased's life partner for over ten years.

[6] By virtue of his employment with IEMAS, the deceased became and remained a member as contemplated in the Policy until his death.

[7] On 16 January 2014, the deceased completed and signed a nomination form in the presence of two witnesses (the 2014 Nomination). He nominated Crossman to receive 100% of the proceeds of the death benefit that would be payable in terms of the Policy upon his death. The deceased provided this 2014 Nomination to IEMAS and it was retained in his employee file.

[8] During January 2019 the deceased informed IEMAS that he intended to change beneficiaries for his pension, provident and death benefits and he was provided with the requisite documents to effect these changes on 7 January 2019.

[9] Subsequent to the deceased's death, Crossman completed a death benefit claim on 11 July 2019 pursuant to the 2014 Nomination. This claim form was submitted to IEMAS for payment by Capital Alliance in terms of the Policy. IEMAS in turn submitted the claim form to Capital Alliance on 16 July 2019.

[10] On 23 July 2019 another nomination of beneficiary form was discovered by employees of IEMAS in the deceased's desk. This form was signed by the deceased on 20 May 2019 and nominated Gareth as the beneficiary of 100% of the death benefit payable in terms of the Policy (the 2019 Nomination). It was not witnessed and had been left in the deceased's desk drawer.

[11] IEMAS submitted the 2019 Nomination to Capital Alliance on 23 July 2019. Capital Alliance effected payment of the death benefit to Gareth on 18 December 2019 in terms of the 2019 Nomination on the basis that he had been nominated as the most recent beneficiary by the deceased in terms of the 2019 Nomination submitted by IEMAS.

[12] Aggrieved by this decision, Crossman referred a complaint to the Ombudsman for Long-Term Insurance (the Ombudsman) in March 2020. She complained that Capital Alliance failed to honour the terms of both the 2014 nomination form and the 2019

nomination form by effecting payment of the deceased's death benefit in terms of the Policy to Gareth.

[13] On 1 July 2020, the Ombudsman informed Crossman that his office could not make a determination that affected third parties over whom it had no jurisdiction, like Gareth, or who were not a party to the complaint proceedings, like IEMAS. The Ombudsman therefore declined to consider the merits of the complaint and expressed the view that the matter would be more appropriately resolved by a court of law, with the joinder of all the parties involved. That ruling resulted in the launch of these proceedings before me.

[14] The relevant material and express terms and provisions of the Policy are the following:

(a) A 'beneficiary' is defined as '*the person nominated in writing by the member to the participating employer to receive part or all of the member's death or accidental death benefits*.' In this case Crossman and Gareth fall within the definition of beneficiary.

(b) A 'member' is defined as '*an eligible employee who is insured under the Policy for the death, educator and permanent disability benefits.'* In this case member means the deceased.

(c) 'Benefits' is defined as '*the Death, Accidental Death, Educator or Permanent Disability Benefits selected and applied for by the Participating Employer in respect of the Member, which shall be paid by Liberty upon the occurrence of the Member's death or disablement whilst in the employ of the Employer, subject at all times to the applicable Insurance Limits*.'

(d) Reference to sponsor and participating employer in the Policy means TSA and IEMAS respectively.

(e) In terms of clause 10.2, IEMAS' application for Insurance, the Policy document, the schedules and any endorsements to the Policy document constitute the entire contract between Capital Alliance, TSA and IEMAS. '*Capital Alliance is not bound by any alteration or amendment unless such alteration or amendment has been reduced to writing and signed by the managing director of Capital Alliance or his duly authorised representative and is made an endorsement of this Policy. No contract between Capital Alliance and any other person other than the Sponsor and Participating Employer is hereby constituted or implied.'*

(f) IEMAS, as the participating employer, is required to pay the premiums due to Capital Alliance (clause 3.2).

(g) The claims procedure for death claims requires that TSA provide written notice to Capital Alliance of any death benefit or accidental death claim within the required notification period (clause 7.1.1).

(h) The claims procedure for disability claims requires that TSA provide written notice to Capital Alliance of any impending permanent disability benefit claim within the required notification period (clause 7.2.1).

(i) TSA must ensure that all claim documentation is received by Capital Alliance (clause 7.7).

(j) In terms of clauses 9.1 and 9.3 the scheme may be discontinued or a participating employer's participation may be discontinued without reference to the members of the scheme.

(k) Clause 9.2 entitles TSA to cancel the Policy within 30 days from the commencement date and participating employers are entitled to cancel their participation within 30 days of the employer's entry date.

(l) The nomination of a beneficiary is provided for in clause 8.2. This sub-clause provides for an employee / member to nominate a beneficiary to receive the death and accidental death benefit subject to, *inter alia,* the following terms and conditions:

(i) *'the nomination is made in writing and is recorded by the participating employer*' (clause 8.2.1);

(ii) 'the member may change or withdraw the nomination at any time provided that such change or withdrawal is made in writing' (clause 8.2.2);

(m) Clause 11 records the mandatory dispute resolution processes that the contracting parties are obliged to follow. It does not make provision for members or beneficiaries of members to refer disputes. It provides that TSA and Capital Alliance or IEMAS and Capital Alliance will attempt to resolve any dispute between them that arises from the interpretation or implementation of the Policy. If the parties are unable to resolve the dispute, the matter will be referred to the Ombudsman. If the dispute is not resolved by the Ombudsman or if the parties are unhappy with Ombudsman's determination, the dispute must be referred to

arbitration within the requisite period failing which any claim against Capital Alliance shall fall away.

The parties' contentions

[15] Crossman contends that 'the wording of the nomination form' prescribed the manner for an effective and valid revocation and change of beneficiary to occur. That in order for a revocation and change of beneficiary to be effective and valid, such must be effected by the completion of a new nomination form that must be submitted to IEMAS for it to record the new beneficiary.

[16] Therefore, since the deceased did not submit the 2019 Nomination to IEMAS, he did not comply with the terms and condition of the nomination form and the Policy and accordingly the 2019 Nomination was null and void.

[17] She further contends that the 2019 Nomination was discovered and submitted at a point in time after she had already accepted the benefit in terms of the Policy on the basis of the 2014 Nomination. This acceptance was effected by the completion and submission of the required claim form to IEMAS, which created a contract between her and Capital Alliance.

[18] Although not expressly stated in the founding papers, it was also contended on behalf of Crossman that the Policy created a *stipulatio alteri* for the benefit of the deceased, who upon acceptance of the benefits became a contractual party to Policy, with Capital Alliance and IEMAS. As a party to the Policy, the deceased acquired rights and incurred obligations such as the obligation to pay premiums. Upon the death of the deceased the nominated beneficiary is entitled to accept the benefit and Capital Alliance is obliged to pay the proceeds to her. Accordingly, Crossman's acceptance of the benefits created a contractual relationship between her and Capital Alliance.

[19] Crossman also averred that IEMAS' recording of the 2019 Nomination was an attempt by it to vest Gareth with rights in terms of the Policy when the benefits in terms of that Policy had already been accepted by her.

[20] Notwithstanding the fact that it disputed most of Crossman's averments, Capital Alliance's opposition to this application is succinctly encapsulated in four arguments. The first argument is that Crossman's claim is fundamentally flawed because it is premised upon the assertion that the Policy was simply an agreement for the benefit of a third party. That it

created a *stipulatio alteri* in her favour as the nominated beneficiary thereby creating and imposing contractual rights and obligations between her and Capital Alliance. The Policy, it asserted, is one which has only been concluded between Capital Alliance, TSA and IEMAS (the contracting parties).

[21] Whilst it may confer benefits on members and/or beneficiaries, it does not create any contractual nexus between Capital Alliance and a beneficiary, upon the death of a member. The policy does not create a *stipulatio alteri* in favour of a nominated beneficiary in circumstances where the member himself is not a contracting party, nor was it intended by the contracting parties that such a *stipulatio alteri* would be created.

[22] The second argument is that clause 8.2.2 of the Policy entitled the deceased to revoke and change his nominated beneficiary at any time. The Policy only requires this change to be in writing to be effective. There are no additional requirements prescribed by the Policy for the revocation and change of a nominated beneficiary to be valid.

[23] In the event that Crossman is found to be a party to the Policy, then the third argument advanced is that Crossman was required to refer this dispute to arbitration in accordance with the dispute resolution procedure provided for in the Policy.

[24] Capital Alliance's final contention is that Crossman's application is replete with factual disputes vis-à-vis IEMAS and herself regarding the nomination form that was the last form completed and signed by the deceased and recorded by IEMAS. Self-evidently Capital Alliance cannot have personal knowledge of occurrences within IEMAS and since Crossman has been aware of these material disputes of fact from inception of this application, she ought rather to have instituted action proceedings. In that way witnesses could have been subpoenaed if necessary and disputes of fact could have been appropriately ventilated.

[25] Capital Alliance avers that it made payment of the death benefit due upon the death of the deceased in accordance with the terms of the Policy as directed by the participating employer, IEMAS. It disputes that it received a claim from Crossman or that receipt of a claim resulted in the conclusion of a contract between her and Capital Alliance.

[26] The nub of Crossman's relief is directed at Capital Alliance. It is therefore hardly surprising that IEMAS and Gareth challenge Crossman's *locus standi* to institute these proceedings and that they contend that the application discloses no discernible cause of action against either of them.

The issues

[27] The issues that require determination in this matter are whether:

(a) The Policy constitutes a *stipulatio alteri* that created a contractual nexus between Crossman and Capital Alliance.

(b) Crossman is entitled to the declaratory orders sought.

(c) Any cause of action has been disclosed against IEMAS and/or Gareth in the founding affidavit.

(d) The alternative relief sought is competent and appropriate.

The applicable legal principles

[28] It is trite that a *stipulatio alteri* is a contract between two parties that is designed to enable a third party to come in as a party to a contract with one of the other two. As stated by Smalberger JA in *Total South Africa (Pty) Ltd v Bekker NO*[1]: '*The mere conferring of a benefit is therefore not enough; what is required is an intention on the part of the parties to a contract that a third person can, by adopting the benefit, become a party to the contract.*'[2] The original contracting parties must also intend to confer enforceable rights upon the third party, upon acceptance of the benefit conferred by the contract.[3]

[29] In *Sage Life Ltd v Van der Merwe,*[4] a decision emanating from this division, the court was required to determine whether a member of a group life insurance scheme was a party to the contract between the insurer and the scheme. In determining whether the contract between the insurer and the group life insurance scheme constituted a contract for the benefit of a third party, namely the member, the court restated and applied the general principles underlying a *stipulatio alteri.* The court confirmed that the third party must indicate that he has become a party to the contract by accepting the benefit before he becomes entitled to enforce any obligations under the contract.[5] It must also be clear from the terms of the contract between the original parties that it is '*meant for the benefit of a third in the*

[1] *Total South Africa (Pty) Ltd v Bekker NO* 1992 (1) SA 617 (A).
[2] *Bekker* ibid at 625E-G.
[3] *Unitrans Freight (Pty) Ltd v Santam Ltd* 2004 (6) SA 21 (SCA) para 14.
[4] *Sage Life Ltd v Van der Merwe* 2001 (2) SA 166 (W).
[5] *Sage Life* ibid at 168H-I.

sense that a third party is meant to step in, whether as an additional party or in lieu of one of the others.'[6]

[30] In order to ascertain the intention of the contracting parties and whether the Policy constitutes a *stipulatio alteri* that created a contractual nexus as contended for by Crossman, it is necessary to have regard to the Policy wording itself.

[31] The court in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[7] has authoritatively determined the approach that must be adopted in the interpretation of contracts and statutes. This exercise must take account of the language used, understood in the context in which it is used, and having regard to the purpose of the provision. In *Capitec Bank Holdings Limited v Coral Lagoon Investments 194 (Pty) Ltd*[8] the SCA restated these principles and held as follows:
'…*the triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitutes the enterprise by recourse to which a coherent and salient interpretation is determined…*

Endumeni is not a charter for judicial constructs premised upon what a contract should be taken to mean from a vantage point that is not located in the text of what the parties in fact agreed. Nor does Endumeni licence judicial interpretation that imports meanings into a contract so as to make it a better contract, or one that is ethically preferable.'

[32] I have already made reference, earlier in this judgment, to those provisions of the Policy that are relevant to the determination of the issues. Having regard to these express provisions of the Policy, it is apparent and clear that the nomination form does not form part of the Policy documents. The contracting parties are Capital Alliance, TSA and IEMAS. Clause 10.2 specifically records that no contract is constituted or implied between Capital Alliance and any other person, other than TSA and IEMAS.

[33] In terms of the Policy, IEMAS is responsible for payment of the premiums to Capital Alliance. TSA is responsible for the submission and notification of claims to Capital Alliance. The contracting parties are afforded rights to terminate the Policy that require no notification

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[6] *Sage Life* note 4 above at 169A.

[7] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 ALL SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18.

[8] *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* 2022 (1) SA 100 (SCA).

to the members and/or beneficiaries. The Policy also makes provision for members to effect an individual policy for themselves upon their retirement or the termination of their services with the participating employer. Such provision would be meaningless and serve no purpose if a contract already existed between the members and Capital Alliance.

[34] In the circumstances, there is simply no basis for the conclusion that the deceased, as a member, was a contractual party to the Policy. Further, the Policy provisions are not indicative of an intention by the contracting parties that the members and/or beneficiaries should become parties to the contract. To the contrary, they indicate quite clearly that the members and/or beneficiaries are not intended to become parties to the Policy.

[35] In the circumstances, having regard to the express provisions of the Policy, I am of the view that the Policy does not constitute a *stipulatio alteri* in any form and no contractual privity was created at any time between Capital Alliance and Crossman. It follows, in my view that Crossman has, as a result failed to establish her *locus standi* to institute these proceedings.

[36] Although my finding regarding the lack of contractual privity and *locus standi* are dispositive of this matter, in the event that I am wrong on these points, I turn now to consider Crossman's contentions regarding the completion of the 2019 Nomination.

[37] The contention that the revocation and change of beneficiary must be effected in accordance with the 'terms of the nomination form' is misconceived. The nomination form is patently not one of the documents constituting the Policy contract as defined in clause 10.2 of the Policy.

[38] The provisions of clause 8.2.2 of the Policy entitled to the deceased to revoke and change his nominated beneficiary at any time. The Policy only requires the amendment to be in writing to be effective. There are no additional express requirements prescribed by the Policy such as the need for the amended nomination to be witnessed or 'submitted' to the employer.

[39] Crossman has accepted that the deceased signed the 2019 Nomination. She does not provide any authority or persuasive argument to support the submission that the 2019 Nomination had to be submitted by the deceased to IEMAS for it to be 'recorded by the employer' to be valid. The Policy does not provide a definition of record and accordingly IEMAS and Capital Alliance were entitled to deal with this aspect as they did.

[40] Crossman accepts that Capital Alliance received the 2019 Nomination after the submission of her 2014 Nomination. She also accepts that Capital Alliance was advised by IEMAS of the circumstances surrounding the discovery of the 2019 Nomination after the death of the deceased. That it was informed that the 2019 Nomination was the latest nomination obtained and on record with IEMAS who advised that payment of the death benefit should be paid to Gareth. Therefore, insofar as there are any disputes of fact, vis-à-vis Crossman and Capital Alliance, regarding the latest nomination form completed by the deceased and recorded by IEMAS, these must be resolved in favour Capital Alliance on the basis of the test enunciated in *Plascon-Evans.*[9]

[41] Further, insofar as there are any disputes of fact, vis-à-vis Crossman and IEMAS, regarding the 2019 Nomination, these must also be resolved in favour IEMAS on the basis of the test enunciated in *Plascon-Evans.*[10]

[42] The founding papers do not disclose a discernible cause of action vis-à-vis IEMAS. It is a well-established rule that an applicant in motion proceedings must make out her case in the founding affidavit and not in the replying affidavit. In *Faber v Nazerian*[11] Molahlehi J restated the applicable principles as follows: '*This rule is based on the principle that the applicant stands or falls by his founding affidavit. The rule is also based on the procedural requirement of the motion proceedings which requires that the applicant should set out the cause of action in both the notice of motion and the supporting affidavit. The notice of motion and the founding affidavit form part of both the pleadings and the evidence. The basic requirement is also that the relief sought has to be found in the evidence supported by the facts set out in the founding affidavit'.*[12]

[43] The applicant will not be permitted to supplement her case in the replying affidavit unless special circumstances exist for her to do so.[13] Molahlehi J also considered the approach that should be adopted by a court in the exercise of a judicial discretion when considering whether to allow new facts and averments to be introduced in the replying affidavit. He held:

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[9] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634E-635D.

[10] *Plascon Evans* ibid.

[11] *Faber v Nazerian* (2012/42735) [2013] ZAGPJHC 65 (15 April 2013).

[12] *Faber* ibid para 22.

[13] *Poseidon Ships Agencies (Pty) Ltd v African Coaling and Exporting Co (Durban) (Pty) Ltd and Another* 1980 (1) SA 313 (D) at 315H-316A.

'The approach to adopt, in considering whether to allow new matter in the replying affidavit, received attention in Juta and Co Ltd and Others v De Koker 1994 (3) SA 499 (T) at 510F-H, where the Court accepted and quoted with approval what was said in the headnote in Shakot Investment (Pty) Ltd v Town Council of Borough of Stanger 1976 (2) SA 701 (D), where the Court held that: "In consideration of the question whether to permit or strike out additional facts or grounds for relief raised in the replying affidavit, a distinction must, necessarily, be between a case in which the new material is first brought to light by the applicant who knew of it at the time the when his founding affidavit was prepared and a case in which facts alleged in the respondent's answering affidavit reveal the existence of a further ground for relief sought by the applicant. In the latter type of case the Court would obviously more readily allow the applicant in his replying affidavit to utilise and enlarge upon what has been revealed by the respondent and to set up such additional ground for relief as might arise therefrom."[14]

[44] The averments in the replying affidavit to IEMAS' answering affidavit seek to set out and establish Crossman's cause of action vis-à-vis IEMAS. These averments evince of no newly discovered facts or special circumstances and I am drawn to the ineluctable conclusion that there is no reason why they should not have been properly set out in the founding papers. Accordingly, I am disinclined to exercise my discretion and allow the introduction of the cause of action in reply.

[45] The founding papers also do not disclose a discernible cause of action vis-à-vis Gareth, notwithstanding the relief sought against him. The fact that he is the beneficiary and recipient of the proceeds of the death benefit does not, without more, entitle Crossman to cite him as a party and to seek the relief claimed with a concomitant punitive costs order. It does not assist Crossman to state that the Ombudsman directed her to institute these proceedings with the joinder of Gareth. It is clear that the Ombudsman did not make a determination on the merits of her claim, nor did he direct or propose application proceedings as the most appropriate manner in which to present this matter to a court for adjudication.

[46] It is trite that the duty to allege and prove *locus standi rests on the party* instituting the proceedings.[15] As stated by Schippers JA in *Four Wheel Drive CC*[16]*:*
'The rule that only a person who has a direct interest in the relief sought can claim a remedy, is no more clearly expressed than in the judgment of Innes CJ in Dalrymple & others v Colonial Treasurer 1910 TS 372 at 379 "The general rule of our law is that no man can sue in respect of a wrongful act,

[14] *Faber* note 11 above para 25.
[15] *Four Wheel Drive CC v Leshni Rattan NO* (1048/17) [2018] ZASCA 124 (26 September 2018) para 7.
[16] *Four Wheel Drive CC* ibid at para 8.

unless it constitutes a breach of a duty owed to him by the wrongdoer, or unless it causes him some damage in law."

[47] It may well be that Crossman does notionally have a cause of action against Gareth however, it is not this Court's role to discern, establish and assert such on her behalf. I am confined to issues before me.[17]

[48] Given my findings that the Policy does not constitute a *stipulatio alteri* and the validity of the 2019 Nomination, I do not consider it necessary to make a finding in relation to Capital Alliance's arguments that the matter should be referred to arbitration or that it should have been instituted by action proceedings due to the anticipated disputes of fact.

[50] My final consideration is in regard to the alternative relief. Crossman is not entitled to this relief. The request for such relief is misplaced. It is clear from the Policy wording and it is common cause that the death benefit is paid from an unapproved group life lump sum directly to the deceased's last nominated beneficiary/beneficiaries. Crossman was informed that an employer and insurer had no discretion when processing payments under this benefit and that there is no statutory or other requirement to confirm the financial dependents of the deceased prior to payment being effected.

[51] By contrast, benefits payable under the pension and provident fund (PPF) are governed by s37C of the Pension Fund Act 24 of 1956 (the PFA). Before effecting payment of any benefit, the trustees of the PPF are required to investigate and determine all financial dependents of the deceased, where after allocation of the benefits are made according to dependency.

[52] The alternative relief appears to be premised upon a misunderstanding that s37C of the PFA applies equally to death benefits. Alternatively, that a court may, in the exercise of a discretion, order such relief. Regardless and notwithstanding Crossman's failure to make out any case for this alternative relief, such an order is not competent in the circumstances of this case.

Costs

[53] The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for

[17] *Four Wheel Drive CC* note 15 above at para 21 and 22.

doing so.[18] IEMAS and Gareth seek a punitive costs order against Crossman on the same scale of the punitive cost order sought in the relief claimed.

[54] Upon a consideration of the appropriateness of a punitive costs order, Madlanga J noted the following in *Tjiroze v Appeal Board of the Financial Services Board*[19]:

'In Public Protector v South African Reserve Bank, Mogoeng CJ noted that "[c]osts on an attorney and client scale are to be awarded where there is fraudulent, dishonest, vexatious conduct and conduct that amounts to an abuse of court process". (Public Protector v South African Reserve Bank [2019] ZACC 29; 2019 (6) SA 253 (CC); 2019 (9) BCLR 1113 (CC) at para 8). Although that was in the minority judgment, I do not read the majority judgment to differ on this. In the majority judgment Khampepe J and Theron J further noted that "a punitive costs order is justified where the conduct concerned is 'extraordinary' and worthy of a court's rebuke" (para 226). Both judgments referred to Plastic Converters Association of SA, in which the Labour Appeal Court stated:

> *"The scale of attorney and client is an extraordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible manner. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium." (Plastic Converters Association of SA on behalf of Members v National Union of Metalworkers of SA [2016] ZALAC 39; (2016) 37 ILJ 2815 (LAC) at para 46.'*[20]

[55] Punitive costs are frequently awarded against a party whose conduct is considered an abuse of the process of court.[21] Costs have also been awarded *de bonis propriis* in circumstances where an attorney's lack of experience or familiarity with the rules is not considered an acceptable excuse for the unnecessary incursion of costs and waste of time.[22]

[56] However, I cannot conclude, in the circumstances of this case that the manner in which Crossman conducted the litigation in this matter is deserving of this Court's opprobrium in the form of a punitive costs order.

Order

[57] In the circumstances I make the following order:

(a) The application is dismissed.

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[18] *Myers v Abramson*, 1951(3) SA 438 (C) at 455.

[19] *Tjiroze v Appeal Board of the Financial Services Board* [2020] ZACC 18.

[20] *Tjiroze* ibid at para 23.

[21] *Santam Ltd and Others v Bamber* 2005 (5) SA 209 (W) at 212B-C.

[22] *South African Express Ltd v Bagport (Pty) Ltd* 2020 (5) SA 404 (SCA) para 37; *Huysamen and Another v Absa Bank Ltd and Others* (660/2019) [2020] ZASCA 127 (12 October 2020) para 12 and 21.

(b) The applicant is ordered to pay the first, second and fourth's respondents costs on a party and party basis.

T NICHOLS

Acting Judge of the High Court

Gauteng Local Division, Johannesburg

Date Heard	:	11 August 2021
Date Judgement Delivered	:	21 April 2022
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