IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A5067/2020
COURT A QUO CASE NO: 43327/2012

1. Reportable: No
2. Of interest to other judges: No
3. Revised: Yes

(Signature)
Date: 31/1/2022

In the appeal in the matter between:

COLLATZ; CHERYL-ANNE MARGUERITE	First applicant
COLLATZ; CHERYL-ANNE MARGUERITE N.O.	Second applicant

and

ALEXANDER FORBES FINANCIAL SERVICES (PTY) LTD	First respondent
THE ANNUITY FUND	Second respondent
COLLATZ; ISABELLA HERMIENA	Third respondent
GOOSEN; ALJA	Fourth respondent
COLLATZ; JACOBUS HERCULES	Fifth respondent
HODGSON; MICHAEL IAN	Sixth respondent
HODGSON; SHANNON-LEIGH	Seventh respondent
THE PENSION FUNDS ADJUDICATOR	Eighth respondent
JOHNSON & JOHNSON PROVIDENT FUND	Ninth respondent

Appeal: The failure to provide security in the appeal as required by uniform rule 49(13) – Conditional application for condonation for the lapsing of the appeal – Considerations of interests of justice, fairness, and finality require that the appeal be determined on its merits.

Summary: Appeal against the High Court's dismissal of an application under section 30P of the Pension Funds Act, 1956 ("the Act") – The *sui generis* nature of a section 30P application – The ambit, parameters, and constraints of a section 30P application – The complaint in issue in the section 30 P application must be, at least, substantially the same complaint as that determined by the Adjudicator – The social import of section 30C of the Act – The legislative supremacy afforded to section 30C - Section 30C trumps parties' matrimonial regime, testator's testamentary freedom, contractual provisions, and customary law – Whether the withdrawal benefit in issue accrued to the joint estate prior to the member's death – The import of the rigors of the rule in Plascon-Evans in a section 30P application.

Costs: Relevant considerations – The suitability of the personal costs order and punitive scale of such costs order by the High Court and costs order against the first appellant personally in the appeal

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JUDGEMENT – THE COURT

CORAM: SENYATSI J, MAHOMED AJ and AMM AJ

A. INTRODUCTION

1. On 26 September 2012, the Adjudicator (the eighth respondent)[1] handed down a determination in terms of section 30M of the Pension Funds Act, 1956 ("the PFA"). Her determination pertained to a complaint lodged by Ms. Collatz (the first appellant) during November 2011.

2. In her complaint to the Adjudicator, Ms. Collatz, sought to set aside the transfer of her (late) husband's provident fund withdrawal benefit to an annuity fund of the second respondent. Ms. Collatz complained, *inter-alia*, that the withdrawal benefit formed part

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[1] I.e., the Pension Fund Adjudicator, being the "Adjudicator" as defined in section 1 of the Pensions Funds Act, 1956.

of her husband's and her joint estate (they were married in community of property), and as such, could not be dealt with without her consent. The Adjudicator dismissed Ms. Collatz's complaint.[2]

3. The appellants, as applicants *a quo*, then approached the High Court for relief. They did so during November 2012. Whilst referencing section 30P[3] in their founding affidavit, they initially did not seek or identify any relief in terms of section 30P in their notice of motion. Section 30P reads:

> "***30P. Access to court***
>
> *(1) Any party who feels aggrieved by a determination of the Adjudicator may, within six weeks after the date of the determination, apply to the division of the High Court which has jurisdiction, for relief, and shall at the same time give written notice of his or her intention so to apply to the other parties to the complaint.*"

4. At what can only be described as the eleventh hour and then some eight years later, the appellants amended their notice of motion to seek relief in terms of section 30P. More specifically, the appellants sought, in addition to other relief, an order "*reviewing and setting aside the Adjudicator's determination made on 26 September 2012 in terms of section 30P of the Pension Funds Act*".

5. On 26 October 2020, the High Court dismissed the appellants' section 30P application. In so doing, the High Court also granted a punitive attorney and client costs order against Ms. Collatz personally.

6. This is an appeal, with the leave of the High Court, against the orders of the High Court. As was the case in the section 30P application before the High Court, the first and second respondents, the third to fifth respondents and the ninth respondent oppose the

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2 Section 30O deems the Adjudicator's determination to be a civil judgement of the court of law.

3 References to sections of legislation in this judgment are references to sections in the Pension Funds Act, 1956; unless otherwise specifically stated, indicated or apparent from the context.

appeal. (I am unpersuaded by the ninth respondent's claimed "*neutral position*" in the litigation.)

B. THE CONTEXT FOR THE DETERMINATION OF THIS APPEAL

7. In their heads of argument, the appellants seek to infuse this appeal with noble and laudable considerations of "*matrimonial principles*", claims of gender bias, gender inequality and similar-type enticing arguments and submissions about "*vunerable woman*" or "*similarly situated woman*" to the first appellant "w*ho are deliberately deprived of the financial resources to which they are legally entitled*". To these ends, the appellants argue that the appeal traverses:

> "... *the intersection between Pension Fund law and the Matrimonial Property Act, No 88 of 1984. More specifically, as to whether under the facts of this case, the provisions of the Matrimonial Property Act ought to have been applied as opposed to section 37C of the Pension Fund Act*".

8. Despite the above, the appellants, importantly, have not, and do not raise, a constitutional challenge to section 37C, or, for that matter, the ninth respondent's rules.[4] Moreover, the third to fifth respondents expressly state, upfront, in their heads of argument that there is no constitutional challenge in issue in this appeal. This did not invoke a response from the appellants. Furthermore, senior counsel for the appellants, when asked during argument in this appeal, confirmed that there was no such challenge. Entrenching the aforesaid position, no argument in this regard was advanced in the appeal.

9. As such, there are no (constitutional) considerations of gender bias or gender equality in issue in this appeal. As I see them, the issues to be determined in this appeal are far plainer. This is in part because the appeal falls to be determined within the context of: (i) the widely reported and widely discussed SCA decision in **Meyer v Iscor Pension**

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4 The ninth respondent is the relevant Provident Fund.

Fund,[5] [6] (ii) the parameters of sections 30P, and (iii) the legislative supremacy afforded to section 37C. The rule in **Plascon-Evans**[7] also features prominently.

C. THE APPELLANTS' CONDONATION APPLICATION AND THEIR FAILURE TO PROVIDE SECURITY IN THE APPEAL

(a) Introduction

10. Before engaging in the merits in their appeal; two preliminary issues require determination. First, the appellants conditionally apply for condonation for their failure to comply with that prescribed in uniform rule 49(6) and, and, as such, their late prosecution of their appeal. The condonation application seeks to reinstate the appeal. Second, there is the issue of the appellants' failure to provide security in the appeal as required by uniform rule 49(13)(a). Both issues pertain, in some measure, to the question whether the appeal, at this juncture, can or ought to be determined on its merits.

11. To contextualise and meaningfully deal with the appellants' condonation application and the issue of their failure to furnish security, regard must be had to the disquieting history that contaminates this matter. In dealing with this history, I am mindful that Ms. Collatz is financially constrained and, on occasions, has been legally unrepresented, albeit the third to fifth respondents contest the true extent of her claims of being unrepresented and her accompanying disadvantages.

12. This history comprises: (i) a diligent disregard for the uniform rules of court, (ii) inexplicable and inordinate delays resulting in a slew of condonation applications, and

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5 [2003] All SA 40 (SCA), (2003) 24 ILJ 338 (SCA), 2003 (3) BPLR 4427 (SCA).

6 See *inter-alia* the following:
- http://www.pensionlawyers.co.za/wp-content/uploads/2018/10/PensionTrusteesObligationsSouthAfrica.pdf,
- https://www.derebus.org.za/the-correct-route-to-follow-when-dealing-with-pension-fund-adjudicators-determinations/
- http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S2077-49072016000100005

7 **Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (A) 634E-635D.

(iii) several other equally unsatisfactory aspects. By way of example, features of this history include:

12.1. For extended periods, the appellants have adopted a dilatory, if not insouciant, approach to prosecuting their section 30P application. The application was launched during November 2012. The application was only argued some eight years later, during October 2020, and then only because the first and second respondents' attorneys set the application down for hearing.

12.2. The appellants have additionally adopted a Delphic approach to the relief sought by them in their application. Their notice of motion, and its ultimate form, is the product of various amendments and attempted / proposed amendments; the scars of which remain (particularly when measured against the case they initially sought to make in their founding affidavit). In this regard:

12.2.1. The appellants' initial November 2012 notice of motion sought, in the main, orders: (i) setting aside the transfer of the "*deceased benefits*" to the second respondent, and (ii) directing the second respondent to "*pay half of the proceeds of such Annuity*" to each of the appellants respectively.

12.2.2. During late November / December 2018 (some six years later), the appellants amended their notice of motion. In so doing, they abandoned the payment relief sought against the second respondent. Moreover, the second applicant alone now sought a money judgement, albeit against "*the Ninth and/or First Respondent jointly and severally*"; the ninth respondent being joined as a party in the section 30P application in the intervening period. The appellants' founding affidavit, as I read it, however does not support the altered relief sought in the amended notice of motion.

12.2.3. Thereafter, the section 30P application was enrolled as already mentioned, at the instance of the first and second respondents, for

hearing on 26 October 2020. No doubt whilst preparing for the upcoming hearing and, in so doing, realising the aforesaid and other Achilles heels in their case, the appellants belatedly sought to (further) amend their notice of motion. They sought to do so in terms of a "*Notice of Amendment of the Motion*" dated 9 September 2020.

12.2.4. The proposed 9 September 2020 amended notice of motion sought, *inter-alia*, an order for the first time "*reviewing and setting aside*" the Adjudicator's determination in terms of section 30P. The appellants also sought to (re)introduce an order for the granting of a money judgement against the second respondent. More specifically, the second appellant now sought a money judgement against the "*Ninth and/or the Second and/or the First Respondent jointly and severally*". These belated proposed amendments triggered objections.

12.2.5. Whilst the circumstances in which they did so is not immediately clear from the record,[8] the appellants subsequently successfully amended their notice of motion, via an amendment dated 30 September 2020. This is the notice of motion, and accompanying relief, that served before the High Court.

12.2.6. In their 30 September 2020 amended notice of motion, the appellants sought: (i) an order reviewing and setting aside the Adjudicator's determination in terms of section 30P, (ii) a money judgement in favour of the second applicant against the "*Ninth and/or the First Respondent jointly and* severally", and (iii) an order declaring that the amount of the "*accrued benefits*" (being an amount of R9,955,4091.45) is, somewhat confusingly, "*an asset in the deceased estate of the late Edward Collatz and the joint estate of the said Edward Collins and the First Applicant*".

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8 The notice of appeal states that "*all of the objecting respondents withdrew their objection as a result of the negotiations between the parties*", while the heads of argument of certain of the respondents appear to suggest otherwise.

12.2.7. These amendments to the notice of motion caused the first and second respondents and the ninth respondent to file supplementary affidavits.

12.3. Separate to the various amendments to the notice of motion is the appellants' ever-evolving case. An inordinate number of affidavits have been filed in this application.[9] The appellants filed a first supplementary founding affidavit during March 2013 and a second supplementary founding affidavit during July 2015. Their July 2015 affidavit introduced a discrete but substantial new cause of action (claim) asserting, for the first time, that Mr. Collatz had signed the relevant authorisation form at a time that he was a patient at the Denmar Psychiatric Hospital and that he did not have "*the [mental] capacity to appreciate the significance of such 'authorisation'*".

12.4. The authorisation form,[10] being a requirement in terms of the ninth respondent's rule 7.2 (discussed below), pertains to Mr. Collatz exercising his election to transfer the provident fund (withdrawal) benefit from the ninth respondent to an annuity fund with the second respondent. This second supplementary founding affidavit necessitated the filing of supplementary answering affidavits.

12.5. Sandwiched between these two supplementary founding affidavits is the dispatch of a letter dated 30 May 2013. The letter communicates the appellants' intention to withdraw the section 30P application, together with a request that each party pay their own costs. The appellants further intimated that they would comply with the trustees' section 37C allocations, provided that the first respondent would receive 15%[11] of the benefit.

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9 See **Sealed Africa (Pty) Ltd v Kelly 2006 (3) SA 65 (W)** and **Union Finance Holdings Ltd vs I S Mirk Office Machines II (Pty) Ltd & Another** 2001 (4) SA 842 (W) which hold, within the context of uniform rule 6(50(e), that in the absence of leave being granted by the Court for the filing of further affidavits, parties are not entitled to simply, by their own arrangement, file as many affidavits as they wish.

10 This document has various nomenclature in the appeal record and heads of argument. By way of example, it is also referred to as the "*transfer form*".

11 The heads of argument for the ninth respondent however states that the 37C distribution provides for 65% of the death benefit going to Ms. Collatz, amounting to R15,925,000.00 before tax.

12.6. Another feature of the litigation history is the belated joinder of a panoply of materially interested and necessary respondents in the section 30P application. Initially there were only two respondents cited in the section 30P application. The subsequently joined respondents include, *inter-alia*, the late Mr. Collatz's potential dependents and beneficiaries (the third to seventh respondents), the Adjudicator (as the eighth respondent) and the John & Johnson Provident Fund (as ninth respondent).

12.7. These respondents were joined in two tranches (the second of which is dealt with separately below). More specifically, the third to eighth respondents were joined during June 2016 in terms of an order granted by Coetzee AJ. The third to fifth respondents, thereafter and during September 2016, delivered their answering affidavit.

12.8. Presumably frustrated by the appellants' failure to prosecute their section 30P application – the appellants had not (yet) filed a replying affidavit to the supplementary answering affidavit filed during September 2016 – the first and second respondents set the section 30P application down for hearing on 4 September 2017. Still no replying affidavit was forthcoming.

12.9. All that appears to have occurred of any moment in the prosecution of the application on 4 September 2017 is the High Court *mero muto* ordering the ninth respondent's joinder; albeit that this order was handed down during March 2018. Once joined, the ninth respondent filed its answering affidavit during May 2018.

12.10. The appellants thereafter again tarried; waiting until November 2018 to file their replying affidavit. When eventually doing so, they introduced substantial new matter into the 30P application. Albeit not stated in such express or clear terms in the replying affidavit, this new matter constitutes an unclearly articulated and unparticularised challenge to the veracity and authenticity of the already mentioned authorisation form signed by Mr. Collatz.

12.11. In due course, and unsurprisingly labelled by the High Court as a "*breathtaking development*" in its judgement, the appellants' counsel sought during argument to refer to a previously undisclosed 2017 report of a handwriting expert dealing with the authorisation form. The High Court, pursuant to the respondent's objections, refused the late introduction of the expert report and its accompanying affidavit.

13. The aforesaid is a retelling, in part, of the history of the section 30P application. This appeal has regrettably suffered from similar type insouciance. By way of example:

13.1. There is also the already mentioned application for condonation for the late prosecution of this appeal because of, *inter-alia*, the appellant's delay in obtaining the transcript of the section 30P application.

13.2. To this must be added the appellants' inexplicable failure to furnish security in the appeal, despite its unchallenged and clear obligation to do so.

13.3. The appellants also sought to introduce, into the appeal record, documents that did not serve before the High Court.

13.4. There is also the issue of the clumsy and uncoordinated uploading, and unnecessary duplication, of documents onto CaseLines. Moreover, certain of these documents, being copies of copies of copies, are barely legible.

14. The appellants additionally, in the appeal, adjust, reconfigure and relaunch their challenge to the veracity and authenticity of the authorisation form. Whereas they previously had attempted to rely on the aforesaid belated tendering of expert evidence, the appellants now claim that it is clear to the "*naked eye*" that the authorisation form has been tampered with. Furthermore, it is bravely claimed in the appellants' heads of argument, without any evidence, that: "*The first respondent's officials altered and signed the questioned document in the most important sections of the document.*"

15. Having set out and contextualised, at least in part, the history of the matter, I now turn to consider the issues of the appellants' failure to furnish security in the appeal, and the appellants' condonation application pertaining to the reinstatement of the appeal.

(b) The appellants' failure to furnish security in the appeal

16. As already indicated, the appellants have failed to furnish security for the costs of the appeal. They are, and were, nevertheless obliged to do so. This is because: (i) the respondents have not waived their rights to security, and (ii) the appellants did not make application to be released from their obligation to furnish security.

17. In so doing, the appellants have failed to comply with uniform rule 49(13)(a).[12] Compliance with uniform rule 49(13)(a) is peremptory. The rule obliges the appellants to give security and moreover they should have done so before the lodging of the appeal record.[13] The appellants moreover do not appear to seriously dispute their obligation to furnish security.

18. The appellants' indifference to their security obligations is troubling. Despite the issue of the appellants' rule 49(13)(a) recalcitrance forming the subject matter of correspondence between the relevant attorneys, the appellants make no mention of the issue in their heads of argument. The appellants' head-in-the-sand attitude to their uncontested security obligation is unsatisfactory. The respondents thus seek, as is their right,[14] an order that the appeal be struck from the roll with costs. Whilst there is

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12 Uniform rule (13) (a) provides:
"*Unless the respondent waives his or her right to security or the court in granting leave to appeal or subsequently on application to it, has released the appellant wholly or partially from that obligation, the appellant shall, before lodging copies of the record on appeal with the registrar, enter into good and sufficient security for the respondent's costs of appeal.*"

13 **TR Eagle Air (Pty) Ltd and Another v Thompson** [2020] ZAGPPHC 801 at para [18] http://www.saflii.org/za/cases/ZAGPPHC/2020/801.html#:~:text=%5B18%5D%20Rule%2049%20(13,is%20filed%20with%20the%20Registrar

14 *Ibid* at 141C-D and *cf* **Boland Konstruksie Maatskappy (Edms) Bpk v Petlen Properties (Edms) Bpk** 1974 (4) SA 291 (C).

indubitable merit in respondents' position, I am reluctant to strike the appeal from the roll.

19. The striking of an appeal, let alone any matter, from the relevant roll: (i) does not constitute a determination of the merits of the matter,[15] and (ii) does not have the effect of *res judicata*.[16] Rather, the effect of an order striking an appeal from the court roll is twofold. First, the appeal is discontinued and, as such, lapses. Second, the operation of the order appealed against is no longer suspended.[17] That said, an appeal that has lapsed can be resurrected via a successful application for condonation and re-enrolment. The court hearing the appeal will, in the normal course, adjudicate and determine the condonation and re-enrolment application.[18]

20. As such, if this appeal were to be struck from the roll, the appellants can nevertheless seek to resurrect their appeal. Given their historical conduct, there is a real and genuine prospect that the appellants will make such application. This would bring about even further delays; all the while leaving the disputes between the parties unresolved. The interests of justice, fairness,[19] and finality are the constellation of lodestars in litigation.

21. In addition to the already mentioned litigation history involving prodigious procedural omissions, missteps, and other defects, the need for finality in this appeal must also be considered within the context of: (i) the disputed transfer in issue taking place during 2008, (ii) Mr. Collatz passing away on 9 June 2010, (iii) the complaint being lodged with the Adjudicator during November 2011, and (iv) the section 30P application being

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15 **Jojwana v Regional Court Magistrate and Another** 2019 (6) SA 524 (ECM) at para [10]. **Jojwana** also correctly contextualises and distinguishes the decisions in **Zuma v Democratic Alliance and Others** 2018 (1) SA 200 (SCA) and **Thint Holdings (Southern Africa) (Pty) Ltd v National Director of Public Prosecutions; Zuma v NDPP** 2009 (1) SA 141 (CC). The court in **Jojwana** held that these cases do not lay down a general rule that if a matter is struck from the roll, it is thereby terminated and may not be re-enrolled.

16 **Jojwana** *supra* at para [13].

17 **Jojwana** *supra* at para [10] referencing, *inter-alia*, **Skhosana v Roos t/a Roos se Oord** 2000 (4) SA 561 (LCC) at para [19] and **Goldman v Stern** 1931 TPD 261 at 264.

18 See **Herf v Germani** 1978 (1) SA 440 (T) at 449C-G; **Aymac CC v Widgerow** 2009 (6) SA 433 (W) at 440H–441I, **Panayiotou v Shoprite Checkers (Pty) Ltd and Others** 2016 (3) SA 110 (GJ) at para [13] and **Strouthos v Shear 2003 (4) SA 137 (T) at 140H**.

19 See section 35 of our Constitution.

launched during November 2012. In summary, this litigation pertains to issues which arose some 13 years ago.

22. Whilst, as already indicated, uniform rule 49(13)(a) is peremptory in its terms, it is nevertheless necessary that the uniform rules are not immutable, nor inflexible. Without in any way diluting the obviously beneficial function, purpose and import of the uniform rules of court, the constitutional and common law jurisdictions of our superior courts[20] provide for self-governance in respect of their own procedures and processes.[21]

23. As such, the rules are meant for the court, not the court for the rules. The Constitutional Court has unequivocally affirmed this position. It did so in **PFE International Inc (BVI) and others v Industrial Development Corporation of South Africa Ltd**[22] when stating, within the context of section 173 of the Constitution, the following:

> "*30. Since the rules are made for courts to facilitate the adjudication of cases, the superior courts enjoy the power to regulate their processes, taking into account the interests of justice. It is this power that makes every superior court the master of its own process. It enables a superior court to lay down a process to be followed in particular cases, even if that process deviates from what its rules prescribe. Consistent with that power, this Court may in the interests of justice depart from its own rules.*"

24. All things considered, I am not prepared to strike the appeal from the roll. To do so would not be in the interests of justice, and will in all probability not provide finality. It would moreover render an unsatisfactory outcome particularly for the respondents, and the section 37C beneficiaries of the deceased's estate. The third respondent is, for example, said to be 75 years old. The administration of Mr. Collatz's estate awaits finalization. The relevant heirs, beneficiaries, and section 37C dependents, including the first

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20 Section 1 of Superior Courts Act, 2013 defines "*Superior Court*" as meaning "*the Constitutional Court, the Supreme Court of Appeal, the High Court and any court of a status similar to the High Court*".

21 See section 173 of our Constitution and *inter-alia* Schreiner JA in **Trans-African Insurance Co. Ltd v Maluleka** 1956 (2) SA 273 (A).

22 2013 (1) SA 1 (CC) at para [30].

appellant, have waited long enough. It is unfair to expect them to wait any longer. They are entitled to finality, one way or another, in this litigation.

25. In coming to the aforesaid conclusion, I am also mindful of the sentiments expressed by Ngalwana AJ in **Commissioner: CIPC v Independent Music Performance Rights Association**[23] where he states: "*Far more efficacious for a court to render judgment that resolves a dispute between litigants, …*".

26. Additionally, whatever financial prejudice the appellants may suffer, or potentially suffer, because of the appellants' failure to furnish security has already been incurred or suffered. I say so because the respondents have prepared on all aspects for this appeal, filed heads of argument dealing with the merits of the appeal, and have incurred the costs of counsel to argue the appeal. It would truly be a pyrrhic victory for the respondents if the appeal were to be struck from the roll, despite their already incurring such costs and without the merits of the appeal being determined.

(c) The appellants' conditional condonation application

27. As foreshadowed above, the appellants also seek condonation, on a conditional basis, for the delayed prosecution, and the reinstatement, of their appeal. At the heart of the condonation application is stated to be their delay in obtaining a typed court order and the "*recordings in this matter*".

28. Their application is however only conditionally pursued; namely it is only pursued if, *inter-alia*, the respondents seek to argue that the prescribed uniform rule 49(6) periods have not been complied with and, moreover, only if it is found that the appeal has lapsed. The appellants' conditional and coy stance on whether their appeal has lapsed is unsatisfactory; particularly because *bona fides* is one of the guiding considerations in

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[23] **Commissioner: Companies & Intellectual Property Commission v Independent Music Performance Rights Assoc and Another** (37475/2020) [2020] ZAGPPHC 668 (23 November 2020) at para [1].

assessing the existence of "*good cause*" or "*sufficient cause*" and, as such, in assessing the conduct and motives of the party seeking the indulgence.[24]

29. The respondents, for their part and correctly, contend that the appeal has lapsed. The appellants' condonation application is vigorously opposed. Answering affidavits have been filed. These answering affidavits have elicited an unnecessarily long replying affidavit. In filing such a replying affidavit, the appellants eschew Scholtz JA's declaration of war "*on unnecessarily prolix replying affidavits and upon those who inflate them*".[25] The appellants similarly ignore Harms ADP's (as he then was) echoing of Scholtz JA's sentiments, albeit in more vociferous tones, in **Van Zyl and Others v Government of the Republic of South Africa and Others**.[26]

30. The inordinate length of the replying affidavit is however but one of various unsatisfactory aspects in the condonation application; regard being had to that stated in the respondents' answering affidavits and heads of argument, and the attacks mounted therein on the merits of the condonation application. Moreover, as correctly submitted on behalf of the third to fifth respondents, the appellants' delay, and as such their conditional application, must be viewed holistically. I have already dealt with the issue of delay and the history of the matter. I refer to that stated above.

31. There is also sound merit in the first and second respondents' reliance on the decisions in **Corlett Drive Estate v Boland Bank Ltd and Another**[27] and **LTA Construction Ltd v Minister of Public Works and Land Affairs**.[28] These decisions make it clear that the reinstatement of an appeal is not simply there for the asking.

32. Whilst I find that the appeal has lapsed and that the condonation application is unsatisfactory in certain respects and respect, I, nevertheless find myself compelled to

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24 See, *inter-alia*, **Siber v Ozen Wholesalers (Pty) Ltd** 1954 2 SA 345 (A) at 353A and **Smith NO v Brummer NO and Another** 1954 3 SA 352 at 358A and *cf.* **Madinda v Minister of Safety and Security** 2008 (4) SA 312 (SCA) at 320H-J.

25 **Minister of Environmental Affairs and Tourism v Bato Star Fishing (Pty) Ltd** 2003 (6) SA 407 (SCA) at 439G-H.

26 2008 (3) SA 294 (SCA) in para 46.

27 1978 (4) SA 420 (C) at 425F.

28 1994 (1) SA 153 (A) at 157F.

adopt the same approach, position, and considerations as those stated above when dealing with the issue of the outstanding security in the appeal. To these, I must add the importance of the case to the parties.

(d) Conclusionary findings on these preliminary issues

33. All things considered, the interests of justice, fairness and finality necessitates that the appeal be heard, determined and disposed of on its merits, and I intend to do so. I am not prepared to kick the can down the road.

34. Accordingly, I am prepared to grant the condonation sought by the appellants. While the appellants do not ask for condonation therefore, I am also prepared to overlook, for purposes of this appeal, their failure to furnish security in the appeal (see **PFE International**[29]). The cost consequences of the issue of the appellants' outstanding security and the appellants' condonation application are dealt with at the end of this judgement.

D. THE RELEVANT CONTEXT, BACKGROUND AND *DRAMATIS PERSONAE*

35. Turning now to an evaluation of the merits of the appeal, the relevant context, background and *dramatis personae* must be first identified and traversed. I then deal with the legal considerations applicable to the section 30P application. I then discuss the parties' submissions and arguments on the merits of the appeal.[30]

36. Ms. Collatz is the widow of her late husband, Mr. Collatz. They were married in community of property on 3 December 1994. The marriage had however run its course with a divorce summons being issued during 2008. On the face of it, the patrimonial consequences of their then impending divorce were heavily contested. Mr. Collatz passed away early in June 2010. He passed away approximately three months before

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29 *Supra.*

30 Whilst certain of the parties' arguments and contentions may not specifically be traversed in this judgement, they have nevertheless been thoroughly considered and do not impact upon the outcome and result of this appeal.

the trial date in their divorce action. Despite not being a beneficiary under his will and the fact of their then impending divorce, Ms. Collatz is the appointed executrix of Mr. Collatz's deceased estate. Ms. Collatz thus wears two hats in this litigation. In her personal capacity, she is the first appellant (first applicant before the High Court). In her representative capacity, as the executrix of her husband's deceased estate, she is the second appellant (second applicant before the High Court).

37. The third respondent was previously married to Mr. Collatz. The fourth and fifth respondents are the surviving children of their marriage. As I understand matters, the second respondent (as the relevant section 37C trustees) has determined that they, together with Ms. Collatz, are section 37C dependents of the late Mr. Collatz for purposes of the section 37C distribution in issue.

38. The sixth respondent is Ms. Collatz's son (the stepson of Mr. Collatz). The seventh respondent is Mr. Collatz's daughter, and "the stepdaughter" of the third respondent. Despite their joinder and providing confirmatory affidavits to the appellants' replying affidavit stating that they will abide by the decision of the court, the sixth and seventh respondents nevertheless state - without providing any real reasons therefore and in respect of which they would have personal knowledge - that they "*do not support the findings of the Eighth Respondent in this matter*". The sixth and seventh respondents did not otherwise participate in the section 30P application. They do not participate in this appeal.

39. Whilst he was still alive, and prior to his retirement,[31] Mr. Collatz was an employee and the CEO of Johnson & Johnson Medical (Pty) Ltd. He had been employed by the company since 1980. Mr. Collatz, whilst alive, was furthermore a member of the ninth respondent, being his (former) employer's provident fund. The first respondent administered the provident fund.

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[31] A dispute exists in the section 30P application, arising even as early in in the founding papers, as to whether Mr. Collatz had retired or had been retrenched. This is not the only factual dispute that contaminates the section 30P application and that this appeal. I return to this dispute later in this judgement.

40. On the termination of his employment, and as a result thereof, Mr. Collatz ceased to be a member of the ninth respondent, and as such became entitled to a withdrawal benefit. In this regard, Mr. Collatz had an election to either receive a cash payment or transfer such benefit to a pension fund of his choice in terms of the ninth respondent's rules.

41. During March 2008, Mr. Collatz redeemed, as a lump sum, his withdrawal benefit; the value thereof being in an amount of some R10,000,000.00.[32] Initially, the withdrawal benefit was placed into a money market account. In this regard, a dispute exists in the application regarding: (i) who was the money market account holder, and (ii) whether, at that time and because of that event, the benefit accrued to the joint estate.

42. Ms. Collatz asserts that the funds represented by the withdrawal benefit remained the only asset of any substance in Mr. Collatz's and her joint estate. As such and within the context of their contested divorce action and her accompanying fears that Mr. Collatz was dissipating assets, Ms. Collatz claims that during late July / August 2008, she, Mr. Collatz, and one Mr. Bakos (claimed by Ms. Collatz to have represented the first respondent, albeit employed by a separate entity and who is not cited as a party in the litigation), reached an agreement. The terms of the agreement is said to be to the effect that the cash proceeds of the withdrawal benefit: (i) would be transferred to and held in a "*preservation fund*", and (ii) could not be accessed and/or dealt with by either of the Collatzs pending the outcome or settlement of their divorce action.

43. During October 2008, the withdrawal benefit was transferred to a (retirement) annuity fund with the second respondent and invested as such by Mr. Collatz "*as his 'own funds' in his 'own name'*" (using the words of Ms. Collatz, albeit that she contends this is wrongly so). Ms. Collatz asserts that she did not consent to this transfer.

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32 These two amounts are listed in the affidavits filed in the application, being R10,283,631.16 and R10,308,989.34. There is reference in the ninth respondent's answering affidavit, and in the appellants' replying affidavit, to the deduction of an amount of R353,497.89 in settlement of a housing loan advanced to Mr. Collatz. The ninth respondent states that it had provided a guarantee for the loan. Nevertheless, there appears to be no dispute regarding the value of the contested withdrawal benefit for purposes of the section 30P application being an amount.

44. As already mentioned, Mr. Collatz passed away in June 2010. Consequently, Ms. Collatz contends in her founding affidavit in the section 30P application that the withdrawal benefit, on her late husband's retirement, accrued to their joint estate and that she has a claim to a half-share of such proceeds.

45. Her claims and approaches in this regard were rebuffed such that during late November 2011 and in the circumstances set out above, the first appellant (in her personal capacity) submitted a lengthy, and at times needlessly repetitive and often difficult to read, written complaint to the Adjudicator. Therein, the first appellant sought that the Adjudicator "*redress*" the following "*wrongs*:

45.1. the aforesaid transfer of the provident fund withdrawal benefit to the annuity fund;

45.2. the alleged change in the status / label, attaching to Mr. Collatz's exit from his previous employer, from "*retirement*" to "*retrenchment*"; and

45.3. the alleged breach of the July / August 2008 preservation agreement (namely that the cash proceeds were not preserved for purposes of the pending divorce proceedings).

46. It is within the above context that the "*complaint*" to the Adjudicator falls to be identified and classified. For the reasons expanded upon below, the importance of identifying and classifying the "*complaint*" that served before the Adjudicator is paramount within the context of a section 30P application, and this appeal.

47. The complaint thus submitted to the Adjudicator is that the provident fund withdrawal benefit, constituting an accrued asset of the joint estate of their marriage in community of property, was - in the absence of Ms. Collatz's consent and in breach of the preservation agreement - wrongly transferred to the annuity fund, and, as a corollary thereof, that the withdrawal benefit does not fall to be dealt with in terms of section 37C.

48. Moreover, having identified the "*wrongs*" that inform her complaint to the Adjudicator, the Ms. Collatz asked the Adjudicator for the following central "*desired outcome / relief*" in her complaint:

> "• *The entire transaction whereby the funds were placed in the "new" annuity fund must be set aside and the entire proceeds released from the provisions of section 37(C) [sic] of the Pension Act [sic].*[33]
>
> • *I must be paid out to enable me to examine the investment options most suited to me.*"

49. On 26 September 2012 and after having received responses and submissions from the relevant respondents and Ms. Collatz's further submissions, the Adjudicator provided her section 30M[34] determination in respect of the complaint. The Adjudicator determined that "*the complaint cannot succeed and is dismissed*".

50. Because of that which informs an application in terms of section 30P, particularly within the factual context and matrix of this appeal (as discussed below), I do not intend to traverse the reasons for the Adjudicator's determination. The Adjudicator's reasons are, in any event, adequately traversed in the judgement of the High Court, and to all intents and purposes they become largely irrelevant, or of archival interest only, within the context of a High Court's below-mentioned functions, powers, and jurisdiction in a section 30P application.

E. THE PENSIONS FUNDS ACT: THE LEGISLATIVE CONTEXT

(a) Introduction

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33 Presumably, the first appellant intended to refer to section 37C of the Pension Funds Act, 1956.

34 Section 30M of the Pension Funds Act, 1956 provides:

"*Statement by Adjudicator regarding determination*

After the Adjudicator has completed an investigation, he or she shall send a statement containing his or her determination and the reasons therefor, signed by him or her, to all parties concerned as well as to the clerk or registrar of the court which would have had jurisdiction had the matter been heard by a court."

51. Before dealing (further) with the merits of this appeal, it is first necessary for me to set out the relevant legislative context. In this regard, particular attention is to be paid to, *inter-alia*, sections 30P and 37C of the Pension Funds Act.

(b) Section 1(1) definitions: "complainant" and "complaint"

52. Section 1(1) defines "*complainant*" to include members and former members of a fund, beneficiaries and former beneficiaries of a fund, employers who participate in a fund, a board of a fund or a member of a board or any interested person.

53. The definition of a "*complaint*" in the section is equally important. It is defined to mean:

> "*A complaint of a complainant relating to the administration of a fund, the investment of its funds or the interpretation and application of its rules, and alleging-*
>
> *(a) that a decision of the fund or any person purportedly taken in terms of the rules was in excess of the powers of that fund or person, or an improper exercise of its powers;*
>
> *(b) that the complainant has sustained or may sustain prejudice in consequence of the maladministration of the fund by the fund or any person, whether by act or omission;*
>
> *(c) that a dispute of fact or law has arisen in relation to a fund between the fund or any person and the complainant; or*
>
> *(d) that an employer who participates in a fund has not fulfilled its duties in terms of the rules of the fund*;
>
> *but shall not include a complaint which does not relate to a specific complainant.*"

(c) A section 30P application: The parameters and ambit of a court's powers

54. There appears to be little disagreement between the parties, at least on a primary level, on the approach to be adopted by a court when considering a section 30P application.

55. The appellants, in their heads of argument, summarise the section 30P legal position as follows:

> *"The division of the High Court may consider the merits of the complaint made to the adjudicator under section 30A(3) and on which the adjudicator's determination was based and may make any order it deems fit."*

56. An equally useful summary of the section 30P legal position is contained in the first and second respondents' heads of argument. Therein, they state:

> *"An application in terms of section 30P of the PFA is strictly speaking neither an appeal nor a review. It is a* sui generis *application in which a High Court exercises original jurisdiction and reconsiders* ***the merits of the complaint*** *that was lodged with the Pension Funds Adjudicator in terms of section 30A(1) of the PFA."*[35]

57. The parties' aforesaid common position is no doubt attributable to the numerous authoritative judgements dealing with section 30P, and a section 30P application. For example, Thring J. in **De Beers Pension Fund v Pension Fund Adjudicator and Another**[36] held that:

> *"An application under section 30P of the Act is sui generis: it entails the exercise by this Court, in addition to its inherent powers of review, of jurisdiction analogous to original jurisdiction. ... In exercising such original jurisdiction, this Court may, in terms of the section:*
>
> *(a) consider the merits of the complaint in question;*
>
> *(b) itself take evidence; and*
>
> *(c) make any order it deems fit."*[37]

58. In **Cape Town Municipality v South African Local Authorities Pension Fund and Another**[38] the SCA states the following:

> *"This is illustrated by s 30P of the Act which provides that any party who is aggrieved by determination of the Adjudicator may apply to the division of the*

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35 The bolding is taken from their heads of argument.

36 2003 2 All SA 239 (C) at 245.

37 See also **Iscor Pension Fund v Murphy NO and Another** 2002 (2) SA 742 (T) and **Shell and BP South African Petroleum Refineries (Pty) Ltd v Murphy NO and Others** [2000] 9 BPLR 953 (PFA) at 958I and 958E-F as referenced in **De Beers Pension Fund** *ibid.*

38 2014 (2) SA 365 (SCA) at para [28]

> *high court. The high court will then consider the merits of the complaint and my make any order it deems fit. Under s 30P(3) the high court can then decide whether sufficient evidence has been adduced on which a decision can be made.*"

59. Of particular importance for purposes of this appeal - for several reasons and on various levels - is the decision of the SCA in **Meyer v Iscor Pension Fund**.[39] All of the parties in this appeal reference and rely upon this decision; albeit the appellants do so with a different gloss - notwithstanding its lack of ambiguity.

60. Paragraph [8] of the decision in **Meyer v Iscor Pension Fund** explains as follows:

> "*From the wording of s 30P(2) it is clear that the appeal to the High Court contemplated is an appeal in the wide sense. The High Court is therefore not limited to a decision whether the Adjudicator's determination was right or wrong. Neither is it confined to the evidence or the grounds upon which the Adjudicator's determination was based. The Court can consider the matter afresh and make any order it deems fit. At the same time, however, the High Court's jurisdiction is limited by s 30P(2) to a consideration of 'the merits of the complaint in question'. The dispute submitted to the High Court for adjudication must therefore still be a 'complaint' as defined. Moreover, it must be substantially the same 'complaint' as the one determined by the Adjudicator. Since it is an appeal, it follows that where, for example, a dispute of fact on the papers is approached in accordance with the guidelines formulated by Corbett JA in Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd ... 1984 (3) SA 623 (A) 634E-635D, the complainant should be regarded as the 'applicant' throughout, despite the fact that it is the other side who is formally the applicant to set the Adjudicator's determination aside. In case of a 'genuine dispute of fact' on the papers as contemplated in Plascon Evans, the matter must therefore, in essence, be decided on the version presented by the other side unless that version can, in the words of Corbett JA, be described as 'so far-fetched and clearly untenable that the court is justified in rejecting [it] merely on the papers'.*

61. As such, despite it being a *sui generis* application, there are nevertheless constraints and parameters to a section 30P application. These include, *inter-alia*, the complaint in issue in the section 30P application must be, at least, substantially the same "*complaint*" as the one determined by the Adjudicator.[40] A High Court, determining a section 30P

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39 2003 (2) SA 715 (SCA).

40 **Meyer v Iscor Pension Fund** *ibid.*

application, can therefore only consider those complaints placed before the Adjudicator. A section 30P applicant is therefore not entitled to raise, for the first time, new issues in the section 30P application (i.e., issues not raised before or considered by the Adjudicator).[41]

62. As counsel for the ninth respondent succinctly, yet eloquently, states in her heads of argument: "*Simply put, unless the cause of action has gone through the proverbial 'gate' of the Adjudicator's determination, it cannot be considered in section 30P proceedings - any other conclusion would rendered meaningless the provisions of section 30P of the PFA.*"

63. A summary of the above is then that while a High Court can "*consider the matter afresh*",[42] and "*itself take evidence*" and "*make any order it deems fit*";[43] it may only do so within, and is constrained by, the parameters and ambit of, substantially at least, the same complaints as that submitted to and determined by the Adjudicator.

64. An additional feature of the decision in **Meyer v Iscor Pension Fund**, is that a complainant potentially faces, and may need to overcome, the rigours of **Plascon-Evans**[44] should genuine disputes of fact arise in a section 30P application.[45]

(d) Section 37C of the Pension Funds Act

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41 **Van Heerden** v **Fundsatwork Umbrella Provident Fund & others** Case no. 94615/16 para [18], an unreported decision of Fourie J in the Gauteng Division (18 September 2018).

42 See **Meyer v Iscor Pension Fund** *supra.*

43 See **De Beers Pension Fund** *supra.*

44 **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (A).

45 **Plascon-Evans** is the *locus classicus* for the factual enquiry test before a final order can be made in motion proceedings. The rule in **Plascon-Evans** stipulates that when factual disputes arise in an application (i.e., motion proceedings), the relief sought by the applicant can only be granted if the facts stated by the respondent, together with the admitted facts in the applicant's affidavits, justify the order and, where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted. More plainly or colloquially cast, the **Plascon-Evans**' rule calls on a court to adjudicate an application on the assumption that the respondent's version is to be preferred to the applicant's as the correct account of the episode wherever the two may differ. In the result and within the context of that stated above in **Meyer v Iscor Pension Fund**, a section 30P application must be decided, where there are disputes of fact (as there are), on the facts put up by the respondent's and where final relief is sought.

65. Section 37C legislates the disposition of pension benefits upon the death of a member.

66. As such, section 37C governs the distributions of payment of lumpsum benefits payable on the death of a member of a pension fund, provident fund, provident preservation fund and annuity fund. The section 37C accordingly regulates the distribution and payment of lump sum benefits payable on the death of the member. These benefits (i.e., any amount payable to a member or beneficiary in terms of the rules of the fund) are colloquially known as "*death benefits*". The section's legislative objective is laudable and ameliorative; namely, to ensure that deceased member's dependents are not rendered destitute by the member's death. Section 37C thus seeks to legislatively ensure that the deceased member's dependents receive adequate support; irrespective of whether the deceased was legally obliged to maintain them.

67. Critically, the wording of section 37C(1) commences with the following: "*Notwithstanding anything to the contrary contained in any law or in the rules of a registered fund, ...*". This unambiguous introduction to section 37C, properly construed, means that the provisions of section 37C overrule any contrary statute, law, or rule (fund or otherwise) which deals with death benefits.[46] Accordingly, to the extent that any statute, law, or rule contradicts the provisions of the section, they are trumped by section 37C.

68. In **Kaplan and Another NNO v Professional and Executive Retirement Fund & Another**,[47] the SCA interpreted section 37C(1) to require that death benefits must be disposed of according to the subsections statutory scheme. More specifically:

> "*The plain meaning of the subsection is this. All benefits payable in respect of a deceased member, whether subject to a nomination or not, must be dealt with in terms of one or other of the quoted subparagraphs. In other words none fall into the estate save in the circumstances stated in subparas (b) and (c). In addition, these nominations having been made in terms of the rules, and the rules requiring the benefits to go to the nominated beneficiaries, the trustees' case is inextricably linked to the rules. However, as the phrase '(n)otwithstanding anything to the contrary ... contained in the rules' makes unmistakably clear, it matters not in the present situation what the rules say -*

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46 See **Baron & Jester v Eastern Metropolitan Local Council** 2002 (2) SA 248 (W) at 257.
47 1999 (3) SA 798 (SCA) at 803A-C.

the benefits must be disposed of according to the subsection's statutory scheme."

69. Section 37C's legislative purpose, intention and interpretation is confirmed in **Mashazi v African Products Retirement Benefit Provident Fund and Another**.[48] Therein, the following is stated:

> "*Section 37C of the Act was intended to serve a social function. It was enacted to protect dependency, even over the clear wishes of the deceased. This section specifically restricts freedom of testation in order that no dependents are left without support. Section 37C(1) specifically excludes the benefits from the assets in the estate of a member. Section 37C enjoins the trustees of the pension fund to exercise an equitable discretion, taking into account a number of factors. The fund is expressly not bound by a will, nor is it bound by the nomination form. The contents of the nomination form are there merely as a guide to the trustees in the exercise of their discretion.*"

70. Given its legislative objective, section 37C places a duty on the fund's trustees to allocate and pay the death benefit in a manner deemed to be fair and equitable. As such, the right and responsibility of allocating death benefits resides with the trustees of relevant fund, not with the member.[49] As such, the trustees must: (i) identify the deceased member's dependents and nominees, (ii) effect an equitable distribution of the death benefits amongst them, considering relevant factors,[50] and (iii) select an appropriate mode of payment of the benefits.[51]

71. The impact, length, and breadth of the section 37C's legislative supremacy is wide-ranging. By way of example:

71.1. A death benefit is not subject to the marital property regime of the deceased member; it being irrelevant whether the parties were married in or out community

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48 2003 (1) SA 629 (W) at 633.

49 See, *inter-alia*, **In Mashazi v African Products Retirement Benefit Provident Fund** 2003 (1) SA 629 (W).

50 See **Sithole v IC Provident Fund & Another 2002 [4] BPLR 430 PFA** at paras [24] to [25] where certain factors are listed, albeit this is not a closed list.

51 **Municipal Workers Retirement Fund v Mabula** 2017 JDR 2056 (GP) at para [9].

of property. In **Makume v Cape Joint Retirement Fund**,[52] it was held that the benefit must be distributed in terms of section 37C. In so doing, the court rejected the applicant's claim that she was entitled to 50% of the benefit simply because she was married in community of property to the deceased. An identical argument in **Letsoalo and Others v Lukhaimane NO and Others**[53] was similarly rejected. Section 37C likewise trumps the provisions of the Matrimonial Property Act.

71.2. Section 37C's supremacy also operates within the context of the limitation the section imposes on the testamentary freedom of the member. As foreshadowed above, the section removes the ability of a fund's member to dispose of his death benefits as he or she wishes, and as he or she would ordinarily be able to do with other estate assets.[54] As such, even though a member may conclude a testamentary will, or a beneficiary nomination, these ordinarily serve as no more than a guide. As such, the benefits do not form part of the assets of a deceased member's estate,[55] except for in the limited circumstances listed in sub-paragraphs (b) and (c) of section 37C (neither of which apply in the present instance). Simply put, the member's testamentary intentions, as expressed in his or her will or beneficiary nomination form, do not override the provisions of Section 37C.

71.3. Furthermore, section 37C's legislative supremacy includes its precedence over customary law.[56]

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52 See the High Court decision [2007] 2 BPLR 174 (C) at para [152].

53 (48743/16) [2017] ZAGPPHC 1246 (13 December 2017) at para [18] http://www.saflii.org/za/cases/ZAGPPHC/2017/1246.html.

54 **Mashazi** *supra*.

55 **Mbatha v Transport Sector Retirement Fund Mbatha v Transport Sector Retirement Fund and Another** (0016223/19) [2020] ZAGPJHC 18 (19 February 2020), an unreported judgement of Meyer J http://www.saflii.org/za/cases/ZAGPJHC/2020/18.html.

56 See the Adjudicator's decision in **Sithole v ICS Provident Fund** [2000] 4 BPLR 430 (PFA). The deceased member was survived by a spouse and three children. The adjudicator overturned the board's decision to pay the benefit to the deceased's grandmother because, in terms of customary law, she was the head of the household. The grandmother was also the sole nominee.

71.4. This legislative supremacy also trumps the fact, terms and conditions of a settlement agreement reached between the deceased's beneficiaries regarding the distribution of the death benefit.[57]

72. In summary, the legislature has prioritised section 37C by making the section applicable to any distribution of a death benefit regardless of any, *inter-alia*, other law, or the rules of the relevant fund. The impact and consequences of section 37C on the appellants' case should already appear to be obvious; particularly because there is no constitutional challenge to section 37C.

F. THE HIGH COURT'S DISMISSAL OF THE SECTION 30P APPLICATION

73. The slow train of events enumerated under topic heading C above brings me to the section 30P application that served before the High Court.

74. As already mentioned, Ms. Collatz wore two different hats in the application. As the first applicant, she proceeded in her personal capacity. As the second applicant, she proceeded in her representative capacity as the executrix of the deceased estate of her late husband. I mention this issue again because, as I read the complaint to the Adjudicator, Ms. Collatz pursued her complaint in her personal capacity only. She did not pursue her complaint in her representative capacity.

75. As, such Ms. Collatz was not, in her representative capacity as executrix, a party to the complaint. Nevertheless, she proceeded in both capacities in the section 30P application. Only the third to fifth respondents identify with this anomaly. This however begs the questions: (i) Is the second appellant, in her representative capacity as the executor of her late husband's deceased estate, a "*party ... aggrieved by a determination of the Adjudicator*" as contemplated by section 30P, and, if not, (ii) what is the second appellant's *locus standi* in the section 30P application within the context

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57 The fact that the parties have entered into a settlement agreement confirming the distribution of the benefit does not override the legal duties imposed by section 37C. See the Adjudicator's determinations in **Matene v Noordberg Group Life Assurance Scheme (2)** [2001] 2 BPLR 4788 (PFA) and **Brummer v CSIR Pension Fund and Another** (2005) 10 BPLR 797 (PFA).

of the first appellant's complaint to the Adjudicator? I do not believe that the question is satisfactorily traversed in the appellants' various affidavits or answered through the various amendments to the appellant's notice of motion.

76. As already mentioned, the appellants failed in their section 30P application. Moreover, in addition to dismissing the application, the High Court granted a punitive costs order against the first appellant. The heart of the High Court's reasons for dismissing the application is stated pithily in paragraph [24] of its judgement. It reads:

> "*[24] In my view, it is not necessary to canvass the many defences raised by the respondents beyond my reference to Ms. Collatz's section 37C difficulty and the lack of evidence put forward by Ms. Collatz on the mental health problem [of Mr. Collatz] read with the serious dispute of facts in relation thereto. The introduction of substantial new allegations in reply and in supplementary affidavit is fatal to the application, especially one which was dragged slowly over eight years and which has been accompanied by substantial amendments.*"

77. As traversed below, the appellants argue that the High Court treated this application as an ordinary appeal as opposed to a *sui generis* application, with all its accoutrements, brought in terms of section 30P. The appellants however, for the reasons traversed below, exaggerate the scope of that permissible within the context of a section 30P application. Moreover, the specific circumstances in which the appellants criticise the High Court for failing to deal with the rule 30P as a *sui generis* application do not assist them, because such circumstances relied upon fall beyond the ambit of the section 30P application that served before the High Court. As such, I believe the appellants' criticism of the High Court is unwarranted.

G. THE PARTIES' SUBMISSIONS AND ARGUMENTS ON APPEAL

(a) The case for the appellants

78. The gravamen[58] of the appellants' submissions in this appeal are the following:

78.1. The first appellant is entitled to half of the assets that constitute the joint estate; after the deceased's legal obligations and liabilities have been discharged, including any accrued retirement benefits.

78.2. Certain "*material facts*" were not (made) available / disclosed to the Adjudicator by the first, second and ninth respondents when she made her determination and as such the Adjudicator "*was prevented from handing down a proper outcome*".

78.3. The Adjudicator relied on "*inherent hearsay allegations and contradictions*" from the respondents.

78.4. The Adjudicator "*followed a wrong path*" in determining the complaint on the basis of section 37C of the Pension Fund Act and, in so doing, failed to apply "*matrimonial principles*". More particularly, because Mr. and Ms. Collatz were married in community of property, section 15(2)(c) of the Matrimonial Property Act, 1984 applies (presumably in preference to section 37C of the PFA).

78.5. The High Court adopted, as foreshadowed above, an "*incorrect approach*" to the section 30P application. It did so by (i) treating the application as an "*ordinary appeal*", (ii) failing to have regard to section 30P, and (iii) consequently, failing to appreciate that a section 30P application is *sui generis.*

78.6. Because it is *sui generis* application, the High Court should have considered "*the matter fresh and not restrict[ed] itself to the record of the adjudicator's*

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58 Whilst I do not recount and traverse all the of appellants' grounds of appeal, accompanying appeal submissions and appeal arguments in this judgement advanced on behalf of the appellants and the respondent's, I nevertheless have had due and full regard to, and considered, all of them in determining this appeal.

proceedings". The High Court moreover had "*powers to accept evidence it deems necessary to make a judgement*".

79. Flowing from the above, the appellants pursue essentially three central arguments on appeal. These are listed, in the appellants heads of argument, as the "*main issues*" arising "*from the appellants' founding affidavit*". Listed under the under the rubric that the High Court should have set aside the Adjudicator's determination, they are the following:

79.1. the late Mr. Collatz did not "*authorise the first respondent or ninth respondent to re-invest his retirement benefit with the second respondent*" – here the High Court is criticised for failing to receive further expert evidence said to demonstrate that the authorisation form had been tampered with;

79.2. within the context of section 15(2)(c) of the MPA, the late Mr. Collatz required, but did not obtain, Ms Collatz's consent before he re-invested his withdrawal benefit with the second respondent; and

79.3. the High Court failed to apply its mind to the question of whether the deceased retired or was retrenched?

80. Qualifying all the above is the respondents' contention, in their heads of argument, that this appeal "*rises and falls*" on the "*purported authorisation form*".

81. However, before dealing with the authorisation form - the fate of which, so the appellants contend, is determinative of this appeal - I nevertheless must first deal with the question of whether the withdrawal benefit accrued to the joint estate, and the accompanying argument by the appellants that Ms. Collatz's consent was required to deal therewith. I thereafter deal with the impact, if any, of the preservation agreement (to the extent that it still warrants attention given that it was not seriously pressed in the appeal). Consideration thereafter is given to the question, and impact, if any, of whether Mr. Collatz retired or was retrenched.

(b) Did the withdrawal benefit accrue to their joint estate?

82. The appellants argue that because of their marriage in community of property, Mr. Collatz's provident fund withdrawal benefit formed part of Mr. and Ms. Collatz's joint estate.

83. In support of this argument, the appellants rely on the decision in **De Kock v Jacobson**.[59] Therein it is held that there is "*no reason in principle why the accrued right to the pension should not form part of the community of property existing between the parties prior to divorce*". The decision however does not assist the appellants. In **De Kock v Jacobson**, the court was required to determine whether a pension interest - having been converted upon retirement into a right to a pension that the husband was receiving - was an asset in the joint estate of a couple married in community of property. More specifically, the court was required to determine whether an accrued pension right was a pension interest in terms of the Divorce Act, 1979. The court in **De Kock v Jacobson** however, as it specifically notes in its judgement, was not required to concern itself with the position before the pension interest became due. Accordingly, the decision in **De Kock v Jacobson** is distinguishable because the applicant there was a member of the Sasol pension fund prior to his retirement and he ceased being such a member upon his retirement and his pension interest was converted to a pension which he was receiving at the time. In the present instance, as detailed below, the time at which Mr. Collatz ceased being a member of the ninth respondent's provident fund is paramount. Mr. Collatz only ceased being a member on the transfer of the withdrawal benefit to the annuity fund.

84. The decision in **De Kock v Jacobson** is furthermore distinguishable because the court's determination is made within the ambit and context of the Divorce Act, 1979. The court was concerned with the patrimonial consequences, and division of assets between divorcing spouses. Mr. and Ms. Collatz's marriage however terminated, not because of divorce, but because of Mr. Collatz's death.

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59 1999 (4) SA 346 (W) at 349G-H.

85. The appellants' reliance upon the decision in **Commissioner for Inland Revenue v Nolan's Estate**[60] is equally misplaced. This decision is distinguishable on its facts and the applicable legislation. Here the court concerned itself with the fate of an annuity enjoyed jointly during his lifetime by the deceased and his wife, who were married in community of property, and enjoyed by her after his death. The annuity which commenced on the deceased retirement, and would continue after his death, was referred to as a "*joint and survivorship annuity*". The court was asked to determine, within the context of the Estate Duty Act, 1955, whether the deceased's share of the annuity which accrued to the deceased's wife was property under section 3(2)(b) of the Estate Duty Act, or if the full capitalised value of the benefits accruing to the deceased's wife constituted the proceeds of the policy of insurance on the life of the deceased and fell under section 3(3)(a) of that Act. The deceased retired on 1 February 1958, and he and his wife, by virtue of their marriage in community, became entitled to receive the joint annuity. It was therefore held, on the facts of the case, that the annuity enjoyed jointly by the deceased and his wife during his lifetime, and enjoyed by her after his death, came into existence on his retirement and not on his death and could not be defined in terms of section 3(3)(a) of the Estate Duty Act as an amount due and recoverable under a policy of insurance.

86. The decision in **Clark v Clark**,[61] a matter decided at exception stage, similarly does not assist the appellants. In fact, I find the appellants' reliance on this decision puzzling. Here the spouses' in community of property marriage was terminated by an order of divorce. I refer to that just mentioned in this regard. Furthermore, the court declined to determine the exception - argued within the context of an interpretation of Statutory Pensions Protection Act, 1923 – finding that it would be better to wait until all the relevant facts were properly before the Court at the trial.

87. The SCA decision in **CM v EM**,[62] also relied upon by the appellants, is likewise similarly distinguishable. This much is apparent from the following: The decision was determined

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60 1962 (1) SA 785 (A) at 791C–E.
61 1949 (3) SA 226 (D).
62 2020 (5) SA 49 (SCA).

within the context of a pending divorce action. The divorcing parties were married to each other out of community of property, subject to the accrual system. The issue to be determined, as an ill-defined separated issue, was whether certain "*living annuities*", as defined in terms of section 1 of the Income Tax Act, 1962, comprised a pensionable interest as defined in the Divorce Act, 1979, and as such susceptible to an accrual claim. Accordingly, no further regard needs to be had to this decision.

88. Furthermore, understandably none of the aforesaid decisions consider or traverse the impact of section 37C, within the context of section 13 of the PFA (discussed below) and the ninth respondent's rules. I have already dealt with the legislative supremacy afforded to section 37C. As such, the High Court cannot be criticised, as the appellants seek to do, for disposing of the section 30P application in terms of, *inter-alia*, section 37C.

89. Likewise, the appellants are also unable to find any comfort in the Divorce Act, 1979. The Divorce Act simply does not apply. This is because, as already mentioned, Mr Collatz passed away before the finalisation of their divorce. As such, their marriage terminated as a result of his passing and not as a result of a divorce.

90. In broad terms, the respondents opposed the section 30P application, and this appeal, on the basis that the withdrawal benefit never formed part of, and did not accrue to, the joint estate. As such, Mr. Collatz was able to deal with the withdrawal benefit as he pleased given, *inter-alia*, the ninth respondent's rules and, in so doing, Mr. Bakos was instructed to place the funds in an annuity (fund) investment vehicle of Mr. Collatz's choice, being the second respondent's annuity fund.

91. Regard is also to be had to the binding nature of the ninth respondent's rules within the context of section 13 of the PFA;[63] specific regard however being had to the ninth

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[63] Section 13 of the PFA reads:

"*13. Binding force of rules*

Subject to the provisions of this Act, the rules of a registered fund shall be binding on the fund and the members, shareholders and officers thereof, and on any person who claims under the rules or whose claim is derived from a person so claiming."

respondent's rule 7.2.2. It provides that a member may, instead of receiving a benefit entirely in cash, transfer all or part of the benefit to an approved annuity fund. The respondents argue that this is what Mr. Collatz did. The funds representing the withdrawal benefit were, pursuant to his instruction, transferred to an annuity fund investment with the second respondent. Moreover, the ninth respondent's rule 7.2.2 entitled Mr Collatz to transfer the withdrawal benefit to another fund, in this instance the annuity fund, without it having accrued to him.

92. The first and second respondents further argue that Mr. Collatz's intervening death triggered section 37C, and with it the consequences already dealt with in this judgement, including the benefits being specifically excluded as assets in the deceased estate of Mr. Collatz, or the joint estate.[64] They further argue that because the second respondent has complied with its section 37C obligations, the funds represented by the benefits must be distributed in terms of such determination and allocation.

93. The ninth respondent denies that the withdrawal benefit became an asset of the joint estate on 31 August 2017 (being the date upon which Mr Collatz's employment terminated). It says this is so because the definition of "*member*" in the PFA states that a person remains a member of a fund until the member has been paid out the benefit in terms of the fund's rules, and no longer has any claim against the fund. The ninth respondent's rule 7.2.3 additionally provides that a member will no longer have a claim on its fund once the benefit has been paid to the member as a lump sum or transferred in terms of rule 7.2.2. The ninth respondent therefore asserts that the transfer from the provident fund to the annuity fund constituted a simple modality of payment of Mr. Collatz's (the member's) benefit pursuant to rule 7.2.2 of the ninth respondent's rules; something over which Ms Collatz had no say or influence in terms of the ninth respondent's rules.

94. As such, until the withdrawal benefit was paid to Mr Collatz, the ninth respondent's position is that it did not accrue to or form part of the joint estate. Likewise, section 5(2)

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64 In **Mashazi v African Products Retirement Benefit Provident Fund** *supra* at 633.

of the PFA provides that until such time, the withdrawal benefit was an asset of the provident fund and belonged to the fund.

95. On the issue of initially placing Mr Collatz's withdrawal benefit into a money market account, the ninth respondent states that this money market account was held in the name of the ninth respondent and that happens routinely when it is notified of the termination of a member's employment. This happens in order to insulate the withdrawal benefit from potentially adverse market exposure and in the interests of the fund's financial stability. This is stated to be an industry wide practice.

96. The ninth respondent therefore argues that the withdrawal benefit, despite being held in a money market account, remained an asset of the ninth respondent until it was transferred (onwards) in accordance with Mr Collatz's election and instructions. (A *status quo* also advanced on behalf of the first and second respondents.) As such, the withdrawal benefit was not "*paid out*" when placed in the money market account. The withdrawal benefit was only "*paid out*" when it was transferred to the annuity fund, albeit then in terms of the ninth respondent's rule 7.2.2. As such, the ninth respondent denies the appellants' assertion that the "*proceeds of the Johnson and Johnson Pension Fund were at that stage invested in cash with Alexander Forbes Financial Services*".

97. I agree with the respective respondents' aforesaid reasoning. Mr. Collatz's benefit, at all material times, did not form part of the joint estate. Instead, it belonged to the ninth respondent until it was transferred to the annuity fund. On receipt by the annuity fund, it became subject to the rules of that fund.[65] However, at all times the benefit remained subject to the PFA. I have already dealt with the section 37C's legislative supremacy. As such, Mr. and Ms. Collatz being married in community of property is of no moment or consequence (see **Makume v Cape Joint Retirement Fund**[66] and **Letsoalo and Others v Lukhaimane NO and Others**[67]). Because the benefit did not accrue to the joint estate and because she had no undivided share or co-owned interest therein, it

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65 See **Tek Corporation Provident Fund v Lorentz** 1999 (4) SA 884 (SCA).
66 *Supra.*
67 *Supra.*

cannot be said, as the appellants claim, that Ms. Collatz was "*unlawfully stripped*" of her right to be a party to the investment decision.

98. In the result, I find that the withdrawal benefit did not accrue to the joint estate, and more particularly that the withdrawal benefit, in whatever its form, did not accrue to the joint estate at any time prior to Mr. Collatz's death. For this reason alone, section 15(2)(c) of the MPA cannot apply. Additionally, even if the MPA did apply, for the reasons already mentioned and because of section 37C, the provisions of the MPA, including section 15(2)(c), are trumped by section 37C. For these reasons, Ms. Collatz's consent for the transfer of the benefit to the annuity fund was not required.

99. There is also separately merit in the argument advanced on behalf of certain of the respondents that that spousal consent was, in any event, not required for the payment of the benefit to the annuity fund because the mode of payment is a "*juristic act*" not mentioned in sections 15(2), (3) and (7) of the MPA. So too, is there merit in the ninth respondent's argument that even if the benefit formed part of the joint estate prior to the transfer to the annuity fund, section 15(2)(c) of the MPA would not apply because the instruction to transfer the benefit did not constitute an alienation, pledge, or a cession - as contemplated by section 15(2)(c) of the MPA.

100. That said, having just mentioned section 15(2)(c) of the MPA, I must also deal with the argument advanced on behalf of the third to fifth respondents regarding what they label as the "evolution *of the Appellant's case*" from the complaint to the Adjudicator, through the various affidavits filed on behalf of the appellants' amendments to their notice of motion and subsequently in this appeal. I do so because they argue that there is a separate (further) reason why section 15(2)(c) of the MPA cannot not apply.

101. In the above regard, the genesis of the appellants' case is that Mr. and Ms. Collatz were married in community of property, an accompanying claim that the withdrawal benefit accrued to the joint estate, and an alleged breach of the preservation agreement. (I return to the preservation agreement shortly.)

102. As the third to fifth respondents correctly point out, the appellants did not rely on section 15(2)(c) of the MPA in any one of their three founding affidavits (i.e., the founding affidavit and their two supplementary founding affidavits). Yet, the appellants subsequently mention, *inter-alia*, that section 15(2)(c) of the MPA required the first appellant's consent to reinvest the accrued benefit because it is an investment.

103. The third to fifth respondents then proceed to argue, relying on the above quoted dictum in **Meyer v Iscor Pension Fund**[68] and the decision in **Van Niekerk v FundsAtWork Umbrella Provident Fund**,[69] that as the appellants did not raise a section 15(2)(c) complaint to the Adjudicator, it cannot subsequently feature in the section 30P application. I refer to the "complaint" to the Adjudicator as identified above.

104. I however must disagree with the third to fifth respondents on this score. The decision in **Meyer v Iscor Pension Fund** holds that: *"... the High Court's jurisdiction is limited by s 30P(2) to a consideration of 'the merits of the complaint in question'. The dispute submitted to the High Court for adjudication must therefore still be a 'complaint' as defined. Moreover, it must be substantially the same 'complaint' as the one determined by the Adjudicator*".

105. Given the nature and content of the first appellant's complaint to the Adjudicator, as identified above, the issue of the absence of Ms. Collatz's consent within the context of the parties being married in community of property forms an indelible component thereof. Section 15(2)(c) of the MPA provides, in summary, that a spouse in a marriage in community of property shall not without the written consent of the other spouse alienate any "... *investments by or on behalf the other spouse in the financial institution, forming part of the joint estate*". Whilst there is no specific earlier mention of section 15(2)(c) of the MPA by the appellants, I am nevertheless of the view that the section 15(2)(c) complaint, given the content of the consent complaint to the Adjudicator, is, as

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68 *Supra.*
69 *Supra.*

required in **Meyer v Iscor Pension Fund**, "*substantially the same 'complaint' as the one determined by the Adjudicator*".

106. Nevertheless, this specific complaint of the appellants, whether it is labelled as a section 15(2)(c) complaint or otherwise, must however fail for the reasons already mentioned. The withdrawal benefit did not form an asset in the joint estate and as such, Ms. Collatz's consent was not required for the transfer to the annuity fund.

(c) The fact and import of preservation agreement

107. The preservation agreement equally provides no refuge for the appellants. This is for a variety of reasons. I deal with the preservation agreement as a matter of caution for the reasons already mentioned.

108. The first and second respondents dispute the contents of the agreement within the context of that known to the parties at the time regarding the accompanying taxation implications. These, so the first and second respondents contend, rendered a transfer to a preservation fund impossible and because the agreement precluded encashment, the only feasible and available option was a transfer to the annuity fund. As such, the funds were preserved, i.e., not paid out in cash, pending the finalisation of Mr. and Ms. Collatz's divorce. They additionally state that at no stage were any "*cash funds*" relevant to the proceedings held by the second respondent.

109. The ninth respondent's approach is that it is a "*stranger*" to the preservation agreement, and that it did not and could not have had any knowledge thereof because the first respondent, as its provident fund administrator, was responsible for administering the fund in terms of the ninth respondent's rules. The ninth respondent states that these rules, which include rule 7.2., are not in dispute, and that rule 7.2 does not require or provide that in instruction by, or the consent of, the non-member's spouse is required when withdrawing benefits. As such, the ninth respondent argues that any agreement between spouses cannot be relied upon to: (i) place any obligation on the ninth respondent, or (ii) operate to amend its rules.

110. The first and second respondents, together with the ninth respondent, are furthermore at pains to point out that they are not parties to the preservation agreement, and as such are not bound thereby. The relevant respondents further assert that Mr. Bakos was employed by an entity other than the fund's administrator (who was the first respondent) and that he had nothing to do with the ninth respondent. The ninth respondent moreover states that it would never have provided Ms. Collatz with the impression that Mr. Bakos was a representative of either the ninth respondent, or its administrator.

111. The aforesaid positions adopted by the first, second and ninth respondents demonstrate the presence of material genuine disputes of fact. These genuine disputes pertain, *inter-alia*, to the fact, enforceability, nature, and content of the preservation agreement and whether or not there was, at any time, "*cash funds*" relevant to the proceedings held by the second respondent. As such, the rigours of the **Plascon-Evans** requires that the respondents' versions be preferred.

112. In any event for the reasons already mentioned, the preservation agreement, even if concluded in the terms asserted by the appellants, could not, and cannot, trump section 37C.

113. In summary, the preservation agreement is therefore not the panacea that the appellants want it to be.

(d) The new complaints: the appellants' challenges to the enforceability, veracity, and authenticity of the authorisation form

114. I now turn to deal with the (new) complaints belatedly introduced and advanced by the appellants. I do so specifically within the context of the appellants' argument that:

> "*[T]he court a quo failed to appreciate, in line with established precedent from the Supreme Court of Appeal, that the appellants' appeal was sui generis, making it is an appeal in the wide sense which required the court to consider the matter fresh and not restrict itself to the record of the adjudicator's proceedings.*"

115. Given that already traversed in this regard in this judgement, for the appellants to succeed on this score, it is trite that the complaint pursued before the Adjudicator must be the same complaint (or substantially the same complaint) raised and in issue in the section 30P application. This is no doubt why the appellants assert, in their heads of argument and in referencing the decision in **Meyer v Iscor Pension Fund**, that: "*The merits of the appellants' complaint are exactly the same as the complaint provided to the adjudicator*".

116. That said, while the appellants correctly state that section 30P permits a court to admit further (new) evidence within the context of a section 30P application being *sui generis*, they appear to overlook that this further (new) evidence must be relevant and admissible and comprise evidence pertinent to the merits of the complaint before the Adjudicator, and not evidence relating to a new cause of action or irrelevant to such complaint. As such, any High Court reconsideration of the matter is, as already mentioned, unavoidably bound by the parameters and ambit of the complaint.

117. I pause to emphasise that the further (new) evidence must obviously also be admissible evidence (i.e., procedurally admissible and admissible in terms of the rules and Law of Evidence). Furthermore, the test in **Plascon-Evans** continues to apply and so too the uniform rules of court. Otherwise stated, section 30P does not permit the opening of an evidential or procedural Pandora's box.

118. The appellants' aforesaid submission regarding the complaints being "*exactly the same*" is however incorrect within the context of the (new) complaints. The appellants' challenges to Mr. Collatz's mental capacity and the authorisation form did not feature in the complaint to the Adjudicator. These (new) complaints arose after the Adjudicator published her determination. They appear for the first time in the section 30P application.

119. The appellants' challenge to Mr. Collatz's mental health arose for the first time in the appellants' second supplementary affidavit in the section 30P application delivered during July 2015; being some four years after the first appellant lodged her complaint

with the Adjudicator. The challenge to the authenticity and veracity of the authorisation form arose a further three years thereafter and for the first time, at best for them, late in 2018 and then in the appellants' replying affidavit; but even then it is unsatisfactorily only vaguely and opaquely asserted.

120. By way of example, the appellants contend in their replying affidavit, without any specificity or particularity, that during 2013 and 2014, the first appellant engaged with the first and second respondents on, *inter-alia*, "*the authenticity of the Questioned retirement investment form, in particular, the form was completed by more than one person, there are many changes and alterations in the document and the signatures in [sic] of the pages of the form was insert by someone other [Mr Collatz].*

121. The appellants proceed to allege, in their replying affidavit, that they deal "*with the signature of the document, the Questioned retirement investment form allegedly signed by [Mr Collatz] whilst he was undergoing mental health treatment*" in their "*supplementary affidavit*" delivered on 31 July 2015; being a reference to the second supplementary (founding) affidavit.

122. However, even if this statement in their replying affidavit is benignly read, it is only partially correct. I say so because the thrust of their second supplementary (founding) affidavit is, as already mentioned, a challenge to Mr Collatz's mental capacity when signing the authorisation form, and not a challenge to authenticity of the form or his or others' signatures thereon.

123. As such, as I read and understand their second supplementary (founding) affidavit, and its annexures, they do not question the veracity or authenticity of Mr Collatz's signature on the documents, but rather his mental capacity at the time of his doing so - more specifically his ability to appreciate the nature and consequence of the documents he signed. Accordingly, they contended in their second supplementary (founding) affidavit that Mr Collatz's capacity to perform juristic acts was impaired at the time.

124. I am fortified in my reading and understanding of the second supplementary (founding) affidavit because in a letter addressed on their behalf to the Adjudicator, an annexure

to that affidavit, the specific allegation is made that "*the Alexander Forbes Group*" had not disclosed "*that the 'application had been signed by the deceased in the Psychiatric hospital*'. Furthermore, their second supplementary (founding) affidavit concludes by asserting that the application "*was invalid in that deceased lacked the requisite capacity to make that application or authorise the transfer*" (emphasising their challenge is targeted at Mr. Collatz's mental capacity alone).

125. Be that as it may, these complaints (challenges) indubitably constitute new complaints which were not placed before, or considered by, the Adjudicator. These new complaints are materially and fundamentally different from the complaints placed before the Adjudicator during November 2011. They comprise, separately and cumulatively, a completely new case, and are not substantially the same complaint as that referred to and determined by the Adjudicator. These complaints therefore cannot form part of the section 30P application.

126. There is also the unexplained anomaly or disconnect in these complaints, as pointed out by the High Court in paragraph 17 of its judgement, and which centres on Mr. Collatz being mentally able (capax) in late July 2008 to conclude the preservation agreement when measured against his alleged subsequent incapacity during late September 2008 when electing to transfer the withdrawal benefit to the annuity. This sudden change in his capacity, over a matter of weeks, is unexplained.

127. I cannot therefore agree that the High Court, as submitted on behalf of the appellants, was obliged to: (i) weigh the medical evidence presented by the appellants, or (ii) accept into evidence the expert evidence that they contend demonstrates that the deceased did not authorise a reinvestment of his withdrawal benefit. Similarly, I am unable to agree with the appellants' contention that the High Court must be criticised for failing to apply its mind on the issue of the questioned authorisation form.

128. Given that permissible in terms of section 30P, it simply did not behove the High Court, as claimed by the appellants, to "*consider the medical expert evidence*" or "*scrutinise the nitty-grittyness*" of the authorisation form.

129. As such, the High Court cannot be criticised for not considering these new complaints because they are extraneous to the complaint before and determined by the Adjudicator. The High Court did not have any discretion to do so, and it would have been incompetent for the High Court to do so. On the contrary, the High Court - in disallowing the introduction of these complaint(s) and the accompanying evidence - ensured that the application did not move beyond the parameters (complaint- and evidence-wise) set by section 30P.

130. Given the above, the appellants' reliance on the Constitutional Court decision in **Department of Transport and others v Tasima (Pty) Limited**[70] is advanced in a factual and jurisdictional vacuum; directly attributable to the operation of section 30P and the jurisdictional and evidential limits imposed thereby on the High Court. As such, the decision does not assist the appellants.

131. Furthermore, even if the High Court, was at large or even obliged to entertain these new complaints within the context of the section 30P application, it would have struggled to do so because these complaints are riddled with various material foreseeable disputes of fact. The very nature of the appellants' contentions and complaints regarding: (i) the mental capacity of Mr Collatz, and (ii) the authenticity and veracity of the authorisation form demonstrates the unavoidable expectation, and existence of serious disputes of fact, and with it the rigours of the **Plascon-Evans** rule.

132. As quoted above, the SCA specifically held in **Meyer v Iscor Pension Fund** that the rule in **Plascon-Evans** applies to section 30P applications and wherein the complainant is to be regarded as the applicant. Moreover, whilst the onus in respect of an alleged fraud (in this instance a fraudulent authorisation form) remains an ordinary civil onus, fraud is not easily inferred.[71] This is why it is trite that a party wishing to rely on fraud must not only allege the existence of the fraud but must also prove it clearly and distinctly.[72]

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70 2017 (2) SA 622 (CC).
71 **Gilbey Distillers & Vintners (Pty) Ltd v Morris NO** 1990 (2) SA 217 (SE).
72 **Courtney-Clarke v Bassingthwaighte** 1991 (1) SA 684 (Nm) at 689.

133. The appellants' aforesaid difficulties are compounded in circumstances where the first and second respondents meaningfully and issuably deny that Mr. Collatz, at the time when electing to transfer the withdrawal benefit to the second respondent, suffered from any psychiatric or mental condition rendering him incapable of making decisions or attending to his own affairs. (The ninth respondent states that it cannot assist on the issue of Mr. Collatz's mental capacity because it has no knowledge thereof.)

134. Importantly, however, the third to fifth respondents' reference and rely on an affidavit filed by Mr. Collatz's sister. She is a witness to the authorisation form. She states in her affidavit that her brother drank excessively after the tragic death of his son, and the accompanying specific circumstances leading to his admission to Denmar for alcohol abuse and emotional depression. She states that he was not admitted because of any mental incapacity and that his "*mental capacity was never a concern*". She further states that the deceased completed and signed the nomination forms in her presence, which she witnessed. She adds that at the time of his doing so, "*nothing was out of place*" with him, he "*looked like the person [she] had known [her] entire life*", "*his character was intact*" and that she never suspected that he was "*mentally incapable of understanding the documents or appreciating the nature of the transaction*". Mr. Collatz had also informed her that he had discussed the contents of the forms and the type of the investment with Mr. Bakos.

135. The appellants seek to impeach Mr. Collatz sister's evidence by attempting to implicate her in an alleged odious conspiracy pertaining to the authorisation form. This endeavour by the appellants is evidentially unsupported and unsustainable, if not mischievous; and nothing further needs to be mentioned in this regard.

136. In its answering affidavit before the High Court, the ninth respondent's position on the appellants' belated "*new cause of action*" (at that stage the incapacity complaint) is that "*this matter should be determined once and for all, not the least in order to enable the final de-registration and winding up of the J&J Fund*". The position adopted by the ninth respondent in this regard, fortifies my already expressed view, regarding the need for finality in this litigation.

137. On the issue of the challenge to the authorisation form, the ninth respondent states as follows: (i) the ninth respondent would not be involved in the administrative task of receiving or the processing of the instruction represented by the authorisation form, (ii) the first respondent, as its nominated administrator, would receive and implement the instruction, and in so doing acted correctly, and (iii) if Mr. Collatz did indeed lack capacity at the relevant time, the ninth respondent knew nothing of this but that the withdrawal benefit must revert to the ninth respondent, together with interest, in order for it to be dealt with in accordance with its rules, which will result ultimately in the ninth respondent's payment of the withdrawal benefit, less any tax payable, as a lump sum into the estate of Mr. Collatz.

138. Within the above context, the High Court also cannot be criticised for finding, as it is, regarding the lack of evidence proffered in respect of the Mr. Collatz's claimed mental health problems and the accompanying existence of the serious dispute of facts in relation thereto. Whilst not expressly stating so, the High Court clearly had regard to the rule in **Plascon-Evans**.

139. Furthermore, even if the High Court was enjoined to consider afresh, within the context of the section 30P application, the challenges to: (i) Mr. Collatz's mental capacity, and (ii) the authenticity and veracity of nomination form (which it was not), and in so doing have regard, *inter-alia*, to the expert handwriting report, the appellants would in any event not have overcome the hurdle presented by the rule in **Plascon-Evans**. The appellants would have thus failed to satisfy the High Court that there had been, as they contend, "*a clear violation of the law that would result in serious injustice*". This much is patent from the above quoted paragraph 24 of the High court's judgement.

(e) Did Mr Collatz retire, or was he retrenched, and is the answer relevant?

140. The issue of whether Mr. Collatz was retired or retrenched features prominently, and so too the specific label to be attached to his employment exit event. These issues are heavily contested in the section 30P application.

141. The appellants argue that because Mr. Collatz retired, the ninth respondent's rule 5 applies, not its rule 7. Because rule 5 applies, the appellants argue that the withdrawal benefit accrued to Mr. Collatz on his retirement and, as such, it formed part of the joint estate. Rule 7 regulates the position if a member exits the services of their employer before "*Normal Retirement Date*". As mentioned elsewhere, rule 7.2.2 entitles and enables Mr. Collatz to transfer the withdrawal benefit to the annuity fund without it having accrued to him.

142. The first and second respondents join issue with the appellants. Their factually supported account – including references to documents produced by the appellants and correspondence from the first appellant's then attorney - culminates in their conclusion that "*the funds never left the Ninth's Respondent's account and at all times remained with the Ninth Respondent until such time as it was paid over to the Second Respondent, following Mr Collatz's election, on or about 1 October 2008*". As already mentioned, the ninth respondent's account, which is not unsustainably disputed, is that the withdrawal benefit (factually and legally) remained its asset until Mr. Collatz exercised his rule 7.2 election, and this election was implemented.

143. A further difficulty for the appellants is that it is clear, and not seriously or genuinely in dispute, that Mr. Collatz and his previous employer elected and agreed to treat his exit event as a retrenchment. The fact that this may have been motivated for taxation reasons is irrelevant for purposes of the section 30P application, and as such this appeal. It is also not disputed that when exiting, Mr. Collatz had not yet reached the mandatory retirement age of 65. Given the contractual relationship between Mr. Collatz and his previous employer, it was open for them to agree on the exit event and the specific label to be attached to the termination of their relationship.

144. The appellants, however, argue that it is trite that a factual exit event from employment which enables a member of a retirement fund to exit the fund cannot be changed or negotiated once it has occurred. The appellants however provide no authority to support this "trite" position. The submission, in any event, ignores that notwithstanding the

categorisation of an exit event, the appellant remained, at all material times, a member of the ninth respondent.

145. Considering the above, I do not believe that the appellants have successfully discharged their onus of establishing that Mr Collatz's exit event, for purposes of the section 30P application, falls to be regarded and treated as a retirement, as opposed to a retrenchment.

146. Even if I am wrong in the above regards, two additional considerations militate against the appellants in this appeal. They are:

146.1. First, all of the above demonstrates, at worst for the respondents, that there are several material factual disputes on the issue of the Mr Collatz's exit event. These factual disputes, once again, bring with them the rigours, and consequences for the appellants, of the rule in **Plascon-Evans**. Preferring then, as I must, the first and second respondents and ninth respondent's accounts of the disputed events, I find that: (i) the withdrawal benefit, pursuant to being paid into the money market account, did not divest from the ninth respondent at any time prior to its transfer to the annuity fund, and (ii) the withdrawal benefit did not accrue to the joint estate.

146.2. Second, there is merit in the third to fifth respondents' argument that even if the ninth respondent's rule 5 did apply, such does not mean that the withdrawal benefit automatically accrued to Mr. Collatz, because Mr. Collatz, as a member of the ninth respondent, was still armed with an election to commute some or all of the withdrawal benefit, otherwise the benefit is transferred directly to the annuity. The appellants do not contend that Mr. Collatz commuted the whole of the benefit.

(f) Have the alleged debts pursued by the second appellant against the first and ninth respondents prescribed?

147. I refer to that stated above regarding the various iterations of the appellants' notice of motion in their section 30P application.

148. Benignly read, their initial 2012 notice of motion sought orders requiring the second respondent to make payment of the withdrawal benefit process. This notice of motion did not seek such an order against the first respondent. The appellants' 2018 amended notice of motion did not seek a payment from the second respondent but rather sought, for the first time, a money judgement against the first and/or ninth respondent(s).

149. With the above chronology in mind, it is not in dispute that the contested transfer to the second respondent (payment) of the withdrawal benefit to the second respondent took place during October 2008.

150. The first and second respondents argue that, on the appellants' own version, the payment of R9,955,941.45 accrued on 5 March 2008, as is apparent from paragraph 4.1 of the appellants' amended notice of motion. The first and second respondents therefore argue that any case or claim advanced (more properly a "debt" sought to be enforced or recovered[73]) against the first respondent prescribed in 2011.

151. The first and second respondents squarely raise the issue of the prescription in their August 2019 affidavit; filed in response to the appellants' (then 2018) amendment to their notice of motion. In a further affidavit filed by the ninth respondent, it simply raises the issue of prescription, but therein claims that the debt pursued by the second appellant against the ninth respondent - pursuant to the 2018 amendment to the appellants notice of motion – has prescribed, albeit the ninth respondent asserts that the claim would have prescribed, at the very latest, by November 2015, being a date three years after the first appellant lodged her complaint with the Adjudicator. All things

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73 In **Unilever Bestfoods Robertsons (Pty) Ltd v Soomai & another** 2007 (2) SA 347 (SCA) at 359F-H, Farlam JA succinctly put it as follows: "*What prescribes in terms of the Prescription Act . . . is a 'debt', that is to say, not a 'cause of action', but a 'claim'*".

considered, prescription is correctly and issuably raised in the section 30P application of **Gericke v Sack**.[74]

152. It is trite that the running of prescription commences once a creditor has acquired the right to claim a debt.[75] The SCA in **The Master v IL Back & Co Ltd & others**[76] held that a creditor cannot by its own conduct – namely action or inaction – postpone the commencement of prescription.

153. Notwithstanding all of the aforesaid, the appellants failed to deal issuably or sustainability in their (or a subsequently filed) replying or further affidavit with the issue of prescription. There is therefore no sustainable case made out by the appellants as to why the debt sought to be pursued against the first respondent has not prescribed, such as incapacity, the suspension or interruption of the running of prescription.

154. Additionally, it matters not whether prescription commenced to run when the payment of R9,955,941.45 accrued, as the appellants contend, on 5 March 2008, or when the actual transfer took place during October 2008, or if the debt had prescribed, at the very latest, by November 2015. The importance of a 2011 / 2015 prescription date fades in any of its significance because the appellants only sought to recover the debt represented by such payment / transfer more than ten years later, during 2018 if regard is had to the 2008 transfer), or more than six years after the submission of the complaint to the Adjudicator, and some three years after 2015.

155. All things considered and ignoring for present purposes all of the appellants' other difficulties in this appeal, I cannot help but conclude that the debt pursued by the second appellant against the first respondent, and possibly also the ninth respondent, has prescribed.

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74 1978 (1) SA 821 (A).

75 See, *inter-alia*, **Truter & another v Deysel** 2006 (4) SA 168 (SCA) at para [15] and **Standard Bank of South Africa Ltd v Miracle Mile Investments 67 (Pty) Ltd & another** 2017 (1) SA 185 (SCA) at para [24].

76 1983 (1) SA 986 (A) at 1004A-1005H.

156. I qualify the aforesaid position in respect of the ninth respondent because the issue of prescription is not pressed in the heads of argument filed on behalf of the ninth respondent. Instead, the attitude and position of the ninth respondent in the section 30P application and in this appeal is that: (i) it did not oppose the relief sought by Ms. Collatz in the application, (ii) it occupies a "*neutral position*" akin to an amicus, and (iii) the relief sought by the appellants against the ninth respondent is incompetent, cannot be competently granted and would be impossible to give effect to. (I have however expressed my view on the ninth respondent's claimed neutral position.)

G. CONCLUSION ON THE MERITS OF THE APPEAL

157. For the above reasons, separately and cumulatively, I am unable to agree with the appellants' submission that they have made out a case for: (i) the setting aside of the Adjudicator's determination in the founding affidavit and, moreover, (ii) that the relief to which they claim to be entitled is adequately crystallised in the amended notice of motion.

158. I am also unable to find that the appellants' affidavits make out an identifiable and sustainable case (cause of action) against the first or the ninth respondents for the payment of R 9,955,941.45, or for any of the other relief sought by them in the amended notice of motion in their section 30P application.

159. I am also unpersuaded that the High Court erred in the respects alleged by the appellants. In any event, it is trite, as held by the SCA in **Absa Bank Limited v Mkhize**,[77] that an appeal lies against the orders granted and not against the reasons for the orders. This "*sound principle*" is confirmed in numerous other decisions.[78]

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77 2014 (5) SA 16 (SCA) at para [64].

78 See, for example, **Neotel (Pty) Ltd v Telkom SA Soc Ltd and Others** (605/2016) [2017] ZASCA 47 (31 March 2017).

160. As the ninth respondent correctly argues, Ms. Collatz is not disadvantaged through the application of section 37C, the section is as beneficial to her as it is to Mr. Collatz's other dependents.

161. Consequently, the appellants must fail in their appeal and their appeal thus falls to be dismissed.

162. Because of the conclusions that I come to in this appeal and the accompanying dismissal, it is unnecessary for me to specifically consider and deal with, *inter-alia*, the following:

162.1. the appellants' abandonment, and the consequences thereof, of the relief initially sought by them against the second respondent, within the context of their accompanying failure to tender the second respondent's costs;

162.2. the first and second respondents' argument and the challenges to Mr. Collatz's mental capacity falls beyond the definition of a "*complaint*" and therefore cannot form the subject matter of a section 30P complaint, and by extension the section 30P application;

162.3. the first and second respondents' argument that the appellants "*new cause of action*" (a reference to the new complaints) is "*time barred in terms of the provisions of the [Pension Funds Act] and the Prescription Act*";

162.4. the first and second respondents' contention regarding the non-citation of Mr. Bakos and his employer, Alexander Forbes Financial Planning Consultants (Pty) Ltd - notwithstanding that this point was not seriously, if at all, addressed or pressed in this appeal, an appeal court nevertheless can *mero muto* raise the issue of non-joinder;[79] and

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79 See the full bench decision in **Rosebank Mall (Pty) Ltd and Another v Cradock Heights (Pty) Ltd** 2004 (2) SA 353 (W).

162.5. the substantial taxation and interest implications and consequences, within the context of the relief sought by the appellants in their amended notice of motion, accompanying any order for the (re)payment of the amount of R 9,955,941.45.

H. THE ISSUE OF COSTS

163. The High Court ordered that the first appellant personally pay the costs of the section 30P application and, moreover, it ordered that such be paid on the punitive scale with the accompanying terms thereof relating to the employment of two counsel and senior counsel.

164. It is a trite that a court considering a costs order exercises a discretion.[80] Smalberger JA in **Intercontinental Exports (Pty) Ltd v Fowles**[81] says the following regarding this discretion:

> "*The court's discretion is a wide, unfettered and equitable one. It is a facet of the court's control over the proceedings before it. It is to be exercised judicially with due regard to all relevant consideration. These would include the nature of the litigation being conducted before it and the conduct before it and the conduct of the parties (or their representatives). A court may wish, in certain circumstances, to deprive a party of costs, or a portion thereof, or order lesser costs than it might otherwise have done as a mark of its displeasure at such party's conduct in relation to the litigation.*"

165. There is nothing to suggest that the High Court did not exercise its discretion judicially or for a finding, in this appeal, that the personal punitive costs order was unwarranted.[82] The High Court specifically addressed, in paragraph [26] of its judgement, the question of costs and the circumstances that accompanied a consideration of a punitive costs order (within the context of "*this case*"). It is apparent from the High Court's judgement

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80 **Koekemoer v Parity Insurance Company Ltd & another** 1964 (4) SA 138 (T) at 144F-145.
81 1999 (2) SA 1045 (SCA at para [25].
82 See **Nel v Waterberg Landbouwers v Ko-operatiewe Vereeniging** 1946 (1) AD 597 at 607.

that it engaged with the appellants' senior counsel on the issue of the punitive scale of costs.[83] The appellants do not suggest, let alone argue, the contrary in this appeal.

166. I am thus unable to find any basis to interfere with the High Court's costs order. Rather, I am of the view that the High Court's punitive costs order is warranted given the appellants' conduct and delays in the history of the section 30P application.

167. As to the costs of this appeal, I have already expressed my concerns regarding the second appellant's *locus standi* in the section 30P application within, *inter-alia*, the context of the first appellant's complaint to the Adjudicator. I need not finally determine this question because I, in any event, agree with the sentiments of the High Court, albeit within the context of this appeal, that Ms. Collatz has litigated, in her capacity as the executor, at the expense of the beneficiaries of Mr. Collatz's deceased estate, and potentially to their and her own prejudice.

168. When submitting her complaint to the Adjudicator and in bringing the section 30P application, is difficult to find that Ms. Collatz did so for reasons other than her own; which reasons trumped the interests of Mr. Collatz's deceased estate, its beneficiaries, and his section 37C dependents.

169. Ms. Collatz's self-interest is best expressed in her own words, and in the form of the "*relief*" she sought from the Adjudicator in her complaint. Therein, she states, *inter-alia*, the following: "*I must be paid out to enable me to examine the investment options most suited to me*". Her self-interest in pursuing the litigation, and in due course this appeal, is entrenched in the appellants' heads of argument. Therein the following is stated:

> "*The appellant is entitled to half of the assets that constitute the parties' joint estate; after the deceased's legal obligations and liabilities have been discharged.*"

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83 See **AA Alloy Foundry (Pty) Ltd v Titaco Projects (Pty) Ltd** (1) SA 639 (SCA) at 648 E-I and **Thoroughbred Breeders Association v Price Waterhouse** 2001 (4) SA 551 (SCA) at 596 D-I.

170. When making application for condonation, the appellants sought an indulgence because their appeal had lapsed. Notwithstanding the specific circumstances in which such condonation has been granted, the opposition to the condonation application, albeit unsuccessful, was not unreasonable. There are obviously cost consequences accompanying the condonation application. The respondents should not be liable for these costs, neither Mr. Collatz's deceased estate.

171. To the extent that the respondents have incurred additional costs in respect of the appellants' failure to comply with uniform rule 49(13), I can see no reason why they should be burdened with these costs. This is particularly so in circumstances were the appellants' scorn and cavalier approach to their security obligations is lamentable. I make this order only as a matter of caution and only if these costs may, for whatever reason, not ordinarily be taxable and recoverable in the taxation of the costs of the appeal.

172. Finally, for the reasons already mentioned, I do not believe it is appropriate to burden Mr. Collatz's deceased estate with a costs order in this appeal. These costs must instead be borne by Ms. Collatz personally.

I. ORDER

173. For the several reasons set out above, the appellants must fail, on all scores, in their appeal. Accordingly, the following orders are made:

1. The appellants' application for condonation for the late prosecution of the appeal, and its reinstatement, is granted. The first appellant personally is to pay the costs of the condonation application.

2. The appeal is dismissed with costs, which costs are to be paid by the first appellant personally.

3. The costs orders in paragraphs 1 and 2 above are to include the costs of two counsel, where so employed.

4. The costs order in paragraph 2 above furthermore includes those or any (additional) costs incurred by the respondents attributable to the issue of the appellants' failure to comply with uniform rule 49(13).

AMM AJ
Acting Judge of The High Court of South Africa, Gauteng Local Division

I concur:

SENYATSI J
Judge of The High Court of South Africa, Gauteng Local Division

I concur:

MAHOMED AJ
Acting Judge of The High Court of South Africa, Gauteng Local Division

VIRTUALLY HEARD & ARGUED: - 30 August 2021

JUDGEMENT ELECTRONICALLY DELIVERED: - This judgement was handed down electronically by circulation to the parties' legal representatives by email. It will also be uploaded onto CaseLines.

The date and time for the handing-down of this judgement is deemed to be:

10h00 on **10 FEBRUARY 2022**.

APPEARANCES:

Appellants:	Adv M Mpshe SC mokotedimpshe56@gmail.com & Adv N Mahlako neo.mahlako1@gmail.com Instructed by: Rambevha Morobane Attorneys (012) 346 3494 clement@ramorattorneys.co.za
First & second respondents:	Adv S Khumalo SC sandilekh78@yahoo.co.za & Adv L Bedhesi counsel@bedhesi.com Instructed by: Bowman Gilfillan Inc. (011) 669 9000 Mxolisi.ngubane@bowmanslaw.com
Third to fifth respondents:	Adv S Vivian SC mail@viviansc.co.za Instructed by: Giuseppe Fizzotti Attorneys (011) 622 5530 fizzys@iafrica.com
Ninth respondent:	Adv A Milovanovic-Bitter anam@counsel.co.za Instructed by: Fasken Attorneys (011) 586 6017 ncarman@fasken.com