REPORTABLE
(as to paragraphs 1 – 23 and 32 to end)

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No:
266/11

In the matter between:

BEULAH EVELYN BONUGLI **First Appellant**

CHRISTOPHER STEPHEN BONUGLI N.O. **Second Appellant**

and

THE STANDARD BANK OF SOUTH AFRICA LIMITED **Respondent**

Neutral citation: *Bonugli v Standard Bank of South Africa Limited* (266/2011) [2012] ZASCA 48 (30 March 2012)

Coram: FARLAM, CACHALIA, MALAN, WALLIS JJA and PETSE AJA

Heard: 15 February 2012

Delivered: 30 March 2012

Summary: Jurisdiction – submission to – peregrine defendant opposing summary judgment on the merits without contesting competence of court – effect thereof – mistake – rectification of contract – party seeking rectification failing to establish requirements therefor – calculation of quantum – whether certain charges recoverable.

ORDER

On appeal from: Western Cape High Court, Cape Town (Veldhuizen J sitting as court of first instance):

1. The appeal is upheld with costs including the costs occasioned by the employment of two counsel, save that the costs in respect of the preparation, perusal and copying of the record shall not exceed ten per cent of the costs incurred in relation to those tasks.

2. The order of the trial court is set aside and the following order is substituted in its stead:

'Judgment is granted in favour of the plaintiff against the first defendant in her personal capacity and against the first and second defendants in their representative capacities jointly and severally, the one paying the other to be absolved, for:

(a) payment of the sum of R14 578 143;

b) interest on the sum of R14 578 143 at 15,5 per cent per annum from the date of service of summons to date of payment;

c) costs of suit which shall include the costs occasioned by the employment

of two counsel.'

JUDGMENT

WALLIS JA and PETSE AJA (FARLAM, CACHALIA and MALAN JJA concurring):

Introduction

[1] The respondent, the Standard Bank of South Africa Limited (as plaintiff) successfully sued the appellants (as defendants) in the Western Cape High Court for payment of the sum of R16 958 969 together with interest and costs of suit, inclusive of the costs occasioned by the employment of two counsel.

[2] The first appellant, Beulah Evelyn Bonugli, was sued both in her personal capacity and in her representative capacity as a trustee of Rivonia Close Trust (RCT). The second appellant, Christopher Stephen Bonugli, was sued in his representative capacity as a trustee of RCT. In effect therefore the action was against Mrs Bonugli and RCT. The appeal to this court is with the leave of the court below.

[3] The bank's action was founded on a deed of suretyship purporting to bind both Mrs Bonugli and RCT as sureties for the debts of Union Charter Trust (UCT)

under four leases in respect of Pilatus PC12 aircraft. The leases and the suretyship were concluded on different dates in Johannesburg. Mrs Bonugli represented RCT in executing the deed of suretyship. She also represented UCT in concluding the leases. In each instance she claimed to be authorised to do so by her fellow trustees. UCT's indebtedness, although not the amount thereof, was admitted. This is hardly surprising as UCT had been sequestrated by the bank in respect of that indebtedness.

[4] Pursuant to its right in terms of the contracts the respondent recovered possession of the four aircraft in May 2006 and on various dates sold them. The amount of UCT's indebtedness in respect of each aircraft, save one, was agreed in the course of the trial. We will need to revert to that one when dealing with the question of quantum.

[5] The deed of suretyship, described as a general guarantee, was executed on or about 22 April 1998. In terms of the guarantee RCT and the first appellant undertook liability, jointly and severally, as sureties and co-principal debtors in-solidum with UCT for the due and faithful payment by UCT to the respondent of all sums of money then owing or which might thereafter become owing in relation to any cause of indebtedness whatsoever and acknowledged that any admission or acknowledgement of indebtedness by UCT would be binding upon them and that a certificate signed by a manager of the respondent, whose appointment need not be proved, as to the amount owing by UCT to the respondent, would constitute prima facie proof of such indebtedness.

[6] Subsequent to the sequestration of UCTand shortly prior to the commencement of this action a number of certificates of indebtedness were issued by a manager employed by the bank, in terms of which various amounts were

certified as due and owing to the respondent by UCT. Although some time was spent in the trial over the validity of these certificates the issues in that regard were largely overtaken by the agreement on quantum and nothing in this appeal turns on them.

[7] The defences raised by Mrs Bonugli and RCT were:

a) Rectification, in that they claimed that the suretyship did not correctly reflect the common intention of the respondent and the appellants, because it was only intended to guarantee UCT's obligations in terms of an earlier instalment sale agreement, which UCT concluded with the respondent on 22 April 1998, in respect of an aircraft with registration number BEB – 180 (the BEB aircraft). In other words, notwithstanding the general terms of the guarantee, it was, so they contended, limited to a single transaction and inapplicable to the four lease agreements giving rise to UCT's indebtedness to the bank.

b) A defence of lack of authority based on the contention that Mrs Bonugli was not authorized to represent and bind RCT to a general guarantee at the time she executed the deed of suretyship, but only a guarantee limited to the earlier lease concluded in relation to the BEB aircraft.

c) A special plea (which was filed on 28 May 2007) averring that the Western Cape High Court had no jurisdiction to entertain the respondent's action against RCT because

the leases were concluded in Johannesburg and the deed of suretyship was also executed in that city, whilst the second appellant was permanently resident in Sydney, Australia when the respondent's action was instituted.

[8] The court below found that the bank had established its case against Mrs

Bonugli and RCT. In other words it held that it had jurisdiction in relation to the claim against RCT; that the defences of rectification and lack of authority were unsound and that the issues raised by the defendants in regard to the quantum were unfounded.

[9] The appellants relied on four discrete grounds of appeal in their application for leave to appeal, but in their heads of argument relied on three grounds only for purposes of this appeal, namely that:

(a) The court below erred in finding that it had jurisdiction to entertain the bank's claim;

(ii) The court below erred in not granting the prayer for rectification of the guarantee; and

(iii) The court below erred in finding that the respondent had established the quantum of its claim in the amount of R16 958 969.

Jurisdiction

[10] The appellants asserted in this court, as they did in the court below, that the latter court lacked the requisite jurisdiction to entertain the respondent's claim against RCT. In this regard it was contended that as the various contracts founding the respondent's claim against the appellants were concluded in Johannesburg none of the elements of the cause of action relate to any cause arising within the area of jurisdiction of the Western Cape high court.[1] They said that the court below could not have exercised jurisdiction over the Bonuglis in their representative capacity – they both being necessary parties in order to bring RCT before the court– because the second appellant resides in Sydney and was permanently resident there when the respondent's action was instituted the court

1 It is unnecessary to consider whether, if the cause of action had arisen within the area of jurisdiction of the trial court, this would have overcome the jurisdictional problem occasioned by Mr Bonugli's residence in Australia.

below lacked jurisdiction to entertain the claim against the appellants in their representative capacity.[2] In technical legal language he is a peregrinus of South Africa and is not subject to the jurisdiction of our courts save in limited circumstances.

[11] The respondent countered the appellants' contentions that the court below lacked jurisdiction to entertain the claim on a number of bases. It pointed out that in terms of the guarantee, RCT agreed 'that any division of the [High Court] of South Africa … shall have jurisdiction with regard to any legal proceedings arising' under the guarantee. RCT also agreed that the guarantee would be governed by the laws of the Republic of South Africa. Furthermore reliance was placed on s 5 of the Trust Property Control Act 57 of 1988 (the Act) which provides:

'Notification of address

A person whose appointment as trustee comes into effect after the commencement of this Act, shall furnish the Master with an address for the service upon him of notices and process and shall, in case of change of address, within 14 days notify the Master by registered post of the new address.'

It is common cause in this appeal that the address given by both appellants, as trustees of RCT, to the Master in terms of s 5 of the Act was that reflected in the respondent's summons. That address was within the area of jurisdiction of the trial court.

[12] On the basis of those facts it was submitted on behalf of the respondent, relying on *Hay Management Consultants (Pty) Ltd v P3 Management Consultants (Pty) Ltd*[3] paras 13-15 that the address furnished to the Master in terms of s 5 of

2 E Cameron, M de Waal, B Wunsh, P Solomon and E Kahn *Honore's South African Law of Trusts* 5 ed (2002) at 256-257.

3 *Hay Management Consultants (Pty) Ltd v P3 Management Consultants (Pty) Ltd* 2005 (2) SA 522 (SCA).

the Act is akin to a domicilium clause in a contract and, together with the other two factors, the furnishing of this address amounted to a submission to the jurisdiction of the Western Cape high court.

[13] In the alternative the bank contended that the failure by RCT to contest the jurisdiction of the trial court, in the affidavit deposed to by Mrs Bonugli opposing summary judgment, amounted to a submission to the jurisdiction. In response to that contention it was submitted in the appellants' heads of argument that rule 32(3)*(b)* of the Uniform Rules only requires of a defendant resisting an application for summary judgment to satisfy the court that there is a bona fide defence to the action and no more. Consequently, so the argument continued, the defences that the appellants raised in their opposing affidavit having been sufficient to meet the threshold required by rule 32(3)*(b*), it was not necessary for them also to have raised lack of jurisdiction as a defence.

[14] In holding that it had the necessary jurisdiction the court below, whilst mindful of the considerable differences between a partnership and a trust, found support for its findings in the general principles on jurisdiction relating to a partnership, considerations of convenience and common sense for its conclusion to entertain the claim. It went on to conclude on that aspect by saying that:
'The following facts and circumstances are, in my opinion, pertinent:

a) In terms of s 19(1)*(a)* of the Act this court has jurisdiction over the first defendant in her personal capacity as well as in her representative capacity.
b) The second defendant is not resident in the Republic.
c) All the defendants entered an appearance to defend and this court's judgment will, therefore, bind them.
d) Any warrant for execution issued pursuant to this court's judgment will

be valid throughout the Republic.

e) The first defendant was the driving force behind the RCT.

f) None of the defendant's will suffer any inconvenience or prejudice if this court was to adjudicate the issues.

g) Every consideration of convenience and common sense requires that this court should adjudicate the issue between the plaintiff and all the defendants.'

[15] It is of course trite that a trust does not have legal personality.[4] A trust is in truth an accumulation of assets and liabilities, which constitute the trust estate vesting in the trustee. The trust can only act through its trustees. Trustees must therefore act jointly unless the trust deed provides otherwise.[5] It follows that in legal proceedings the trustees must all be cited in their representative capacity as such as the trust itself cannot be either a plaintiff or defendant as an entity in its own right.

[16] In *Lupacchini NO & another v Minister of Safety & Security*[6] this court said the following:

'By the nature of the office of trustee the control and administration of the trust property vests in each trustee individually. It follows that where there is more than one trustee they must act jointly, unless the trust instrument provides otherwise. And because they have individual interests all must necessarily join in litigation concerning the affairs of the trust (through it seems that one trustee might authorise another to sue in his or her name).'

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4 *Commissioner for Inland Revenue v Friedman NO* 1993 (1) SA 353 (A) at 370-371; *Land and Agricultural Bank of South Africa v Parker & others* 2005 (2) SA 77 (SCA) para 10.

5 *Nieuwoudt & another NNO v Vrystaat Mielies (Edms) Bpk* 2004 (3) SA 486 (SCA) para 16; *Land and Agricultural Bank of South Africa v Parker & others* para 15.

6 *Lupacchini NO & another v Minister of Safety & Security* 2010 (6) SA 457 (SCA) para 2.

[17] Mindful of this proposition the bank cited both trustees as defendants. But, as alluded to earlier in this judgment, the second appellant was not resident within the area of jurisdiction of the court below when litigation was commenced. For that reason it was said that the court lacked jurisdiction over him and hence over RCT. We use 'resident' in the special sense that it has in the area of the law of jurisdiction over natural persons, where a distinction is drawn between those who are resident within the area of jurisdiction of a court, commonly referred to by the Latin word *incolae*, and those who are not, commonly referred to as *peregrini*. Mr Bonugli is a *peregrinus* of South Africa, having become a permanent resident of Australia. Ordinarily jurisdiction can only be exercised over a *peregrinus* if there has been an attachment to found or confirm jurisdiction of property owned by the *peregrinus*, (whether in conjunction with some other ground of jurisdiction or, in some cases, not), or a submission to the jurisdiction. In the case of a person being sued in a representative capacity, such as a trustee, the former of these requirements poses considerable difficulties and may require some development of our law. However, in the light of the conclusion we have reached on the question of a submission to jurisdiction it is unnecessary to canvass that issue.

[18] In our view, by permitting Mrs Bonugli to cause an appearance to defend the action to be delivered on behalf of RCT and to depose to an affidavit opposing summary judgment on its behalf, in which she dealt solely and in considerable detail with the merits of its defences to the claim, without challenging the court's jurisdiction, Mr Bonugli, in his representative capacity, submitted to the jurisdiction of the Western Cape high court. We say so for the following reasons.

[19] In *Mediterranean Shipping Co v Speedwell Shipping Co Ltd & another*[7] it was stated that:

7 *Mediterranean Shipping Co v Speedwell Shipping Co Ltd & another* 1986 (4) SA 329 (D) at 333E-G.

'Submission to the jurisdiction of a court is a wide concept and may be expressed in words or come about by agreement between the parties. *Voet* 2.1.18. It may arise through unilateral conduct following upon citation before a court which would ordinarily not be competent to give judgment against that particular defendant. Voet 2.1.20. Thus where a person not otherwise subject to the jurisdiction of a court submits himself by positive act or negatively by not objecting to the judgment of that court, he may, in cases such as actions sounding in money, confer jurisdiction on that court. Herbstein and Van Winsen *The Civil Practice of the Superior Courts in South Africa* 3 ed at 30; Pollak *The South African Law of Jurisdiction* at 84 *et seq.'*

[20] In *MV Alina II (no 2) Transnet v Owner of MV Alina II*[8] this Court said that the question of submission 'to the court's jurisdiction' is a factual enquiry. It went on to say the following:

'It may be constituted by the terms of an agreement prior to litigation commencing. Thus, nominating a South African *domiciluim citandi et executandi* in a contract, in conjunction with a choice of South African Law, was held to constitute a submission to the jurisdiction in respect of any claims in respect of that contract. Submission may arise from conduct in litigation commenced against a person before a court that lacks jurisdiction in respect of that person or that claim.' (Footnotes omitted).

It then cited a passage appearing at 334A in *Mediterranean Shipping* in which the following is stated:

'Anyone who invokes the jurisdiction of this court for relief under the Act must be taken – one can hardly be heard to contend otherwise – to have submitted to that jurisdiction …'

[21] In this case in opposing summary judgment in the court below neither Mr

8 *MV Alina II (no 2) Transnet v Owner of MV Alina II* 2011 (6) SA 206 (SCA) para 14.

Bonugli nor RCT raised lack of jurisdiction – in any form or guise – of the court below to entertain the respondent's claim. The defence of RCT was set out in detail in an affidavit sworn, with Mr Bonugli's authority on its behalf, by Mrs Bonugli. In addition an order for the payment of costs on the attorney and client scale was sought. RCT contends that their failure to object to the jurisdiction cannot be construed as constituting submission by conduct to the jurisdiction of the court below. The foundation for this contention is rule 32(3)*(b)* of the Uniform Rules which, so the contention concluded, does not require of a defendant seeking to defeat an application for summary judgment to disclose all available defences. Thus, it was argued that it was not incumbent upon the second appellant to have raised lack of jurisdiction as a discrete defence to the respondent's claim.

[22] In the view we take of the matter the appellants' reliance on rule 32(3)*(b)* is misplaced. The fallacy in the argument advanced on behalf of the appellants lies in the fact that rule 32 does not deal with the jurisdiction of the court to entertain a plaintiff's claim. Unless expressly challenged, to our minds, rule 32, by logical implication, assumes that the court has such jurisdiction. What it then does, according to well established authority, is to require a defendant seeking leave to defend to set the facts forth fully that would enable a court to determine whether or not there is a bona fide defence to the plaintiff's claim. This by no means entails that the defendant must, in order to successfully resist summary judgment, disclose all the defences to the claim. It requires the defendant to disclose facts from which it appears that there is a bona fide defence to the whole or part of the plaintiff's claim. The facts disclosed necessarily invite the court to determine whether or not the defendant has a bona fide defence that is good in law.[9] This can be tested quite simply by way of a problem put to counsel in argument to which no answer was forthcoming. If the court in this case had held that none of the

9 *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426A-D.

defences raised in the affidavit opposing summary judgment were good it would have entered summary judgment against the defendants in their representative capacities – in effect against RCT. Could there subsequently have been an objection to the court's jurisdiction and an application to have the judgment rescinded on that basis? The answer is clearly in the negative.

[23] When a challenge to a court's jurisdiction is raised, such a challenge instead contests the competence of the court to grant the relief sought by the plaintiff. In our view by electing only to advance facts which constitute a defence to the respondent's claim in the opposing affidavit filed on his and RCT's behalf, the second appellant, in the words of Van Heerden J in *Mediterranean Shipping*,[10] invoked the jurisdiction of the trial court for relief which was, as prayed for by him, to dismiss the respondent's application for summary judgment with attorney and client costs and to grant him leave to defend the respondent's action on its merits. On the facts of this case we therefore conclude that by not contesting the competence of the court below to grant summary judgment the second appellant and therefore RCT, by his conduct, unequivocally submitted to its jurisdiction. That conclusion renders it unnecessary to consider the other bases upon which the jurisdiction of the court below was supported by the respondent in this court.

Lack of authority

[24] The gist of the appellants' argument on this aspect was that Mrs Bonugli was only authorised by RCT to conclude a limited guarantee in respect of the BEB aircraft transaction and not a general guarantee for present and future liabilities of UCT. It was thus contended that RCT is not bound by the terms of the unlimited guarantee because its terms went outside the scope of the authority granted to Mrs

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Bonugli by RCT. The terms of the authority as spelt out in a resolution taken on 22 April 1999, it was claimed, were only to 'sign a suretyship (guarantee)' in favour of UCT (in respect of the) Pilatus PC 12 BEB-180 (aircraft). It was accordingly argued that the first appellant was only authorised to bind RCT as a guarantor for the obligations of UCT arising from the purchase by UCT of a specific aircraft and nothing more.

[25] RCT contended that the respondent's reliance on clause 7.1 of RCT's trust deed, which conferred on Mrs Bonugli, as the donor, the right to decide all matters in terms of such deed of trust 'according to her sole and absolute discretion' was misplaced. This was so, according to it, because in this specific instance the first appellant's sole and absolute discretion was confined to the terms of the RCT resolution authorizing her to conclude only a limited guarantee.

[26] There are a number of flaws in these arguments. On the evidence of Mrs Leukis, which was accepted by the trial court, when the issue of a guarantee arose a general guarantee was discussed between her and Mrs Bonugli, and there was no request for, or a discussion about, a limited guarantee. Mrs Leukis explained that the reason for the unlimited guarantee was that there were plans afoot at the time for UCT to conclude further leases of aircraft with the bank and the guarantee would cover these further transactions. In regard to the resolution of 22 April 1998 Mrs Bonugli accepted under cross-examination that when the suretyship was prepared and signed by her the bank was not in possession of that resolution although it had been relied upon by her in resisting summary judgment. But the bank was, to the knowledge of Mrs Bonugli, in possession of a different resolution taken on 20 April 1998, which did not in any way, restrict her authority in regard to the execution of a guarantee and agreement on its terms. Indeed she accepted, when questioned by the court below, that the later resolution was 'not concluded

[as yet] at the [relevant] time'. The earlier resolution did authorise her to execute a guarantee and to agree the terms thereof with the bank. According to Mrs Leukis that is what happened and it suffices to dispose of the claim of lack of authority

Rectification

[27] There is no need to spend much time on this defence. The case in that regard was that the guarantee was only intended to cover the BEB transaction and not the later transactions or, put differently, was intended to be a limited, not a general, guarantee. That case depended entirely upon the conflicting testimony of Mrs Bonugli and Mrs Leukis. The learned judge accepted the evidence of Mrs Leukis, the bank's witness in regard to the execution of the deed of suretyship, and rejected that of Mrs Bonugli in emphatic terms. He said that her evidence could be summed up in a single word 'bad'. He described her as 'verbose, evasive and argumentative' and said that it was clear that she was not averse to fabricating evidence. These credibility findings were not challenged in the heads of argument or in oral argument before this court. They must be accepted and there is no reason not to do so. Whilst in the heads of argument it was suggested, on the basis of a single passage in the cross-examination of Mrs Leukis, that the case for rectification had been made out, no argument was addressed to us in support of that contention and on a fair reading of the whole of Mrs Leukis' testimony it could never be sustained. There is accordingly no basis for disturbing the learned judge's finding that the defence of rectification was not established.

[28] In the result there was no merit in any of the defences raised, either on behalf of RCT, or by Mrs Bonugli in her personal capacity. The trial court was accordingly correct in entering judgment in favour of the bank. The only question

is whether it correctly assessed the amount for which judgment should be given. It is to that question that we now turn.

The quantum of the bank's claim

[29] During the course of the trial the parties concluded an agreement on quantum by which the issue of quantum was resolved save for amounts claimed under two discrete heads. These were an amount of R385 472.76 paid by the respondent for what it termed 'a deposit for a loan engine' and an amount of R2 088 107 claimed in respect of 'aircraft repair charges'. Both payments were made in respect of an aircraft that was subject to an agreement of sub-lease, shortly before the aircraft concerned was sold. Whilst not contesting that the respondent paid those amounts, the appellants contended that there was no contractual basis for the bank to hold UCT – and by extension them – liable for those charges.

[30] Both in this court and the court below the bank persisted in its contention that UCT was liable for the disputed amounts. In pressing this argument it relied heavily on clause 19 of the relevant lease agreement. Clause 19.1, to the extent relevant, reads as follows:

'Upon expiry of this agreement at the end of the contract period, sub-lessee shall return the goods to sub-lessor, at sub-lessee's expense, to enable sub-lessor to sell the goods. Sub-lessor shall refund the proceeds of the sale to sub-lessee as an abatement of rentals after deduction of the costs of the sale to the sub-lessee and the book value, if any. Where appropriate, sub-lessee shall disclose his abatement to the Receiver of Revenue.'

[31] Relying squarely on the terms of clause 19.1 it was argued on behalf of the bank that the two amounts in dispute were plainly incurred in procuring the

disposal of the aircraft and are thus for the appellants' account. Moreover, so the argument concluded, clause 19.1 was on its terms, capable, by what counsel termed 'a stretched imaginative interpretation', of encompassing the amounts in dispute. This argument cannot be sustained. The terms of clause 19.1 are clear and leave no room for any doubt. They only require the sub-lessee to return the goods at the expiry of the contract period. The 'other charges' and the 'aircraft repair charges' were not expenses incurred in returning the aircraft to the bank. Nor were they 'costs of sale' incurred by the bank in the disposal of the aircraft after their repossession. An examination of the documents in the record does not show why it was necessary to put down a deposit on a loan engine. Nor do they disclose that the repairs were necessary to place the aircraft in a saleable condition, in which event they might have been recoverable as costs of sale. The onus of showing that these amounts were due by UCT under the lease rested on the bank and it failed to discharge that onus. Consequently the court below erred in finding that the bank had established its entitlement to the disputed amounts for they evidently fall outside the terms of the contract upon which the bank relied for its claim. It therefore follows that its claim falls to the reduced by the total amount making up these two claims, namely R2 473 579.76. The bank accepted, rightly so, that the certificate of balance which would ordinarily serve as prima facie proof of the amount owed by the appellants would not avail it if we were to find – as we have – that such a certificate was plainly at variance with the terms of the contract relied upon.

Costs

[32] The conclusion we have reached on the aspect of quantum has a bearing on the costs of the appeal. Counsel were agreed that were we to come to the conclusion that the amounts claimed in respect of 'other charges' and 'aircraft

repair costs' should have been disallowed in the court below, which we have, the appellants would have achieved substantial success on appeal. It therefore follows that they are entitled to a costs order in their favour on appeal. However, for reasons that emerge from what follows, it was quite unnecessary to place most of this voluminous record before us as the real issues emerged from the evidence of a single witness and a handful of documents. The record should have been substantially abbreviated. The failure by the appellants' attorneys to do this must result in a disallowance of certain of the costs that they would otherwise recover.

[33] Before concluding there is one other aspect that requires mention. Rule 10A*(a)(*ix) of the Rules of this court requires of counsel to indicate which portions of the record are in their opinion necessary for the determination of the appeal. The rationale for this rule is twofold. First the number of appeals that may be enrolled for hearing during any given court term is determined by the length of the record and the amount of reading that the members of the court will have to do in order to prepare for the upcoming term. Second, the object of the rule is to direct the attention of the judges of this court in their preparation to what counsel deem necessary for the determination of the appeal. It goes without saying that the less material there is to read the more appeals will be enrolled for hearing. The obvious advantage to litigants in self-evident. This rule serves the public interest in that it promotes expeditious disposal of appeals in this court, both in securing that a date can be allocated for hearings and in facilitating the judicial task of preparation. This laudable objective is not served and indeed is undermined if counsel only pay lip service to the provisions of this rule.

[34] In this case both counsel indicated in their practice notes, inter alia, that the entire record was necessary for the determination of the appeal supposedly in compliance with the rule. But in court counsel for the appellant informed us that

for purpose of the appeal it was only necessary to have regard to the evidence of Mrs Leukis who testified on behalf of the respondent. When the members of the court enquired why, in that case, we were told that it was necessary to read the entire record comprising 2190 pages, if it was thought that only the evidence of the one witness was necessary, all he could do was to tender an apology.

[35] This court has on various occasions explained the object of this rule, which is, as we have said, twofold. First, it enables the President in settling the roll to estimate how much reading matter is to be allocated to a particular judge, and second, to assist judges in preparing the appeal without wasting time and energy in reading irrelevant matter.[11] This court has also on various occasions in the past expressed its utmost displeasure at the frequency with which this particular rule is often flouted. In some cases it has warned that failure to comply with the spirit of the rules and practice notes, may lead to an adverse costs order whereas in others it has made punitive costs orders.[12] In this appeal counsel were agreed that approximately 90 per cent of the material incorporated in the appeal record was not necessary to determine this appeal.

[36] Given the frequency with which rule 10A*(a)* (ix) in particular is transgressed we direct the attention of counsel to what this court said in *Van Aardt v Galway*[13] paras 34-38 in regard to the requirements of the practice note.

[37] Counsel were afforded the opportunity of addressing us on the question whether this court should not, as a mark of its displeasure, deprive them of a

11 *Caterham Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd* 1998 (3) SA 938 (SCA) at 954H.
12 *Premier, Free State v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) para 45; *Southern Cape Car Rentals CC t/a Budget Rent A Car v Braun* 1998 (4) SA 112 (SCA) at 1195F-1196C; *Minister of Health & another v Maliszewski & others* 2000 (3) SA 1062 (SCA) paras 33-39; *Plaaslike Oorgangsraad, Bronkhorstspruit v Senekal* 2001 (3) SA 9 (SCA) paras 28-29.
13 *Van Aardt v Galway* 2012 (2) SA 312 (SCA).

portion of their fees relating to their preparation. Both counsel argued that in the circumstances of this case it would not be appropriate to censure them in this fashion.

[38] We have given careful consideration to those submissions and have, on reflection, felt that we should spare counsel our censure for now purely on the basis that the judgment of this court in *Van Aardt* was delivered after they had already filed their heads of argument. However, it must be said without equivocation that this court views non-compliance with its rules in an extremely serious light. Thus it will not hesitate in appropriate cases, if transgressions persist in the future, to mark its displeasure by means of an appropriate costs order.

Order

[39] In the result the following order is made:

1. The appeal is upheld with costs including the costs occasioned by the employment of two counsel, save that the costs in respect of the preparation, perusal and copying of the record shall not exceed ten per cent of the costs incurred in relation to those tasks.
2. The order of the trial court is set aside and the following order is substituted in its stead:

'Judgment is granted in favour of the plaintiff against the first defendant in her personal capacity and against the first and second defendants in their representative capacities jointly and severally, the one paying the other to be absolved, for:

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M J D WALLIS
JUDGE OF APPEAL

X M Petse
Acting Judge of Appeal

APPEARANCES

APPELLANTS:	B J Manca SC, (with him A M Smalberger) Instructed by Herold Gie, Cape Town; Naudes Inc, Bloemfontein
RESPONDENT:	A O Cook SC, (with him J A Babamia)

Instructed by

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